Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

MOTION RECORD OF THE MOVING PARTY

(Motion for Leave to Appeal)

Dated: December 29, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Odette Lalumière

Tel: (819) 994 2226
Fax: (819) 953 9269

Solicitor for the Respondent,
Canadian Transportation Agency

AND TO: **BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP**
33 Yonge Street, Suite 201
Toronto, ON M5E 1G4

Gerard Chouest

Tel: (416) 982 3804
Fax: (416) 982 3801

Counsel for the Respondent,
Delta Air Lines, Inc.

TABLE OF CONTENTS

DECISION NO. 425-C-A-2014

November 25, 2014

COMPLAINT by Gábor Lukács against Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle.

File No. M4120-3/14-04165

COMPLAINT

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain practices of Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle (Delta) relating to the transportation of large (obese) persons are "discriminatory", contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58, as amended, and inconsistent with the Agency's findings in Decision No. 6-AT-A-2008.

BACKGROUND

[2] On September 5, 2014, the Agency issued Decision No. LET-C-A-63-2014, in which the Agency noted that it was not clear whether Mr. Lukács has an interest in Delta's practices governing the carriage of obese persons. The Agency provided Mr. Lukács with the opportunity to file submissions regarding his standing, and opened pleadings.

[3] In his submission dated September 19, 2014, Mr. Lukács requested that the Agency amend Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large" throughout the Decision to adequately identify the nature of the complaint.

PRELIMINARY MATTER

Should the Agency vary Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large"?

[4] Mr. Lukács submits that the complaint concerns discriminatory practices relating to the transportation of large passengers stated in an e-mail dated August 20, 2014, and that Decision No. LET-C-A-63-2014 incorrectly labels the complaint as one that concerns the transportation of "obese persons". Delta argues that the word "large" is a euphemism and that the characterization of the complaint as one concerning "obese persons" is entirely accurate and appropriate as the practices described in the e-mail concern a passenger who cannot fit in a single seat.

[5] In his complaint, Mr. Lukács used the wording "transportation of large (obese) passengers". It is therefore not clear to the Agency why Mr. Lukács now objects to the Agency using the word "obese" in Decision No. LET-C-A-63-2014. Based on this, the Agency will not vary that Decision by replacing the word "obese" with "large". However, as Delta uses the word "large" in the policy at issue, the Agency will use the word "large" throughout this Decision.

ISSUE

[6] Does Mr. Lukács have standing in this complaint?

POSITIONS OF THE PARTIES

[7] Mr. Lukács states that section 111 of the ATR and subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) serve as a preventative function rather than merely offering remedies or compensation *post facto*. Mr. Lukács refers to Decision No. 746-C-A-2005 (*Black v. Air Canada*), in which the Agency held, at paragraph 7:

> 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.

[8] Mr. Lukács states that it is important to note that in that Decision, the Agency used "persons" in the plural form, which demonstrates that the Agency was mindful of the public benefit of section 111 of the ATR, and that the purpose of such challenges goes well beyond the individual applicant's personal benefit.

[9] Mr. Lukács states that the question of "standing" to challenge the terms or conditions applied by a carrier was also addressed by the Agency in *Black v. Air Canada*, more specifically at paragraph 5:

> The Agency is of the opinion that it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and conditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR. In this regard, the Agency notes that subsection 67.2(1) of the CTA provides that, on the basis of a "complaint in writing to the Agency by any person", the Agency may take certain action if the Agency determines that the terms or conditions at issue are unreasonable or unduly discriminatory. 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, 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" [...]

[10] Mr. Lukács contends that the above findings were reaffirmed in Decision No. 215-C-A-2006 (*O'Toole v. Air Canada*), Decision No. LET-C-A-155-2009 (*Lukács v. Air Canada*) and Decision No. LET-C-A-104-2013 (*Krygier v. several carriers*), and argues that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier.

[11] Mr. Lukács contends that Delta refuses to transport passengers or forces passengers to buy multiple seats based on the personal characteristics of an individual or group and that in light of the public policy purpose of section 111 of the ATR, he is not required to be a member of the group discriminated against in order to have standing.

[12] Delta counters that in *Black v. Air Canada*, because of the basis of Air Canada's objection (that there must be "a real and precise factual background"), the reasons did not deal with the considerations normally reviewed in cases which address standing, and there was no explicit holding on the basis of standing. Delta argues that in this case, the issue of standing is squarely raised.

[13] According to Delta, the holding in *Black v. Air Canada* can be explained on the basis that Mr. Black had a direct interest in the matter and had standing as of right based on the fact that terms imposed by Air Canada affected Mr. Black's rights and would have prejudicially affected him had he travelled with Air Canada. Delta contends that in *Black v. Air Canada*, the Agency reasoned that a person who could be prejudicially affected by the terms complained of should not be required to be subjected to those terms as a precondition of bringing a complaint. Delta argues that the same analysis would explain all the cases which have followed *Black v. Air Canada.*

[14] Mr. Lukács asserts that Delta mistakenly argues that the issue of standing has not been squarely raised in *Black v. Air Canada*, and Delta's contention with respect to *Black v. Air Canada* and the subsequent cases raising the issue of standing is woefully misguided.

[15] Mr. Lukács submits that the Supreme Court of Canada (Supreme Court), in *A.G. (Que.) v. Carrières Ste-Thérèse Ltée,* [1985] 1 S.C.R. 831, at paragraph 28, noted that Parliament does not speak in vain, and that the phrase "any person" was inserted into the legislative text for a reason. Mr. Lukács claims that Delta has failed to address the argument that the right to challenge terms and conditions pursuant to subsection 67.2(1) of the CTA and section 111 of the ATR is conferred upon "any person", and has failed to propose any alternative interpretation for the phrase "any person" that Parliament chose to include in subsection 67.2(1) of the CTA. Mr. Lukács asserts that in light of this, the Agency should find that these rights are collective (similar to language rights pursuant to the *Official Languages Act*, R.S.C., 1985, c. 31 [4th supp.]) and serve the travelling public at large.

[16] Mr. Lukács also submits that it is settled law that private interest standing cannot be founded on hypothetical possibilities, and he refers to *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726 (*Downtown Eastside Sex Workers v. Attorney General*).

[17] Mr. Lukács asserts that consequently, the Agency could not have reached the conclusion it did in *Black v. Air Canada* based on speculations, such as those proposed by Delta, given that the Agency did not speculate that Mr. Black could be travelling on Air Canada the next day. Instead, Mr. Lukács states that the Agency was mindful of the public benefit of section 111 of the ATR.

[18] Mr. Lukács maintains that any doubts that *Black v. Air Canada* might have left as to the issue of standing were resolved in *Krygier v. several carriers*, where the applicant's standing was directly challenged, and the Agency held that: "the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint". Mr. Lukács contends that in *Krygier v. several carriers,* the Agency reached its conclusion without any reference to the personal circumstances of the applicant and in that case, there was no trace of any consideration of the nature suggested by Delta that the applicant might be affected by the challenged terms and conditions.

Burden of proof

[19] Mr. Lukács states that when standing is raised, the burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy the legal test for public interest standing.

[20] Delta submits that Mr. Lukács provides no legal basis for this submission. Delta argues that the opposite is true as revealed by the Federal Court of Appeal in *Public Mobile Inc. v. Canada (Attorney General),* [2011] 3 F.C.R. 344, where J.A. Sexton writing for a unanimous court at paragraph 54 clearly states that "an applicant for public interest standing must satisfy the court" that the test for public interest standing is met. Thus, Delta argues that it is Mr. Lukács who bears the onus of satisfying the Agency that he is entitled to be granted public interest standing, and not Delta to disprove such entitlement.

[21] According to Mr. Lukács, Delta confuses the question of burden of proof with respect to standing when the issue is raised as a preliminary matter with determination of standing in a hearing of an application on its merits. Mr. Lukács states that the *Globalive Wireless Management Corp. v. Public Mobile Inc.,* 2011 FCA 194 case cited by Delta concerned a judgment on the merits of an application for judicial review, which also addressed the issue of standing. Mr. Lukács argues that, in this case, standing was raised as a preliminary issue, before the parties had an opportunity to tender evidence and fully test the evidence of the opposing party and, therefore, the burden of proof is on Delta to demonstrate that the low threshold test is not satisfied.

Private interest standing

[22] Mr. Lukács states that the complaint is not about discrimination against "obese persons", but rather about discrimination against "large persons". He asserts that he is six feet tall, weighs approximately 175 pounds and, as such, he would or could be viewed as a "large person" by Delta's agents. Mr. Lukács contends that in the absence of a clear and consistent statement from Delta about the scope of its practices, it is impossible to conclude that he would not be personally subject to Delta's discriminatory practices due to his physical characteristics. Therefore,

Mr. Lukács argues that he has a private, personal interest in Delta's practices relating to the transportation of "a large person". In addition, Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[23] Delta states that according to the Federal Court of Appeal in *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] 2 F.C. 500 and *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, to be "directly affected" and thus having "direct standing" means that the practice must affect Mr. Lukács's legal rights, impose legal obligations upon him, or else prejudicially affect him in some way.

[24] With respect to Mr. Lukács's submission that he is six feet tall and weighs 175 pounds, Delta indicates that according to a national survey conducted by *Maclean's* Magazine (in 2012), the average Canadian male is five feet nine inches tall and weighs 185 pounds. Delta points out that Mr. Lukács's is only approximately four percent taller than the average Canadian male, and approximately four percent lighter.

[25] According to Mr. Lukács, Delta purports to rely on a national survey conducted by *Maclean's* Magazine as the evidentiary basis for its claim regarding the average size of a Canadian male. Mr. Lukács submits that information published in newspapers and magazines are inadmissible hearsay, and that the Agency should ignore the citation. In any event, Mr. Lukács states that Delta has correctly acknowledged that he is taller than the average Canadian male, thus making him a "large" passenger, and that Delta has provided no evidence as to the meaning of "large" found in its practices, which makes it impossible to conclude with certainty that Mr. Lukács is not "large".

[26] Delta contends that the complaint concerns persons who cannot fit in a single seat by virtue of being obese. Delta argues that given that Mr. Lukács is lighter than the average Canadian, despite being slightly taller, it is patently clear that he does not have a direct interest in the subject matter of the proposed complaint and his rights are not affected by the impugned practices nor would he suffer any prejudice if he elected to travel with Delta.

Public interest standing

[27] Mr. Lukács states that he has public interest standing, and that the legal test for public interest standing requires the consideration of three factors, which are set out in *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC) [*Fraser v. Canada*]:

1. Is there a serious issue to be tried?
2. Does the party seeking public interest standing have a genuine interest in the matter?
3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

1. Is there a serious issue to be tried?

[28] Mr. Lukács states that in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), the Agency established a two-step test for determining whether terms or conditions are "unduly discriminatory":

> [...] In the first place, the Agency must determine whether the term or condition of carriage applied is "discriminatory". In the absence of discrimination, the Agency need not pursue its investigation. If, however, the Agency finds that the term or condition of carriage applied by the domestic carrier is "discriminatory", the Agency must then determine whether such discrimination is "undue".

[29] Mr. Lukács points out that in *Black v. Air Canada*, the Agency applied the same test for determining whether terms or conditions are "unjustly discriminatory" within the meaning of section 111 of the ATR:

> [35] The Agency is therefore of the opinion that in determining whether a term or condition of carriage applied by a carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA or "unjustly discriminatory" within the meaning of section 111 of the ATR, it must adopt a contextual approach which balances the rights of the travelling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers operating in Canada. This position is also in harmony with the national transportation policy found in section 5 of the CTA.

[30] With respect to the meaning of "discriminatory," Mr. Lukács contends that the Agency adopted the interpretation of the Supreme Court in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143:

> [...] discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligation, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages, available to other members of society.

[31] Mr. Lukács asserts that Delta's practices are discriminatory in that they impose a disadvantage on a certain group of passengers based on their personal characteristics, namely, the size and/or shape of their body, and that it is arguable that the practices are "unjustly discriminatory" and contrary to subsection 111(2) of the ATR. Mr. Lukács contends that whether Delta's practices are "unjustly discriminatory" is a serious issue to be tried, meeting the first branch of the test.

2. Does the party seeking public interest standing have a genuine interest in the matter?

[32] Mr. Lukács states that he is a Canadian air passenger rights advocate who has filed more than two dozen successful complaints with the Agency, which have led to substantial improvements and landmark decisions. He adds that he has one complaint before the Agency, four proceedings before the Federal Court of Appeal, and that he is acting as a representative for a passenger in a disability-related complaint.

[33] Mr. Lukács submits that an electronic search of the Agency's decisions reveals 46 decisions mentioning him and/or decisions resulting from his complaints, and argues that based on this, he has a demonstrated long-standing, real, and continuing interest in the rights of air passengers and therefore meets the second branch of the test.

3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

[34] Mr. Lukács points out that in *Fraser v. Canada*, this branch of the test was explained as follows:

> Thus, in order to find that there is a reasonable and effective alternate means to litigate the issue, the A.G. must prove, on the balance of probabilities, that:
>
> a) there is a person who is more directly affected than the applicants; and
> b) that person might reasonably be expected to initiate litigation to challenge the legislation at issue.

[35] Mr. Lukács states that in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 S.C.R. 524 (*Canada v. Downtown Eastside Sex Workers*), at paragraph 51, the Supreme Court provided several examples of the types of interrelated matters that may be useful to take into account when assessing the third branch of the test:

> The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.
>
> The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

> The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities [...] [Emphasis added]

[36] Mr. Lukács asserts that there is a public interest in eliminating any discrimination, a conduct that is inconsistent with the Canadian values enshrined in the *Canadian Charter of Rights and Freedoms* (Charter) and the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, and this is particularly so with respect to "unjust discrimination", alleged in this case, which is an extreme form of discrimination. Mr. Lukács argues that these considerations militate in favour of granting him public interest standing.

[37] According to Mr. Lukács, there is no realistic alternative means for bringing Delta's outrageous practices before the Agency as such proceedings are legally complex and carriers are represented by highly skilled counsels. Mr. Lukács states that because of his expertise, he is in a unique position to meaningfully respond to the legal arguments crafted by such skilled counsels and that any other complainant would be forced to hire a lawyer and incur very substantial expenses.

[38] Delta contends that the essential issue in this case is whether, in the words of the Supreme Court in the *Canada v. Downtown Eastside Sex Workers* case, there are "realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination".

[39] Delta points out that in *Canada v. Downtown Eastside Sex Workers,* the Supreme Court cautioned, at paragraph 51, that:

> Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized. [Emphasis added]

[40] With this guidance from the Supreme Court in mind, Delta submits that it is helpful to consider certain information available on the Agency's Web site, which provides any person with an easy step-by-step tool for completing a complaint in approximately 15 minutes.

[41] Delta states that there exists an expedient method for filing an application, and that the Supreme Court cautioned that the alternative should "be considered in light of the practical realities, not theoretical possibilities". According to Delta, the practical reality in this case is that, in 2013 and the first nine months of 2014, the Agency issued 36 decisions in respect of consumer complaints relating to the air mode, and of these 36 decisions, 11 relate to complaints filed by Mr. Lukács. Delta points out that the total number of persons who participated as complainants was approximately 105 (although it concedes that one single case involved 83 complainants).

[42] Delta argues that there is no discussion of standing in any of the 11 cases initiated by Mr. Lukács which led to decisions in 2013 or 2014, and argues that comments made respecting the *Black v. Air Canada* Decision are applicable in this case as each of the 11 decisions can be explained on the basis of an implicit finding that Mr. Lukács could potentially have been prejudicially affected by the practice, term or condition complained of. Delta also points out that in none of these cases were there any suggestion that Mr. Lukács should be granted public interest standing.

[43] Delta maintains that the Agency provides an accessible medium for lodging consumer complaints, and encourages the participation of self-represented complainants through its informal and non-binding dispute resolution services. Delta adds that the Agency provides experienced mediators at no cost and its rules and procedures are relatively informal by comparison to courts. Therefore, Delta submits that a complainant need not be an expert litigant nor have the assistance of an experienced counsel as it is both practical and reasonable for a complainant who is unjustly affected by a practice, procedure, term or condition of an air carrier to bring a complaint to the Agency.

[44] Mr. Lukács submits that the availability of various forms of non-binding dispute resolution is not a relevant, and certainly not a determinative, consideration in this context.

[45] According to Mr. Lukács, Delta appears to misconstrue the meaning of "alternative means" as the correct interpretation of "alternative means" is the presence of another person who has private interest standing, and who is likely to challenge the impugned action, policy or law before the court or tribunal. Mr. Lukács asserts that Delta has to do more than show the "mere possibility" of a challenge to the impugned practices by a directly affected private litigant, as it was noted in *Fraser v. Canada,* at paragraph 109:

> In order to show there is a "reasonable and effective" alternative, it is necessary to show more than a possibility that such litigation might occur. The "mere possibility" of a challenge by a directly affected private litigant will not result in the denial of public interest standing [...] [Emphasis added]

[46] Regarding Delta's argument that a complaint can be filed "in approximately 15 minutes", Mr. Lukács submits that this is based on the misconception that an average passenger is familiar with the ATR and its section 111. Mr. Lukács asserts that while there may be particularly determined, dedicated and able passengers who might possibly be able to answer the questions found on the Agency's Web site in a meaningful way in relation to an undue or unjust discrimination complaint, this remains a "mere possibility".

[47] Mr. Lukács argues that Delta's claim regarding the number of decisions released by the Agency with respect to consumer complaints does not help Delta's argument, as a number of these complainants were represented by counsel (due to the complexity of the issues), and the fact that the Agency does not require complainants to be represented by counsel does not mean that they can effectively and successfully represent themselves. Mr. Lukács adds that the Agency's new Dispute Rules has a 90-page "companion document" which cannot be simple or accessible for an average passenger.

[48] Mr. Lukács submits that there is no obligation to be represented by counsel before the Federal Court, and most documents can be filed electronically using a simple interface; however, this does not render legal representation unnecessary, and does not demonstrate accessibility of the court and access to justice. Therefore, Mr. Lukács maintains that while there may be a theoretical possibility of this complaint being brought forward by another individual, it is no more than a "mere possibility", and this cannot be a basis for denying him public interest standing.

ANALYSIS AND FINDINGS

[49] Mr. Lukács argues that section 111 of the ATR and subsection 67.2(1) of the CTA serve as a preventive function rather than offering remedies *post facto,* and that the findings in *Black v. Air Canada*, which were reaffirmed in *O'Toole v. Air Canada, Lukács v. Air Canada* and *Krygier v. several carriers*, indicate that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier. Mr. Lukács also argues that in light of the public policy purpose of section 111 of the ATR and its preventive nature, he is not required to be a member of the group discriminated against in order to have standing.

[50] Mr. Lukács submits that in *Krygier v. several carriers*, standing was directly challenged, and the Agency held that the principles outlined in *Black v. Air Canada* applied in that case, and the Agency reached its conclusion without any reference to the personal circumstances of the applicant or how the applicant would be affected by the terms and conditions he was challenging. With respect to this submission, the Agency finds that the principles outlined in *Black v. Air Canada* do not apply in this case as the issue is not whether there is a need for a real and precise factual background but rather, as will be seen, whether Mr. Lukács has private interest standing and/or public interest standing.

Burden of proof

[51] It is important to start the analysis of the issue of standing by reminding that this case relates to a tariff issue, not an issue related to accessible transportation for persons with a disability.

[52] That being said, the Agency raised the issue of standing. Although Mr. Lukács is not required to be a member of the group "discriminated" against in order to have standing, he must have a sufficient interest in order to be granted standing. Hence, notwithstanding the use of the words "any person" in the ATR, the Agency, as any other court, will not determine rights in the absence of those with the most at stake. Determining otherwise would, as noted by the Supreme Court in *Canada v. Downtown Eastside Sex Workers*, "[...] be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized."

[53] Standing can be acquired in two ways, either as a private interest standing or as a public interest standing.

Private interest standing

[54] Private interest standing arises from the basic principle that a person who has a direct personal interest in the question to be litigated is legally entitled to invoke the jurisdiction of the court (see *Ogden v. British Columbia Registrar of Companies*, 2011 BCSC 1151, at paragraph 11).

[55] More particularly, in order to have standing, an applicant, such as Mr. Lukács, must be "aggrieved" or "affected", or have some other "sufficient interest" (Jones & de Villars, in *Principles of Administrative Law*, 2009, at pages 646-647). A person "aggrieved" or "affected" is one whose interests are affected more than those of the general public or community in issue.

[56] Further, the Supreme Court, in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (*Finlay v. Canada*), citing *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, stated that:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[57] In *Canada v. Downtown Eastside Sex Workers*, at paragraph 1, the Supreme Court stated that "[l]imitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government [...]"

[58] Considering this, the Agency must determine whether Mr. Lukács is a person who is "aggrieved" or "affected", or has some other "sufficient interest".

[59] As part of his argument concerning private interest standing, Mr. Lukács states that he would or could be considered a "large person" by Delta's agents as he is six feet tall and weighs approximately 175 pounds. Mr. Lukács also submits that in the absence of the precise meaning of a "large person", it is not possible to conclude that he could not be personally subject to the discriminatory practices due to his physical characteristics.

[60] In this regard, the Agency is of the opinion that it is not clear, as it is not supported, on what basis Mr. Lukács considers that a six-foot tall and 175-pound person is a "large person" and, for the purpose of Delta's policy, that he would not be able to sit in his seat without encroaching into the seat next to his.

[61] Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[62] Concerning the production and interrogatory mechanisms available, the Agency reminded the parties, in Decision No. LET-C-A-76-2013 (*Lukács v. United Air Lines, Inc.*) that:

> [16] [...] an applicant cannot file a complaint and then expect that any lack of information or documentation that, in the applicant's view, could be relevant in explaining or supporting the application be compensated for by inundating the respondent with questions or requests for production of documents.

[63] The Agency is of the opinion that the same rationale applies here as it is not appropriate for Mr. Lukács to submit that he is a "large person" and then to submit that to be certain of that, he should have the right to use the production and interrogatories mechanisms available pursuant to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104. As noted by the Agency in *Lukács v. United Air Lines, Inc.*, a proceeding before the Agency and the right to direct questions to the other party cannot turn into a commission of inquiry, or a "fishing expedition".

[64] The Agency finds that while Mr. Lukács describes himself as a "large person", this does not make him a "large person" for the purpose of Delta's policy and it is obvious, based on his comments regarding the need for interrogatories, that he has doubts as to whether Delta's policy even applies to him. It was for Mr. Lukács to file a complete application with the Agency, which would have included evidence that he is a "large person" for the purpose of Delta's policy at issue. How could the Agency find that Mr. Lukács has private interest standing, or more particularly, that he is a person "aggrieved" or "affected", or has some other "sufficient interest", which would give him the right to "invoke the jurisdiction of the Agency on the issue" when it is clear that Mr. Lukács is not certain himself. As pointed out by the Supreme Court of British Columbia in *Downtown Eastside Sex Workers Society v. Attorney General,* "private interest standing cannot be founded on hypothetical possibilities". In that regard, the Agency finds that Mr. Lukács's "private interest" submissions are founded on such hypothetical possibilities. On this basis, it is impossible for the Agency to find that Mr. Lukács is "aggrieved" or "affected", or has some other "sufficient interest".

[65] The Agency therefore finds that Mr. Lukács has no private interest standing in this case.

Public interest standing

[66] Mr. Lukács refers to the case of *Fraser v. Canada* for the proposition that public interest standing requires the consideration of the three following factors:

1. Is there a serious issue to be tried?
2. Does the party seeking public interest standing have a genuine interest in the matter?
3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

[67] It is important to clarify that the second factor of *Fraser v. Canada* was phrased differently than what Mr. Lukács is proposing. Indeed, the Ontario Superior Court of Justice wrote: "Does the UFCW have a genuine interest in the validity of the legislation?"

[68] This clarification is important as it is consistent with the three factors established by the Supreme Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 (*Thorson v. Attorney General*), *The Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (*Nova Scotia Board of Censors v. McNeil*) and *Minister of Justice (Can.) v. Borowski,* [1981] 2 S.C.R. 575 (*Minister of Justice v. Borowski*) in which there was a challenge to the constitutionality or operative effect of legislation. Those cases led to a three-part test that a party needs to satisfy in order to be granted public interest standing:

1. Is there a serious issue as to the validity of the legislation?
2. Is the party seeking public interest affected by the legislation or does the party have a genuine interest as a citizen in the validity of the legislation?
3. Is there another reasonable and effective manner in which the issue may be brought to the court?

[69] In light of those cases, public interest was granted in cases where the constitutionality of legislation was contested if that three-part test was met.

[70] In *Finlay v. Canada,* the Supreme Court noted that one of the issues in that case was whether the second part of the test established in *Thorson v. Attorney General, Nova Scotia Board of Censors v. McNeil* and *Minister of Justice v Borowski* could also apply to a non-constitutional challenge to the statutory authority for administrative action. The Supreme Court concluded that it could.

[71] This conclusion was reiterated in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236, where the Supreme Court indicated that the *Finlay v. Canada* case made it clear that public interest standing could be granted to challenge an exercise of administrative authority as well as legislation. The Supreme Court also concluded that the principle for granting public interest standing that it had already established did not need to be expanded beyond that.

[72] Of note, in the *Canada v. Downtown Eastside Sex Workers* case referred to by both parties, which involved a Charter challenge to the prostitution provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, the Supreme Court reminded the parties that the limitations on standing were explained in *Finlay v. Canada.*

[73] Although the Supreme Court made it clear in *Canada v. Downtown Eastside Sex Workers*, at paragraph 36, "that the three factors should not be viewed as items on a checklist or as technical requirements" but "[...] should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes", the Supreme Court also made it clear, at paragraph 37, that the "[...] plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing [...]"

[74] Even looking at the three factors cumulatively and in light of their purposes, the fact remains that, in regard to the second factor, the challenge made by Mr. Lukács is not related to the constitutionality of legislation or to the non-constitutionality of administrative action. Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.

[75] The Agency finds that Mr. Lukács does not have public interest standing.

CONCLUSION

[76] The Agency finds that Mr. Lukács lacks both private interest standing and public interest standing and, accordingly, the Agency dismisses his complaint.

(signed)

Geoffrey C. Hare
Member

(signed)

Sam Barone
Member

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT THE MOVING PARTY will make a motion in writing to the Court under Rules 352 and 369 of the *Federal Courts Rules*, S.O.R./98-106.

THE MOTION IS FOR:

1. An Order pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10:

   (a) granting the Moving Party leave to appeal a decision made by the Canadian Transportation Agency (the "Agency") dated November 25, 2014 and bearing Decision No. 425-C-A-2014; and

   (b) if an extension is necessary, granting the Moving Party an extension to bring the present motion;

2. Costs and/or reasonable out-of-pocket expenses of this motion; and

3. Such further and other relief or directions as the Moving Party may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. The Agency erred in law and applied the wrong legal principles with respect to public interest standing by:

   (a) misquoting the Supreme Court of Canada and holding that public interest standing can be granted only in "cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested" (para. 74); and

   (b) failing to assess all three factors of the tripartite test for public interest standing.

2. The Agency erred in law and rendered an unreasonable decision by:

   (a) failing to give effect to the intent of Parliament that the written complaint of "any person" may invoke the Agency's jurisdiction to eliminate unreasonable or unduly discriminatory terms or conditions of airlines;

   (b) failing to recognize that the right to be subject to terms and conditions that are not unreasonable or unduly discriminatory is a collective right of the public at large; and

   (c) failing to recognize that the Agency is a quasi-judicial regulator whose mandate is different than the mandate of the courts.

Extension (if necessary)

3. On December 25-26, 2014, the Court Registry was closed due to the holidays, and reopened only on Monday, December 29, 2014.

Statutes and regulations relied on

4. Sections 5, 41, 67, 67.1, 67.2, and 86 of the *Canada Transportation Act*, S.C. 1996, c. 10.

5. Sections 110, 111, 113, and 113.1 of the *Air Transportation Regulations*, S.O.R./88-58.

6. Section 26 of the *Interpretation Act*, R.S.C. 1985, c. I-21.

7. Rules 352 and 369 of the *Federal Court Rules*, S.O.R./98-106.

8. Such further and other grounds as the Moving Party may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on December 29, 2014.

2. Such further and additional materials as the Moving Party may advise and this Honourable Court may allow.

December 29, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Odette Lalumière

Tel: (819) 994 2226
Fax: (819) 953 9269

Solicitor for the Respondent,
Canadian Transportation Agency

AND TO: **BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP**
33 Yonge Street, Suite 201
Toronto, ON M5E 1G4

Gerard Chouest

Tel: (416) 982 3804
Fax: (416) 982 3801

Counsel for the Respondent,
Delta Air Lines, Inc.

From lukacs@AirPassengerRights.ca Sun Aug 24 15:08:21 2014
Date: Sun, 24 Aug 2014 15:08:18 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretariat <secretariat@otc-cta.gc.ca>
Subject: Discrimantory practices by Delta Airlines

Dear Madam Secretary:

I am writing to complain concerning the practices of Delta Airlines set out in the attached email concerning the transportation of large (obese) passengers:

1. in certain cases, Delta Airlines refuses to transport large (obese) passengers on the flights on which they hold a confirmed reservation, and require them to travel on later flights;

2. Delta Airlines requires large (obese) passengers to purchase additional seats to avoid the risk of being denied transportation.

It is submitted that these practices are discriminatory, contrary to subsection 111(2) of the Air Transportation Regulations, and they are also contrary to the findings of the Agency in Decision No. 6-AT-A-2008 concerning the accommodation of passengers with disabilities.

Sincerely yours,
Dr. Gabor Lukacs

[Part 2: ""]

The following attachment was sent,
but NOT saved in the Fcc copy:
A Application/PDF (Name="2014-08-24--Delta-to-Shubert--large_passengers_may_be_bumped.pdf") segment of about 135,062 bytes.

From: **Contact Delta** ContactUs.Delta@delta.com
Subject: Re: CC-Past Travel Compliment or Complaint-Complaint-Airport (KMM36513423V70481L0KM)
Date: August 20, 2014 at 4:57 AM
To: omer767@gmail.com

Hello Omer,

RE: Case Number 13384069

Thanks for letting us know the discomfort you were caused on your flight with us on August 12. I'm really sorry for the inconvenience you encountered while sitting next to a passenger who required additional space.

Being cramped during a long or a short flight is not a good experience. I realize how uncomfortable it must have been when you were unable to sit comfortably in your seat. Here are the guidelines we follow to help make a large passenger, and the people sitting nearby, comfortable. 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. It's obvious, this was not the case.

Delta Choice Gift
As a goodwill gesture, I'm sending a $50.00 Delta Choice gift. The Delta Choice gift code will arrive in a separate email within three business days. This will include a customer ID and instructions on how to redeem the gift. Please check your spam folder if you don't see the email in your inbox.

We appreciate the time you took to bring this experience to our attention. I hope that your next trip with us is pleasant in every way.

Regards,

Veron M. Fernandes
You Share, We Care

Original Message Follows:

Delta Air Lines Customer Care Form

September 5, 2014

File No. M4120-3/14-04165

BY E-MAIL: lukacs@AirPassengerRights.ca

Gábor Lukács

Halifax, Nova Scotia

BY E-MAIL: andrea.novak@delta.com

Delta Air Lines, Inc.
1030 Delta Blvd. Dept. 982
Atlanta, Georgia
30354

Attention: Andrea Novak
International Senior Paralegal

Dear Sir/Madam:

Re: Certain practices relating to the transportation of obese persons

This refers to the attached complaint filed by Gábor Lukács with the Canadian Transportation Agency alleging that certain practices by Delta Air Lines, Inc. (Delta) relating to the transportation of obese persons are "discriminatory", contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58, as amended, and inconsistent with the Agency's findings in Decision No. 6-AT-A-2008 (Accessible transportation complaint: Additional Fares and Charges – one person, one fare; https://www.otc-cta.gc.ca/eng/ruling/6-at-a-2008).

It is not clear to the Agency that, on the basis of his submission, Mr. Lukács has an interest in Delta's practices governing the carriage of obese persons. As such, his standing (or *locus standi*) in this matter is in question.

To enable the Agency to further consider this issue, Mr. Lukács is provided with the opportunity to file submissions with the Agency regarding his standing by not later than September 19, 2014. Delta will then have 5 business days from receipt of Mr. Lukács' submissions to answer. On receipt of Delta's answer, Mr. Lukács will have 3 business days to file his reply. The parties must copy each other when their respective submissions are filed with the Agency.

Should you have any questions regarding the foregoing, you may contact Mike Redmond by telephone at 819-997-1219 or facsimile at 819-953-5686.

BY THE AGENCY:

(signed)

Geoffrey C. Hare
Member

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

September 19, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Delta Air Lines
Complaint concerning discriminatory practices of Delta Air Lines relating to the transportation of large passengers
File No.: M4120-3/14-04164
Submissions concerning standing as per Decision No. LET-C-A-63-2014

Please accept the following submissions concerning the issue of standing pursuant to the Agency's directions contained in Decision No. LET-C-A-63-2014.

I. Overview

The present proceeding is a complaint concerning the practices of Delta Air Lines set out in the August 20, 2014 email of Delta Air Lines' Customer Care department, which is attached and marked as Exhibit "A". (Since it appears that the Agency may not yet have received the document in question, it is attached here.) According to Exhibit "A":

1. in certain cases, Delta Air Lines refuses to transport large passengers on the flights on which they hold a confirmed reservation, and requires them to travel on later flights; and

2. Delta Air Lines requires large passengers to purchase additional seats to avoid the risk of being denied transportation.

The thrust of the complaint is that this practice is unjustly discriminatory, contrary to s. 111(2) of the *Air Transportation Regulations*, S.O.R./88-58 (the "*ATR*"). In Decision No. LET-C-A-63-2014, the Agency directed the parties to make submissions concerning the Applicant's standing.

II. Preliminary matters

In order to meaningfully address the issue of standing, it is necessary to rectify the record with respect to the nature of the complaint.

(a) Request to correct a material error in Decision No. LET-C-A-63-2014

Decision No. LET-C-A-63-2014 incorrectly labels the present complaint as one that concerns the transportation of "obese persons." This is not the case.

The present complaint concerns discriminatory practice of Delta Air Lines relating to the transportation of large passengers, as stated in Exhibit "A". The description of the practice makes no reference to "obese" persons, but speaks about "a large passenger," and thus the complaint also refers to "large passengers."

"Obese" is a subset of "large", but the two are not equivalent: every obese person is large, but not every large person is obese; there are many ways, other than obesity, to be large. Consequently, discriminatory policies against "large" passengers also affect "obese" passengers (including passengers with obesity-related disabilities), but not vice versa.

Therefore, as a preliminary matter, the Applicant requests that the Agency correct Decision No. LET-C-A-63-2014 by replacing "obese" with "large" throughout the decision to adequately identify the nature of the complaint.

(b) Limited scope of the complaint: no disability-related accommodation is being sought

The purpose of the present complaint is to stop a discriminatory practice of Delta Air Lines that singles out and subjects a category of passengers to substantially worse terms and conditions than the rest of the travelling public. The Applicant does not seek a better or special treatment for these passengers, nor any form of accommodation for any individual or group.

The present complaint does not directly raise any disability-related issues, nor does it seek any kind of accommodation to remove obstacles in transportation. The Applicant intends to rely on the Agency's findings in Decision No. 6-AT-A-2008 for the limited purpose of lending further support to his position that the impugned practice is harmful and unduly discriminatory.

However, the Applicant does not ask in the present complaint to impose on Delta Air Lines the same terms and conditions that the Agency imposed in Decision No. 6-AT-A-2008, because such a disability-related accommodation would be beyond the scope of the present complaint.

III. Section 111 of the *ATR* and standing

The present complaint alleges that Delta Air Lines' practices are unjustly discriminatory, contrary to subsection 111(2) of the *ATR*. In order to address the question of standing to bring a complaint pursuant to subsection 111(2) of the *ATR*, it is necessary to first review the legislative text, the context, and the purpose of subsection 111(2).

(a) Section 111 of the *ATR* and subsection 67.2(1) of the *CTA* are related

Section 111 of the *ATR* states that:

> **111.** (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.
>
> (2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,
>
> (a) make any unjust discrimination against any person or other air carrier;
>
> (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
>
> (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.
>
> (3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.
>
> [Emphasis added.]

Subsection 67.2(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the "*CTA*") states that:

> **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.

The Agency held in *Public Health Agency of Canada and Queen's University v. Air Canada*, Decision No. 482-A-2012, that (para. 7):

> The Agency notes that while the terminology used in subsection 67.2(1) of the CTA and section 111 of the ATR are not identical, this terminology broadly refers to the issue of unreasonable or unjust discrimination. Therefore, the Agency is of the opinion that the words "unreasonable" and "unjust discrimination" used in section 111 of the ATR encompass and capture the meaning of the terms used in subsection 67.2(1) of the CTA.

(b) The purpose of s. 111 of the *ATR* and s. 67.2(1) of the *CTA*

Section 111 of the *ATR* and subsection 67.2(1) of the *CTA* were both enacted to protect the travelling public at large against the unilateral setting of terms and conditions of carriage by air carriers. In *Anderson v. Air Canada*, 666-C-A-2001, the Agency held that:

> In the Agency's opinion, the specific wording of subsection 67.2(1) of the CTA reflects a recognition by Parliament that regulation was needed in order to attain the stated objective of the national transportation policy found in section 5 of the CTA which provides, in part, that:
>
> > ... each carrier or mode of transportation, as far as is practical, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute
> >
> > (i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,

Thus, section 111 of the *ATR* and subsection 67.2(1) of the *CTA* serve a preventative function rather than merely offering remedies or compensation *post facto*. Indeed, in *Black v. Air Canada*, 746-C-A-2005, the Agency held that:

> [7] 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.

(c) "Any person" can challenge the terms and conditions pursuant to s. 111 of the *ATR*

The question of "standing" to challenge the terms or conditions of a carrier pursuant to s. 111 of the *ATR* has been addressed by the Agency in *Black v. Air Canada*, 746-C-A-2005:

> [5] The Agency is of the opinion that it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and con-

> ditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR. In this regard, the Agency notes that subsection 67.2(1) of the CTA provides that, on the basis of a "complaint in writing to the Agency by any person", the Agency may take certain action if the Agency determines that the terms or conditions at issue are unreasonable or unduly discriminatory. 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, 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".
>
> [Emphasis added.]

These findings were reaffirmed by the Agency in *O'Toole v. Air Canada*, Decision No. 215-C-A-2006, *Lukács v. Air Canada*, Decision No. LET-C-A-155-2009, and most recently in Decision No. LET-C-A-104-2013.

Thus, it is submitted that "any person" has standing to challenge, pursuant to s. 111 of the *ATR*, the terms or conditions applied by a carrier.

IV. Standing in the present case

The present complaint alleges that Delta Air Lines' practice is discriminatory, contrary to 111(2) of the *ATR*, and no allegations concerning undue obstacles in the transportation network to the mobility of persons with disabilities are being made.

For the purpose of the present complaint, it is less significant whether Delta Air Lines refuses to transport passengers or forces passengers to buy multiple seats due to their large body size, their eye color, or their race; the essential aspect of the allegation is that Delta Air Lines does so based on the personal characteristics of the individual or group.

In light of the public policy purpose of s. 111 of the *ATR* and its preventative nature, it is submitted that the Applicant is not required to be a member of the group discriminated against in order to have standing to bring a complaint about practices contrary to s. 111(2) of the *ATR*. Holding otherwise would render the phrase "any person" chosen by Parliament meaningless.

Nevertheless, in order to avoid any possible doubt, the Applicant will also address his private and public interest in the complaint.

(a) Private interest

As noted earlier, the complaint is not about the discrimination against "obese persons," but rather about the discrimination against "large persons."

The Applicant is 6 ft tall, and weighs approximately 175 lbs. As such, the Applicant is certainly a "large person" and would or could be viewed as such by Delta Air Lines' agents.

In the absence of a clear and consistent statement from Delta Air Lines about the scope of the practice stated in Exhibit "A" and the precise meaning of "a large person," it is impossible to conclude that the Applicant would not be personally subject to the discriminatory practices set out in Exhibit "A" due to his physical characteristics.

Therefore, the Applicant does have a private, personal interest in the Delta Air Lines' practices relating to the transportation of "a large person." Even if the Agency may have doubts with respect to this issue, it is not possible to conclude that the Applicant has no such interest at the present stage of the proceeding.

Fully addressing the question of private interest would require directing questions to Delta Air Lines and/or requiring Delta Air Lines to produce a wealth of documents, which the Applicant understands is not permitted in the present preliminary exchange of submissions.

(b) Public interest

As noted earlier, the Applicant submits that "any person" has standing to bring a complaint pursuant to s. 111 of the *ATR* and that he has a personal interest in the present complaint.

Alternatively, the Applicant submits that he has public interest standing to bring the present complaint. The legal test for public interest standing requires the consideration of three factors (see *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC)):

(i) Is there a serious issue to be tried?

(ii) Does the party seeking public interest standing have a genuine interest in the matter?

(iii) Is the proceeding a reasonable and effective means to bring the issue before the court (or the tribunal)?

When standing is raised as a preliminary matter, the burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy the test.

For the reasons set out below, the Applicant submits that all three factors favour granting him public interest standing, if necessary, to bring the present complaint.

(i) Serious issue to be tried

In *Anderson v. Air Canada*, Decision No. 666-C-2001, the Agency established a two-step test for determining whether terms or conditions are "unduly discriminatory":

> In the first place, the Agency must determine whether the term or condition of carriage applied is "discriminatory". In the absence of discrimination, the Agency need not pursue its investigation. If, however, the Agency finds that the term or condition of carriage applied by the domestic carrier is "discriminatory", the Agency must then determine whether such discrimination is "undue".

In *Black v. Air Canada*, 746-C-A-2005, the Agency applied the same test for determining whether terms or conditions are "unjustly discriminatory" within the meaning of s. 111 of the *ATR*:

> [35] The Agency is therefore of the opinion that in determining whether a term or condition of carriage applied by a carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA or "unjustly discriminatory" within the meaning of section 111 of the ATR, it must adopt a contextual approach which balances the rights of the travelling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers operating in Canada. This position is also in harmony with the national transportation policy found in section 5 of the CTA.

With respect to the meaning of "discriminatory," the Agency adopted the interpretation of the Supreme Court of Canada in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143:

> [...] discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligation, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages, available to other members of society.

In the present case, the practice set out in Exhibit "A" is certainly discriminatory in that it imposes a disadvantage on a certain group of passengers based on their personal characteristics, namely, the size and/or shape of their body. Moreover, it is arguable that it is "unjustly discriminatory," contrary to s. 111(2) of the *ATR*.

Thus, it is submitted that whether the practice set out in Exhibit "A" is "unjustly discriminatory" is a serious issue to be tried, meeting the first branch of the test.

(ii) The Applicant has a long-standing, real, and continuing interest in the rights of air passengers

The Applicant is a Canadian air passenger rights advocate. Since 2008, the Applicant has filed more than two dozen successful complaints against airlines with the Agency. The Applicant's complaints have lead to substantial improvements and landmark decisions by the Agency in the following areas:

1. baggage liability and accuracy of information on airlines' websites:

    (a) *Lukács v. Air Canada*, 208-C-A-2009;
    (b) *Lukács v. WestJet*, 477-C-A-2010 (leave to appeal refused: 10-A-41);
    (c) *Lukács v. WestJet*, 313-C-A-2010 & 483-C-A-2010 (leave to appeal refused: 10-A-42);
    (d) *Lukács v. Air Canada*, 291-C-A-2011;
    (e) *Lukács v. WestJet*, 418-C-A-2011;
    (f) *Lukács v. United*, 182-C-A-2012;
    (g) *Lukács v. United*, 200-C-A-2012;
    (h) *Lukács v. United*, 335-C-A-2012;
    (i) *Lukács v. United*, 467-C-A-2012;
    (j) *Lukács v. Sunwing*, 249-C-A-2013;
    (k) *Lukács v. British Airways*, 10-C-A-2014;

2. rebooking and/or refund for passengers in the case of flight delay, advancement, cancellation, and denied boarding:

    (a) *Lukács v. Air Transat*, 248-C-A-2012;
    (b) *Lukács v. WestJet*, 249-C-A-2012;
    (c) *Lukács v. Air Canada*, 250-C-A-2012;
    (d) *Lukács v. Air Canada*, 251-C-A-2012;
    (e) *Lukács v. WestJet*, 252-C-A-2012;
    (f) *Lukács v. Porter*, 16-C-A-2013;
    (g) *Lukács v. Sunwing*, 313-C-A-2013;
    (h) *Lukács v. Air Transat*, 327-C-A-2013;
    (i) *Lukács v. Porter*, 344-C-A-2013;
    (j) *Lukács v. Porter*, 31-C-A-2014 (involved also denied boarding compensation issues);

3. denied boarding compensation:

    (a) *Lukács v. Air Canada*, 204-C-A-2013 & 342-C-A-2013;
    (b) *Lukács v. WestJet*, 227-C-A-2013;
    (c) *Lukács v. Porter*, 31-C-A-2014;
    (d) *Lukács v. British Airways*, 201-C-A-2014;
    (e) *Lukács v. Porter*, 249-C-A-2014.

Currently, one complaint of the Applicant is pending before the Agency, four proceedings are pending before the Federal Court of Appeal, and the Applicant is also acting as a representative for a passenger in a disability-related complaint before the Agency.

The Consumers' Association of Canada awarded the Applicant its Order of Merit in recognition of his work in the area of air passenger rights.

In an article entitled "Aviation Practice Area Review" and published in September 2013 (Exhibit "B"), Mr. Carlos Martins, one of the counsels for Delta Air Lines in the present proceeding, characterized the activities of the Applicant as follows:

> In the consumer protection landscape, for the last several years, the field has largely been occupied by Gabor Lukács, a Canadian mathematician who has taken an interest in challenging various aspects of the tariffs filed by air carriers with the regulator, the Canadian Transportation Agency (the Agency). The majority of Mr Lukács' complaints centre on the clarity and reasonableness of the content of the filed tariffs, as well as the extent to which air carriers are applying their tariffs, as filed, in the ordinary course of business.
>
> Mr Lukács' efforts have created a significant body of jurisprudence from the Agency - to the extent that his more recent decisions often rely heavily upon principles enunciated in previous complaints launched by him.
>
> [Emphasis added.]

Mr. Martins' second observation is also very accurate: an electronic search among the Agency's decisions reveals a total of 46 decisions mentioning the Applicant and/or decisions by the Agency resulting from his complaints.

Based on these facts, the Applicant submits that he has a demonstrated long-standing, real, and continuing interest in the rights of air passengers, thus meeting the second branch of the test.

(iii) Reasonable and effective means of bringing the issue before the Agency

In *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC), this branch of the test was explained as follows:

> [109] Thus, in order to find that there is a reasonable and effective alternate means to litigate the issue, the A.G. must prove, on the balance of probabilities, that:
>
> (a) there is a person who is more directly affected than the applicants; and
>
> (b) that person might reasonably be expected to initiate litigation to challenge the legislation at issue.

> In order to show there is a "reasonable and effective" alternative, it is necessary to show more than a possibility that such litigation might occur. The "mere possibility" of a challenge by a directly affected private litigant will not result in the denial of public interest standing: *Canadian Bar Association v. British Columbia (Attorney General)* 1993 CanLII 310 (BC SC), (1993), 101 D.L.R. (4th) 410 (B.C.S.C.) at 417; *Grant v. Canada (Attorney General)*, 1994 CanLII 9274 (FC), [1995] 1 F.C. 158 (F.C. T.D.), aff'd [1995] F.C.J. No. 830 (C.A.), leave to appeal refused [1995] S.C.C.A. No. 394 (S.C.C.) at pp. 198-9.

Recently, in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, the Supreme Court of Canada provided several examples of the types of interrelated matters that may be useful to take into account when assessing the third branch of the test (para. 51):

> The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.
>
> The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.
>
> The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. [...]
>
> [Emphasis added.]

The Applicant submits that these considerations militate in favour of granting him public interest standing, if such standing is necessary for bringing the present complaint.

First, the Applicant has demonstrated through his past activities his experience and expertise in the area of air passenger rights in general, and in matters involving s. 111 of the *ATR* in particular.

Second, there is a public interest in eliminating any discrimination, a conduct that is inconsistent with the Canadian values enshrined in the *Charter* and the *Canadian Human Rights Act*. This is particularly so with respect to "unjust discrimination," alleged in the present case, which is an extreme form of discrimination.

Third, there is no realistic alternative means for bringing Delta Air Lines' outrageous practice before the Agency. Such proceedings are legally complex, and as the present case demonstrates, airlines are represented by highly skilled counsels. The Applicant, due to the expertise he has accumulated in the area, is in a unique position to meaningfully respond to the legal arguments crafted by such skilled counsels. Any other complainant would necessarily be forced to hire a lawyer and incur very substantial expenses.

Fourth, the Applicant is also in a unique position to bring the present complaint because he has obtained evidence of Delta Air Lines' discriminatory practice by way of Exhibit "A". Individuals who have been discriminated against by Delta Air Lines pursuant to these practices may not know that they were singled out based on their physical characteristics, and would certainly be in a difficult position to prove that.

Finally, the issue in the present case is a question of law and not a question of fact. The question is whether Delta Air Lines' practice stated in Exhibit "A" is unjustly discriminatory within the meaning of s. 111(2) of the *ATR*. The present setting is as adversarial as it can get. Since no accommodation is being sought, and the only remedy pursued is an order to extinguish the discriminatory practice, there would be no practical benefit if the present complaint were brought forward by a nominee complainant.

In light of these, it is submitted that the Applicant ought to be granted public interest standing to bring the present complaint if such a standing is necessary.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Gerald Chouest, counsel for Delta Air Lines

From: **Contact Delta** ContactUs.Delta@delta.com
Subject: Re: CC-Past Travel Compliment or Complaint-Complaint-Airport (KMM36513423V70481L0KM)
Date: August 20, 2014 at 4:57 AM
To: omer767@gmail.com

Hello Omer,

RE: Case Number 13384069

Thanks for letting us know the discomfort you were caused on your flight with us on August 12. I'm really sorry for the inconvenience you encountered while sitting next to a passenger who required additional space.

Being cramped during a long or a short flight is not a good experience. I realize how uncomfortable it must have been when you were unable to sit comfortably in your seat. Here are the guidelines we follow to help make a large passenger, and the people sitting nearby, comfortable. 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. It's obvious, this was not the case.

Delta Choice Gift
As a goodwill gesture, I'm sending a $50.00 Delta Choice gift. The Delta Choice gift code will arrive in a separate email within three business days. This will include a customer ID and instructions on how to redeem the gift. Please check your spam folder if you don't see the email in your inbox.

We appreciate the time you took to bring this experience to our attention. I hope that your next trip with us is pleasant in every way.

Regards,

Veron M. Fernandes
You Share, We Care

Original Message Follows:

Delta Air Lines Customer Care Form

WHO'SWHOLEGAL

AVIATION PRACTICE AREA REVIEW

SEPTEMBER 2013

Carlos Martins of Bersenas Jacobsen Chouest Thomson Blackburn outlines recent developments in aviation law in Canada.

There have been a number of developments in Canada in the realm of aviation law that promise to make for interesting times in the months ahead. In this review, we will consider some of these decisions, their implications and how they may play out in the coming year.

Warsaw/Montreal Liability

On the airline liability front, the Supreme Court of Canada will hear the appeal of the Federal Court of Appeal's decision in *Thibodeau v Air Canada*, 2012 FCA 246. This case involves a complaint by Michel and Lynda Thibodeau, passengers on a series of Air Canada flights between Canada and the United States in 2009. On some of the transborder legs of those journeys, Air Canada was not able to provide the Thibodeaus with French-language services at check-in, on board the aircraft or at airport baggage carousels. The substantive aspect of the case is of limited interest to air carriers because the requirement that air passengers be served in both official languages applies only to Air Canada as a result of the Official Languages Act (Canada), an idiosyncratic piece of legislation that continues to apply to Air Canada even though it was privatised in 1988.

However, from the perspective of other air carriers, the most notable facet of the Supreme Court's decision will be whether that Court will uphold the Federal Court of Appeal's "strong exclusivity" interpretation of the Warsaw/Montreal Conventions. If it does, it will incontrovertibly bring the Canadian law in line with that of the United States and the United Kingdom – meaning that passengers involved in international air travel to which either of the Conventions apply are restricted to only those remedies explicitly provided for in the Conventions. At present, the Federal Court of Appeal's decision in *Thibodeau* provides the most definitive statement to date that "strong exclusivity" is the rule in Canada.

YQ Fares Class Action

The battle over "YQ Fares" is expected to continue in a British Columbia class action. The case relates to the practice of several air carriers identifying the fuel surcharge levied on their tickets in a manner that may cause their passengers to believe that these charges are taxes collected on behalf of a third party when, in fact, fuel surcharges are collected by the air carrier for its own benefit. In the British Columbia action, the plaintiffs complain that this practice contravenes the provincial consumer protection legislation which provides that service providers shall not engage in a "deceptive act or practice".

Last year, an issue arose as to whether air carriers can be subject to the provincial legislation given that, in Canada, matters relating to aeronautics are in the domain of the federal government. Most recently, in *Unlu v Air Canada*, 2013 BCCA 112, the British Columbia Court of Appeal held that the complaint should be allowed to proceed on the basis that, among other things, there was no operational conflict between the workings of the provincial legislation and the regime imposed under the federal Air Transportation Regulations, SOR/88-58, that deal with airfare advertising. Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was denied in August 2013.

Regulatory/Passenger Complaints

In the consumer protection landscape, for the last several years, the field has largely been occupied by Gabor Lukács, a Canadian mathematician who has taken an interest in challenging various aspects of the tariffs filed by air carriers with the regulator, the Canadian Transportation Agency (the Agency). The majority of Mr Lukács' complaints centre on the clarity and reasonableness of the content of the filed tariffs, as well as the extent to which air carriers are applying their tariffs, as filed, in the ordinary course of business.

Mr Lukács' efforts have created a significant body of jurisprudence from the Agency – to the extent that his more recent decisions often rely heavily upon principles enunciated in previous complaints launched by him.

Since 2012, Mr Lukács has been involved in complaints arising from, among other things:

- air carriers' online and airport communications to the public as to the extent to which baggage claims involving "wear and tear" must be paid (*Lukács v United Airlines*, CTA Decision Nos. 182/200-C-A-2012);

- lack of compliance of tariff liability provisions with the Montreal liability regime (*Lukács v Porter Airlines*, CTA Decision No. 16-C-A-2013);

• the reasonableness of imposing releases of liability as a precondition for the payment of compensation provided for in a tariff (*Lukács v WestJet*, CTA Decision No. 227-C-A-2013);

• the reasonableness of air carriers engaging in overselling flights for commercial reasons (*Lukács v Air Canada*, CTA Decision No. 204-C-A-2013);

• the amount of denied boarding compensation to be paid to involuntarily bumped passengers in the event of a commercial overbooking (*Lukács v Air Canada*, CTA Decision No. 342-C-A-2013);

• the amount of compensation to be paid to passengers who miss their flight as a result of an early departure (*Lukács v Air Transat*, CTA Decision No. 327-C-A-2013); and

• the use of cameras by passengers onboard aircraft (*Lukács v United Airlines*, CTA Decision No. 311-C-A-2013)

It is expected that, in 2014, Mr Lukács will continue in his quest to ensure that air carrier tariffs are reasonable, clear and faithfully applied.

Although it may not be initiated by Mr Lukács, we expect that, in 2014, the Agency will consider the issue of whether air carriers should be able to charge a fee for booking a specific seat for a child travelling with a parent or guardian.

Regulatory/ Notices to Industry

Wet Leasing

On 30 August 2013, the Agency released its new policy on wet leasing of foreign aircraft. It applies to operators who wet lease foreign aircraft for use on international passenger services for arrangements of more than 30 days. The key changes are that, in order for the Agency to approve such an arrangement:

• the number of aircraft leased by an operator is capped at 20 per cent of the number of Canadian-registered aircraft on the lessees' Air Operator Certificate at the time the application was made;

• small aircraft are excluded from the number of Canadian-registered aircraft described above; and

• small aircraft is defined as an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of not more than 39 passengers.

In addition to the above, the lessee is required to provide a rationale as to why the wetlease arrangement (or its renewal) is necessary. The Agency has stated that it:

• will not deny an application solely on the basis of the rationale for the use of foreign aircraft with flight crew, as long as the cap is not exceeded; and

• may renew approvals of wet-lease applications of more than 30 days as long as the cap is not exceeded.

There is some flexibility for short-term arrangements and where unexpected events require an exception.

All-Inclusive Fare Advertising

In December 2012, the Agency approved new regulations with respect to all-inclusive fare advertising. Initially, the regulations were enforced through a "proactive and collaborative educational approach". The Agency has recently released a notice to the industry advising that it will now take a firmer stance in ensuring compliance. It has recently issued administrative monetary penalties (AMPs) against two online travel retailers for not advertising the total all-inclusive price on their online booking systems. In one case, the AMP amounted to $40,000 due to the lack of initial response from the retailer. In another, the AMP was $8,000 in a situation where that retailer complied in the case of booking through its main website, but not with respect to booking on its mobile website.

Baggage Rules

The Agency has recently completed a consultation process with the industry and with the public with respect to the issue of baggage rules. The issues under contemplation include à la carte pricing, regulatory change and carriers' attempts to further monetize the transportation of baggage. At present, there are two regimes being used in Canada: one of which was adopted by the International Air Transport Association (Resolution 302) and the other by way of recently promulgated

regulations to be enforced by the United States Department of Transportation (14 CFR part 399.87). The Agency has gone on the record to state that it expects to make a decision on the appropriate approach to apply for baggage being transported to/from Canada in the fall of 2013.

Defining the Boundaries of Regulation

In the arena of business aviation, the Appeal Panel of the Transportation Appeal Tribunal of Canada is expected to revisit the extent to which the Canadian Transportation Agency should regulate business-related aviation in Canada. The facts arise from the practice of a casino based in Atlantic City, New Jersey, offering voluntary air transfers to the casino to some of its most valued clients. In evidence that has already been led in these proceedings, the casino has asserted that the complimentary flights are at the sole discretion of the casino; no customer was entitled to such a service; and the provision of the flights is not based on the amount spent by the customers at the casino.

The core of the issue is whether the casino requires a licence from the Agency in order to offer this benefit to its customers. Under the applicable legislation, those who offer a "publicly available air service" in Canada require such a licence and are subject to all of the requirements imposed on licensees. *In Marina District Development Company v Attorney General of Canada*, 2013 FC 800, the Federal Court was asked by the casino, on a judicial review, to overturn the Appeal's panel's previous finding that the casino's air service did, in fact, trigger the Agency's oversight. The Federal Court found that the legal test imposed by the Appeal Panel for determining whether an air service was publicly available bordered on tautological but declined to answer the question itself. The matter was sent back to the Appeal Panel for reconsideration. A new decision is expected in 2014. In our view, it is likely that the matter will be sent back to the Federal Court, possibly before the end of 2014 as well, regardless of which party prevails.

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

33 Yonge Street
Suite 201
Toronto, Ontario
Canada M5E 1G4
T: 416-982-3800
F: 416-982-3801
Web: www.lexcanada.com

September 26, 2014

Gerard Chouest
Direct Dial: 416-982-3804
Direct Fax: 416-982-3801
chouest@lexcanada.com

Elliot P. Saccucci
Direct Dial: 416-982-3812
Direct Fax: 416-982-3801
esaccucci@lexcanada.com

VIA E-MAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario K1A 0N9

Dear Madam Secretary:

Re: Re: Dr. Gabor Lukács v. Delta Air Lines
Complaint Concerning discriminatory practices of Delta Air Lines relating to the transportation of obese passengers

File No.:M4120-3/14-04164
Submissions concerning Dr. Lukács' standing
File No: 301351

Please accept the following submissions concerning Dr. Lukács' standing pursuant to the Canadian Transportation Agency's (the "Agency") directions contained in Decision No. LET-C-A-63-2014.

I. Overview

As highlighted in his September 19th submissions, Dr. Lukács' complaint pertains to an August 20th, 2014 e-mail responding to one passenger ("Omer")'s concern regarding a fellow passenger who "required additional space", and who therefore made Omer feel "cramped". Dr. Lukács attaches the e-mail as Exhibit "A" to his submissions.

Dr. Lukács alleges that the e-mail evidences a practice of the Respondent that is unjustly discriminatory contrary to s. 111(2) of the *Air Transportation Regulations*, S.O.R./88-58 (the "*ATR*") and has requested that the Agency grant him standing to lodge a complaint under that section.

It is submitted that Dr. Lukács does not have a direct interest in the policy he wishes to challenge and that the Agency should not accord him public interest standing.

II. The "large passenger" issue

According to Dr. Lukács, the Agency's Decision No. LET-C-A-63-2014 incorrectly labels his proposed complaint as one concerning the transportation of "obese persons". It is Dr. Lukács' submission that the complaint properly concerns "large persons", which includes but is not limited to "obese persons".

In fact, as is clear from Dr. Lukács' own Exhibit "A", the Agency's characterization of the complaint as one concerning "obese persons" is entirely accurate and appropriate. The passenger complaint and the Respondent's practice alluded to in the e-mail and excerpted below, which Dr. Lukács alleges are "unjustly discriminatory" contrary to section 111(2) of the *ATR*, clearly concern a passenger who cannot fit in a single seat.

For the Agency's benefit and ease of reference, the Respondent's public statement on its practice concerning passengers who cannot fit in a single seat states that: [1]

> If you are unable to sit in your seat without encroaching into the seat next to you while the armrest is down, please ask the agent if they can reseat you next to an empty seat. You might also consider purchasing an upgrade to First/Business Class.
>
> We will do all possible to ensure your comfort but you might consider booking an additional seat in order to ensure your best comfort during your travel. Please call Delta Reservations at 1-800-221-1212 and they will be glad to assist.

Clearly these practices address "obese persons" who cannot fit in a single seat, and in fact encroach onto a second seat by virtue of their condition.

It appears that the Agency has recognized the word "large" in Delta's response to "Omer" for what it is—a euphemism. We submit that Dr. Lukács' request for an amendment should be denied.

III. Section 111(2) of the *ATR* and direct interest standing

It is Dr. Lukács' submission that section 111(2) of the *ATR* ought to be read so as to grant "any person" standing to challenge the terms or conditions applied by a carrier pursuant to that provision. According to Dr. Lukács, the issue of "standing" to challenge the terms or conditions of a carrier pursuant to section 111(2) of the *ATR* was addressed in *Black v. Air Canada*, 746-C-A-2005.

1See <http://www.delta.com/content/www/en_US/traveling-with-us/special-travel-needs/require-extra-seat-space.html>

It is clear from the result that the Agency found that Mr. Black had standing. However, because of the basis of Air Canada's objection (i.e. the submission that there must be "a real and precise factual background") the reasons do not deal with the considerations normally reviewed in cases which address standing and there is no explicit holding respecting the basis of Mr. Black's standing. In the present case the issue is squarely raised and we will discuss the two bases upon which a person may have standing; direct interest standing and public interest standing.

In order to have direct standing to bring a complaint, Dr. Lukács must be directly affected by the Respondent's allegedly "unjustly discriminatory" practice. According to the Federal Court of Appeal in *Rothmans of Pall Mall Canada Ltd. v. Minister of National* Revenue, [1976] 2 F.C. 500 (Fed. C.A.) and *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 (F.C.A.) to be "directly affected" – and thus have direct standing - means that the practice must affect Dr. Lukács' legal rights, impose legal obligations upon him, or else prejudicially affect him in some way.

We submit that the holding in *Black v. Air Canada* can be fully explained on the basis that Mr. Black had a direct interest in the matter of the complaint and had standing as of right. He had not been affected by the terms complained of, but he could have been the next day had he chosen to fly with Air Canada. The terms imposed by Air Canada affected his rights and would have prejudicially affected him had he elected to fly with Air Canada. The same analysis will explain all the cases which have followed *Black*. The Agency reasoned, and we take no exception to this reasoning, that a person who could be prejudicially affected by terms complained of should not be required to subject himself to those terms as a precondition of bringing a complaint.

By his own submission, Dr. Lukács is 6'0 tall and 175lbs in weight. According to Dr. Lukács this makes him "certainly a 'large person'".

However, a national survey conducted by Maclean's Magazine in 2012[2] reveals that the average Canadian male is 5'9 and 185lbs. Despite Dr. Lukács' submissions to the contrary, he is only approximately 4% taller than the average Canadian male, and is in fact approximately 4% lighter than the average Canadian male.

As the Agency properly characterized in Decision No. LET-C-A-63-2014, and as is clear from Dr. Lukács' own Exhibit "A", the proposed complaint is one that concerns persons who cannot fit in a single seat by virtue of being

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2 See <http://www.macleans.ca/news/canada/how-canadian-are-you/>.

obese. As someone who is lighter than the average Canadian, despite being slightly taller, it is patently clear that Dr. Lukács does not have a direct interest in the subject matter of the proposed complaint; his rights are not affected by the impugned practice nor would he suffer any prejudice if he elected to fly with Delta.

V. Public interest standing

In his submissions Dr. Lukács states that "when standing is raised as a preliminary matter, the burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy the test". Dr. Lukács provides no legal basis for this submission.

In fact, the opposite is true as revealed by the Federal Court of Appeal in *Public Mobile Inc. v. Canada (Attorney General)*, [2012] 3 F.C.R. 344 (F.C.A.), where J.A. Sexton writing for a unanimous court at paragraph 54 clearly states that "an applicant for public interest standing must satisfy the court" that the test for public interest standing is met.

Thus, it is Dr. Lukács who bears the onus of satisfying the Agency that he is entitled to be granted public interest standing, and not the Respondent who bears the onus of disproving such entitlement.

Quite apart from the question of who has the onus of proving what, the Respondent submits that the essential issue in this case is whether, in the words of the Supreme Court of Canada in the case of *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, [2012] 2 S.C.R. 524 (S.C.C.), in a passage cited by the Applicant at page 15 of his Submissions, there are "realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination."

Also at paragraph 51 of *Downtown Eastside*, the Court cautioned that:

> Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.
> [Emphasis added].

With this guidance from the Supreme Court in mind we submit it is helpful to consider certain information available on the Agency's website. On the homepage (https://www.otc-cta.gc.ca/eng) and directly under the Maple Leaf we find a banner with the central entry "Complaints and disputes". Any person who elects to click this item will be taken to a page at which she is

asked whether she wishes to submit a complaint. If the visitor clicks the button she is taken to a three step "Complaint Wizard" which provides an easy step by step tool for completing a complaint in approximately 15 minutes.

Thus there is an expedient method for filing a complaint. The Supreme Court of Canada also cautions that the alternative should "be considered in light of the practical realities, not the theoretical possibilities". The practical reality in this case is that, leaving aside complaints related to accessibility issues which Dr. Lukács does not wish to raise, in calendar year 2013 and the first nine months of 2014 the Agency has issued 36 Decisions in respect of Consumer Complaints, related to the air mode. Of these 11 relate to cases filed by Dr. Lukács and the balance of 25 relate to complaints filed by other individuals. The total number of persons who participated as complainants in these matters is approximately 105 (although it is conceded that one single case involved 83 complainants).

There is no discussion of standing in any of the 11 cases initiated by Dr. Lukács which led to Decisions in 2013 or 2014. It is submitted that the comments made above respecting the *Black* decision are applicable here. Each of the 11 decisions can be explained on the basis of an implicit finding that Dr. Lukács could potentially have been prejudicially affected by the practice, term or condition complained of. As in *Black* this justified direct interest standing.

We would like to underline the fact that in none of these cases was there any suggestion that Dr. Lukács should be granted public interest standing.

The Agency provides an accessible medium for lodging consumer complaints, and encourages the participation of self-represented complainants. Through its informal and non-binding dispute resolution services, the Agency provides experienced mediators at no cost to the complainant, while its rules and procedures are relatively informal by comparison to courts. A complainant need not be herself an expert litigant nor have the assistance of experienced counsel.

It is both practical and reasonable for a passenger who is unjustly affected by the practice, procedure, term or condition of an air carrier to bring her complaint to the Agency.

Furthermore, Dr. Lukács submits that he is in a privileged position because he has unique evidence of the allegedly "unjustly discriminatory" practice. However, as is noted above, the impugned practice is described on Delta's publicly available website.

We accordingly submit that his request for public interest standing should be denied.

Yours truly,
Bersenas Jacobsen Chouest Thomson Blackburn LLP

GAC\EPS

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

October 1, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Delta Air Lines
Complaint concerning discriminatory practices of Delta Air Lines relating to the transportation of large passengers
File No.: M4120-3/14-04164
Reply submissions concerning standing as per Decision No. LET-C-A-63-2014

Please accept the following submissions concerning the issue of standing as a reply to Delta Air Lines' submissions dated September 26, 2014.

I. The practice complained of substantially differs from Delta Air Lines' public statement

The Applicant strenuously objects to Delta Air Lines' attempt to obfuscate and sidestep the subject of the complaint, and conflate it with the contents of the statement appearing on Delta Air Lines' website (page 2 of Delta Air Lines' September 26, 2014 submissions).

The present complaint concerns Delta Air Lines' practices, as set out in Exhibit "A" of the Applicant's September 19, 2014 submissions, and not the public statement of Delta Air Lines.

(a) Delta Air Lines' public statement substantially differs from Exhibit "A"

There is a fundamental difference not only in the subject matter, but also in the nature of the statements appearing on Delta Air Lines' website and the practices set out in Exhibit "A". The

difference can be best illustrated as the difference between inviting a guest over for a weekend as opposed to forcibly confining a person for a weekend.

Delta Air Lines cites on page 2 of its September 26, 2014 submissions a statement that appears on Delta Air Lines' website, concerning Delta Air Lines' commitment to offer additional assistance to obese passengers. The public statement uses the permissive language of "you might also consider" and "you might consider," and is clearly a mere suggestion to passengers. There is nothing in these statements to pressure passengers to purchase an additional seat. The airline simply advises the passenger of an option available for the passenger's "best comfort" during their travel.

In sharp contrast, however, the practice complained about is not a recommendation to passengers, but rather a discriminatory practice that singles out "large" passengers:

> [...] 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 [...]

Unlike the public statement on Delta Air Lines' website, these practices do not leave it to the passenger to decide whether they wish to purchase additional seats; rather, Delta Air Lines targets "large" passengers as candidates for being denied transportation on full flights. Furthermore, according to Exhibit "A", Delta Air Lines does not recommend, but requires such passengers to purchase additional seats, lest they be denied transportation on full flights, and be forced to fly at a later time or date.

The Applicant submits that the public statement of Delta Air Lines is so substantially different on essential points from what is set out in Exhibit "A" that it is not possible to make any conclusions with respect to the intended meaning of Exhibit "A" based on the public statement of Delta Air Lines.

(b) Lack of evidence

It is important to note that Delta Air Lines has tendered no evidence as to its actual practices to demonstrate that its practices are not as set out in Exhibit "A" or to explain the meaning of "large" in Exhibit "A".

There would have been many ways for Delta Air Lines to provide evidence on this point, such as producing its training manuals, and providing a statement from a person with knowledge of the pertinent matters about Delta Air Lines' practices.

The Applicant submits that Delta Air Lines tendered no evidence whatsoever to support its contention that "large" in Exhibit "A" is an euphemism for "obese".

(c) Procedural fairness concern

The Applicant submits that it would be unfair to make any conclusions as to the meaning of "large" in Exhibit "A" in the framework of a preliminary question, where he is deprived from using the production and interrogatory mechanisms normally available pursuant to the Agency's rules of procedures after pleadings are opened.

While Delta Air Lines may eventually tender evidence as to the meaning of "large" in Exhibit "A", it would amount to denial of procedural fairness to accept bald allegations as facts at such a preliminary stage of the proceeding.

There is nothing in Exhibit "A" to show that the passenger was complaining about an "obese" passenger sitting next to him and not an exceptionally tall passenger or one with longer than average legs.

Therefore, the Applicant submits that for the purpose of the present preliminary matter concerning standing, and in the absence of any evidence to the contrary, the Agency should look at the words of Exhibit "A" as they stand. Exhibit "A" speaks of "large" and not "obese" passengers. Hence, the present complaint is concerning discrimination against "large" passengers, which can include a range of ways of being "large."

II. Section 111 of the *ATR* and standing

The Applicant submits that Delta Air Lines is grossly misstating the law on standing with respect to section 67.2(1) of the *Canada Transportation Act* and section 111 of the *Air Transportation Regulations*, and the Agency's jurisprudence on it.

(a) Collective right of the travelling public: "any person"

As noted by the Supreme Court of Canada in *A.G. (Que.) v. Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 (at para. 28), Parliament does not speak in vain, and the phrase "any person" was inserted into the legislative text for a reason. Delta Air Lines has failed to address the argument of the Appellant, supported by a wealth of case law from the Agency, that the right to challenge terms and conditions pursuant to s. 67.2(1) of the *CTA* and s. 111 of the *ATR* is conferred upon "any person" and not only those who have been directly affected by the impugned terms and conditions.

Delta Air Lines failed to propose any alternative interpretation for the phrase "any person" that Parliament chose to include in s. 67.2(1) of the *CTA*. In the absence of submissions by Delta Air Lines on this point, the Applicant submits that the Agency should find that these rights are collective rights of the travelling public (similar to language rights pursuant to the *Official Languages Act*), which serve the travelling public at large, and as such, "any person" has standing to challenge terms and conditions.

(b) Delta Air Lines misstates the Agency's jurisprudence

Delta Air Lines mistakenly argues that the issue of standing has not been squarely raised in *Black*, and that the Agency found in favour of the passenger in *Black*, because "he could have been" subject to the terms and conditions complained of "the next day had he chosen to fly with Air Canada." The Applicant submits that Delta Air Lines' contention with respect to *Black* and the subsequent cases raising the issue of standing is woefully misguided, and Delta Air Lines misstates the Agency's decision in *Black*.

It is settled law that private interest standing cannot be founded on hypothetical possibilities. In *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726, it was held that:

> [47] Paragraph 10 of the statement of claim states that Ms. Kiselbach is not currently engaged in prostitution and does not at present intend to re-enter the sex trade. The fact that she cannot rule out the possibility that she may change her mind and may want to engage in sex work in the future does not distinguish her from any other member of the general public. Private interest standing cannot be founded on hypothetical possibilities: *Canadian Council for Refugees v. Canada* (2008), 74 Admin. L.R. (4th) 79, 2008 FCA 229 (CanLII) at paras. 99-102.

Consequently, the Agency could not have reached the conclusion that it did in *Black* based on speculations such as those proposed by Delta Air Lines. The Agency did not speculate that Mr. Black could be travelling on Air Canada the next day. Instead, the Agency correctly focused on the policy objective that s. 111 of the *ATR* serves, and held that:

> To require a "real and precise factual background" could very well dissuade <u>persons</u> from using the transportation network.
>
> [Emphasis added.]

It is important to note that the Agency used "persons" in plural, which demonstrates that the Agency was mindful of the public benefit of s. 111 of the *ATR*, and that the purpose of such challenges go well beyond the individual applicant's personal benefit.

Any doubts that *Black* might have left as to standing to bring s. 111 challenges have been resolved in *Krygier*, where the applicant's standing was directly challenged, and the Agency held that: "the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint."

The Agency's decision in *Krygier* has a number of additional features that are relevant to the question of standing in the present case. First, the Agency reached its conclusion without any reference to the personal circumstances of Mr. Krygier. There is no trace of any consideration of the nature suggested by Delta Air Lines that Mr. Krygier might be affected by the terms and conditions that he was challenging. Second, the Agency distinguished challenges pursuant to s.

111 of the *ATR* from challenges brought under subsection 172(1) of the *CTA*, which must be brought by a person with a disability or filed on behalf of such a person.

Although the Applicant provided counsel for Delta Air Lines with a copy of Decision No. LET-C-A-104-2013, the airline chose not to address this recent decision of the Agency concerning standing.

(c) Conclusion

In light of the Agency's jurisprudence on standing to challenge terms and conditions pursuant to s. 67.2(1) of the *CTA* and s. 111 of the *ATR*, it is submitted that "any person" may bring such challenges, and no further analysis of standing is required.

III. Private interest standing in the present case

Although Delta Air Lines accepts that the Applicant is 6 feet tall and 175 lbs in weight, and that his height is above the average, Delta Air Lines disputes that the Applicant is a "large person."

(a) Inadmissible hearsay

Delta Air Lines purports to rely on a national survey conducted by Maclean's Magazine in 2012 as the evidentiary basis for the claim that the average Canadian male is 5'9" tall and 185 lbs in weight.

The Applicant submits that information published in newspapers and magazines are archetypical examples of inadmissible hearsay, and the Agency should ignore the content of the Maclean's Magazine cited by Delta Air Lines.

(b) Delta Air Lines has acknowledged that the Applicant is taller than average

Regardless of the actual figures, Delta Air Lines has correctly acknowledged that the Applicant is taller than the average Canadian male. Thus, the Applicant is certainly a "large" passenger.

(c) Lack of evidence as to the meaning of "large"

Unfortunately, Delta Air Lines has provided no evidence as to the meaning of "large" in Exhibit "A": no statement from the author of Exhibit "A" nor from anyone else who could have provided some clarification were provided. Thus, at the present preliminary stage, it is impossible to conclude with certainty that the Applicant is not "large" and that the Applicant is not directly affected by the practices set out at Exhibit "A".

(d) The scope of the proposed complaint

Delta Air Lines cannot hijack and alter the present matter by stating that "the proposed complaint is one that concerns persons who cannot fit in a single seat by virtue of being obese." As the Applicant stated on multiple occasions, the present application concerns discrimination and not accommodation for disability, and it concerns an allegation of discrimination against "large" passengers.

Whether such discrimination does exist and its extent are questions that can be answered only after pleadings are opened and evidence is tendered, including by way of productions and interrogatories.

IV. Public interest standing

Delta Air Lines does not dispute the Applicant's submission that the legal test for public interest standing requires the consideration of three factors (see *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC)):

(i) Is there a serious issue to be tried?

(ii) Does the party seeking public interest standing have a genuine interest in the matter?

(iii) Is the proceeding a reasonable and effective means to bring the issue before the court (or the tribunal)?

Moreover, Delta Air Lines does not dispute that the Applicant meets the first two conditions of the test. Thus, the parties' positions differ only on two points related to public interest standing: who has the burden of proof, and whether the third prong of the test is met.

(a) Burden of proof on a preliminary determination of standing

Contrary to what is stated in Delta Air Lines' submissions, the Applicant did cite *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 as an authority with respect to burden of proof when standing is raised as a preliminary issue. Paragraph 55 of *Fraser* reads as follows:

> [55] When the question of standing is raised in a preliminary motion, a court should only consider whether, on the materials before the court, the applicant has an arguable case or, putting it the other way, has no reasonable cause of action: *Sierra Club of Canada*, supra; *Energy Probe v. Canada (Attorney General)* (1989), 1989 CanLII 258 (ON CA), 68 O.R. (2d) 449 (C.A.); *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, supra. The burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy even this low threshold test. [Emphasis added.]

Delta Air Lines confuses the question of burden of proof with respect to standing when such an issue is raised as a preliminary matter with determination of standing in a hearing of an application on its merits. The *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194 case cited by Delta Air Lines concerned a judgment on the merits of an application for judicial review, which also addressed the issue of standing.

In the present case, however, standing was raised as a preliminary issue, before parties had an opportunity to tender evidence and fully test the evidence of the opposing party. Thus, the burden of proof is on Delta Air Lines to demonstrate that the Applicant cannot satisfy a low threshold test.

(b) Reasonable and effective means of bringing the issue before the Agency

Delta Air Lines appears to misconstrue the meaning of "alternative means" in the text for public interest standing. The correct interpretation of "alternative means" is the presence of another person who has private interest standing, and who is likely to challenge the impugned action, policy or law before the court or tribunal. It is submitted that the availability of various forms of non-binding dispute resolution is not a relevant, and certainly not a determinative, consideration in this context.

As noted in *Fraser*, at paragraph 109:

> In order to show there is a "reasonable and effective" alternative, it is necessary to show more than a possibility that such litigation might occur. The "mere possibility" of a challenge by a directly affected private litigant will not result in the denial of public interest standing: *Canadian Bar Association v. British Columbia (Attorney General)* (1993), 1993 CanLII 310 (BC SC), 101 D.L.R. (4th) 410 (B.C.S.C.) at 417; *Grant v. Canada (Attorney General)*, 1994 CanLII 3507 (FC), [1995] 1 F.C. 158 (F.C. T.D.), aff'd reflex, [1995] F.C.J. No. 830 (C.A.), leave to appeal refused [1995] S.C.C.A. No. 394 (S.C.C.) at pp. 198-9.
>
> [Emphasis added.]

Thus, Delta Air Lines has to do more than show the "mere possibility" of a challenge to the impugned practices by a directly affected private litigant.

Delta Air Lines' argument that a complaint can be filed "in approximately 15 minutes" is based on the misconception that an average passenger is familiar with the *Air Transportation Regulations* and its section 111. A review of the Agency's website reveals that completion of the online forms ask for the following:

- Provide a full description of the facts.
- Clearly state the issues.
- Identify any legislative provisions on which you are relying.

- Clearly set out the arguments in support of your application.
- Clearly set out the relief you are seeking.

It is submitted that while there may be particularly determined, dedicated, and able passengers who might possibly be able to answer these in a meaningful way in relation to an undue or unjust discrimination complaint, this remains a "mere possibility."

Delta Air Lines' claim as to the number of decisions released by the Agency with respect to Consumer Complaints does not help Delta Air Lines' argument, as a number of these complainants were represented by counsel, precisely because of the complexity of the issues.

The fact that the Agency does not require individuals to be represented by counsel does not mean that passengers can effectively and successfully represent themselves before the Agency; most individuals cannot.

According to a recent filing with the Federal Court of Appeal (File No.: A-357-14), the Agency's new Dispute Rules has a 90-page "companion document" explaining the rules. The Applicant submits that any procedure that requires a 90-page explanation cannot be simple or accessible for an average passenger.

There is no obligation to be represented by counsel before the Federal Court either, and most documents can be filed electronically using a rather simple interface. This fact, however, does not render legal representation unnecessary, and does not demonstrate in and on its own accessibility of the court and access to justice.

Finally, contrary to what Delta Air Lines claims, the practices set out in Exhibit "A" substantially differ from what is described on the airline's website. Consequently, the Applicant is in a privileged position because he has unique evidence of the unjustly discriminatory practice of Delta Air Lines.

Therefore, the Applicant submits that while there may be a theoretical possibility of the present complaint being brought forward by another individual, it is no more than a "mere possibility," and it cannot be a basis for denying the Applicant public interest standing.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Gerald Chouest, counsel for Delta Air Lines

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: December 29, 2014)

I, Dr. Gábor Lukács, of the City of Halifax in the Regional Municipality of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. I am the Moving Party in the present proceeding. As such, I have personal knowledge of the matters to which I depose.

2. I am a Canadian citizen, a frequent traveller, and an air passenger rights advocate. My activities in the latter capacity include:

   (a) filing approximately two dozen successful regulatory complaints with the Canadian Transportation Agency (the "Agency"), resulting in airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;

   (b) promoting air passenger rights through the press and social media; and

   (c) referring passengers mistreated by airlines to legal information and resources.

3. On September 4, 2013, the Consumers' Association of Canada recognized my achievements in the area of air passenger rights by awarding me its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."

4. On August 24, 2014, I filed a complaint with the Canadian Transportation Agency concerning practices of Delta Air Lines that discriminate against "large" passengers by singling them out for denial of or delay in transportation.

5. I am seeking leave to appeal Decision No. 425-C-A-2014 of the Canadian Transportation Agency, dated November 25, 2014, dismissing the complaint.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on December 29, 2014.

_____

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY

OVERVIEW

1. The Moving Party is seeking leave to appeal from Decision No. 425-C-A-2014 (the "Decision") of the Canadian Transportation Agency ("Agency"), denying the Moving Party both private and public interest standing to bring a complaint concerning practices of Delta Air Lines that discriminate against "large" passengers by singling them out for denial of or delay in transportation.

2. The primary ground of the proposed appeal raises a question of law that is of central importance to the legal system as a whole and is outside the Agency's specialized expertise: can public interest standing be granted only in "cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested" (as the Decision states at para. 74)?

3. The secondary ground of the proposed appeal is that the Agency failed to recognize that the right to not be subjected to unreasonable or unduly discriminatory terms and conditions is a collective right of the travelling public, and that "any person" may bring a complaint about the breach of this right.

PART I – STATEMENT OF FACTS

A. THE STATUTORY SCHEME

4. 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 the terms and conditions set out in the tariff are enforceable in Canada.

***Canada Transportation Act*, s. 67** **Appendix "A": 81**
***Air Transportation Regulations*, s. 110(1)** **Appendix "A": 73**

5. All terms and conditions of carriage established by an airline must be reasonable, and cannot be unduly discriminatory.

***Canada Transportation Act*, s. 67.2(1)** **Appendix "A": 82**
***Air Transportation Regulations*, s. 111(2)** **Appendix "A": 74**

6. The Agency is a quasi-judicial federal regulator created by the *Canada Transportation Act*. Parliament conferred upon the Agency broad regulatory powers with respect to the contractual terms and conditions that are imposed by airlines. The Agency may disallow any tariff or tariff rule that is found to be unreasonable or unduly discriminatory, and then it may substitute the disallowed tariff or tariff rule with another one established by the Agency itself.

***Canada Transportation Act*, ss. 67.2(1) & 86(1)(h)** **App. "A": 82 , 83**
***Air Transportation Regulations*, s. 113** **Appendix "A": 75**

7. 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.

***Canada Transportation Act*, s. 37** **Appendix "A": 79**

B. PROCEEDINGS BEFORE THE AGENCY

(i) The Moving Party (Complainant)

8. The Moving Party, Dr. Gábor Lukács, is a Canadian air passenger rights advocate and a frequent traveller. Lukács has a track record of approximately two dozen successful regulatory complaints with the Agency. The Consumers' Association of Canada awarded Lukács its Order of Merit in recognition of his work in the area of air passenger rights.

Lukács Affidavit , paras. 2-3 **Tab 8: 51**

(ii) The complaint

9. According to an email sent by a customer care agent of Delta Air Lines ("Delta") on or around August 20, 2014, the airline applies the following practices with respect to large passengers:

> Sometimes, we ask the passenger to move to a location in the place 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.
>
> [Emphasis added.]

Complaint of Dr. Lukács, attachment **Tab 3: 20**

10. On August 24, 2014, Lukács filed a written complaint with the Agency alleging that the aforementioned practice of Delta is (unduly) discriminatory, contrary to subsection 111(2) of the *Air Transportation Regulations* (the "*ATR*").

Complaint of Dr. Lukács, attachment **Tab 3: 19**

(iii) The preliminary issue of standing

11. On September 5, 2014, the Agency invited the parties to make submissions with respect to the standing of Lukács to bring the complaint.

Decision No. LET-C-A-63-2014 **Tab 4: 21**

12. On September 19, 2014, Lukács submitted to the Agency that:

(a) the complaint did not seek any disability-related accommodation, but only sought to stop discrimination against passengers based on their size;

(b) "any person" has standing to bring a complaint pursuant to s. 111 of the *ATR*; and

(c) alternatively, Lukács should be granted public interest based on the well-established three-part test.

Submissions of Dr. Lukács (Sep. 19, 2014) **Tab 5: 22**

13. On September 26, 2014, Delta submitted to the Agency that Lukács did not have private interest standing, and should not be granted public interest standing. Delta's arguments were focused on the third part of the test for public interest standing, and Delta submitted that there might be others who are directly affected by Delta's discriminatory practices, and who might complain about the same issue. Delta did not address the first or second part of the test, and it did not dispute that the complaint raises a serious issue to be tried, nor did it dispute that Lukács had a genuine interest in the matter.

Submissions of Delta (Sep. 26, 2014) **Tab 6: 37**

14. On October 1, 2014, Lukács filed his reply on the issue of standing.

Reply of Dr. Lukács (Oct. 1, 2014) **Tab 7: 43**

(iv) The decision proposed to be appealed

15. On November 25, 2014, the Agency issued Decision No. 425-C-A-2014 (the "Decision") dismissing the complaint on the basis that Lukács is lacking both private and public interest standing to bring the complaint.

Decision No. 425-C-A-2014, para. 76 **Tab 1: 14**

16. The Agency misquoted the Supreme Court of Canada on the issue of public interest standing, and erroneously held that:

> Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.

Decision No. 425-C-A-2014, para. 74 **Tab 1: 14**

17. The Agency also correctly found that Lukács is not required to be a member of the group discriminated against in order to have standing to complain about the impugned practices; however, in the same sentence, the Agency contradicted itself by stating that "he must have a sufficient interest in order to be granted standing."

Decision No. 425-C-A-2014, para. 52 **Tab 1: 10**

PART II – STATEMENT OF THE POINTS IN ISSUE

18. The question to be decided on this motion is whether this Honourable Court should grant Lukács leave to appeal.

PART III – STATEMENT OF SUBMISSIONS

A. THIS HONOURABLE COURT HAS JURISDICTION

19. Every decision, order, rule or regulation of the Agency may be appealed to this Honourable Court on a question of law or a question of jurisdiction with the leave of the Court. The motion for leave to appeal must be brought within one month, but the Court may extend that deadline in "special circumstances."

***Canada Transportation Act*, s. 41(1)** **Appendix "A": 80**

(i) Questions of pure law

20. The proposed appeal raises two questions of pure law, which this Honourable Court has jurisdiction to hear on appeal:

(a) Did the Agency apply the wrong legal principles with respect to public interest standing?

(b) Did the Agency err in law in failing to find that "any person" has standing to complain to the Agency about unreasonable or unduly discriminatory terms and conditions applied by airlines?

(ii) Deadline falling on holiday and extension (if necessary)

21. The last day of the one month period from the date of the Decision fell on December 25, 2014. The Court Registry was closed on December 25-26, 2014 due to the holidays, and re-opened only on Monday, December 29, 2014. By s. 26 of the *Interpretation Act*, when a deadline for doing a thing falls on a holiday, the thing may be done on the next day that is not a holiday. Thus, it is respectfully submitted that the present motion is not belated.

***Interpretation Act*, s. 26** **Appendix "A": 90**

22. In the alternative, should this Honourable Court find that the motion is belated, Lukács is asking the Court to grant him an extension to bring the present motion based on the closure of the Court Registry during the holidays.

B. THE AGENCY APPLIED THE WRONG LEGAL PRINCIPLES TO DETERMINE PUBLIC INTEREST STANDING

23. The Agency denied Lukács public interest standing based on the erroneous premise that public interest standing is not available in the present case:

> Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.

Decision No. 425-C-A-2014, para. 74 **Tab 1: 14**

24. Lukács submits that the Agency misstated the law, misquoted the Supreme Court of Canada, and failed to assess each of the three factors in the tripartite test for public interest standing.

(i) The current state of the law

25. Public interest standing is not confined to constitutional cases nor to cases challenging the legality of administrative actions. The 2005 case of *Thibodeau v. Air Canada* did not involve any challenge to the constitutionality of legislation nor the legality of administrative action. Nevertheless, the Federal Court granted the applicant standing to challenge the airline's non-compliance with the *Official Languages Act* on behalf of the public interest. This Honourable Court affirmed the judgment of the Federal Court.

***Thibodeau v. Air Canada*, 2005 FC 1156, paras. 74-79** **Tab 15: 189**

***Thibodeau v. Air Canada*, 2005 FCA 115** **Tab 16: 195**

26. The test for granting public interest standing articulated in *Thibodeau* notably makes no reference to the "validity of the legislation" at all:

1. The applicant must raise a serious and justiciable issue;
2. He must have a genuine interest; and
3. There must be no other reasonable and effective manner in which the issue may be brought before the Court.

***Thibodeau v. Air Canada*, 2005 FC 1156, para. 75** **Tab 15: 189**

27. In the case of *ATU Local 279 v. OC Transpo*, the Agency itself articulated and applied essentially the same test as in *Thibodeau*. The Agency found that the trade union met the first and the second part of the test even though the case did not involve a constitutional challenge nor a challenge to the legality of administrative actions. (It is also worth noting that the trade union was denied public interest standing because a specific individual with private interest standing was identified.)

***ATU Local 279 v. OC Transpo*,** **Tab 10: 93**
431-AT-MV-2008, paras. 11-12

28. Therefore, in the Decision at bar, the Agency not only misstated the law with respect to public interest standing, but also contradicted its own jurisprudence on public interest standing.

(ii) The Agency misquoted the Supreme Court of Canada

29. It is difficult to understand what led the Agency to erroneously believe that the Supreme Court of Canada restricted the second part of the test to cases "in which constitutionality of legislation or the non-constitutionality of administrative action is contested."

Decision No. 425-C-A-2014, para. 74 **Tab 1: 14**

30. As the Agency has referred to *Canadian Council of Churches v. Canada* in this context, it is worth reviewing this case for greater certainty. The case turned on the third part of the test, that is, the availability of another reasonable and effective way. With respect to the second part, it was held that:

> There can be no doubt that the applicant has satisfied this part of the test. The Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

***Canadian Council of Churches v. Canada*,** **Tab 12: 135**
[1992] 1 S.C.R. 236, para. 39

31. The question considered by the Supreme Court under the heading of "Should the Current Test for Public Interest Standing be Extended" was not the nature of cases where public interest standing is available, but rather whether the third part of the test should be relaxed:

> The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded.

***Canadian Council of Churches v. Canada*,** **Tab 12: 135**
[1992] 1 S.C.R. 236, para. 36

(iii) Failure to assess all three factors

32. As the Agency correctly noted in the Decision, the three factors of the tripartite test for public interest standing should not be viewed as items on a checklist or as technical requirements, but rather should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purpose.

***Canada v. Downtown Eastside Sex Workers*,** **Tab 11: 109**
2012 SCC 45, para. 36

33. Alas, in the Decision at bar, the Agency failed to perform the analysis that it explicitly acknowledged it was required to perform. Instead, the Agency confined its analysis to the second part of the test, and made no findings at all with respect to the first and third parts of the test. The Decision is silent as to whether in the Agency's opinion Lukács raised a "serious and justiciable issue" or if the Agency believed that there was another reasonable and effective manner in which to bring the issue before the Agency.

(iv) Conclusion on public interest standing

34. Although the granting of public interest standing is a discretionary decision, that discretion must be exercised in accordance with the well-established principles of the law governing the question.

35. In the case at bar, it is apparent on the face of the Decision that the Agency applied the wrong legal principles to determine the issue of public interest standing; in particular, this ground of the proposed appeal is a fairly arguable question of law.

C. "ANY PERSON" HAS STANDING TO BRING A COMPLAINT TO THE AGENCY

36. It is submitted that both the Agency's own past interpretation and a textual, contextual, and purposive analysis of the *Canada Transportation Act* lead to the conclusion that Parliament intended to establish a regulatory scheme that includes the Agency accepting complaints not only from those affected by the terms and conditions of an airline, but from "any person." Being affected by the terms and conditions is a requirement only if the complainant also seeks monetary compensation.

(i) The Agency's own analysis: *Krygier v. several carriers*

37. The question of standing to bring a complaint to the Agency arose recently in *Krygier v. several carriers*, where some of the respondent airlines challenged the standing of the complainant. The Agency began its analysis on standing by distinguishing the case from disability-related complaints:

> The respondents refer to Decision No. 431-AT-MV-2008 to support their position. The Agency notes that the application at issue in that Decision concerned the Agency's mandate to inquire into matters concerning undue obstacles in the transportation network to the mobility of persons with disabilities. [...] Therefore, the conclusions reached in that Decision have no bearing on the present case.

The Agency then went on to cite from its own Decision No. 746-C-A-2005:

> The Agency is of the opinion that it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and conditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR. In this regard, the Agency notes that subsection 67.2(1) of the CTA provides that, on the basis of a "complaint in writing to the Agency by any person", the Agency may take certain action if the Agency determines that the terms or conditions at issue are unreasonable or unduly discriminatory. 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. [...]
>
> ⋮
>
> 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.
>
> [Emphasis added.]

The Agency finally concluded:

> The Agency is of the opinion that the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint, and that it has jurisdiction to consider Mr. Krygier's complaint as filed. As such, the Agency denies the respondents' motion to dismiss Mr. Krygier's complaint against Air Canada, Air Transat, Sunwing, Jazz and Porter and will consider the complaint filed against all respondents.

***Krygier v. several carriers*, LET-C-A-104-2014, pp. 5-6** **Tab 13: 143 - 144**

38. It is submitted that the Agency correctly recognized its mandate and the purpose of s. 67.2 of the *Canada Transportation Act* and s. 111 of the *Air Transportation Regulations* in *Krygier v. several carriers*, and correctly dismissed the challenge to Mr. Krygier's standing. It is further submitted that the Agency should have reached the same conclusion with respect to the standing of Lukács.

(ii) Textual and contextual analysis: "any person" v. "person adversely affected"

39. As the Agency correctly noted in *Krygier*, s. 67.2(1) of the *Canada Transportation Act* provides that the Agency may eliminate unreasonable or unduly discriminatory terms and conditions if the Agency receives a "complaint in writing to the Agency by any person" (emphasis added). The Agency's broad interpretation of "any person" in *Krygier* is harmonious with the Act for the following reasons.

***Canada Transportation Act*, s. 67.2(1)** **Appendix "A": 82**

40. The *Canada Transportation Act* uses two different phrases: "any person" and "person adversely affected." The phrase "'any person" appearing in ss. 67.1

and 67.2(1) refers to a complainant who brings a complaint in writing to the Agency. On the other hand, "person adversely affected" appearing in ss. 67.1(b) and 86(1)(h)(iii) refers to a person who can seek monetary compensation.

***Canada Transportation Act*, ss. 67.1, 67.2(1), 86(1)(h)(iii)** **Appendix "A": 81 , 82 , 83**

41. Parliament is presumed to not be speaking in vain, and to speak consistently. When a statute uses different words in relation to the same subject, such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.

***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, paras. 38 and 41** **Tab 14: 156 , 158**

42. Thus, the phrases "any person" and "person adversely affected" have different meanings in the *Canada Transportation Act*, and "any person" does not have to be (adversely) affected.

43. Therefore, the phrase "any person" in s. 67.2(1) indicates that a complaint may be brought by "any person" even if they are not "adversely affected"; however, only those "adversely affected" can obtain monetary compensation.

(iii) Purposive analysis

44. In enacting the *Canada Transportation Act*, Parliament chose to create a regulatory scheme to regulate the national transportation system in order to achieve certain policy objectives, which are identified in section 5.

***Canada Transportation Act*, s. 5** **Appendix "A": 78**

45. The Agency is not merely a quasi-judicial tribunal for adjudicating private disputes between private parties, but also a regulator that is required to act in the public interest to maintain a functional transportation network.

46. Eliminating unreasonable or unduly discriminatory terms and conditions applied by airlines is not merely a consumer protection measure, but rather an economic necessity for maintaining a functional transportation network, which is vital for the economic growth of a country as large as Canada.

47. Consequently, the right to not be subjected to unreasonable or unduly discriminatory terms and conditions is, unlike the right for monetary compensation, a collective right of the public at large, in the same fashion that the rights conferred by the *Official Languages Act* are collective rights.

48. Thus, the purpose of the Agency's powers to eliminate unreasonable or unduly discriminatory terms and conditions applied by airlines is to prevent harm and damage to the public, and serve the public interest. These preventive powers must be distinguished from the restitutional powers of the Agency to award a monetary compensation to a "person adversely affected."

49. The very essence of preventive powers of a regulatory body is that they can be invoked by a complaint from any member of the public, and such powers are meant to be invoked before anyone is harmed or suffers damages. Holding otherwise would undermine the very purpose for which preventive powers were conferred.

50. Therefore, the question of whether the terms and conditions complained of affect the complainant is relevant only to claims for monetary compensation before the Agency, but this question is immaterial in the context of the Agency's preventive powers to eliminate unreasonable or unduly discriminatory terms and conditions. The law of standing cannot be applied to preventive powers.

(iv) Application to the case at bar

51. In the Decision at bar, the Agency correctly noted that the complaint of Lukács relates to a tariff issue, and is unrelated to accessible transportation for persons with a disability. This observation is important, because accommodation of a disability requires assessing the individual needs of the person seeking it, while tariff complaints can and have been dealt with by the Agency "on principle," without the presence of an "affected" person.

Decision No. 425-C-A-2014, para. 51 **Tab 1: 10**

52. The Agency also correctly concluded that Lukács is not required to be a member of the the group discriminated against in order to have standing.

Decision No. 425-C-A-2014, para. 52 **Tab 1: 10**

53. However, the Agency's finding that Lukács "must have a sufficient interest in order to be granted standing" to bring a complaint about the discriminative practices of Delta is unreasonable, because:

(a) it contradicts the finding that Lukács does not have to be a member of the group discriminated against in order to have standing; and

(b) it is inconsistent with the phrase "any person" in the *Canada Transportation Act* and defeats the preventive purpose for which Parliament conferred upon the Agency powers to eliminate unreasonable and unduly discriminatory terms and conditions.

Decision No. 425-C-A-2014, para. 52 **Tab 1: 10**

54. Since Lukács clearly meets the definition of "any person," Lukács has the required standing to bring the complaint in question.

D. COSTS

55. Lukács submits that no costs should be awarded against him if he is unsuccessful on the present motion, because:

(a) the motion raises novel questions of law that have not been addressed by this Honourable Court;

(b) the motion and the proposed appeal, seeking to clarify the law with respect to standing to bring a complaint to the Agency, is in the nature of public interest litigation; and

(c) the issues raised in the motion are not frivolous.

***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 62** **Tab 14: 161**

PART IV – ORDER SOUGHT

56. The Moving Party, Dr. Gábor Lukács, is seeking an Order:

(a) granting Lukács leave to appeal Decision No. 425-C-A-2014 of the Canadian Transportation Agency;

(b) if an extesion is necessary, granting Lukács an extension to bring the present motion;

(c) granting Lukács costs and/or reasonable out-of-pocket expenses of this motion; and

(d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 29, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, S.O.R./88-58,
ss. 110, 111, 113, 113.1

Canada Transportation Act, S.C. 1996, c. 10,
ss. 5, 37, 41, 67, 67.1, 67.2, 86

Federal Courts Rules, S.O.R./98-106
ss. 352, 369

Interpretation Act, R.S.C. 1985, c. I-21,
s. 26

CASE LAW

Amalgamated Transit Union Local 279 v. OC Transpo,
Canadian Transportation Agency, Decision No. 431-AT-MV-2008

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236

Krygier v. several carriers, Canadian Transportation Agency,
Decision No. LET-C-A-104-2014

Lukács v. Canada (Transportation Agency), 2014 FCA 76

Thibodeau v. Air Canada, 2005 FC 1156

Thibodeau v. Air Canada, 2007 FCA 115

Appendix “A”

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to April 29, 2013

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Interest

107.1 Where the Agency, by order, directs an air carrier to refund specified amounts to persons that have been overcharged by the air carrier for fares or rates in respect of its air service pursuant to paragraph 66(1)(*c*) of the Act, the amount of the refunds shall bear interest from the date of payment of the fares or rates by those persons to the air carrier to the date of the Agency's order at the rate of interest charged by the Bank of Canada on short-term loans to financial institutions plus one and one-half percent.

SOR/2001-71, s. 3.

Intérêts

107.1 Dans le cas où, en vertu de l'alinéa 66(1)*c*) de la Loi, l'Office enjoint, par ordonnance, à un transporteur aérien de rembourser des sommes à des personnes ayant versé des sommes en trop pour un service, le remboursement porte intérêt à compter de la date du paiement fait par ces personnes au transporteur jusqu'à la date de délivrance de l'ordonnance par l'Office, au taux demandé par la Banque du Canada aux institutions financières pour les prêts à court terme, majoré d'un et demi pour cent.

DORS/2001-71, art. 3.

DIVISION II

INTERNATIONAL

Application

108. Subject to paragraph 135.3(1)(*d*), this Division applies in respect of every air carrier that operates an international service, except an air carrier that operates TPCs, TPNCs or TGCs.

SOR/96-335, s. 55.

SECTION II

SERVICE INTERNATIONAL

Application

108. Sous réserve de l'alinéa 135.3(1)*d*), la présente section s'applique aux transporteurs aériens qui exploitent un service international, sauf ceux qui effectuent des VAP, des VAPNOR ou des VAM.

DORS/96-335, art. 55.

Exception

109. An air carrier that operates an international service that serves the transportation requirements of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees and workers is excluded, in respect of the service of those requirements, from the requirements of subsection 110(1).

Exception

109. Le transporteur aérien est exempté de l'application du paragraphe 110(1) en ce qui concerne l'exploitation d'un service international servant à répondre aux besoins de transport des véritables clients, des véritables employés et des véritables travailleurs d'un hôtel pavillonnaire, y compris le transport des bagages, du matériel et des fournitures de ces personnes.

Filing of Tariffs

110. (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, before commencing the operation of an international service, an air carrier or its agent shall file with the Agency a tariff for that service, including the terms and conditions of free and reduced rate transportation for that service, in the style, and containing the information, required by this Division.

Dépôt des tarifs

110. (1) Sauf disposition contraire des ententes, conventions ou accords internationaux en matière d'aviation civile, avant d'entreprendre l'exploitation d'un service international, le transporteur aérien ou son agent doit déposer auprès de l'Office son tarif pour ce service, conforme aux exigences de forme et de contenu énoncées dans la présente section, dans lequel sont comprises les conditions du transport à titre gratuit ou à taux réduit.

(2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency.

(3) No air carrier shall advertise, offer or charge any toll where

(*a*) the toll is in a tariff that has been rejected by the Agency; or

(*b*) the toll has been disallowed or suspended by the Agency.

(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

SOR/96-335, s. 56; SOR/98-197, s. 6(E).

111. (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(*a*) make any unjust discrimination against any person or other air carrier;

(2) L'acceptation par l'Office, pour dépôt, d'un tarif ou d'une modification apportée à celui-ci ne constitue pas l'approbation de son contenu, à moins que le tarif n'ait été déposé conformément à un arrêté de l'Office.

(3) Il est interdit au transporteur aérien d'annoncer, d'offrir ou d'exiger une taxe qui, selon le cas :

a) figure dans un tarif qui a été rejeté par l'Office;

b) a été refusée ou suspendue par l'Office.

(4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

(5) Il est interdit au transporteur aérien ou à ses agents d'offrir, d'accorder, de donner, de solliciter, d'accepter ou de recevoir un rabais, une concession ou un privilège permettant, par un moyen quelconque, le transport de personnes ou de marchandises à une taxe ou à des conditions qui diffèrent de celles que prévoit le tarif en vigueur.

DORS/96-335, art. 56; DORS/98-197, art. 6(A).

111. (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

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

(*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.

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) 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.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

SOR/93-253, s. 2; SOR/96-335, s. 57.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

DORS/93-253, art. 2; DORS/96-335, art. 57.

112. (1) All air carriers having joint tolls shall establish just and reasonable divisions thereof between participating air carriers.

112. (1) Les transporteurs aériens qui appliquent des taxes pluritransporteurs doivent établir une répartition juste et raisonnable de ces taxes entre les transporteurs aériens participants.

(2) The Agency may

(*a*) determine and fix just and equitable divisions of joint tolls between air carriers or the portion of the joint tolls to be received by an air carrier;

(*b*) require an air carrier to inform the Agency of the portion of the tolls in any joint tariff filed that it or any other carrier is to receive or has received; and

(*c*) decide that any proposed through toll is just and reasonable notwithstanding that an amount less than the amount that an air carrier would otherwise be entitled to charge may be allotted to that air carrier out of that through toll.

(2) L'Office peut procéder de la façon suivante :

a) déterminer et fixer la répartition équitable des taxes pluritransporteurs entre les transporteurs aériens, ou la proportion de ces taxes que doit recevoir un transporteur aérien;

b) enjoindre à un transporteur aérien de lui faire connaître la proportion des taxes de tout tarif pluritransporteur déposé que lui-même ou tout autre transporteur aérien est censé recevoir ou qu'il a reçue;

c) décider qu'une taxe totale proposée est juste et raisonnable, même si un transporteur aérien s'en voit attribuer une portion inférieure à la taxe qu'il serait autrement en droit d'exiger.

113. The Agency may

(*a*) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of

113. L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

a tariff that does not conform with any of those provisions; and

(*b*) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

SOR/93-253, s. 2; SOR/96-335, s. 58.

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa *a*).

DORS/93-253, art. 2; DORS/96-335, art. 58.

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

(*a*) take the corrective measures that the Agency considers appropriate; and

(*b*) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

SOR/2001-71, s. 4; SOR/2009-28, s. 1.

113.1 Si un transporteur aérien n'applique pas les prix, taux, frais ou conditions de transport applicables au service international qu'il offre et figurant à son tarif, l'Office peut lui enjoindre :

a) de prendre les mesures correctives qu'il estime indiquées;

b) de verser des indemnités à quiconque pour toutes dépenses qu'il a supportées en raison de la non-application de ces prix, taux, frais ou conditions de transport.

DORS/2001-71, art. 4; DORS/2009-28, art. 1.

114. (1) Every tariff or amendment to a tariff shall be filed with the Agency by the air carrier or by an agent appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(2) Every joint tariff or amendment to a joint tariff shall be filed by one of the air carriers that is a party thereto or by an agent of the air carrier appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(3) Where an air carrier files a joint tariff pursuant to subsection (2), that air carrier shall be known as the issuing carrier.

(4) No air carrier that issues a power of attorney to another air carrier or any other agent to publish and file tolls shall include in the carrier's own tariff tolls that duplicate or conflict with tolls published under such power of attorney.

(5) Every tariff or amendment to a tariff that is on paper shall be filed with the Agency together with a filing advice in duplicate.

114. (1) Les tarifs et leurs modifications doivent être déposés auprès de l'Office par le transporteur aérien ou un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(2) Les tarifs pluritransporteurs et leurs modifications doivent être déposés par l'un des transporteurs aériens participants ou par un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(3) Le transporteur aérien qui dépose un tarif pluritransporteur conformément au paragraphe (2) doit être désigné comme le transporteur aérien émetteur.

(4) Il est interdit à un transporteur aérien qui habilite par procuration un agent ou un autre transporteur aérien à publier et à déposer des taxes, de publier dans ses propres tarifs des taxes qui font double emploi ou sont incompatibles avec celles-ci.

(5) Les tarifs sur papier et leurs modifications doivent être déposés auprès de l'Office en deux exemplaires et être accompagnés d'un avis de dépôt fourni en double.

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

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International agreements respecting air services

(3) In the event of any inconsistency or conflict between an international agreement or convention respecting air services to which Canada is a party and the *Competition Act*, the provisions of the agreement or convention prevail to the extent of the inconsistency or conflict.

1996, c. 10, s. 4; 2007, c. 19, s. 1.

Conventions ou accords internationaux sur les services aériens

(3) En cas d'incompatibilité ou de conflit entre une convention internationale ou un accord international sur les services aériens dont le Canada est signataire et les dispositions de la *Loi sur la concurrence*, la convention ou l'accord l'emporte dans la mesure de l'incompatibilité ou du conflit.

1996, ch. 10, art. 4; 2007, ch. 19, art. 1.

NATIONAL TRANSPORTATION POLICY

Declaration

5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(*a*) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(*b*) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(*c*) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(*d*) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and

(*e*) governments and the private sector work together for an integrated transportation system.

1996, c. 10, s. 5; 2007, c. 19, s. 2.

POLITIQUE NATIONALE DES TRANSPORTS

Déclaration

5. Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

d) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

1996, ch. 10, art. 5; 2007, ch. 19, art. 2.

Mediator not to act in other proceedings

(3) The person who acts as mediator or arbitrator may not act in any other proceedings before the Agency in relation to any matter that was at issue in the mediation or arbitration.

2007, c. 19, s. 7; 2008, c. 5, ss. 8, 9.

Impossibilité d'agir

(3) La personne qui agit à titre de médiateur ou d'arbitre ne peut agir dans le cadre d'autres procédures devant l'Office à l'égard des questions qui ont fait l'objet de la médiation ou de l'arbitrage.

2007, ch. 19, art. 7; 2008, ch. 5, art. 8 et 9.

Inquiries

Enquêtes

Inquiry into 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.

Enquêtes sur les plaintes

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.

Appointment of person to conduct inquiry

38. (1) The Agency may appoint a member, or an employee of the Agency, to make any inquiry that the Agency is authorized to conduct and report to the Agency.

Délégation

38. (1) L'Office peut déléguer son pouvoir d'enquête à l'un de ses membres ou fonctionnaires et charger ce dernier de lui faire rapport.

Dealing with report

(2) On receipt of the report under subsection (1), the Agency may adopt the report as a decision or order of the Agency or otherwise deal with it as it considers advisable.

Connaissance du rapport

(2) Sur réception du rapport, l'Office peut l'entériner sous forme de décision ou d'arrêté ou statuer sur le rapport de la manière qu'il estime indiquée.

Powers on inquiry

39. A person conducting an inquiry may, for the purposes of the inquiry,

(*a*) enter and inspect any place, other than a dwelling-house, or any structure, work, rolling stock or ship that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary; and

(*b*) exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Pouvoirs de la personne chargée de l'enquête

39. Toute personne chargée de faire enquête peut, à cette fin :

a) procéder à la visite de tout lieu autre qu'une maison d'habitation — terrain, construction, ouvrage, matériel roulant ou navire — , quel qu'en soit le propriétaire ou le responsable, si elle l'estime nécessaire à l'enquête;

b) exercer les attributions d'une cour supérieure pour faire comparaître des témoins et pour les contraindre à témoigner et à produire les pièces — objets, livres, plans, cahiers des charges, dessins ou autres documents — qu'elle estime nécessaires à l'enquête.

Review and Appeal

Révision et appel

Governor in Council may vary or rescind orders, etc.

40. The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

Modification ou annulation

40. Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

Appeal from Agency

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Appel

41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Report of Agency

Rapport de l'Office

Agency's report

42. (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(*a*) applications to the Agency and the findings on them; and

(*b*) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Rapport de l'Office

42. (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Assessment of Act

(2) The Agency shall include in every report referred to in subsection (1) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act.

Évaluation de la loi

(2) L'Office joint à ce rapport son évaluation de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci.

Tabling of report

(3) The Minister shall have a copy of each report made under this section laid before each House of Parliament on any of the first thirty

Dépôt

(3) Dans les trente jours de séance de chaque chambre du Parlement suivant la réception du rapport par le ministre, celui-ci le fait déposer devant elle.

1996, ch. 10, art. 42; 2013, ch. 31, art. 2.

Tariffs to be made public

67. (1) The holder of a domestic licence shall

(*a*) display in a prominent place at the business offices of the licensee a sign indicating that the tariffs for the domestic service offered by the licensee, including the terms and conditions of carriage, are available for public inspection at the business offices of the licensee, and allow the public to make such inspections;

(*a.1*) publish the terms and conditions of carriage on any Internet site used by the licensee for selling the domestic service offered by the licensee;

(*b*) in its tariffs, specifically identify the basic fare between all points for which a domestic service is offered by the licensee; and

(*c*) retain a record of its tariffs for a period of not less than three years after the tariffs have ceased to have effect.

Publication des tarifs

67. (1) Le licencié doit :

a) poser à ses bureaux, dans un endroit bien en vue, une affiche indiquant que les tarifs et notamment les conditions de transport pour le service intérieur qu'il offre sont à la disposition du public pour consultation à ses bureaux et permettre au public de les consulter;

a.1) publier les conditions de transport sur tout site Internet qu'il utilise pour vendre le service intérieur;

b) indiquer clairement dans ses tarifs le prix de base du service intérieur qu'il offre entre tous les points qu'il dessert;

c) conserver ses tarifs en archive pour une période minimale de trois ans après leur cessation d'effet.

Prescribed tariff information to be included

(2) A tariff referred to in subsection (1) shall include such information as may be prescribed.

Renseignements tarifaires

(2) Les tarifs comportent les renseignements exigés par règlement.

No fares, etc., unless set out in tariff

(3) The holder of a domestic licence shall not apply any fare, rate, charge or term or condition of carriage applicable to the domestic service it offers unless the fare, rate, charge, term or condition is set out in a tariff that has been published or displayed under subsection (1) and is in effect.

Interdiction

(3) Le titulaire d'une licence intérieure ne peut appliquer à l'égard d'un service intérieur que le prix, le taux, les frais ou les conditions de transport applicables figurant dans le tarif en vigueur publié ou affiché conformément au paragraphe (1).

Copy of tariff on payment of fee

(4) The holder of a domestic licence shall provide a copy or excerpt of its tariffs to any person on request and on payment of a fee not exceeding the cost of making the copy or excerpt.

Exemplaire du tarif

(4) Il fournit un exemplaire de tout ou partie de ses tarifs sur demande et paiement de frais non supérieurs au coût de reproduction de l'exemplaire.

1996, c. 10, s. 67; 2000, c. 15, s. 5; 2007, c. 19, s. 20.

1996, ch. 10, art. 67; 2000, ch. 15, art. 5; 2007, ch. 19, art. 20.

Fares or rates not set out in tariff

67.1 If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to

(*a*) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;

(*b*) compensate any person adversely affected for any expenses they incurred as a result of the licensee's failure to apply a fare, rate,

Prix, taux, frais ou conditions non inclus au tarif

67.1 S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a, contrairement au paragraphe 67(3), appliqué à l'un de ses services intérieurs un prix, un taux, des frais ou d'autres conditions de transport ne figurant pas au tarif, l'Office peut, par ordonnance, lui enjoindre :

a) d'appliquer un prix, un taux, des frais ou d'autres conditions de transport figurant au tarif;

b) d'indemniser toute personne lésée des dépenses qu'elle a supportées consécutivement à la non-application du prix, du taux, des

charge or term or condition of carriage that was set out in its tariffs; and

(*c*) take any other appropriate corrective measures.

2000, c. 15, s. 6; 2007, c. 19, s. 21.

frais ou des autres conditions qui figuraient au tarif;

c) de prendre toute autre mesure corrective indiquée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 21.

When unreasonable or unduly discriminatory terms or conditions

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.

Conditions déraisonnables

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.

Prohibition on advertising

(2) The holder of a domestic licence shall not advertise or apply any term or condition of carriage that is suspended or has been disallowed.

2000, c. 15, s. 6; 2007, c. 19, s. 22(F).

Interdiction d'annoncer

(2) Il est interdit au titulaire d'une licence intérieure d'annoncer ou d'appliquer une condition de transport suspendue ou annulée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 22(F).

Non-application of fares, etc.

68. (1) Sections 66 to 67.2 do not apply in respect of fares, rates or charges applicable to a domestic service provided for under a contract between a holder of a domestic licence and another person whereby the parties to the contract agree to keep its provisions confidential.

Non-application de certaines dispositions

68. (1) Les articles 66 à 67.2 ne s'appliquent pas aux prix, taux ou frais applicables au service intérieur qui fait l'objet d'un contrat entre le titulaire d'une licence intérieure et une autre personne et par lequel les parties conviennent d'en garder les stipulations confidentielles.

Non-application of terms and conditions

(1.1) Sections 66 to 67.2 do not apply in respect of terms and conditions of carriage applicable to a domestic service provided for under a contract referred to in subsection (1) to which an employer is a party and that relates to travel by its employees.

Non-application aux conditions de transport

(1.1) Les articles 66 à 67.2 ne s'appliquent pas aux conditions de transport applicables au service intérieur qui fait l'objet d'un contrat visé au paragraphe (1) portant sur les voyages d'employés faits pour le compte d'un employeur qui est partie au contrat.

Provisions regarding exclusive use of services

(2) The parties to the contract shall not include in it provisions with respect to the exclusive use by the other person of a domestic service operated by the holder of the domestic licence between two points in accordance with a published timetable or on a regular basis, unless the contract is for all or a significant portion of the capacity of a flight or a series of flights.

Stipulations interdites

(2) Le contrat ne peut comporter aucune clause relative à l'usage exclusif par l'autre partie des services intérieurs offerts entre deux points par le titulaire de la licence intérieure, soit régulièrement, soit conformément à un horaire publié, sauf s'il porte sur la totalité ou une partie importante des places disponibles sur un vol ou une série de vols.

Retention of contract required

(3) The holder of a domestic licence who is a party to the contract shall retain a copy of it for a period of not less than three years after it has ceased to have effect and, on request made within that period, shall provide a copy of it to the Agency.

1996, c. 10, s. 68; 2000, c. 15, s. 7; 2007, c. 19, s. 23.

Double à conserver

(3) Le titulaire d'une licence intérieure est tenu de conserver, au moins trois ans après son expiration, un double du contrat et d'en fournir un exemplaire à l'Office pendant cette période s'il lui en fait la demande.

1996, ch. 10, art. 68; 2000, ch. 15, art. 7; 2007, ch. 19, art. 23.

deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

2000, c. 15, s. 7.1; 2007, c. 19, s. 25.

REGULATIONS

Regulations

86. (1) The Agency may make regulations

(*a*) classifying air services;

(*b*) classifying aircraft;

(*c*) prescribing liability insurance coverage requirements for air services or aircraft;

(*d*) prescribing financial requirements for each class of air service or aircraft;

(*e*) respecting the issuance, amendment and cancellation of permits for the operation of international charters;

(*f*) respecting the duration and renewal of licences;

(*g*) respecting the amendment of licences;

(*h*) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and

(i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,

(ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,

miner la plainte conformément aux dispositions de la présente partie en vertu desquelles elle a été déposée.

Inhabilité

(4) Le membre de l'Office ou le délégué qui a tenté de régler l'affaire ou joué le rôle de médiateur en vertu du présent article ne peut agir dans le cadre de procédures ultérieures, le cas échéant, devant l'Office à l'égard de la plainte en question.

Prolongation

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

Inclusion dans le rapport annuel

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

2000, ch. 15, art. 7.1; 2007, ch. 19, art. 25.

RÈGLEMENTS

Pouvoirs de l'Office

86. (1) L'Office peut, par règlement :

a) classifier les services aériens;

b) classifier les aéronefs;

c) prévoir les exigences relatives à la couverture d'assurance responsabilité pour les services aériens et les aéronefs;

d) prévoir les exigences financières pour chaque catégorie de service aérien ou d'aéronefs;

e) régir la délivrance, la modification et l'annulation des permis d'affrètements internationaux;

f) fixer la durée de validité et les modalités de renouvellement des licences;

g) régir la modification des licences;

h) prendre toute mesure concernant le trafic et les tarifs, prix, taux, frais et conditions de transport liés au service international, notamment prévoir qu'il peut :

(i) annuler ou suspendre des tarifs, prix, taux ou frais,

(ii) établir de nouveaux tarifs, prix, taux ou frais en remplacement de ceux annulés,

(iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

(iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

(*i*) requiring licensees to file with the Agency any documents and information relating to activities under their licences that are necessary for the purposes of enabling the Agency to exercise its powers and perform its duties and functions under this Part and respecting the manner in which and the times at which the documents and information are to be filed;

(*j*) requiring licensees to include in contracts or arrangements with travel wholesalers, tour operators, charterers or other persons associated with the provision of air services to the public, or to make those contracts and arrangements subject to, terms and conditions specified or referred to in the regulations;

(*k*) defining words and expressions for the purposes of this Part;

(*l*) excluding a person from any of the requirements of this Part;

(*m*) prescribing any matter or thing that by this Part is to be prescribed; and

(*n*) generally for carrying out the purposes and provisions of this Part.

Exclusion not to provide certain relief

(2) No regulation shall be made under paragraph (1)(*l*) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

(3) [Repealed, 2007, c. 19, s. 26]

1996, c. 10, s. 86; 2000, c. 15, s. 8; 2007, c. 19, s. 26.

(iii) enjoindre à tout licencié ou transporteur de prendre les mesures correctives qu'il estime indiquées et de verser des indemnités aux personnes lésées par la non-application par le licencié ou transporteur des prix, taux, frais ou conditions de transport applicables au service et qui figuraient au tarif,

(iv) obliger tout licencié ou transporteur à publier les conditions de transport du service international sur tout site Internet qu'il utilise pour vendre ce service;

i) demander aux licenciés de déposer auprès de lui les documents ainsi que les renseignements relatifs aux activités liées à leurs licences et nécessaires à l'exercice de ses attributions dans le cadre de la présente partie, et fixer les modalités de temps ou autres du dépôt;

j) demander aux licenciés d'inclure dans les contrats ou ententes conclus avec les grossistes en voyages, voyagistes, affréteurs ou autres personnes associées à la prestation de services aériens au public les conditions prévues dans les règlements ou d'assujettir ces contrats ou ententes à ces conditions;

k) définir les termes non définis de la présente partie;

l) exempter toute personne des obligations imposées par la présente partie;

m) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

n) prendre toute autre mesure d'application de la présente partie.

Exception

(2) Les obligations imposées par la présente partie relativement à la qualité de Canadien, au document d'aviation canadien et à la police d'assurance responsabilité réglementaire en matière de service aérien ne peuvent faire l'objet de l'exemption prévue à l'alinéa (1)*l*).

(3) [Abrogé, 2007, ch. 19, art. 26]

1996, ch. 10, art. 86; 2000, ch. 15, art. 8; 2007, ch. 19, art. 26.

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

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Consent to Reversal or Variation of Judgment

Consent to reversal or variation of judgment

349. (1) A respondent may consent to the reversal or variation of an order appealed from by serving and filing a notice to that effect.

Judgment on consent

(2) The Court may pronounce judgment in accordance with a notice filed under subsection (1) if the resultant judgment is one that could have been given on consent.

Material in the Possession of a Tribunal

Material in possession of a tribunal

350. Rules 317 to 319 apply to appeals and motions for leave to appeal, with such modifications as are necessary.

New Evidence on Appeal

New evidence on appeal

351. In special circumstances, the Court may grant leave to a party to present evidence on a question of fact.

Motions for Leave to Appeal

Leave to appeal

352. (1) Unless the Court orders otherwise, where leave to appeal is required, it shall be obtained on a motion brought in writing.

Respondents and service

(2) On a motion under subsection (1) the moving party shall name as respondents all persons referred to in rule 338 and personally serve all persons referred to in rule 339.

Motion record

353. (1) A person bringing a motion under rule 352 shall serve the motion record and, unless the Court orders otherwise, file three copies thereof.

Modification par consentement

Avis de consentement

349. (1) L'intimé peut consentir à ce que l'ordonnance portée en appel soit annulée ou modifiée, en signifiant et en déposant un avis à cet effet.

Jugement sur consentement

(2) La Cour peut rendre son ordonnance conformément à l'avis visé au paragraphe (1), s'il s'agit d'un jugement qui aurait pu être prononcé sur consentement des parties.

Obtention de documents en la possession d'un office fédéral

Demande de transmission

350. Les règles 317 à 319 s'appliquent aux appels et aux requêtes en autorisation d'appeler, avec les adaptations nécessaires.

Présentation de nouveaux éléments de preuve

Nouveaux éléments de preuve

351. Dans des circonstances particulières, la Cour peut permettre à toute partie de présenter des éléments de preuve sur une question de fait.

Requête en autorisation d'appeler

Requête en autorisation

352. (1) Sauf ordonnance contraire de la Cour, si une autorisation est requise pour interjeter appel, une requête à cet effet est présentée par écrit.

Signification de l'avis de requête

(2) La personne qui présente un avis de requête visé aux termes du paragraphe (1) désigne à titre d'intimé les personnes qui seraient désignées comme intimées selon la règle 338 et le signifie à personne aux personnes visées à la règle 339.

Dépôt du dossier de requête

353. (1) La partie qui présente une requête en autorisation d'appeler signifie son dossier de requête et, sauf ordonnance contraire de la Cour, en dépose trois copies.

(*c*) subject to rule 368, the portions of any transcripts on which the respondent intends to rely;

(*d*) subject to rule 366, written representations; and

(*e*) any other filed material not contained in the moving party's motion record that is necessary for the hearing of the motion.

SOR/2009-331, s. 6; SOR/2013-18, s. 13.

c) sous réserve de la règle 368, les extraits de toute transcription dont l'intimé entend se servir et qui ne figurent pas dans le dossier de requête;

d) sous réserve de la règle 366, les prétentions écrites de l'intimé;

e) les autres documents et éléments matériels déposés qui sont nécessaires à l'audition de la requête et qui ne figurent pas dans le dossier de requête.

DORS/2009-331, art. 6; DORS/2013-18, art. 13.

Memorandum of fact and law required

366. On a motion for summary judgment or summary trial, for an interlocutory injunction, for the determination of a question of law or for the certification of a proceeding as a class proceeding, or if the Court so orders, a motion record shall contain a memorandum of fact and law instead of written representations.

SOR/2002-417, s. 22; SOR/2007-301, s. 8; SOR/2009-331, s. 7.

Mémoire requis

366. Dans le cas d'une requête en jugement sommaire ou en procès sommaire, d'une requête pour obtenir une injonction interlocutoire, d'une requête soulevant un point de droit ou d'une requête en autorisation d'une instance comme recours collectif, ou lorsque la Cour l'ordonne, le dossier de requête contient un mémoire des faits et du droit au lieu de prétentions écrites.

DORS/2002-417, art. 22; DORS/2007-301, art. 8; DORS/2009-331, art. 7.

Documents filed as part of motion record

367. A notice of motion or any affidavit required to be filed by a party to a motion may be served and filed as part of the party's motion record and need not be served and filed separately.

Dossier de requête

367. L'avis de requête ou les affidavits qu'une partie doit déposer peuvent être signifiés et déposés à titre d'éléments de son dossier de requête ou de réponse, selon le cas. Ils n'ont pas à être signifiés et déposés séparément.

Transcripts of cross-examinations

368. Transcripts of all cross-examinations on affidavits on a motion shall be filed before the hearing of the motion.

Transcriptions des contre-interrogatoires

368. Les transcriptions des contre-interrogatoires des auteurs des affidavits sont déposés avant l'audition de la requête.

Motions in writing

369. (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Procédure de requête écrite

369. (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

Request for oral hearing

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of

Demande d'audience

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des rai-

the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

sons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

Réponse du requérant

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Disposition of motion

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

Décision

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

Abandonment of motion

370. (1) A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

Désistement

370. (1) La partie qui a présenté une requête peut s'en désister en signifiant et en déposant un avis de désistement, établi selon la formule 370.

Deemed abandonment

(2) Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

Désistement présumé

(2) La partie qui ne se présente pas à l'audition de la requête et qui n'a ni signifié ni déposé un avis de désistement est réputée s'être désistée de sa requête.

Testimony regarding issue of fact

371. On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

Témoignage sur des questions de fait

371. Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

PART 8

PRESERVATION OF RIGHTS IN PROCEEDINGS

General

PARTIE 8

SAUVEGARDE DES DROITS

Dispositions générales

Motion before proceeding commenced

372. (1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

Requête antérieure à l'instance

372. (1) Une requête ne peut être présentée en vertu de la présente partie avant l'introduction de l'instance, sauf en cas d'urgence.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d'interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

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Restriction as to public servants

(3) Nothing in paragraph (2)(*c*) or (*d*) shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the *Statutory Instruments Act*.

(3) Les alinéas (2)*c*) ou *d*) n'ont toutefois pas pour effet d'autoriser l'exercice du pouvoir de prendre des règlements au sens de la *Loi sur les textes réglementaires*.

Restriction relative aux fonctionnaires

Successors to and deputy of public officer

(4) Words directing or empowering any public officer, other than a minister of the Crown, to do any act or thing, or otherwise applying to the public officer by his name of office, include his successors in the office and his or their deputy.

(4) La mention d'un fonctionnaire public par son titre ou dans le cadre de ses attributions vaut mention de ses successeurs à la charge et de son ou leurs délégués ou adjoints.

Successeurs et délégué d'un fonctionnaire public

Powers of holder of public office

(5) Where a power is conferred or a duty imposed on the holder of an office, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

R.S., 1985, c. I-21, s. 24; 1992, c. 1, s. 89.

(5) Les attributions attachées à une charge peuvent être exercées par son titulaire effectivement en poste.

L.R. (1985), ch. I-21, art. 24; 1992, ch. 1, art. 89.

Pouvoirs du titulaire d'une charge publique

Evidence

Preuve

Documentary evidence

25. (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

25. (1) Fait foi de son contenu en justice sauf preuve contraire le document dont un texte prévoit qu'il établit l'existence d'un fait sans toutefois préciser qu'il l'établit de façon concluante.

Preuve documentaire

Queen's Printer

(2) Every copy of an enactment having printed thereon what purports to be the name or title of the Queen's Printer and Controller of Stationery or the Queen's Printer is deemed to be a copy purporting to be printed by the Queen's Printer for Canada.

R.S., c. I-23, s. 24.

(2) La mention du nom ou du titre de l'imprimeur de la Reine et contrôleur de la papeterie ou de l'imprimeur de la Reine, portée sur les exemplaires d'un texte, est réputée être la mention de l'imprimeur de la Reine pour le Canada.

S.R., ch. I-23, art. 24.

Imprimeur de la Reine

Computation of Time

Calcul des délais

Time limits and holidays

26. Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

R.S., 1985, c. I-21, s. 26; 1999, c. 31, s. 147(F).

26. Tout acte ou formalité peut être accompli le premier jour ouvrable suivant lorsque le délai fixé pour son accomplissement expire un jour férié.

L.R. (1985), ch. I-21, art. 26; 1999, ch. 31, art. 147(F).

Jour férié

Clear days

27. (1) Where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating that number of days the days on which the events happen are excluded.

27. (1) Si le délai est exprimé en jours francs ou en un nombre minimal de jours entre deux événements, les jours où les événements surviennent ne comptent pas.

Jours francs

Not clear days

(2) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of

(2) Si le délai est exprimé en jours entre deux événements, sans qu'il soit précisé qu'il

Délais non francs

Appendix “B”

Case Law

Canadian Transportation Agency

Decision No. 431-AT-MV-2008

August 20, 2008

APPLICATION by Amalgamated Transit Union Local 279 regarding the accessibility of OC Transpo bus service to visually and hearing impaired passengers.

File No. U3570/08-3

BACKGROUND

[1] The Canadian Transportation Agency (the Agency) received an application from Amalgamated Transit Union (ATU) Local 279. ATU Local 279 submits that the failure of the City of Ottawa to purchase and install an automated announcement system for stops for its bus fleet has resulted in continued barriers and has created an undue obstacle for "disabled members of the community" who utilize OC Transpo.

PRELIMINARY MATTER

Standing before the Agency

[2] The Agency must consider whether it will inquire into ATU Local 279's application pursuant to Part V of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA). A fundamental issue to be determined first is whether ATU has legal standing to file an application in this case and whether the Agency should exercise its discretion, as set out in subsection 172(1) of the CTA, to inquire into this matter.

[3] Standing may be acquired in one of two ways: as a right ("direct personal interest standing") or with leave of the Agency upon a question of public interest ("public interest standing").

[4] It is a fundamental principle of law that unless a party can demonstrate a sufficient stake in the issue to support its participation in a proceeding, a tribunal will rule that the party lacks standing or *locus standi.*

[5] The issue in this application is whether persons with disabilities encounter undue obstacles by not being provided with an appropriate level of accommodation.

[6] In cases of this kind, the Agency has recognized that persons with disabilities who submit that they have faced an undue obstacle have an interest to seek the removal of the undue obstacle. It has also been accepted that such a request may be filed on behalf of persons with disabilities.

[7] However, to ensure that an application properly represents the perspective of persons with disabilities, it is important for the Agency to grant standing only to those with similar interests. Consequently, the Agency is of the opinion that an applicant must demonstrate that it undoubtedly represents the interests of persons with disabilities.

[8] It is clear from the application that ATU Local 279 has a mandate to represent employees of OC Transpo and intends to seek redress on their behalf to ensure that their health and safety concerns are taken into account. However, there is no evidence that ATU Local 279 has any mandate to represent persons with disabilities.

[9] This alone supports the conclusion that the applicant has no direct personal interest in the issue and no standing in this matter.

[10] It may also be argued by ATU Local 279 that even without a sufficient direct personal interest, it should be afforded public interest standing to pursue the application.

[11] The Supreme Court of Canada addressed the issue of public interest standing in a series of cases culminating in *Finlay v. Canada* (*Minister of Finance*), [1986] 2 S.C.R. 607. It was determined that the approach to public interest standing reflected in Supreme Court of Canada decisions related to constitutionality issues in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575 should be extended to non-constitutional administrative issues. Those cases laid down three criteria or tests to establish grounds for public interest standing for a party to pursue an issue, namely: (1) there is a serious issue raised; (2) the applicant has established it is directly affected by the issue or, if not, has a genuine interest in the issue; and, (3) there is no other reasonable and effective way to bring the issue to court.

[12] In this application, it is arguable that the issues raised are serious and that ATU Local 279 has a genuine interest in those issues. However, ATU Local 279 fails to meet the third test. The key concerns raised by ATU Local 279 in its application relate to the workplace health and safety of its members and how that may impact persons with disabilities travelling on OC Transpo buses. ATU Local 279 has recourse to other remedies to address its key concerns. Further, the parties to Decision No. 200-AT-MV-2007 relating to the application filed by Terrance J. Green have recourse to section 32 of the CTA which provides for an application to be made to the Agency for a review of the Decision if there has been a change in the facts or circumstances.

[13] The Agency also notes that its enforcement division is currently conducting an investigation for the purpose of assessing OC Transpo's compliance with the corrective action ordered in the Decision.

CONCLUSION

[14] The Agency will not exercise its discretion to inquire into this matter based on the application of ATU Local 279 and dismisses this application for lack of standing.

Members

- Raymon J. Kaduck
- John Scott

Indexed as:

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society

Attorney General of Canada, Appellant;
v.
Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach, Respondents, and Attorney General of Ontario, Community Legal Assistance Society, British Columbia Civil Liberties Association, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and Positive Living Society of British Columbia, Interveners.

[2012] 2 S.C.R. 524

[2012] 2 R.C.S. 524

[2012] S.C.J. No. 45

[2012] A.C.S. no 45

2012 SCC 45

File No.: 33981.

Supreme Court of Canada

Heard: January 19, 2012;
Judgment: September 21, 2012.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella,

Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

(78 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Civil procedure -- Parties -- Standing -- Public interest standing -- Public interest group and individual working on behalf of sex workers initiating constitutional [page525] challenge to prostitution provisions of Criminal Code -- Whether constitutional challenge constituting a reasonable and effective means to bring case to court -- Whether public interest group and individual should be granted public interest standing.

Summary:

A Society whose objects include improving conditions for female sex workers in the Downtown Eastside of Vancouver and K, who worked as such for 30 years, launched a *Charter* challenge to the prostitution provisions of the *Criminal Code*. The chambers judge found that they should not be granted either public or private interest standing to pursue their challenge; the British Columbia Court of Appeal, however, granted them both public interest standing.

Held: The appeal should be dismissed.

In determining whether to grant standing in a public law case, courts must consider three factors: whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

In this case, the issue that separates the parties relates to the formulation and application of the third factor. This factor has often been expressed as a strict requirement that a party seeking standing persuade the court that there is *no* other reasonable and effective manner in which the issue may be brought before the court. While this factor has often been expressed as a strict requirement, this Court has not done so consistently and in fact has rarely applied the factor restrictively. Thus, it would be better expressed as requiring that the proposed suit be, in all of the circumstances and in light of a number of considerations, *a* reasonable and effective means to bring the case to court.

[page526]

By taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible. Whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

In this case, all three factors, applied purposively and flexibly, favour granting public interest standing to the respondents. In fact, there is no dispute that the first and second factors are met: the respondents' action raises serious justiciable issues and the respondents have an interest in the outcome of the action and are fully engaged with the issues that they seek to raise. Indeed, the constitutionality of the prostitution provisions of the *Criminal Code* constitutes a serious justiciable issue and the respondents, given their work, have a strong engagement with the issue.

In this case, the third factor is also met. The existence of a civil case in another province is certainly a highly relevant consideration that will often support denying standing. However, the existence of parallel litigation even litigation that raises many of the same issues is not necessarily a sufficient basis for denying standing. Given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. Further, the issues raised are not the same as those in the other case. The court must also examine not only the precise legal issue, but the perspective from which it is made. In the other case, the perspective is very different. The claimants in that case were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. A stay of proceedings pending resolution of other litigation is [page527] one possibility that should be taken into account in exercising the discretion as to standing.

Taking these points into account here, the existence of other litigation, in the circumstances of this case, does not seem to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward.

Moreover, the existence of other potential plaintiffs, while relevant, should be considered in light of practical realities, which are such that it is very unlikely that persons charged under the prostitution provisions would bring a claim similar to the respondents'. Further, the inherent unpredictability of

criminal trials makes it more difficult for a party raising the type of challenge raised in this instance.

In this case, also, the record shows that there were no sex workers in the Downtown Eastside willing to bring a challenge forward. The willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge in their own names.

Other considerations should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. [page528] It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of K, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

Having found that the respondents have public interest standing to pursue their action, it is not necessary to address the issue of whether K has private interest standing.

Cases Cited

Applied: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; **discussed:** *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; **referred to:** *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331; *Baker v. Carr*, 369 U.S. 186 (1962); *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *R. v. Smith* (1988), 44 C.C.C. (3d) 385; *R. v. Gagne*, [1988] O.J. No. 2518 (QL); *R. v. Jahelka* (1987), 43 D.L.R. (4) 111; *R. v. Kazelman*, [1987] O.J. No. 1931 (QL); *R. v. Bavington*, [1987] O.J. No. 2728 (QL); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. v. Bailey*, [1986] O.J.

No. 2795 (QL); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4) 464; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL); *R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

[page529]

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(*b*), (*d*), 7, 15.

Constitution Act, 1982.

Criminal Code, R.S.C. 1985, c. C-46, ss. 210 to 213.

Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], r. 19(24).

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Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated December 2011, release 17).

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Sossin, Lorne. "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 U.B.C. L. Rev. 727.

Sossin, Lorne M. *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2 ed. Toronto: Carswell, 2012.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Neilson and Groberman JJ.A.), 2010 BCCA 439, 10 B.C.L.R. (5) 33, 294 B.C.A.C. 70, 498 W.A.C. 70, 324 D.L.R. (4) 1, 260 C.C.C. (3d) 95, 219 C.R.R. (2d) 171, [2011] 1 W.W.R. 628, [2010] B.C.J. No. 1983 (QL), 2010 CarswellBC 2729, setting aside in part a decision of Ehrcke J., 2008 BCSC 1726, 90 B.C.L.R. (4) 177, 305 D.L.R. (4) 713, 182 C.R.R. (2d) 262, [2009] 5 W.W.R. 696, [2008] B.C.J. No. 2447 (QL), 2008 CarswellBC 2709. Appeal dismissed.

Counsel:

Cheryl J. Tobias, Q.C., and *Donnaree Nygard*, for the appellant.

Joseph J. Arvay, Q.C., *Elin R. S. Sigurdson* and *Katrina Pacey*, for the respondents.

Janet E. Minor and *Courtney J. Harris*, for the intervener the Attorney General of Ontario.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

[page530]

Jason B. Gratl and *Megan Vis-Dunbar*, for the intervener the British Columbia Civil Liberties Association.

Justin Duncan and *Kaitlyn Mitchell*, for the intervener Ecojustice Canada.

C. Tess Sheldon, *Niamh Harraher* and *Kasari Govender*, for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and the ARCH Disability Law Centre.

Written submissions only by *Mark C. Power* and *Jean-Pierre Hachey*, for the intervener Conseil scolaire francophone de la Colombie-Britannique.

Kent Roach and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Written submissions only by *Cara Faith Zwibel*, for the intervener the Canadian Civil Liberties Association.

Lorne Waldman, *Clare Crummey* and *Tamara Morgenthau*, for the interveners the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees.

Written submissions only by *Michael A. Feder*, *Alexandra E. Cocks* and *Jordanna Cytrynbaum*, for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia.

The judgment of the Court was delivered by

CROMWELL J.:--

I. Introduction

1 This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled [page531] to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

2 In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

3 In this case, the respondents the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers, [page532] and Ms. Kiselbach, have launched a broad constitutional challenge to the prostitution provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. The British Columbia Court of Appeal found that they should be granted public interest standing to pursue this challenge; the Attorney General of Canada appeals. The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. Applying it here, my view is that the Society and Ms. Kiselbach should be granted public interest standing. I would therefore dismiss the appeal.

II. Issues

4 The issues as framed by the parties are whether the respondents should be granted public interest standing and whether Ms. Kiselbach should be granted private interest standing. In my view, this case is best resolved by considering the discretion to grant public interest standing and

standing should be granted to the respondents on that basis.

III. Overview of Facts and Proceedings

A. *Facts*

5 The respondent Society is a registered British Columbia society whose objects include improving working conditions for female sex workers. It is run "by and for" current and former sex workers living in the Vancouver Downtown Eastside. The Society's members are women, the majority of whom are Aboriginal, living with addiction issues, health challenges, disabilities, and poverty; almost [page533] all have been victims of physical and/or sexual violence.

6 Sheryl Kiselbach is a former sex worker currently working as a violence prevention coordinator in the Downtown Eastside. For approximately 30 years, Ms. Kiselbach engaged in a number of forms of sex work, including exotic dancing, live sex shows, work in massage parlours and street-level free-lance prostitution. During the course of this time, she was convicted of several prostitution-related offences. Ms. Kiselbach left the sex industry in 2001. She claims to have been unable to participate in a court challenge to prostitution laws when working as a sex worker because of risk of public exposure, fear for her personal safety, and the potential loss of social services, income assistance, clientele and employment opportunities (chambers judge's reasons, 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, at paras. 29 and 44).

7 The respondents commenced an action challenging the constitutional validity of sections of the *Criminal Code* that deal with different aspects of prostitution. They seek a declaration that these provisions violate the rights of free expression and association, to equality before the law and to life, liberty and security of the person guaranteed by ss. 2(*b*), 2(*d*), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The challenged provisions are what I will refer to as the "prostitution provisions", the "bawdy house provisions", the "procurement provision" and the "communication provision". Prostitution provisions is the generic term to refer to the provisions in the *Criminal Code* relating to the criminalization of activities related to prostitution (ss. 210 to 213). Within these provisions can be found the bawdy house provisions, which include those relating to keeping and being within a common bawdy house (s. 210), and transporting a person to a common bawdy house (s. 211). The procurement provision refers to the act of procuring and living on the avails of prostitution (s. 212, [page534] except for s. 212(1)(*g*) and (*i*)), while the communication provision refers to the act of soliciting in a public place (s. 213(1)(*c*)). Neither respondent is currently charged with any of the offences challenged.

8 The respondents' position is that the prostitution provisions (ss. 210 to 213) infringe s. 2(*d*) freedom of association rights because these provisions prevent prostitutes from joining together to increase their personal safety; s. 7 security of the person rights due to the possibility of arrest and imprisonment and because the provisions prevent prostitutes from taking steps to improve the health and safety conditions of their work; s. 15 equality rights because the provisions discriminate against members of a disadvantaged group; and s. 2(*b*) freedom of expression rights by making illegal

communication which could serve to increase safety and security.

B. *Proceedings*

(1) British Columbia Supreme Court (Ehrcke J.), 2008 BCSC 1726, 90 B.C.L.R. (4th) 177

9 The Attorney General of Canada applied in British Columbia Supreme Court Chambers to dismiss the respondents' action on the ground that they lacked standing to bring it. In the alternative, he applied under Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by *Supreme Court Civil Rules*, B.C. Reg. 168/2009, effective July 1, 2010), to have portions of the statement of claim struck out and part of the action stayed on the basis that the pleadings disclosed no reasonable [page535] claim. In the further alternative, he applied for particulars which he said were necessary in order to know the case to be met (chambers judge's reasons, at para. 2). The chambers judge dismissed the action, holding that neither respondent had private interest standing and that discretionary public interest standing should not be granted to them. In light of this conclusion, the chambers judge found it unnecessary to consider the Attorney General's applications under Rule 19(24) and for particulars (para. 88).

10 The chambers judge reasoned that neither the Society nor Ms. Kiselbach was charged with any of the impugned provisions or was a defendant in an action brought by a government agency relying upon the legislation. Further, the Society is a separate entity with rights distinct from those of its members. Ms. Kiselbach, he determined, was not entitled to private interest standing because she was not currently engaged in sex work and the continued stigma associated with her past convictions could not give rise to private interest standing because that would amount to a collateral attack on her previous convictions.

11 The chambers judge turned to public interest standing and found that he should not exercise his discretion to grant standing to either respondent. He reviewed what he described as the three "requirements" for public interest standing as set out in *Canadian Council of Churches* and concluded that the respondents' action raised serious constitutional issues and they had a genuine interest in the validity of the provisions. Thus, the judge held that the first and second "requirements" for public interest standing were established. He then turned to the third part of the test, "whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court" (para. [page536] 70). This, in the judge's view, was where the respondents' claim for standing faltered.

12 He agreed with the Attorney General's argument that the provisions could be challenged by litigants charged under them. The fact that members of the Society were "particularly vulnerable" and allegedly unable to come forward could not give rise to public interest standing (para. 76). Members of the Society would likely have to come forward as witnesses should the matter proceed to trial and if they were willing to testify as witnesses, they were able to come forward as plaintiffs. The chambers judge noted that there was litigation underway in Ontario raising many of the same

issues: *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1. He reasoned that, while the existence of this litigation was not necessarily a sufficient reason for denying standing, it tended to show that there "may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75). He also referred to the fact that there had been a number of cases in British Columbia and elsewhere where the impugned legislation had been challenged and that there are hundreds of criminal prosecutions every year in British Columbia in each of which the accused "would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77).

13 The judge concluded that he was bound to apply the test of whether there is no other reasonable and effective way to bring the issue before the court and that the respondents did not meet that test (para. 85).

[page537]

(2) British Columbia Court of Appeal, 2010 BCCA 439, 10 B.C.L.R. (5th) 33

14 The respondents appealed, submitting that the chambers judge had erred by rejecting private interest standing for Ms. Kiselbach and public interest standing for both respondents. The chambers judge's finding that the Society did not have private interest standing was not appealed (para. 3). The majority of the Court of Appeal upheld the chambers judge's decision to deny Ms. Kiselbach's private interest standing, but concluded that both respondents ought to have been granted public interest standing. The only issue on which the Court of Appeal divided was with respect to the third factor, that is, whether standing should be denied because there were other ways the issues raised in the respondents' proceedings could be brought before the courts.

15 Saunders J.A. (Neilson J.A. concurring), writing for the majority, found no reason for denying public interest standing. She held that this Court has made it clear that the discretion to grant standing must not be exercised mechanistically but rather in a broad and liberal manner to achieve the objective of ensuring that impugned laws are not immunized from review. The majority read the dissenting reasons for judgment of Binnie and LeBel JJ. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, as characterizing the *Charter* challenge in that case as a "systemic" challenge, which differs in scope from an individual's challenge addressing a discrete issue. To the majority, *Chaoulli* recognized that any problems arising from the difference in scope of the challenge may be resolved by taking "a more relaxed view of standing in the right case" (para. 59).

[page538]

16 Applying this approach, the majority considered this case to fall closer on the spectrum to *Chaoulli* than to *Canadian Council of Churches*. Saunders J.A. took the view that the chambers judge had stripped the action of its central thesis by likening it to cases in which prostitution-related charges were laid. Saunders J.A. focused on the multi-faceted nature of the proposed challenge and felt that the respondents were seeking to challenge the *Criminal Code* provisions with reference to their cumulative effect on sex trade workers. In the majority judges' view, public interest standing ought to be granted in this case because the essence of the complaint was that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities and exacerbates their vulnerability.

17 In dissent, Groberman J.A. agreed with the chambers judge's reasoning. In his view, this case did not raise any challenges that could not be advanced by persons with private interest standing. He accepted the respondents' position that it was unlikely that a case would arise in which a multi-pronged attack on all of the impugned provisions could take place. However, he did not consider that the lack of such an opportunity established a valid basis for public interest standing. He took the view that a very broad-ranging challenge such as the one in this case required extensive evidence on a multitude of issues and he did not find it clear that the litigation process would deal fairly and effectively with such a challenge in a reasonable amount of time. Interpreting the judgment in *Chaoulli*, Groberman J.A. held that the Court had not broadened the basis for public interest standing. In his view, *Chaoulli* did not establish that public interest standing should be granted preferentially for wide and sweeping attacks on legislation.

[page539]

IV. Analysis

A. *Public Interest Standing*

(1) The Central Issue

18 In *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, the majority of the Court summed up the law of standing to seek a declaration that legislation is invalid as follows: if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598). At the root of this appeal is how this approach to standing should be applied.

19 The chambers judge, supported by quotations from the leading cases, was of the view that the

law sets out three requirements something in the nature of a checklist which a person seeking discretionary public interest standing must establish in order to succeed. The respondents, on the other hand, contend for a more flexible approach, emphasizing the discretionary nature of the standing decision. The debate focuses on the third factor as it was expressed in *Borowski* that there is no other reasonable and effective manner in which the issue may be brought to the court and concerns how strictly this factor should be defined and how it should be applied.

20 My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a [page540] flexible and generous manner that best serves those underlying purposes.

21 I do not propose to lead a forced march through all of the Court's case law on public interest standing. However, I will highlight some key aspects of the Court's standing jurisprudence: its purposive approach, its underlying concern with the principle of legality and its emphasis on the wise application of judicial discretion. I will then explain that, in my view, the proper consideration of these factors supports the Court of Appeal's conclusion that the respondents ought to be granted public interest standing.

(2) The Purposes of Standing Law

22 The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches*, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav.* 121. The Court has recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

23 This Court has taken a purposive approach to the development of the law of standing in public [page541] law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches*, at p. 252.

24 It will be helpful to trace, briefly, the underlying purposes of standing law which the Court has identified and how they are considered.

25 The most comprehensive discussion of the reasons underlying limitations on standing may be found in *Finlay*, at pp. 631-34. The following traditional concerns, which are seen as justifying limitations on standing, were identified: properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government. A brief word about each of these traditional concerns is in order.

(a) *Scarce Judicial Resources and "Busybodies"*

26 The concern about the need to carefully allocate scarce judicial resources is in part based on the well-known "floodgates" argument. Relaxing standing rules may result in many persons having the right to bring similar claims and "grave inconvenience" could be the result: see, e.g., *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331, at p. 337. Cory J. put the point cogently on behalf of the Court in *Canadian Council of Churches*, at [page542] p. 252: "It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important." This factor is not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole.

27 The concern about screening out "mere busybodies" relates not only to the issue of a possible multiplicity of actions but, in addition, to the consideration that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other challenges by parties with "specific and factually established complaints": *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 694.

28 These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court - A Functional Analysis" (1973), 86 Harv. L. Rev. 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the [page543] most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see, e.g., *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 145.

(b) *Ensuring Contending Points of View*

29 The second underlying purpose of limiting standing relates to the need for courts to have the benefit of contending points of view of the persons most directly affected by the issue. Courts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skillfully. "[C]oncrete adverseness" sharpens the debate of the issues and the parties' personal stake in the outcome helps ensure that the arguments are presented thoroughly and diligently: see, e.g., *Baker v. Carr*, 369 U.S. 186 (1962), at p. 204.

(c) *The Proper Judicial Role*

30 The third concern relates to the proper role of the courts and their constitutional relationship to the other branches of government. The premise of our discretionary approach to public interest standing is that the proceedings raise a justiciable question, that is, a question that is appropriate for judicial determination: *Finlay*, at p. 632; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91; see also L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in [page544] Canada* (2nd ed. 2012), at pp. 6-10. This concern engages consideration of the nature of the issue and the institutional capacity of the courts to address it.

(3) The Principle of Legality

31 The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication" (p. 145 (emphasis added)).

32 The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).

[page545]

33 The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the *Charter* and the courts' new concomitant constitutional role called for a "generous and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

34 In *Hy and Zel's*, Major J. commented on the underlying rationale for restricting standing and the balance that needs to be struck between limiting standing and giving due effect to the principle of legality:

> If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations. [p. 692]

(4) Discretion

35 From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147 [page546] and 163; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

36 It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

(5) A Purposive and Flexible Approach to Applying the Three Factors

37 In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[page547]

38 The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) *Serious Justiciable Issue*

39 This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

40 By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 U.B.C. L. Rev. 727, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.

41 This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody: [page548] *Canadian Council of Churches*, at p. 252; *Finlay*, at pp. 631-33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular

circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

42 To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) *The Nature of the Plaintiff's Interest*

43 In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned [page549] with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para5.120).

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

44 This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show ... that there

is no other reasonable and effective manner in which the issue may be brought before the Court": p. 598 (emphasis added); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring [page550] consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

45 A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

46 The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: see *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] another reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

47 A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of [page551] the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff (pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

48 Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be

shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) This Factor Must Be Applied Purposively

49 This third factor should be applied in light of the need to ensure full and complete adversarial [page552] presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at para5.120. In *Hy and Zel's*, Major J. linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

50 The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

[page553]

51 It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

* The court should consider the plaintiff's capacity to bring forward a claim.

In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.

* The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

* The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained [page554] by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

* The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

52 I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of [page555] bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.

(6) Weighing the Three Factors

53 I return to the circumstances of this case in light of the three factors which must be considered: whether the case raises a serious justiciable issue, whether the respondents have a real stake or a genuine interest in the issue(s) and the suit is a reasonable and effective means of bringing the issues before the courts in all of the circumstances. Although there is little dispute that the first two factors favour granting standing, I will review all three as in my view they must be weighed cumulatively rather than individually. I conclude that when all three factors are considered in a purposive, flexible and generous manner, the Court of Appeal was right to grant public interest standing to the Society and Ms. Kiselbach.

(a) *Serious Justiciable Issue*

54 As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. The constitutionality of the prostitution laws certainly constitutes a "substantial constitutional issue" and an "important one" that is "far from frivolous": see *McNeil*, at p. 268; *Borowski*, at p. 589; *Finlay*, at p. 633. Indeed, the respondents argue that the impugned *Criminal Code* provisions, by criminalizing many of the activities surrounding prostitution, adversely affect a great number of women. These issues are also clearly justiciable ones, as they concern the constitutionality of the challenged provisions. Consideration of this factor unequivocally supports exercising discretion in favour of standing.

55 The appellant submits, however, that the respondents' action does not disclose a serious [page556] issue with respect to the constitutionality of s. 213(1)(*c*) (formerly s. 195.1(1)(*c*)) because this Court has upheld that provision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *R. v. Skinner*, [1990] 1 S.C.R. 1235.

56 On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects of the statement of claim raise serious issues as to the invalidity of the legislation. Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the

standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.

(b) *The Proposed Plaintiff's Interest*

57 Applying the purposive approach outlined earlier, there is no doubt, as the appellant accepts that this factor favours granting public interest standing. The Society has a genuine interest in the current claim. It is fully engaged with the issues it seeks to raise.

58 As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run "by and for" current and former sex [page557] workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the needs of street-based sex workers and its objects include working toward better health and safety for sex workers, working against all forms of violence against sex workers and lobbying for policy and legal changes that will improve the lives and working conditions of the sex workers (R.F., at para. 8).

59 From Sheryl Kiselbach's affidavit, it is clear that she is deeply engaged with the issues raised. Not only does she claim that the prostitution laws have directly and significantly affected her for 30 years (A.R., vol. IV, at pp. 15-17), but also she notes that she is now employed as a violence prevention coordinator.

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

60 Understandably, the chambers judge treated the traditional formulation of this factor as a requirement of a strict test. He rejected the respondents' submission that they ought to have standing because their action was "[t]he most reasonable and effective way" to bring this challenge to court. The judge noted that this submission misstated the test set down by this Court and that he was "bound to apply" the test requiring the respondents to show that "there is no other reasonable and effective way to bring the issue before the court" (paras. 84-85). However, for the reasons I set out earlier, approaching the third factor in this way should be considered an error in principle. We must therefore reassess the weight to be given to this consideration when it is applied in a purposive and flexible manner.

61 The learned chambers judge had three related concerns which he thought militated strongly [page558] against granting public interest standing. First, he thought that the existence of the *Bedford* litigation in Ontario showed that there could be other potential plaintiffs to raise many of the same issues. Second, he noted that there were many criminal prosecutions under the challenged provisions and that the accused in each one of them could raise constitutional issues as of right. Finally, he was not persuaded that individual sex workers could not bring the challenge forward as private litigants. I will discuss each of these concerns in turn.

62 The judge was first concerned by the related *Bedford* litigation underway in Ontario. The judge noted that the fact that there is another civil case in another province which raises many of the same issues "would not necessarily be sufficient reason for concluding that the present case ... should not proceed", it nonetheless "illustrates that if public interest standing is not granted ... there may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75).

63 The existence of parallel litigation is certainly a highly relevant consideration that will often support denying standing. However, I agree with the chambers judge that the existence of a civil case in another province even one that raises many of the same issues is not necessarily a sufficient basis for denying standing. There are several reasons for this.

64 One is that, given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. What is needed is a [page559] practical and pragmatic assessment of whether having parallel proceedings in different provinces is a reasonable and effective approach in the particular circumstances of the case. Another point is that the issues raised in the *Bedford* case are not identical to those raised in this one. Unlike in the present case, the *Bedford* litigation does not challenge ss. 211, 212(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*h*) or (3) of the *Code* and does not challenge any provisions on the basis of ss. 2(*d*) or 15 of the *Charter*. A further point is that, as discussed earlier, the court must examine not only the precise legal issue, but the perspective from which it is raised. The perspectives from which the challenges in *Bedford* and in this case come are very different. The claimants in *Bedford* were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. As the claim of unconstitutionality of the prostitution laws revolves mainly around the effects it has on street-level sex workers, the respondents in this action ground their challenges in a distinctive context. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. We were told, for example, that the respondents proposed that their appeal to this Court should be stayed awaiting the results of the *Bedford* litigation. A stay of proceedings pending resolution of other litigation is one possibility that should be taken into account in exercising the discretion as to standing.

65 Taking these points into account, the existence of the *Bedford* litigation in Ontario, in the circumstances of this case, does not seem to me to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward. The *Bedford* litigation, in my view, has not [page560] been shown to be a more reasonable and effective means of doing so.

66 The second concern identified by the chambers judge was that there are hundreds of prosecutions under the impugned provisions every year in British Columbia. In light of this, he reasoned that "the accused in each one of those cases would be entitled, as of right, to raise the

constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77). He noted, in addition, that such challenges have been mounted by accused persons in numerous prostitution-related criminal trials (paras. 78-79). In my view, however, there are a number of points in the circumstances of this case that considerably reduce the weight that should properly be given this concern here.

67 To begin, the importance of a purposive approach to standing makes clear that the existence of a parallel claim, either potential or actual, is not conclusive. Moreover, the existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.

68 The cases to which we have been referred did not challenge nearly the entire legislative scheme as the respondents do. As the respondents point out, almost all the cases referred to were challenges to the communication law alone: *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *Skinner*; *R. v. Smith* (1988), 44 C.C.C. (3d) 385 (Ont. H.C.J.); *R. v. Gagne*, [1988] O.J. No. 2518 (QL) (Prov. Ct.); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111 (Alta. C.A.); [page561] *R. v. Kazelman*, [1987] O.J. No. 1931 (QL) (Prov. Ct.); *R. v. Bavington*, [1987] O.J. No. 2728 (QL) (Prov. Ct.); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.); *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255 (Prov. Ct.); *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232 (S.C.); *R. v. Bailey*, [1986] O.J. No. 2795 (QL) (Prov. Ct.); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464. Most of the other cases challenged one provision only, either the procurement provision (*R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL) (C.A.)), or the bawdy house provision (*R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (Ont. C.A.)). From the record, the only criminal cases that challenge more than one section of the prostitution provisions were commenced *after* this case (Affidavit of Karen Howden, June 24, 2011, at para. 10 (*R. v. Mangat*) (A.R., vol. V, at p. 102; vol. IX, at pp. 31-36); paras. 4-5 (*R. v. Cho*) (A.R., vol. V, at p. 102; vol. VIII, at p. 163); paras. 2 and 11 (*R. v. To*) (A.R., vol. V, at pp. 101-3 and 104-12)). At the time of writing these reasons, one case had been dismissed, the other held in abeyance pending the outcome of this case and the last one was set for a preliminary inquiry.

69 Of course, an accused in a criminal case will always be able to raise a constitutional challenge to the provisions under which he or she is charged. But that does not mean that this will necessarily constitute a more reasonable and effective alternative way to bring the issue to court. The case of *Blais* illustrates this point. In that case, the accused, a client, raised a constitutional challenge to the communication provision without any evidentiary support. The result was that the Provincial Court of British Columbia dismissed the constitutional claim, without examining it in detail. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance. For instance, in *R. v. Hamilton* (Affidavit of Elizabeth Campbell, September 17, 2008, at para. 6 (A.R., vol. II, at pp. 34-35)), the Crown, for [page562] unrelated

reasons, entered a stay of proceedings after the accused filed a constitutional challenge to a bawdy house provision. Thus, the challenge could not proceed.

70 Moreover, the fact that many challenges could be or have been brought in the context of criminal prosecutions may in fact support the view that a comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised. There could be a multitude of similar challenges in the context of a host of criminal prosecutions. Encouraging that approach does not serve the goal of preserving scarce judicial resources. Moreover, a summary conviction proceeding may not necessarily be a more appropriate setting for a complex constitutional challenge.

71 The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). [page563] As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

72 I conclude, therefore, that these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them.

73 I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that

others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will [page564] ensure that there is both an individual and collective dimension to the litigation.

74 The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (R.F., at para. 20). Further, the Society is represented by experienced human rights lawyers, as well as by the Pivot Legal Society, a non-profit legal advocacy group working in Vancouver's Downtown Eastside and focusing predominantly on the legal issues that affect this community (Affidavit of Peter Wrinch, January 30, 2011, at para. 3 (A.R., vol. V, at p. 137)). It has conducted research on the subject, generated various reports and presented the evidence it has gathered before government officials and committees (see Wrinch Affidavit, at paras. 6-21 (A.R., vol. V, at pp. 137-44)). This in turn, suggests that the present litigation constitutes an effective means of bringing the issue to court in that it will be presented in a context suitable for adversarial determination.

75 Finally, other litigation management tools and strategies may be alternatives to a complete denial of standing, and may be used to ensure that the proposed litigation is a reasonable and effective way of getting the issues before the court.

[page565]

(7) Conclusion With Respect to Public Interest Standing

76 All three factors, applied purposively, favour exercising discretion to grant public interest standing to the respondents to bring their claim. Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society, but it will also promote the economical use of scarce judicial resources: *Canadian Council of Churches,* at p. 252.

B. *Private Interest Standing*

77 Having found that the respondents have public interest standing to pursue their claims, it is not necessary to address the issue of whether Ms. Kiselbach has private interest standing.

V. Disposition

78 I would dismiss the appeal with costs. However, I would not grant special costs to the respondents. The Court of Appeal declined to do so (2011 BCCA 515, 314 B.C.A.C. 137) and we ought not to interfere with that exercise of discretion unless there are clear and compelling reasons to do so which in my view do not exist here: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 77.

Appeal dismissed with costs.

Solicitors:

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondents: Arvay Finlay, Vancouver; Pivot Legal, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Community Legal Assistance Society: Community Legal Assistance Society, Vancouver.

[page566]

Solicitors for the intervener the British Columbia Civil Liberties Association: Gratl & Company, Vancouver; Megan Vis-Dunbar, Vancouver.

Solicitor for the intervener Ecojustice Canada: Ecojustice Canada, Toronto.

Solicitors for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and the ARCH Disability Law Centre: West Coast Women's Legal Education and Action Fund (West Coast LEAF), Vancouver; Justice for Children and Youth, Toronto; ARCH Disability Law Centre, Toronto.

Solicitors for the intervener Conseil scolaire francophone de la Colombie-Britannique: Heenan Blaikie, Ottawa.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitor for the intervener the Canadian Civil Liberties Association: Canadian Civil Liberties Association, Toronto.

Solicitors for the interveners the Canadian Association of Refugee Lawyers and the Canadian

Council for Refugees: Waldman & Associates, Toronto.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia: McCarthy Tétrault, Vancouver.

Indexed as:

Canadian Council of Churches v. Canada (Minister of Employment and Immigration)

The Canadian Council of Churches, appellant;
v.
Her Majesty The Queen and The Minister of Employment and Immigration, respondents, and
The Coalition of Provincial Organizations of the Handicapped, The Quebec Multi Ethnic Association for the Integration of Handicapped People, League for Human Rights of B'Nai Brith Canada, Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC), interveners.

[1992] 1 S.C.R. 236

[1992] S.C.J. No. 5

File No.: 21946.

Supreme Court of Canada

1991: October 11 / 1992: January 23.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Stevenson and Iacobucci JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (45 paras.)

Standing -- Public interest group -- Immigration Act amendments making provisions with respect to determination of refugee status more stringent -- Public interest group active in work amongst refugees and immigrants -- Action commenced to challenge constitutionality of Act under the Charter -- Whether standing should be granted to challenge provisions -- Immigration Act, 1976, S.C. 1976-77, as am. by S.C. 1988, c. 35 and c. 36 -- Canadian Charter of Rights and Freedoms, s. 7.

The Canadian Council of Churches is a federal corporation which represents the interests of a broad group of member churches including the protection and resettlement of refugees. The Council had expressed its concerns about the refugee determination process in the proposed amendments to the Immigration Act, 1976 [page237] (which later came into force on January 1, 1989) to members of the government and to the parliamentary committees considering the legislation. These amendments changed the procedures for determining whether applicants came within the definition of a Convention Refugee.

The Council sought a declaration that many, if not most, of the amended provisions violated the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to bring the action and had not demonstrated a cause of action. The application to strike out was dismissed at trial but to a large extent was granted on appeal. Appellant appealed and respondents cross-appealed. At issue here is whether the appellant should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended Immigration Act, 1976.

Held: The appeal should be dismissed; the cross-appeal should be allowed.

Recognition of the need to grant public interest standing, whether because of the importance of public rights or the need to conform with the Constitution Act, 1982, in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. A balance must be struck between ensuring access to the courts and preserving judicial resources. The courts must not be allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases.

Status has been granted to prevent the immunization of legislation or public acts from any challenge. Public interest standing, however, is not required when it can be shown on a balance of probabilities that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court, while they should be given a liberal and generous interpretation, need not and should not be expanded.

[page238]

Three aspects of the claim must be considered when public interest standing is sought. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the Court?

Although the claim at issue made a sweeping attack on most of the many amendments to the Act, some serious issues as to the validity of the legislation were raised. Appellant had a genuine interest

in this field. Each refugee claimant, however, has standing to initiate a constitutional challenge to secure his or her own rights under the Charter and the disadvantages faced by refugees as a group do not preclude their effective access to the court. Many refugee claimants can and have appealed administrative decisions under the statute and each case presented a clear concrete factual background upon which the decision of the court could be based. The possibility of the imposition of a 72-hour removal order against refugee claimants does not undermine their ability to challenge the legislative scheme. The Federal Court has jurisdiction to grant injunctive relief against a removal order. Given the average length of time required for an ordinary case to reach the initial "credible basis" hearing, there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim.

Cases Cited

Considered: Gouriet v. Union of Post Office Workers, [1978] A.C. 435; Australian Conservation Foundation Incorporated v. Commonwealth of Australia (1980), 28 A.L.R. 257; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982); Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607; referred to: Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575; Toth v. Minister of Employment and Immigration (1988), 86 N.R. 302; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959.

[page239]

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C., 1985, App. III.
Canadian Charter of Rights and Freedoms, Preamble, s. 7.
Constitution Act, 1982, s. 52(1).
Immigration Act, 1976, S.C. 1976-77, c. 52, as am. by S.C. 1988, c. 35 and c. 36.

Authors Cited

Australia. Australian Law Reform Commission. Discussion Paper No. 4. Access to the Courts--I: Standing: Public Interest Suits. Sydney: 1977.
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Tribe, Laurence H. American Constitutional Law, 2nd ed. Mineola, New York: Foundation Press, Inc., 1988.
United States Constitution, Article III, s. 2(1).

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 534, 36 F.T.R. 80, 68 D.L.R. (4th) 197, 106 N.R. 61, 46 C.R.R. 290, 44 Admin. L. R. 56, 10 Imm. L. R. (2d) 81, allowing an appeal from a judgement of Rouleau J., [1989] 3 F.C. 3, 27 F.T.R. 129, 41 C.R.R. 152, 38 Admin. L. R. 269, 8 Imm. L. R. (2d) 298, dismissing an application to strike out. Appeal dismissed and cross-appeal allowed.

Steven M. Barrett, Barb Jackman and Ethan Poskanzer, for the appellant.
Graham R. Garton, for the respondents.
Anne M. Molloy, for the interveners, The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration of Handicapped People.
David Matas and Marvin Kurz, for the intervener, League for Human Rights of B'Nai Brith Canada.
Mary Eberts and Dulcie McCallum, for the interveners, Women's Legal Education and Action [page240] (LEAF) and Canadian Disability Rights Council (CDRC).

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

1 **CORY J.**:-- At issue on this appeal is whether the Canadian Council of Churches should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended Immigration Act, 1976 which came into effect January 1, 1989.

Factual Background

2 The Canadian Council of Churches (the Council), a federal corporation, represents the interests of a broad group of member churches. Through an Inter-Church Committee for Refugees it co-ordinates the work of the churches aimed at the protection and resettlement of refugees. The Council together with other interested organizations has created an organization known as the Concerned Delegation of Church, Legal, Medical and Humanitarian Organizations. Through this body the Council has commented on the development of refugee policy and procedures both in this country and in others.

3 In 1988 the Parliament of Canada passed amendments to the Immigration Act, 1976, S.C. 1976-77, c. 52, by S.C. 1988, c. 35 and c. 36. The amended act came into force on January 1, 1989. It completely changed the procedures for determining whether applicants come within the definition of a Convention Refugee. While the amendments were still under consideration the Council expressed its concerns about the proposed new refugee determination process to members of the government and to the parliamentary committees which considered the legislation. On the first business day after the amended act came into force, the Council commenced this action, seeking a

declaration that many if not most of the amended provisions violated the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, R.S.C., 1985, App. III. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to [page241] bring the action and had not demonstrated a cause of action.

Proceedings in the Courts Below

Federal Court, Trial Division, Rouleau J., [1989] 3 F.C. 3

4 Rouleau J. dismissed the application. His judgment reflects his concern that there might be no other reasonable, effective or practical manner to bring the constitutional question before the Court. He was particularly disturbed that refugee claimants might be faced with a 72-hour removal order. In his view, such an order would not leave sufficient time for an applicant to attempt either to stay the proceedings or to obtain an injunction restraining the implementation removal order.

Federal Court of Appeal, [1990] 2 F.C. 534

5 MacGuigan J.A. speaking for a unanimous Court allowed the appeal and set aside all but four aspects of the statement of claim.

6 In his view the real issue was whether or not there was another reasonably effective or practical manner in which the issue could be brought before the Court. He thought there was. He observed that the statute was regulatory in nature and individuals subject to its scheme had, by means of judicial review, already challenged the same provisions impugned by the Council. Thus there was a reasonable and effective alternative manner in which the issue could properly be brought before the Court.

7 He went on to consider in detail the allegations contained in the statement of the claim. He concluded that some were purely hypothetical, had no merit and failed to disclose any reasonable cause of action. He rejected other claims on the grounds that they did not raise a constitutional challenge and others on the basis that they raised issues that had already been resolved by recent decisions of the Federal Court of Appeal.

[page242]

8 He granted the Council standing on the following matters raised on the statement of claim.

1. The claim in paragraph 3(c) of the statement of claim which alleges that the requirement that detainees obtain counsel within 24 hours from the making of a removal order violates s. 7 of the Charter (at p. 558);
2. The claim in paragraph 6(a) which alleges that provisions temporarily

excluding claimants from having claims considered violate s. 7 of the Charter (at p. 554);

3. The claim in paragraph 10(a) which alleges that provisions allowing the removal of a claimant within 72 hours leave too short a time to consult counsel and violate s. 7 of the Charter (at p. 561);
4. The claim in paragraph 14(c) which alleges that the provisions permitting the removal of a claimant with a right to appeal within 24 hours if a notice of appeal is not filed in that time violate the Constitution (at p. 562).

9 The appellant seeks to have the order of the Federal Court of Appeal set aside. The respondents has cross-appealed to have the remaining positions of the statement of claim struck out.

Issues

10 The principal question to be resolved is whether the Federal Court of Appeal erred in holding that the Canadian Council of Churches should be denied standing to challenge many of the provisions of the Immigration Act, 1976.

11 The secondary issue is whether the Federal Court of Appeal erred in holding that certain allegations in the statement of claim failed to disclose a cause of action and others were hypothetical or premature.

[page243]

The Approaches Taken in Other Common Law Jurisdictions to Granting Parties' Status to Bring Action

12 It may be illuminating to consider by way of comparison the position taken in other common law jurisdictions on this issue of standing. The highest Courts of the United Kingdom, Australia and the United States have struggled with the problem. They have all recognized the need to balance the access of public interest groups to the Courts against the need to conserve scarce judicial resources. It will be seen that each of these jurisdictions has taken a more restrictive approach to granting status to parties than have the courts in Canada.

The United Kingdom

13 Traditionally only the Attorney General of the United Kingdom had standing to litigate matters for the protection of public rights. The Attorney General was not a member of cabinet and as a result had a greater appearance of independence from the political branch of government than holders of the same office in other jurisdictions. As well, it must be remembered that in the United Kingdom, Parliament is supreme. Thus there is no prospect of the courts' finding that the

government has acted unconstitutionally as there is in Canada and the United States.

14 The English courts have developed three exceptions to the rule that only the Attorney General can represent the interests of the public. First an individual may have standing to litigate a question of public right if the impugned activity simultaneously affects the individual's private rights. Second, an individual may bring an action claiming a violation of a public right if that individual suffered special damage as a result of the impugned activity. Thirdly, a local authority may bring an action where it considers it necessary to protect or promote the interests of the citizens within its borders.

15 These exceptions were affirmed in Gouriet v. Union of Post Office Workers, [1978] A.C. 435, at p. 506. [page244] In that case the plaintiff sought standing to obtain an injunction against a postal union. It was argued that the union's announced plan that it would not process any mail for South Africa for a period of one week would violate the criminal law. The Attorney General refused to bring an action against the union. Yet, the House of Lords refused to grant standing to Gouriet. It held that he could only litigate the issue in a relator action brought by the Attorney General.

16 There are now various statutes in the United Kingdom which provide that a Court may in certain circumstances grant an applicant leave to bring an action. Recent cases have turned upon the wording of the particular statutory provisions and as a result they are of limited assistance in consideration of the issue in Canada.

Australia

17 The Australian Law Reform Commission published a paper on the question of public interest standing in 1977, (Access to the Courts -- I: Standing: Public Interest Suits (No. 4, 1977)). The report reviewed circumstances which had resulted in demand for increased access to the Courts in common law jurisdictions. It identified the first as the introduction of legal aid which permitted socially-disadvantaged citizens to assert their private legal rights. The second was the provision of legal representation for "diffuse" interest groups in areas such as consumer and environmental protection. It noted that these organizations often raise issues that are not connected with the private rights or interests in property which would provide the traditional common law basis for standing. The Commission put forward three alternative solutions to the question of when standing should be granted. They were as follows:

[page245]

(1) Open Door Policy. This would allow any person to take any proceedings in the public law area and reliance would be placed on the discipline of costs to limit the number of these cases.

(2) United States Method. The so called United States method would enable the Courts to screen the proposed plaintiffs as a part of the determination of the particular case.
(3) Preliminary Screening. This method would institute a preliminary screening procedure which would be undertaken by the Court before the substantive issue was considered.

18 The Commission recommended the open-ended approach. The report did not discuss the relative merits of introducing reforms by means of legislation or through the evolution of the common law. Nor did it address concerns as to what should be the role of the courts, a matter which is crucial to the American approach to the question.

19 Subsequent to the publication of the Law Reform Report the High Court of Australia considered the problem in Australian Conservation Foundation Incorporated v. Commonwealth of Australia (1980), 28 A.L.R. 257 (H.C.). The Foundation was an environmental group very active in Australia. It challenged a decision made by the Government of Australia to establish a resort area. The challenge was based upon environmental legislation which, the majority of the High Court concluded, did not create any private rights. It determined the only duty the legislation imposed was a public one cast upon the Minister, which was not owed to any one individual. The application of the Conservation Foundation for status as a party was therefore rejected.

20 Gibbs J. put the position in this way at p. 270:

> A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not [page246] so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

He specifically rejected the Foundation's claim that it had a special interest either as a result of its communication with the Government on the issue or because its membership had chosen to specify environmental protection as one of its objects.

21 In concurring reasons Mason J. observed that the Canadian approach as expressed in Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, was directly contradicted in Australia by cases holding that the taxpayer has no standing to challenge the validity of a statute which authorizes the appropriation or expenditure of funds in a suit for declaratory relief.

22 Thus, despite the report and recommendation of the Australian Law Reform Commission, the position taken in that country on the issue of granting status is far more restrictive than it is in Canada.

The United States of America

23 Article III of the Constitution of the United States is the source of the authority of Federal Courts which extends to all "cases and controversies". This provision provides:

> Section 2, Clause 1. Subjects of jurisdiction. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority,--to all Cases affecting Ambassadors, other public Ministers and Consuls,--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;-- between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and [page247] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

24 The United States Supreme Court has interpreted this provision as restricting access to the courts to litigants who have suffered a personal injury which they wish to redress. The leading decision on the question is Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). In that case, a group of citizens challenged the Federal Government's decision to give property to a Christian educational institution without charge. It was the group's contention that the gift of state property violated the Constitution. It claimed standing on the basis that each of their members was an individual taxpayer and that the gift constituted an improper use of their taxes. Rehnquist J. gave the reasons for the majority denying standing to the group. He interpreted Article III as demanding the fulfilment of three conditions. In order to secure standing a plaintiff must show:

> (1) "he has personally suffered some actual or threatened injury" as a result of the impugned act,
> (2) that the injury "fairly can be traced to the challenged action" and
> (3) that the injury is "likely to be redressed by a favorable decision".

To these constitutional requirements for standing, Rehnquist J. added "prudential principles". He determined that a court may exercise its discretion to deny standing even if all the above conditions were met if the plaintiff presents "abstract questions of wide public significance", rests its claim on the rights of third parties, or does not present a claim falling within the "zone of interests" protected by the law in question.

[page248]

25 He observed that, "This Court repeatedly has rejected claims of standing predicated "'on the right, possessed by every citizen, to require that the Government be administered according to law' ... ." He expressed his concern that the Federal Court should not overstep its traditional role by

entering into conflict with the legislative branch over claims asserted by individuals who have not suffered a "cognizable injury".

26 Tribe has referred to the position taken by the Supreme Court of the United States as "one of the most criticized aspects of constitutional law". (See American Constitutional Law (2nd ed.), at p. 110.) However, he carefully noted that the court's position was a legitimate approach to standing based upon a coherent view of the role of the courts. He observed that a narrow rule of standing enhanced the view that the Federal Court should determine issues between private parties and not take on a role "as the branch of government best able to develop a coherent interpretation of the Constitution ... ." He noted that the courts' resistance to hearing cases brought by those without a personal interest in the impugned activity of the state is founded on a policy of deference to the legislature. He observed that the Congress may, if it wishes, pass legislation which allows for more generous standing than that which the court has discretion to award since Article III limits the court's discretion on standing but not that of the legislature.

27 Once again it will be seen that the principles enunciated by the United States Supreme Court on standing are more restrictive than those that are applicable in Canada.

The Question of Standing in Canada

28 Courts in Canada like those in other common law jurisdictions traditionally dealt with individuals. [page249] For example, courts determine whether an individual is guilty of a crime; they determine rights as between individuals; they determine the rights of individuals in their relationships with the state in all its various manifestations. One great advantage of operating in the traditional mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not overextended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing.

29 On the other hand there can be no doubt that the complexity of society has spawned ever more complex issues for resolution by the courts. Modern society requires regulation to survive. Transportation by motor vehicle and aircraft requires greater regulation for public safety than did travel by covered wagon. Light and power provided by nuclear energy requires greater control than did the kerosene lamp.

30 The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the Charter this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases;

Thorson v. Attorney General of Canada, supra, Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, and Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575. Writing for the majority in Borowski, supra, Martland J. set forth the conditions [page250] which a plaintiff must satisfy in order to be granted standing, at p. 598:

> ... to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Those then were the conditions which had to be met in 1981.

31 In 1982 with the passage of the Charter there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. The Charter enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those Charter rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the Charter. By its terms the Charter indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, Charter rights might be unenforced and Charter freedoms shackled. The Constitution Act, 1982 does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with the law.

32 The rule of law is recognized in the preamble of the Charter which reads:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

The rule of law is thus recognized as a corner stone of our democratic form of government. It is the rule of law which guarantees the rights of citizens to protection against arbitrary and unconstitutional government action. This same right is affirmed in s. 52(1) which states:

[page251]

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Parliament and the legislatures are thus required to act within the bounds of the constitution and in accordance with the Charter. Courts are the final arbitors as to when that duty has been breached.

As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the Charter.

33 The question of standing was first reviewed in the post-Charter era in Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607. In that case Le Dain J. speaking for the Court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for "the limits of statutory authority".

34 The standard set by this Court for public interest plaintiffs to receive standing also addresses the concern for the proper allocation of judicial resources. This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation. In Finlay, supra, it was specifically recognized that the traditional concerns about widening access to the courts are addressed by the conditions imposed for the exercise of judicial discretion to grant public interest standing set out in the trilogy. Le Dain J. put it in this way, at p. 631:

> ... the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; [page252] the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in Thorson, McNeil and Borowski.

Should the Current Test for Public Interest Standing be Extended

35 The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

36 The whole purpose of granting status is to prevent the immunization of legislation or public

acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The [page253] decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

The Application of the Principles for Public Interest Standing to this Case

37 It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

(1) Serious Issue of Invalidity

38 It was noted in Finlay, supra, that the issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge. In the case at bar the Federal Court of Appeal in its careful reasons turned its attention to the question of whether the amended statement of claim raised a reasonable cause of action. The claim makes a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the Immigration Act, 1976. Some of the allegations are so hypothetical in nature that it would be impossible for any court to make a determination with regard to them. In many ways the statement of claim more closely resembles submissions that might be made to a parliamentary committee considering the legislation than it does an attack on the validity of the provisions of the legislation. No doubt the similarity can be explained by the fact that the action was brought on the first working day following the passage of the legislation. It is perhaps unfortunate that this court is asked to fulfil the function of a motion's [page254] court judge reviewing the provisions of a statement of claim. However, I am prepared to accept that some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation.

(2) Has the Plaintiff Demonstrated a Genuine Interest?

39 There can be no doubt that the applicant has satisfied this part of the test. The Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

(3) Whether there is Another Reasonable and Effective Way to Bring the Issue Before the Court

40 It is this third issue that gives rise to the real difficulty in this case. The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them

has standing to initiate a constitutional challenge to secure his or her own rights under the Charter. The applicant Council recognizes the possibility that such actions could be brought but argues that the disadvantages which refugees face as a group preclude their effective use of access to the court. I cannot accept that submission. Since the institution of this action by the Council, a great many refugee claimants have, pursuant to the provisions of the statute, appealed administrative decisions which affected them. The respondents have advised that nearly 33,000 claims for refugee status were submitted in the first 15 months following the enactment of the legislation. In 1990, some 3,000 individuals initiated claims every month. The Federal Court of Appeal has a wide experience in this field. MacGuigan J.A., writing for the court, took judicial notice of the fact that refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis. I accept without hesitation this observation. It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear concrete [page255] factual background upon which the decision of the court could be based.

41 The appellant also argued that the possibility of the imposition of a 72-hour removal order against refugee claimants undermines their ability to challenge the legislative scheme. I cannot accept that contention. It is clear that the Federal Court has jurisdiction to grant injunctive relief against a removal order: see Toth v. Minister of Employment and Immigration (1988), 86 N.R. 302 (F.C.A.). Further, from the information submitted by the respondents it is evident that persons submitting claims to refugee status in Canada are in no danger of early or speedy removal. As of March 31, 1990 it required an average of five months for a claim to be considered at the initial "credible basis" hearing. It is therefore clear that in the ordinary case there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim. However, even where the claims have not been accepted "the majority of removal orders affecting refugee claimants have not been carried out". (See Report of the Auditor General of Canada to the House of Commons, Fiscal Year Ended 31 March 1990, at pp. 352-53, paragraph 14.43.) Even though the Federal Court has been prepared in appropriate cases to exercise its jurisdiction to prevent removal of refugee claimants there is apparently very little need for it to do so. The means exist to ensure that the issues which are sought to be litigated on behalf of individual applicants may readily be brought before the court without any fear that a 72-hour removal order will deprive them of their rights.

42 From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted [page256] as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. The Council must, therefore, be denied standing on each of the counts of the statement of claims. This is sufficient to dispose of the appeal. The respondents must also succeed on their cross-appeal to strike out what remained of the claim as the

plaintiff council does not satisfy the test for standing on any part of the statement of claim. I would simply mention two other matters.

Intervener Status

43 It has been seen that a public interest litigant is more likely to be granted standing in Canada than in other common law jurisdictions. Indeed if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. Yet the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained.

Review of the Statement of Claim to Determine if it Discloses a Cause of Action

44 In light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail. Had it [page257] been necessary to do so I would have had some difficulty agreeing with all of the conclusions of the Federal Court of Appeal on this issue. Perhaps it is sufficient to set out once again the principles which should guide a court in considering whether a reasonable cause of action has been disclosed by a statement of claim. It was put in this way by Wilson J. giving the reasons of this Court in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, at p. 980:

> ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

If these guidelines had been followed a different result would have been reached with regard to some aspects of this statement of claim. A party who did have standing might well find in this vast broadside of grievances some telling shots that would form the basis for a cause of action somewhat wider than that permitted by the Federal Court of Appeal.

Disposition of the Result

45 In the result I would dismiss the appeal and allow the cross-appeal on the basis that the plaintiff does not satisfy the test for public interest standing. Both the dismissal of the appeal and the allowance of the cross-appeal are to be without costs.

Solicitors for the appellant: Sack Goldblatt Mitchell, Toronto.
Solicitor for the respondents: John C. Tait, Ottawa.
Solicitors for the interveners, The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration [page258] of Handicapped People: Advocacy Resource Centre for the Handicapped, Toronto.
Solicitors for the intervener, League for Human Rights of B'Nai Brith Canada: David Matas, Winnipeg, and Dale Streiman and Kurz, Brampton.
Solicitors for the interveners, Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC): Tory, Tory, DesLauriers & Binnington, Toronto and Dulcie McCallum, Victoria.

September 10, 2013 File No. M4120-3/13-03258

BY E-MAIL: trembley@pmlaw.com

WestJet
Air Canada
Air Transat A.T. Inc.
Sunwing Airlines Inc.
JazzAviation LP/Jazz Aviation S.E.C.
Porter Airlines Inc.
c/o Timothy Trembley
Patterson, MacDougall LLP
Box 100, Suite 900
1 Queen Street East
Toronto, Ontario
M5C 2W5

BY E-MAIL: lbeliveau@loogol.ca

Kevin Krygier
c/o Louis Beliveau, LL.B.
530-65 Queen Street West
Toronto, Ontario
M5H 2M5

Dear Sirs:

Re: Complaint against WestJet, Air Canada, Air Transat A.T. Inc. carrying on business as Air Transat (Air Transat), Sunwing Airlines Inc. (Sunwing), Jazz Aviation LP/Jazz Aviation S.E.C. carrying on business as Air Canada Jazz, Jazz and Jazz Air (Jazz) and Porter Airlines Inc. (Porter) - seat selection policies of those carriers.

This refers to a complaint filed by Kevin Krygier with the Canadian Transportation Agency (Agency) against WestJet, Air Canada, Air Transat, Sunwing, Jazz and Porter (the respondents) on June 10, 2013.

BACKGROUND

Pleadings were opened in this matter on June 28, 2013 and were to be closed on August 2, 2013. However, the time lines respecting the pleadings process in this matter were stayed to address a motion filed by Gábor Lukács on July 15, 2013.

In his motion filed pursuant to section 27 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), and sections 32 and 43 of the *Canadian Transportation Agency General Rules*, SOR/2005-35, as amended (General Rules), Mr. Lukács requested to be added as an applicant or an intervener in this matter. Mr. Lukács points out that he is an air passenger rights advocate who has successfully challenged the policies and practices of numerous airlines before the Agency and that the precedents and principles established by the Agency in the decision on his complaints have significantly expanded and clarified the rights of passengers. Mr. Lukács submits that he has had a genuine interest in the rights of air passengers since 2008. He states that if his motion is granted, he will address, among other issues, the legal tests for

reasonableness and "unduly discriminatory" or "unjustly discriminatory," within the meaning of the CTA and the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), the use of international instruments for determining the reasonableness of tariff provisions and case law documenting harassment of children and/or minors on board commercial flights.

On July 19, 2013, the Agency informed Mr. Lukács that prior to making a ruling on his motion, he must determine whether he wishes to be an intervener or a complainant in the matter. The Agency also stated that if Mr. Lukács files a complaint, the Agency, as provided for under the General Rules, intends to combine that proceeding with the complaint filed by Mr. Krygier. The Agency also stated that before making a determination in that regard, the Agency would provide the respondents with an opportunity to comment on the Agency's intention/and or the status sought by Mr. Lukács.

On July 20, 2013, Mr. Lukács advised the Agency that he would be filing a complaint by August 5, 2013. However, on August 8, 2013, Mr. Lukács then advised that he could not file a complaint within the next few weeks, but that he would revisit the possibility at a later date. No complaint has been filed by Mr. Lukács.

PRELIMINARY RULING SOUGHT

On July 26, 2013, the respondents filed a joint submission seeking a preliminary ruling from the Agency with respect to:

1. The standing of Mr. Krygier to complain against Air Canada, Jazz, Air Transat, Porter and Sunwing; and the standing of Mr. Lukács to complain against any of the respondents; and

2. An alternative application for leave to intervene by Mr. Lukács should that request be revisited.

Issue 1: The standing of Mr. Krygier to complain against Air Canada, Jazz, Air Transat, Porter and Sunwing; and the standing of Mr. Lukács to complain against any of the respondents

Position of the respondents

The respondents submit that in Decision No. 431-AT-MV-2008 **(**Application by Amalgamated Transit Union Local 279 regarding the accessibility of OC Transpo bus service to visually and hearing impaired passengers), the Agency held that a complainant can acquire standing under the CTA in two ways: as a right (direct personal interest standing) or with leave of the Agency upon a question of public interest (public interest standing).

The respondents maintain that Mr. Krygier's complaint and Mr. Lukács' application for standing raise two issues: (1) Does Mr. Krygier have direct personal interest standing against the respondents other than against WestJet; and (2) Does Mr. Lukács have direct personal interest standing against any of the respondents? If not, can either Mr. Krygier or Mr. Lukács establish public interest standing?

Direct Personal Standing

The respondents submit that subsection 67.2(1) of the CTA, under which it is assumed that Mr. Krygier is bringing his complaint, stipulates that a complaint must arise because the carrier has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory. The respondents submit that the past tense, "has applied," is used intentionally, as the complaint does not arise unless and until the objectionable terms and conditions have been applied to the person complaining.

The respondents are of the view that Parliament enacted subsection 67.2(1) of the CTA as part of the overall objective of providing a mechanism for dealing with air passenger complaints under the CTA. This provision was added in the year 2000 as part of the initiative to have the Agency review and attempt to resolve air passenger complaints when "the consumer is not satisfied with the response of the carrier."

The respondents assert that other sections of the CTA and the ATR envisage recourse to someone claiming that the air carrier has caused him or her compensable harm in some way like section 67.1 of the CTA or paragraph 113.1(*b*) of the ATR which leave no doubt that Parliament's intention through the amendments to the CTA was to provide a remedy for those directly and adversely affected by a term or condition of carriage.

The respondents claim that interpreting the CTA as requiring a complainant to have direct interest in the outcome of the complaint is consistent with the national transportation policy set out in section 5 of the CTA as it is neither competitive nor efficient to require air carriers to respond to whimsical complaints brought by any member of the public, whether or not directly affected by a condition of carriage.

The respondents argue that the above interpretation of the CTA aligns with the limits that common law places on direct personal interest standing as in common law, a person must have a sufficient stake in the outcome to invoke the judicial process. The respondents also argue that a factual background is necessary to address complaints pertaining to a carrier's terms and conditions of carriage. In their view, the reasonableness of any fee, including a seat selection fee, involves consideration of a number of facts unique to a given case, including, but not limited to:

- The origin and destination of the contract of carriage in question;
- The fare category selected by the passenger;
- The amount of the fee;
- The amount of the fee in relation to other mandatory fees such as airport improvement fees; and
- The financial circumstances of the passenger.

The respondents argue that it is in the interest of all affected by the adjudication process to proceed on the basis of a full factual and evidentiary record.

The respondents conclude that Mr. Krygier does not have direct personal interest standing to complain against Air Canada, Jazz, Air Transat, Porter and Sunwing, and that Mr. Lukács does not have direct personal interest standing to complain against any of the respondents.

Public Interest Standing

The respondents submit that the Supreme Court's recent decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] S.C.J. No. 45, sets out the test for determining whether the Agency may grant public interest standing to Mr. Krygier and Mr. Lukács. The respondents assert that the person seeking standing status must persuade the Agency that the following three factors favour granting standing: (1) whether there is a serious justiciable issue raised; (2) whether the complainant has a real stake or a genuine interest in it; and, (3) whether the proposed suit is a reasonable and effective way to bring the issue before the courts. The respondents contend that the Agency must prefer a complainant with standing as a right over a complainant desiring public interest standing.

The respondents submit that to constitute a serious justiciable issue under a motion for public interest standing, the question raised must be a substantial constitutional issue or one concerning the validity of legislation. As such, public interest standing should not be granted to assess the reasonableness of terms and conditions of a contract between private entities. The respondents submit the complainant must be engaged with the issues that he or she raises, and furthermore, that the complainant must have a level of engagement that goes beyond a mere intellectual interest in the issue raised.

The respondents conclude that neither Mr. Lukács nor Mr. Krygier have established that they are sufficiently affected by the policies challenged that they have the requisite interest for public interest standing.

As such, the respondents request that:

a) The complaint of Mr. Krygier be dismissed as against Air Canada, Jazz, Air Transat, Porter, and Sunwing for lack of standing; and

b) The complaint of Mr. Lukács be dismissed against the respondents for lack of standing.

Position of Mr. Lukács and Mr. Krygier

Although the Agency did not seek comments from Mr. Lukács or Mr. Krygier with respect to the respondents' motion, Mr. Lukács states in a July 30, 2013 e-mail that the reliefs sought by the respondents regarding his status are hypothetical at this point, as he has not yet filed a complaint.

On August 8, 2013, Mr. Beliveau, representing Mr. Krygier, stated that in light of the Agency's consistent rulings on the scope of section 67.2 of the CTA and section 111 of the ATR, (i.e. Decision Nos. 746-C-A-2005 (*Black v. Air Canada*), 215-C-A-2006 (Joseph O'Toole against Air

Canada regarding its excess baggage charges for domestic carriage**),** LET-C-A-155-2009 (Complaint by Gábor Lukács against Air Canada with respect to its domestic Tariff**)**, and LET-C-A-47-2012 (Complaint by Gábor Lukács against Air Canada), and its longstanding practice of adjudicating tariff complaints "on principle," it is unclear whether the Agency finds it necessary to hear from Mr. Krygier on that issue.

Analysis and findings

Mr. Krygier's "standing"

The respondents submit that Mr. Krygier has no standing to bring complaints against Air Canada, Air Transat, Sunwing, Jazz and Porter. The respondents submit that Mr. Krygier has not established that he is sufficiently affected by the policies challenged and that he has the requisite "direct personal interest standing" or "interest for public interest standing."

The respondents refer to Decision No. 431-AT-MV-2008 to support their position. The Agency notes that the application at issue in that Decision concerned the Agency's mandate to inquire into matters concerning undue obstacles in the transportation network to the mobility of persons with disabilities. As such, the applicant referred to in Decision No. 431-AT-MV-2008 clearly lacked the personal interest required to trigger the Agency's jurisdiction pursuant to subsection 172(1) of the CTA; it was neither a person with a disability or a person having filed a request on behalf of a person with a disability. Therefore, the conclusions reached in that Decision have no bearing on the present case.

In Decision No. 746-C-A-2005, the Agency denied a motion for dismissal, similar to the motion at issue in this case, in which Air Canada claimed that "the Agency should exercise its jurisdiction only when confronted by 'a real and precise factual background involving the application of terms and conditions'" (see para. 4 of the Decision). In that Decision, the Agency stated that (see paras. 5 to 8 of the Decision):

> The Agency is of the opinion that it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and conditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR. In this regard, the Agency notes that subsection 67.2(1) of the CTA provides that, on the basis of a "complaint in writing to the Agency by any person", the Agency may take certain action if the Agency determines that the terms or conditions at issue are unreasonable or unduly discriminatory. 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, 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.
>
> The Agency is of the opinion that by virtue of incorporating terms and conditions of transport in a tariff, Air Canada is applying those terms and conditions, and is conveying such information to the travelling public. There would be no purpose to set out the terms and conditions of transport in a tariff if it could be argued that, in doing so, Air Canada is not really applying these terms and conditions.
>
> 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.
>
> The Agency is therefore of the opinion that it has jurisdiction to consider complaints that, on principle, allege that terms and conditions of carriage are inconsistent with subsection 67.2(1) of the CTA and section 111 of the ATR.

Further, in Decision Nos. 215-C-A-2006 (*O'Toole v. Air Canada*), and LET-C-A-155-2009 (*Lukács v. Air Canada*), the Agency denied motions filed by Air Canada to dismiss complaints on similar grounds. In both cases, the Agency, referring to Decision No. 746-C-A-2005, concluded it has jurisdiction to consider the complaints.

The Agency is of the opinion that the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint, and that it has jurisdiction to consider Mr. Krygier's complaint as filed. As such, the Agency denies the respondents' motion to dismiss Mr. Krygier's complaint against Air Canada, Air Transat, Sunwing, Jazz and Porter and will consider the complaint filed against all respondents.

Mr. Lukács' standing

Regarding the respondents' request that Mr. Lukács' complaint be dismissed, the Agency agrees with Mr. Lukács' that the relief sought is hypothetical at this point, as Mr. Lukács has not filed a complaint. Therefore, is of the opinion that it is not necessary for the Agency to consider the issue relating to Mr. Lukács' standing as a complainant in this matter.

Issue 2: An alternative application for leave to intervene by Mr. Lukács should that request be revisited.

Position of the respondents

The respondents state that while Mr. Lukács appears to have withdrawn his application to intervene, should he decide nonetheless to seek such recourse, Mr. Lukács does not meet the standard of intervener status and that any such application should be dismissed. To support their

position, the respondents state, among other things, that there are no issues raised by Mr. Lukács in his request for intervener status that are not adequately addressed in the complaint filed by Mr. Krygier.

The respondents, therefore, request that the Agency dismiss any application for intervener status by Mr. Lukács, should it be sought.

Position of Mr. Lukács

Although the Agency did not seek comments from Mr. Lukács with respect to the respondents' motion, Mr. Lukács states in a July 30, 2013 communication that he advised the Agency on July 20, 2013 that he would be filing a complaint instead of seeking intervener status.

Analysis and findings

With respect to the respondents' request for dismissal of any future application for intervener status by Mr. Lukács, the Agency notes that Mr. Lukács has decided not to intervene. As such, it is not necessary for the Agency to consider the issue relating to Mr. Lukács' standing as an intervener in this matter.

Further directions will be provided to resume pleadings regarding Mr. Krygier's complaint.

Should you have any questions regarding the foregoing, you may contact Shanda Frater by e-mail at shanda.frater@otc-cta.gc.ca or by telephone at 819-953-0341.

Sincerely,

(signed)

Cathy Murphy
Secretary

BY THE AGENCY:

(signed) (signed)

Sam Barone
Member

Geoffrey C. Hare
Member

c.c. kevkrygier@gmail.com
lukacs@AirPassengerRights.ca
lmackenzie@westjet.com
louise-helene.senecal@aircanada.ca
anil.mohan@flyjazz.ca
george.petsikas@transat.com
greg.shehan@flyporter.com
smirza@sunwing.ca

Case Name:

Lukács v. Canada (Transportation Agency)

Between
Dr. Gábor Lukács, Appellant, and
Canadian Transportation Agency, Respondent

[2014] F.C.J. No. 301

2014 FCA 76

456 N.R. 186

Docket: A-279-13

Federal Court of Appeal
Halifax, Nova Scotia

Dawson and Webb JJ.A. and Blanchard J.A. (ex officio)

Heard: January 29, 2014.
Judgment: March 19, 2014.

(63 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or functions -- Types -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was

reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Statutory interpretation -- Statutes -- Construction -- By context -- Legislative intent -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Appeal by Lukacs from the Canada Transportation Agency's decision to enact a rule (the "quorum rule") that provided that in all proceedings before the Agency, one member constituted a quorum. Prior to the enactment of the quorum rule, two members of the Agency constituted a quorum. The quorum rule was not made with the approval of the Governor in Council. The appellant took the position that the rules governing the conduct of the proceedings before the Agency were regulations within the meaning of s. 36(1) of the Canada Transportation Act and as such could only be made with the approval of the Governor in Council and that as the rules were originally approved by the Governor in Council, they could not be amended without the approval of the Governor in Council. The Agency argued that the quorum rule was a rule respecting the number of members that were required to hear any matter or perform any function of the Agency and, as such, it could be enacted by the Agency pursuant to the Agency's rule-making power in s. 17 of the Act.

HELD: Appeal dismissed. The appropriate standard of review was reasonableness as the issue was whether the Agency properly interpreted its rule-making power contained in its home statute. The Agency's decision to enact the quorum rule pursuant to its rule-making power, so that the approval of the Governor in Council was not required, was reasonable. A contextual analysis of the Canada Transportation Act suggested that rules held a subsidiary position to orders or regulations, which was consistent with the view that rules were created by the Agency on its own initiative, while order came at the end of an adjudicative process and regulations must be approved by the Governor in Council. Furthermore, the interpretation of "rules" as a subset of "regulation" violated the presumption against tautology. Moreover, whenever "rule" appeared in the Act, it was in the context of internal procedural or non-adjudicative administrative matters and wherever "regulation" appeared in the Act it referred to more than internal, procedural matters. In addition, since the Act specifically required Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure but there was no express requirement for the Agency to do so, the application of the expressio unius maxim was consistent with the interpretation that the Agency's rules were not subject to that requirement. Furthermore, under the former Act, the predecessor of the Agency had the power to make rules with the approval of the Governor in Council. Interpreting

the Act so as to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) was consistent with the purpose of the Agency as envisioned in the Act. The fact that the Governor in Council had approved the Rules in 2005 did not mean that the approval of the Governor in Council was required to amend the rules. Firstly, Governor in Council approval in 2005 was an unnecessary step. Secondly, the quorum rule was new and did not rescind or vary any provision of the rules that was previously approved by the Governor in Council.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 4(1), s. 16(1), s. 17, s. 17(a), s. 17(b), s. 17(c), s. 25, s. 25.1(4), s. 29(1), ss. 34-36, s. 34(1), s. 34(2), s. 36(1), s. 36(2), s. 41, s. 54, s. 86(1), s. 86.1, s. 92(3), s. 109, s. 117(2), s. 128(1), s. 163(1), s. 169.36(1), s. 170

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 2.1

Interpretation Act, R.S.C. 1985, c. I-21, s. 2(1), s. 3(3), s. 15(2)(b), s. 35(1)

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, s. 22(1)

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

Counsel:

Dr. Gábor Lukács, the Appellant (on his own behalf).

Simon-Pierre Lessard, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made

with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> * * *
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament. [Emphasis added.]

* * *

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale. [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

* * *

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative

tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *Alberta Teachers'*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 N.R. 340, at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *Council of Canadians with Disabilities v. Via Rail, Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 92 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286, and *Yates v. Newfoundland and Labrador (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317.

20 In my view both decisions are distinguishable. At issue in the first case was whether

regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *Alberta Teachers'* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of"regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> * * *
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte :
>
> ...
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

2. (1) In this Act,

"regulation" means a statutory instrument

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Texte réglementaire :

a) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;

b) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.

Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation"do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the

purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation"in that in some contexts it can include a "rule". Where the word "regulation"can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation"is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to avoid speaking in vain *(Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

* subsection 16(1): dealing with the quorum requirement;
* subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
* subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
* subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
* subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
* subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
* section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
* subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
* subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word"regulations" generally refers to more than merely internal, procedural matters. For example:

* subsection 86(1): the Agency can make regulations relating to air services;
* section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
* subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
* subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;
* subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and
* section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an

Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. Canada*, [2000] F.C.J. No. 894, 257 N.R. 193, at paragraph 12 (F.C.A.).

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act,1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business

before the Agency, including the circumstances in which in camera hearings may be held; and

(*c*) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.

(2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]

* * *

22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

53 Subsection 29(1) of the Act requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

<u>What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?</u>

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005

stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347, at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

62 For these reasons, I would dismiss the appeal. In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

DAWSON J.A.
WEBB J.A.:-- I agree.
BLANCHARD J.A. (*ex officio*):-- I agree.

** Translation **

Case Name:

Thibodeau v. Air Canada

Between
Michel Thibodeau, applicant, and
Air Canada and Air Canada Regional Inc., respondent, and
Commissioner of Official Languages of Canada, intervener

[2005] F.C.J. No. 1395

[2005] A.C.F. no 1395

2005 FC 1156

2005 CF 1156

[2006] 2 F.C.R. 70

[2006] 2 R.C.F. 70

292 F.T.R. 67

148 A.C.W.S. (3d) 1001

Docket T-346-02

Federal Court
Ottawa, Ontario

Beaudry J.

Heard: May 16 and 17, 2005.
Judgment: August 24, 2005.

(101 paras.)

Counsel:

Michel Thibodeau (representing himself), for the applicant.

René Cadieux and Louise-Hélène Sénécal, for the respondent.

Amélie Lavictoire, for the intervener.

REASONS FOR ORDER AND ORDER

1 BEAUDRY J.:-- The applicant, who is representing himself, has filed an application for a remedy under subsection 77(1) of the Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.) (OLA).

THE APPLICATION

2 The applicant is essentially seeking the following relief from the Court:

> [TRANSLATION]
>
> I. THE APPLICATION seeks, first of all, a DECLARATION that:
>
> (a) Air Canada and its subsidiary company Air Canada Regional Inc. are subject to the OLA, and more particularly Part IV, the Air Canada Public Participation Act (the ACPPA), and more particularly subsection 10(1) and paragraph 10(2)(a), and the Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48 (the Regulations);
> (b) Air Canada and its subsidiary company Air Canada Regional Inc. are not complying with the language obligations under Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;
> (c) the violation of the language rights under Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations is also a violation of the rights under sections 16 and 20 of the Canadian Charter of Rights and Freedoms (the Charter);
> (d) Air Canada and its subsidiary company Air Canada Regional Inc. failed to comply with their language obligations under Part IV of the

OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations on August 14, 2000 on flight AC 1347 between Montréal and Ottawa, and thereby breached the language rights of Michel Thibodeau guaranteed by the Charter;

(e) the provisions of the OLA, the ACPPA and the Regulations prevail over the provisions of trade agreements or collective agreements and their enforcement and these agreements cannot effectively absolve Air Canada and Air Canada Regional Inc. of their language obligations under Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;

II. THE APPLICATION further seeks a mandatory ORDER against the respondents Air Canada and Air Canada Regional Inc. requiring them, within six months of the delivery of judgment in this proceeding, or within any other period determined by the Court:

(a) to take all the necessary steps to ensure that the public can communicate with and receive available services from the respondents in French, in accordance with Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;

(b) without limiting the generality of the foregoing statements in the preceding paragraph, to take the following steps:

(i) to ensure that the respondents have an adequate bilingual capability and take all the other necessary steps to provide services to the public in French for in-flight services on routes with a significant demand;

(ii) to ensure, in the previously stated circumstances, that steps be taken by the respondents to actively offer service to the public, for example by making an active offer of service in French, entering into communication with it or by signage, notices or documentation in accordance with Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;

(iii) to establish adequate procedures and a system of supervision designed to quickly identify, document and quantify potential violations of language rights, which rights are set out in Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the

ACPPA and the Regulations;

(iv) to ensure that language rights, as described in Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations, prevail over any agreement executed by the respondents and any collective agreements that involve them;

III. THE APPLICATION further seeks a REMEDY under subsection 24(1) of the Charter, subsection 77(4) of the OLA and rule 53 of the Federal Court Rules, 1998, having regard for the circumstances and in order to ensure compliance by the respondents with the Charter, the OLA, the ACPPA and the Regulations. THE APPLICATION is seeking the following RELIEF:

(a) the payment by the respondents to the applicant as damages of $25,000.00 or any other amount considered appropriate by the Court;
(b) the payment by the respondents to the applicant as punitive and exemplary damages of $500,000.00 or any other amount considered appropriate by the Court;
(c) any further RELIEF that the Court considers appropriate and just to order;

IV. THE APPLICATION further seeks a mandatory ORDER against the respondents, Air Canada and Air Canada Regional Inc., requiring them to give the applicant, Michel Thibodeau, a letter of apology, which shall be posted by the respondents in all the Air Canada and Air Canada Regional Inc. customer service counters. This letter should be visible to the public, easily readable, posted for a duration of two or more weeks and include, inter alia, the following:

(a) An acknowledgement that Air Canada and Air Canada Regional Inc. are legally required to provide services in French in accordance with the provisions of Part IV of the OLA, the ACPPA and the Regulations;
(b) An acknowledgement that Air Canada and Air Canada Regional Inc. have breached their duty to provide services in French to Francophone passengers;
(c) Apologies to Michel Thibodeau for the lack of service in French and

for the lack of respect on the part of Air Canada and Air Canada Regional Inc. associated with the incident of August 14, 2000; [emphasis in original]

ISSUES

3 The issues are the following:

1. Does section 10 of the Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.) (ACPPA), as amended in July 2000, impose an obligation of result on Air Canada in respect of its subsidiaries instead of an obligation of means?
2. (a) What is the admissible evidence in this case?

   (b) In light of the evidence, is there a breach of the applicant's language rights?

3. More particularly, but without limitation:

   (a) Does the Canadian Charter of Rights and Freedoms apply to Air Canada and Air Canada Regional Inc.?
   (b) Having regard to section 10 of the ACPPA, as amended, does the applicant have an independent remedy against Air Canada Regional Inc.?
   (c) Having regard to the circumstances, does the applicant have standing to raise legal issues and remedies that are not specific to his personal legal situation?
   (d) Does section 79 of the OLA prevail over the other federal statutes?
   (e) Is section 25 of the OLA applicable in the circumstances?

4. In view of the legal situation of the applicant and the respondents, particularly in the wake of the orders issued under the Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36 (CCAA), is the applicant entitled to relief other than that already provided under the CCAA?
5. Do the provisions of the OLA, the ACPPA and the Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48 prevail over the provisions of trade agreements or collective agreements?

FACTUAL CONTEXT

4 On August 14, 2000, the applicant and his wife were passengers on board flight AC 1347 of Air Ontario departing from Montréal for Ottawa.

5 Air Ontario is a subsidiary of Air Canada and, since January 1, 2001, has been legally part of the merged unit known as Air Canada Regional Inc.

6 The only flight attendant on duty (Marne Guenther) on flight AC 1347 was a unilingual Anglophone. She asked the applicant and his wife in English if they would be kind enough to give up their seats to accommodate a couple with a baby. They agreed to do so.

7 During the snack service, the applicant spoke to Ms. Guenther in French. The flight attendant replied: "I apologize that I do not speak French. Would you like anything to drink?" (flight attendant's version). The applicant's version: "Excuse me, I do not speak French."

8 The versions differ regarding the events that followed. The applicant submits that he did not use a threatening tone but admits that he was upset that he could not obtain service in French.

9 The flight attendant and other witnesses who were present, on the other hand, allege that the applicant, through the tone of his voice, intimidated some passengers, including Ms. Guenther.

10 Another flight attendant (Ms. Lawn), who was in uniform but not on duty aboard flight AC 1347, then intervened to help Ms. Guenther and serve as her interpreter with the applicant.

11 Dissatisfied, the applicant asked to speak to the captain. The flight was a short one and the plane had already begun its descent. Ms. Lawn explained to the applicant that it would be impossible to speak to the captain since he did not speak French.

12 Upon his arrival at the Ottawa airport, two officers of the Ottawa-Carleton police force boarded the plane to meet with the applicant in response to a call from Air Ontario. Since the police intervention amounted to nothing more than an on-site intervention and necessitated no action on their part, there was no written report.

13 In their oral submissions, the respondents state that they did not want to label the applicant as having been under the influence of "air rage".

14 On August 16, 2000, the applicant filed a written complaint with the Commissioner of Official Languages, Air Canada and Air Ontario concerning the lack of services in French on board flight AC 1347.

15 The applicant received an acknowledgement of receipt from the office of the Commissioner of Official Languages and Air Ontario. However, he was informed by Air Canada, in a telephone conversation, that it would not respond to his complaint as the matter concerned only Air Ontario,

an independent company of Air Canada.

16 A report of the Office of the Commissioner of Official Languages was delivered to the applicant in January 2002 and the findings may be summarized as follows:

- The flight attendant on duty was unable to provide service in French to the passengers, despite the fact that this flight services a route with a significant demand for services in both official languages, pursuant to paragraph 7(4)(c) of the Regulations.
- Air Canada and Air Ontario did not fulfill their obligations under subsection 10(2) of the ACPPA and Part IV of the OLA.
- Since the ACPPA did not give the Air Canada regional carriers who operate in Eastern Canada some time in which to comply with their obligations, as was provided for the Western subsidiaries (subsection 10(5) of the ACPPA), Air Canada's obligations took effect immediately upon the coming into force of the ACPPA amendments, on July 5, 2000.
- The Commissioner's analysis indicates that over the last ten years Air Canada's efforts to fulfill its obligations under the OLA have had essentially no effect since there has been no appreciable improvement in service in French.
- The OLA is quasi-constitutional legislation and as such the public's rights are not negotiable. The respondents should not be required to negotiate the public's language rights with the union. They must persuade the union representatives that the seniority provisions cannot contravene the duty to provide services in both official languages on designated flights. They must clearly state that the assignment of bilingual flight attendants to designated bilingual flights is not negotiable.

17 The applicant subsequently filed this application. On April 1, 2003, Air Canada was placed under the protection of the CCAA. Mr. Justice Farley of the Superior Court of Ontario granted Air Canada and some of its subsidiaries protection against their creditors so they could proceed in an orderly way with a restructuring of their activities.

18 On April 9, 2003, the Commissioner of Official Languages (the Commissioner) was given leave to intervene in this proceeding with respect to the issue of interpretation of section 10 of the ACPPA.

19 On October 5, 2003, Mr. Justice Noël of this Court made an order staying these proceedings until Mr. Justice Farley's order to stay was definitively lifted.

20 On September 18, 2003, Farley J. made a "Claims Procedure Order" (CPO) establishing the procedure to be taken in making a claim under the ACPPA on behalf of unsecured creditors.

21 Observing the problem that exists concerning the appropriate forum for determining a claim under the OLA, Noël J. issued a direction in which he requested that the parties ask Farley J. which forum (the CPO or the Federal Court) would be the most appropriate for making determinations arising out of this case. Farley J. determined that the CPO is the appropriate forum for dealing with the monetary portion of the claim, but that the non-monetary aspects should be heard by the Federal Court.

22 On June 2, 2004, Noël J., taking into consideration the determination by Farley J., made a second order dismissing the request to lift the order to stay, pending the issuance of the final order of Farley J. or upon application by one of the parties should the circumstances so warrant.

23 Mr. Thibodeau's claim was rejected by the Air Canada monitor and he appealed that decision. That appeal was heard by Mr. Boudreault (a retired former judge) on the basis of the documentation on file under the CPO. He concluded that Air Canada had failed to comply with the applicant's language rights under the OLA and assessed the damages at $1,175 including interest, leaving the Federal Court the discretion to determine the costs.

24 Mr. Thibodeau appealed this decision to the Superior Court of Ontario alleging that the value of the award was unreasonable and ought to be increased. Mr. Justice Rouleau dismissed the applicant's appeal and upheld Mr. Boudreault's decision.

25 On February 15, 2005, Noël J. made two orders -- the first, ordering that the stay of proceedings be lifted to allow the applicant to proceed to the hearing of his case, and the second listing the issues to be decided by this Court.

ANALYSIS

1. Does section 10 of the ACPPA, as amended in July 2000, impose an obligation of result on Air Canada in respect of its subsidiaries instead of an obligation of means?

26 Air Canada was legally constituted by Parliament in 1937 under the name "Trans-Canada Airlines". The name "Air Canada" replaced "Trans-Canada Airlines" pursuant to legislation enacted in 1964.

27 The Canadian government decided to privatize the airline. This project materialized through the enactment of the ACPPA. The airline, previously a Crown corporation, now became an ordinary company whose activities were subject to the Canada Business Corporations Act, R.S.C. 1985, c. C-44.

28 Under section 10 of the ACPPA, the OLA applies to Air Canada. It is clear that this company is under a statutory duty to comply with the OLA and the Regulations thereunder.

29 Because of differences of opinion concerning the extent of Air Canada's linguistic obligations in respect of its subsidiaries, Parliament decided to amend the ACPPA. Section 10 of the ACPPA now expressly provides, effective July 5, 2000, that Air Canada must ensure that its subsidiaries comply with Part IV of the OLA. In other words, the ACPPA provides that Air Canada customers may communicate with and be served in the official language of their choice when they use the services of Air Canada subsidiaries (subsection 10(2)).

30 On July 6, 2000, Air Canada sent a message to all staff members of the regional carriers informing them of their official languages obligations under the amendments to the ACPPA. This message clearly stated that, effective July 2000, Air Ontario was required by law to provide its in-flight services in both official languages [TRANSLATION] "on all flights departing Montréal, Ottawa or Moncton, flights to those cities or flights that include a transit in those cities and on all flights within Ontario, Quebec and New Brunswick ...".

31 On November 2, 2000, in a letter from Air Ontario, Manon Stuart, OLA Implementation Coordinator for Air Canada regional airlines, confirmed that Air Ontario had been subject to the OLA since July 5, 2000.

32 It is undeniable, therefore, that the OLA applies to Air Canada and to all of its subsidiaries in respect of communications with travellers. But what is the extent of this obligation? Is it an obligation of result as the applicant and the intervener contend, or is it an obligation of means as the respondents submit?

33 It is important to assess the intensity of the obligation under subsection 10(2) of the ACPPA. The classification of duties according to their intensity is a doctrinal classification. Parliament does not define this intensity; instead, it describes the extent of the obligation. Classification is an important means in practical terms for determining the evidence that the applicant must adduce and the grounds of exoneration available to the respondents.

34 Jean-Louis Baudouin and Pierre-Gabriel Jobin define the obligation of means and of result as follows:

> [TRANSLATION]
>
> Obligation of means - The obligation of means is the obligation for the satisfaction of which the debtor is required to act with prudence and diligence with a view to obtaining the agreed result, using all reasonable means, but without guaranteeing the creditor that the result will be achieved (p. 32)
>
> Obligation of result - The obligation of result is the obligation for the satisfaction of which the debtor is required to provide the creditor with a specific and defined

result (p. 34)

Baudouin, Jean Louis and Pierre-Gabriel Jobin, Les Obligations, 5th ed., Les éditions Yvon Blais Inc., Cowansville, Quebec, 1998, 1217 pages.

35 In the case of an obligation of means, the respondent will be liable only if it has not exercised due diligence and care in respect of its obligation. The obligation of result, on the contrary, suffices to impose a presumption of fault on the respondent. Accordingly, in order to prove it is not liable, the respondent must establish that the non-performance or harm results from a force majeure. Absence of fault is not sufficient to exonerate it (Baudouin, supra, pages 36-37).

36 A number of factors must be considered in analyzing the intensity of the duties under section 10 of the ACPPA: the text of section 10 of the ACPPA, the context of the Act and the intention of Parliament when it enacted the OLA and the ACPPA (Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, page 41, paragraph 21).

Current meaning of the words

37 The current meaning of the words focuses on the wording of the section in question. This method of interpretation presumes that Parliament chose certain words the use and meaning of which is that of the general population. The text of section 10 of the ACPPA reads as follows (since July 5, 2000, through the coming into force of section 18 of the Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence, S.C. 2000, c. 15 (AAACPPA)):

Official Languages Act

10. (1) The Official Languages Act applies to the Corporation.

Duty re subsidiaries

(2) Subject to subsection (5), if air services, including incidental services, are provided or made available by a subsidiary of the Corporation, the Corporation has the duty to ensure that any of the subsidiary's customers can communicate with the subsidiary in respect of those services, and obtain those services from the subsidiary, in either official language in any case where those services, if provided by the Corporation, would be required under Part IV of the Official Languages Act to be provided in either official language.

Subsidiary body corporate

(3) For the purposes of this section, a body corporate is a subsidiary of the Corporation if

(a) it is controlled by

(i) the Corporation,
(ii) the Corporation and one or more bodies corporate each of which is controlled by the Corporation, or
(iii) two or more bodies corporate each of which is controlled by the Corporation; or

(b) it is a subsidiary of a body corporate that is a subsidiary of the Corporation.

Control

(4) For the purposes of subsection (3), a body corporate is controlled by another body corporate if

(a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of the other body corporate; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

Application of subsection (2)

*(5) Subsection (2) applies

(a) in respect of air services, including incidental services, provided or made available by a subsidiary of the Corporation at a facility or office in Manitoba, British Columbia, Saskatchewan, Alberta, the Yukon Territory,

the Northwest Territories or Nunavut or on a route wholly within those provinces, one year after that subsection comes into force if it had been a subsidiary of the Corporation on that coming into force; and

(b) in respect of a person that becomes a subsidiary of the Corporation only after that subsection comes into force, or in respect of Canadian Airlines International Ltd. or Canadian Regional Airlines Ltd. if that airline becomes a subsidiary of the Corporation before that subsection comes into force, three years after the person or airline becomes a subsidiary.

* [Note: Subsection 10(2) in force July 5, 2000, see SI/2000-59.]

Extension

(6) The Governor in Council may, by order made on the recommendation of the Minister of Transport, increase the three years referred to in paragraph (5)(b) to a maximum of four years in respect of a route served, or an office or facility from which service is provided, by a subsidiary.

Duties of replacements

(7) If Canadian Airlines International Ltd., Canadian Regional Airlines Ltd. or a subsidiary of the Corporation replaces the Corporation or one of its subsidiaries in providing an air service, including incidental services, that the Corporation or the subsidiary provided on or after December 21, 1999, the Corporation has the duty to ensure that any of the customers of the person who replaces the Corporation or the subsidiary can communicate with that person in respect of those services, and obtain those services from that person, in either official language in any case where those services, if provided by the Corporation or the subsidiary, would be required under Part IV of the Official Languages Act or under subsection (2) to be provided in either official language.

For greater certainty

(8) For greater certainty, subsections (2) and (7) do not affect any duty that the Corporation may have under section 25 of the Official Languages Act.

Deemed duty

(9) For the purposes of Parts VIII, IX and X of the Official Languages Act, the duties referred to in subsections (2) and (7) are deemed to be duties under Part IV of that Act.

* * *

Loi sur les langues officielles

10. (1) La Loi sur les langues officielles s'applique à la Société.

Communication avec les voyageurs

(2) Sous réserve du paragraphe (5), la Société est tenue de veiller à ce que les services aériens, y compris les services connexes, offerts par ses filiales à leurs clients le soient, et à ce que ces clients puissent communiquer avec celles-ci relativement à ces services, dans l'une ou l'autre des langues officielles dans le cas où, offrant elle-même les services, elle serait tenue, au titre de la partie IV de la Loi sur les langues officielles, à une telle obligation.

Filiales

(3) Pour l'application du présent article, une personne morale est la filiale de la Société si, selon le cas :

a) elle est contrôlée :

(i) soit par la Société,
(ii) soit par la Société et une ou plusieurs personnes morales elles-mêmes contrôlées par celle-ci,
(iii) soit par des personnes morales elles-mêmes contrôlées par la Société;

b) elle est la filiale d'une filiale de la Société.

Contrôle

(4) Pour l'application du paragraphe (3), une personne morale est contrôlée par une autre personne morale si :

a) des valeurs mobilières de la personne morale conférant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont détenues, autrement qu'à titre de garantie uniquement, par cette autre personne morale ou pour son bénéfice;
b) les votes que comportent ces valeurs mobilières sont suffisants, en supposant leur exercice, pour élire une majorité des administrateurs de la personne morale.

Application

*(5) Le paragraphe (2) s'applique :

a) un an après son entrée en vigueur, à l'égard des services aériens, y compris les services connexes, offerts soit à un bureau au Manitoba, en Colombie-Britannique, en Saskatchewan, en Alberta, au Yukon, dans les Territoires du Nord-Ouest ou au Nunavut, soit relativement à un trajet dans ces provinces, par une filiale de la Société qui avait ce statut lors de cette entrée en vigueur;
b) à l'égard des Lignes aériennes Canadien International ltée et des Lignes aériennes Canadien Régional ltée, dans le cas où celles-ci deviennent des filiales de la Société avant cette entrée en vigueur et à l'égard de la personne qui ne devient une filiale de la Société qu'après cette entrée en vigueur, trois ans après l'acquisition par elles du statut de filiale.

* [Note : Paragraphe 10(2) en vigueur le 5 juillet 2000, voir TR/2000-59.]

Prorogation

(6) Le gouverneur en conseil peut, par décret pris sur recommandation du ministre

des Transports, proroger le délai de trois ans visé à l'alinéa (5)b) d'au plus un an à l'égard soit d'un trajet emprunté par une filiale, soit d'un bureau où elle offre des services.

Obligation en cas de substitution

(7) Si les Lignes aériennes Canadien International ltée, les Lignes aériennes Canadien Régional ltée ou une filiale de la Société offrent à la place de la Société ou de l'une de ses filiales un service aérien, y compris les services connexes, que celles-ci offraient le 21 décembre 1999 ou par la suite, la Société est tenue de veiller à ce que les services offerts par la personne à ses clients à sa place ou à la place de l'une de ses filiales le soient, et à ce qu'ils puissent communiquer avec la personne relativement à ces services, dans l'une ou l'autre des langues officielles dans le cas où, elle-même ou l'une de ses filiales offrant les services, elle serait tenue, au titre de la partie IV de la Loi sur les langues officielles ou du paragraphe (2), à une telle obligation.

Article 25 de la Loi sur les langues officielles

(8) Il demeure entendu que les paragraphes (2) et (7) ne portent pas atteinte à l'obligation qui incombe à la Société au titre de l'article 25 de la Loi sur les langues officielles.

Assimilation

(9) Pour l'application des parties VIII, IX et X de la Loi sur les langues officielles, les obligations prévues aux paragraphes (2) et (7) sont réputées être des obligations prévues à la partie IV de cette loi.

38 Subsection 10(2) provides that Air Canada has a duty to ensure that the customers of its subsidiaries can communicate and obtain services in either of the official languages. The English wording is in my opinion stronger than the language in the French version. It states that Air Canada "has the duty to ensure that any subsidiary's customers can communicate ... and obtain those services from the subsidiary in either official language ...".

39 To establish that it has only an obligation of means, Air Canada compares the wording of subsection 10(2) of the ACPPA with the wording of subsections 705.43(1) and (2) of the Canadian

Aviation Regulations, SOR/96-443, enacted pursuant to the Aeronautics Act, R.S.C. 1985, c. A-2. It states that the resulting obligation under these regulations is clearly an obligation of result because of the words "shall ensure" (doit s'assurer). It adds that the obligation under the ACPPA cannot be one of result since subsection 10(2) uses radically different language, "duty to ensure" (tenue de veiller).

40 In my opinion, the respondents ought instead to conduct a comparative study of the words used in the OLA if they wish to find out how to interpret their duties under the ACPPA. The Canadian Aviation Regulations are not regulations based on a quasi-constitutional enactment. Subsection 10(2) of the ACPPA refers to a quasi-constitutional enactment, the OLA. Consequently, the words in subsection 10(2) of the ACPPA must be construed in light of the language used in the OLA.

41 In terms of communication with and services provided to the public, the OLA provides, in sections 23 and 25, that "every federal institution ... has the duty" (in French, "qu'il incombe aux institutions fédérales" -- "incombe" meaning that federal institutions "ont la responsabilité ou la charge de" [TRANSLATION] "are responsible for", Le Nouveau Petit Robert, 1993). I would liken this obligation to the one in subsection 10(2) of the ACPPA: "has the duty to ensure" (est tenue de veiller à ...). The Federal Court has previously interpreted section 25 of the OLA as imposing an obligation of result on these institutions. In Quigley v. Canada (House of Commons), [2003] 1 F.C. 132, it was held that the House of Commons had breached its duties under the OLA in failing to ensure that the debates are made available in both official languages.

Context of the OLA

42 Section 82 provides that in the event of any inconsistency between Parts I to V of the OLA and any other Act of Parliament or regulation thereunder, other than the Canadian Human Rights Act and the regulations thereunder, these Parts prevail to the extent of the inconsistency.

43 Subsection 10(9) of the ACPPA, as amended, specifies that Air Canada's duties under subsections (2) and (7) are deemed to be the same as the duties of federal institutions under Part IV of the OLA (Communications with and services to the public). By explicitly subjecting Air Canada to the OLA through section 10 of the ACPPA, Parliament has compared Air Canada, for the purpose of this part of this Act, to a federal institution. That being said, Air Canada has the same duties as those incumbent on federal institutions, namely, to ensure that the services it provides itself or through its subsidiaries are consistent with the OLA.

Parliament's intention

44 In R. v. Beaulac, [1999] 1 S.C.R. 768, at paragraph 15, the Supreme Court of Canada states:

> In 1975, when this Court confirmed that language guarantees in s. 133 of the Constitution Act, 1867 were minimal provisions and did not preclude the

> extension of language rights by either the federal or the provincial legislatures (Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182, at pp. 192-93), a purposive and liberal approach to the interpretation of language rights was adopted... .

It was in this context that the OLA was enacted by Parliament. In fact, Part IV of the OLA is primarily intended to guarantee that federal institutions will implement measures that will enable Canadians to exercise fully the rights conferred on them by the Constitution, namely, to communicate with or receive services from the institutions of Parliament and the government of Canada in either of the official languages.

45 Section 2 of the OLA, which serves as an interpretive tool, provides that the purpose of the Act is to advance the equality of status and use of the English and French languages. In Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, at paragraph 23, the Supreme Court confirmed what the Federal Court, in Canada (Attorney General) v. Viola, [1991] 1 F.C. 373, had correctly held, that the OLA is not an ordinary statute:

> It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the Canadian Charter of Rights and Freedoms, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it." [Emphasis added.]

46 In light of the foregoing, the quasi-constitutional nature is clear. That is why the Act must be interpreted having regard to the constitutional guarantees and must be given such broad and liberal interpretation as will best ensure that these guarantees are attained (Pierre-André Côté, The Interpretation of Legislation in Canada, 3rd edition (Scarborough, Carswell, 2000), p. 500).

47 Section 16 of the Charter confirms that the substantive equality of language rights and section 2 of the OLA has the same effect. In Beaulac, supra, the Supreme Court of Canada ruled in paragraph 24 that "the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation." This principle of substantive equality between the two official languages means, for example, that language rights require government action for their implementation and accordingly create positive obligations for the State (Beaulac, supra, at paragraph 20).

48 Since the rights arising under the OLA are comparable to a constitutional guarantee, and since subsection 10(9) of the ACPPA provides that Air Canada's duty in subsection 10(2) is deemed to be a duty under Part IV of the OLA for the purposes of applying Parts VIII, IX and X of the OLA, I consider that this obligation is one of result.

49 The parameters of this obligation of result are found in section 22 of the OLA, which stipulates that this obligation exists within the National Capital Region or wherever, in Canada or elsewhere, there is a significant demand. Subsection 23(1) provides:

> 23.(1) For greater certainty, every federal institution that provides services or makes them available to the travelling public has the duty to ensure that any member of the travelling public can communicate with and obtain those services in either official language from any office or facility of the institution in Canada or elsewhere where there is significant demand for those services in that language.
>
> * * *
>
> 23.(1) Il est entendu qu'il incombe aux institutions fédérales offrant des services aux voyageurs de veiller à ce que ceux-ci puissent, dans l'une ou l'autre des langues officielles, communiquer avec leurs bureaux et en recevoir les services, là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

50 "Significant demand" has been defined in subsection 7(1) and paragraph 7(4)(c) of the Regulations:

> 7. (1) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public, other than air traffic control services and related advisory services, from an office or facility of a federal institution in an official language where the facility is an airport, railway station or ferry terminal or the office is located at an airport, railway station or ferry terminal and at that airport, railway station or ferry terminal over a year at least 5 per cent of the demand from the public for services is in that language.
>
> ...
>
> 7. (4) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public from an office or facility of a federal institution in both official languages where

...

(c) the office or facility provides those services on board an aircraft

(i) on a route that starts, has an immediate stop or finishes at an airport located in the National Capital Region, the CMA of Montreal or the City of Moncton or in such proximity to that Region; CMA or City that it primarily serves that Region, CMA or City,

(ii) on a route that starts and finishes at airports located in the same province and that province has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province, or

(iii) on a route that starts and finishes at airports located in the different provinces and each province has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province;

* * *

7. (1) Pour l'application du paragraphe 23(1) de la Loi, l'emploi d'une langue officielle fait l'objet d'une demande importante à un bureau d'une institution fédérale en ce qui a trait aux services offerts aux voyageurs, à l'exclusion des services de contrôle de la circulation aérienne et des services consultatifs connexes, lorsque le bureau est un aéroport, une gare ferroviaire ou de traversiers ou un bureau situé dans l'un de ces lieux et qu'au moins cinq pour cent de la demande de services faite par le public à cet aéroport ou à cette gare, au cours d'une année, est dans cette langue.

[...]

7. (4) Pour l'application du paragraphe 23(1) de la Loi, l'emploi des deux langues officielles fait l'objet d'une demande importante à un bureau d'une institution fédérale en ce qui a trait aux services offerts aux voyageurs, dans l'une ou l'autre des circonstances suivantes :

[...]

c) le bureau offre les services à bord d'un aéronef :

(i) soit sur un trajet dont la tête de ligne, une escale ou le terminus est un aéroport situé dans la région de la capitale nationale, dans la région métropolitaine de recensement de Montréal ou dans la ville de Moncton, ou un aéroport situé à proximité de l'une de ces régions ou ville qui la dessert principalement,

(ii) soit sur un trajet dont la tête de ligne et le terminus sont des aéroports situés dans une même province dont la population de la minorité francophone ou anglophone représente au moins cinq pour cent de l'ensemble de la population de la province,

(iii) soit sur un trajet dont la tête de ligne et le terminus sont des aéroports situés dans deux provinces dont chacune a une population de la minorité francophone ou anglophone représentant au moins cinq pour cent de l'ensemble de la population de la province;

2. (a) What is the admissible evidence in this case?

51 The respondents challenge the admissibility of the following exhibits:

1. Exhibit TM-15: Report of the Standing Joint Committee on Official Languages, "Air Canada: Good Intentions are Not Enough" (February 2002)
2. Exhibit TM-16: Summary and analysis of the proceedings of the Standing Joint Committee on Official Languages on the implementation of the Official Languages Act in Air Canada, "Air Canada and the implementation of the Official Languages Act" (September 2001)
3. Exhibit TM-17: Affidavit of Michel Robichaud
4. Exhibit TM-14: Report of the Commissioner of Official Languages, "Rapport d'enquête concernant l'absence de service en français sur le vol AC 1347 d'Air Ontario Montréal - Ottawa"

Exhibits TM-15, TM-16

52 The respondents allege that exhibits TM-15 and TM-16 are inadmissible because the respondents are legally unable to question the proceedings of the Standing Joint Committee on Official Languages or to challenge the findings in these reports. Consequently, they contend, it would be contrary to the traditional rules of evidence to admit them. In support of their contentions, they submit the decision of the Ontario Court of Appeal in Robb v. St. Joseph's Health Care Centre; Rintoul v. St. Joseph's Health Centre; Farrow v. Canadian Red Cross Society, [2001] O.J. 4605 (Ont. C.A.), upholding the decision at trial of Mr. Justice Macdonald, referring to paragraphs 23 to

26:

To the extent that Commissioner Krever relied on evidence which may be inadmissible in a civil trial to come to his conclusions, the defendants would be prejudiced by the introduction of such evidence. If the report were admitted, the defendants would be unable to have the opportunity to test the evidentiary findings which are contained in the report. They could not cross examine the report. They cannot know the evidence upon which the particular findings contained in the report are based. This was never a purpose for which the Krever Commission was intended. (emphasis added)

There are also public policy considerations which prevent the Krever Report from being admitted into evidence. To admit the Krever Report as evidence in this trial would have the effect of converting a commission of inquiry into something that it was never intended to be. A commission of inquiry is a means by which the executive branch of the government can be informed on a particular issue. A commission of inquiry cannot have the collateral purpose of providing evidence in civil proceedings. If I were to so find, parties in future civil proceedings could attempt to make use of the findings of a commission of inquiry for that purpose.

...

This reasoning also applies to prevent the Grace Report from being admitted into evidence as proof of its contents. The Grace Report is dated January 21, 1997. It is the report of the Information Commissioner of Canada John W. Grace. It contains the results of his investigation of a complaint made on September 8, 1995 against Health Canada following reports which alleged the destruction of audio tapes and verbatim transcripts in the possession of the Canadian Blood Committee Secretariat (the "Secretariat") of meetings of the Canadian Blood Committee (the "CBC") held between 1982 and 1989. Underlying the allegation of destruction of the audio tapes and verbatim transcripts is the allegation that the destruction of records occurred to thwart their release under the Access to Information Act, R.S.C. 1985, c. A-1. Commissioner Grace focused in his report on a decision taken at a meeting on May 16-18, 1989 of the CBC which directed the Secretariat to destroy the records of all previous meetings of the CBC in the possession of the Secretariat since its inception in 1982. The Report of Commissioner Grace is, according to the plaintiffs, relevant to the issues in this action. The investigation was not a public process. Commissioner Grace was not

> required to apply a standard of proof analogous to civil proceedings.
>
> The reasoning which prohibits the admission of the Krever Report is applicable to the question of whether the Grace Report can be admitted.

[1998] O.J. 5394 (O.C. Gen. Div.)

53 Section 79 of the OLA allows the admission as evidence of information relating to any similar complaint in respect of the same federal institution. In 1997, the Federal Court, in Canada (Commissioner of Official Languages) v. Air Canada, [1997] F.C.J. No. 1834 (T.D.) (QL), analyzed this section. Here is what Mr. Justice Dubé said, at paragraphs 17 to 20:

> This section is one of a kind and does not appear in other similar legislation. Parliament"s intention is clearly to present the courts with a full context... .
>
> In my view, the purpose of section 79 is to enable the Commissioner to prove to the Court that there is a systemic problem and that it has existed for a number of years. Unless all similar complaints are filed in evidence, the Court cannot assess the scope of the problem and the circumstances of the application.
>
> It is up to the judge presiding at the hearing on the merits of the motion to assess the probative force of all these facts or all this information in the context of more general considerations... .
>
> The admissibility in evidence of this additional information of similar complaints nevertheless does not transform the hearing into a public commission of inquiry... .

54 Documents M-15 and M-16 do not provide an exhaustive overview of Air Canada's linguistic performance but they do provide an outline of the problems that had not been satisfactorily resolved at the time the reports were written. A number of witnesses were called to discuss problems Air Canada was having in connection with OLA compliance.

55 Concerning exhibit TM-15, three union representatives of the Air Canada employees drew attention to certain labour relations problems and gave their point of view on the services offered. In response to these allegations, the President and Chief Executive Officer, Robert Milton, accompanied by some of his managers, had their own opportunity to comment on and discuss with the Committee the difficulties confronting Air Canada in complying with the OLA.

56 Document TM-16 is an analysis of the existing situation at Air Canada. The Committee met 13 times between 1980 and 2000. The Commissioner's office appeared several times while the Air Canada representatives appeared five times. The latter, therefore, had an opportunity to make submissions.

57 Exhibits TM-15 and TM-16 are not admissible as evidence of non-compliance with the OLA on Air Ontario's flight AC 1347 on August 14, 2000, but they may be useful in determining the appropriate relief under subsection 77(4) of that Act.

Exhibit TM-17

58 Exhibit TM-17 should not be admissible, according to the respondents, for it is an affidavit of Michel Robichaud filed in docket T-2536-96. This document was not filed by Mr. Robichaud but it was appended to the applicant's affidavit. The respondents argue that they are unable to cross-examine the author of this affidavit, which refers to 70 exhibits that were not filed in the record of this case.

59 The allegations contained in document TM-17 would not be admissible either, the respondents submit, because they involve a factual situation prior to the coming into force, on July 5, 2000, of the amendments to the ACPPA. According to this argument the affidavit cannot, therefore, serve as evidence of information concerning "similar" or "comparable" complaints in respect of the same federal institution. In short, the respondents allege that prior to July 5, 2000, Air Canada was under no obligation to its subsidiaries and the complaints prior to that date are therefore not "similar" for the purposes of section 79 of the OLA.

60 I note that in document TM-17, Michel Robichaud, then an employee of the Office of the Commissioner of Official Languages, lists a number of complaints against Air Canada from November 1987 to 1996. In particular, there were 158 complaints concerning in-flight services. The exhibits appended to his affidavit are not filed, the most recent complaints dating more than four years before the coming into force of the amendments to section 10 of the ACPPA. Moreover, an abandonment was filed by counsel for the Commissioner of Official Languages in docket T-2536-96.

61 I agree with the respondents that this exhibit is inadmissible as evidence.

Exhibit TM-14 (Report of the Commissioner of Official Languages)

62 The reply to the question of the admissibility of the Commissioner's report may be found in the recent decision of the Federal Court of Appeal, Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] F.C.J. No. 1235 (F.C.A.) (QL), at paragraph 21. In that decision, the Court ruled on the purpose of section 77 of the OLA. It stated that the Commissioner's reports are admissible in evidence but they are not binding on the court and may be challenged like any other evidence.

[15] The Judge more than once characterized the proceeding filed by the Forum as an "application for judicial review under section 18.1 of the Federal Court Act". That is an error. Subsection 77(2) provides for "[a]n application" (referred to as a "recours" in the French text), and it is [TRANSLATION] "an application [demande] under section 77 of the Official Languages Act" that the Forum had filed. This proceeding is not an application for judicial review, although it is governed procedurally by the rules applicable to applications (see paragraph 300(b) of the Federal Court Rules, 1998 [SOR/98-106]). This application is instead similar to an action.

[16] The Commissioner, it is important to keep in mind, is not a tribunal. She does not, strictly speaking, render a decision; she receives complaints, she conducts an inquiry, and she makes a report that she may accompany with recommendations (subsections 63(1), (3)). If the federal institution in question does not implement the report or the recommendations, the Commissioner may lodge a complaint with the Governor in Council (subsection 65(1)) and, if the latter does not take action either, the Commissioner may lodge a complaint with Parliament (subsection 65(3)). The remedy, at that level, is political.

[17] However, to ensure that the Official Languages Act has some teeth, that the rights or obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone, Parliament has created a "remedy" in the Federal Court that the Commissioner herself (section 78) or the complainant (section 77) may use. This remedy, the scope of which I will examine later, is designed to verify the merits of the complaint, not the merits of the Commissioner's report (subsection 77(1)), and, where applicable, to secure relief that is appropriate and just in the circumstances (subsection 77(4)). The Commissioner's report is nevertheless the source or the pretext for the remedy or, to repeat the words of Madam Justice Desjardins in relation to the comparable report filed by the Information Commissioner, a [TRANSLATION] "precondition to the exercise of the remedy" (Canada (Information Commissioner) v. Canada (Minister of National Defence) (1999), 240 N.R. 244 (F.C.A.), at page 255): the capacity as an "applicant" to the Court is derived from the capacity as a "complainant" to the Commissioner (subsection 77(1)) and it is the date of communication of the report that serves as the point of departure for the calculation of the time periods (subsection 77(2)). The "complainant", according to subsection 58(2), may be a "person" or a "group".

[18] Thus we see that the remedy differs from an application for judicial review within the meaning of 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)]. It does not attack the "decision" of the federal institution as such. It may be undertaken by a person or a group, which may not be "directly affected by the matter in respect of which relief is sought" (see subsection 18.1(1) of the Federal Courts Act). The relief the applicant may be seeking is not limited to the remedies prescribed in subsection 18.1(3) of the Federal Courts Act, as the Court, by way of exception, has the discretion that it "considers appropriate and just in the circumstances" (subsection 77(4)). New evidence is admissible (section 79). The matter is heard and determined in a summary manner (section 80).

[19] There are some important implications to the fact that the remedy under Part X is basically similar to an action.

[20] For example, the judge hears the matter de novo and is not limited to the evidence provided during the Commissioner's investigation. The remedy is constantly shifting in the sense that even if the merit of the complaint is determined as it existed at the time of the alleged breach, the remedy, if there is one that is appropriate and just, must be adapted to the circumstances that prevail at the time when the matter is adjudicated. The remedy will vary according to whether or not the breach continues.

[21] Moreover, the Commissioner's reports are admissible in evidence, but they are not binding on the judge and may be contradicted like any other evidence. The explanation is obvious. The Commissioner conducts her inquiry in secret and her conclusions may be based on facts that the parties concerned by the complaint will not necessarily have been able to verify. Furthermore, for reasons that I will soon give, the purpose of the Court remedy is more limited than the purpose of the Commissioner's inquiry and it may be that the Commissioner takes into account some considerations that the judge may not consider. Also, I agree with the decision of Mr. Justice Nadon, then in the Trial Division, in Rogers v. Canada (Department of National Defence) (2001), 201 F.T.R. 41 (F.C.T.D.), who held, after accepting in evidence the report of the Commissioner, that (at paragraph 40):

> The conclusion that a breach of the Act has occurred, in any given case, must be reached after the judge has heard and weighed the evidence

advanced by both parties.

[Emphasis added.]

It is my view, therefore, that exhibit TM-14 is admissible but I do not consider myself bound by the conclusions set down in this document.

(b) In light of the evidence, is there a breach of the applicant's language rights?

63 The respondents submit that prior to July 5, 2000, Air Canada legally was under no obligation with respect to Air Ontario and Part IV of the OLA. They argue that common sense dictates that all flight attendants cannot become bilingual overnight. Following the adoption of the amendments to the ACPPA, between August 2000 and August 2001, Air Canada conducted surveys to determine which routes were characterized by "significant demand" within the meaning of subsection 7(2) of the Regulations. In January 2000, Air Canada began to take the necessary steps to fulfill the obligations of means that the amendments to the ACPPA were going to impose on it on July 5.

64 Since I have reached the conclusion that the amended provisions of the ACPPA lead to an obligation of result, I need not ask myself at this point the following question: "Did Air Canada adopt reasonable means to fulfill its obligations?"

65 In Les Obligations, supra, at page 35, it is stated that in terms of evidence, the lack of result creates a presumption of fault and places on the defendant's shoulders the burden of demonstrating that the failure to perform derives from a cause that is not attributable to the defendant. The mere fact of identifying absence of fault is not sufficient to exonerate the defendant from liability. The defendant must identify, by a preponderance of evidence, the existence of force majeure, or that the victim prevented the obligation from being performed, failing which the defendant will be liable for the non-performance.

66 The particulars related in the applicant's affidavit and the letter dated November 2, 2000, by Manon Stuart, Official Languages Act implementation coordinator, Air Canada Regional Airlines, persuades me that Air Canada did not provide services in French to Mr. Thibodeau on August 14, 2000, on the flight from Montréal to Ottawa. Similar findings are found in the decision of the retired judge Mr. Boudreault (applicant's volume 7, tab 6, paragraph 26), a decision upheld by Mr. Justice Rouleau of the Superior Court of Ontario (applicant's volume 7, tab 7, filed at the hearing).

3.

(a) Does the Canadian Charter of Rights and Freedoms apply to Air Canada and Air Canada Regional Inc.?

67 The respondents submit that the Charter expressly provides that the official languages provisions apply to federal institutions and the government of Canada. They contend that the Charter does not apply to Air Canada and its subsidiaries because they are private companies.

68 It is trite law that the Charter does not apply to purely private activities. Henri Brun, in the 16th edition of Charte des droits de la personne: Législation, Jurisprudence, Doctrine (Montréal: Wilson & Lafleur, 2003), page 599, defines the word "government" in section 32 of the Charter as meaning [TRANSLATION] "the federal and provincial executive power, and not the government in its most generic sense. According to section 32, the actors to which the Charter applies are the legislative, executive and administrative branches."

69 Baudouin and Mendes, in Charte Canadienne des Droits & Libertés, 3rd edition (Montréal: Wilson & Lafleur, 1996), pages 47 to 49, state that in order to find out whether the Charter applies, it is necessary to analyze the nature of the undertaking's activities. The company must exercise a governmental function, and the fact that it supplies public services does not necessarily meet the test of governmental function. Although a business corporation derives its existence from the governmental authority, this is not sufficient to subject it to compliance with the Charter.

70 In the case at bar, Air Canada's incorporating legislation, even before its privatization, stipulated that the company was not an agent of the Crown (section 24). Given the fact that Air Canada is now a private company, that it does not exercise a governmental function and does not implement any policy or program determined by the government, I conclude that Air Canada and its subsidiaries are not subject to the Charter (Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, paragraph 42).

(b) Having regard to section 10 of the ACPPA, as amended, does the applicant have an independent remedy against Air Canada Regional Inc.?

71 Subsection 10(2) of the ACPPA provides that the "Corporation" (Air Canada) has the duty to ensure that its subsidiaries provide services in both languages. It is therefore Air Canada that is accountable and not the subsidiaries, since the OLA does not directly apply to them. Subsection 10(2) is modelled on section 25 of the OLA, which provides that every federal institution has the duty to ensure that services provided or made available to the public by another person or organization on its behalf are provided in either official language as if the institution itself were providing the services.

72 The applicant has no independent remedy against Air Canada Regional Inc. The duty to ensure compliance with the OLA rests on Air Canada's shoulders. If there is no compliance with the Act, this is the responsibility of Air Canada and not of its subsidiary.

(c) Having regard to the circumstances, does the applicant have standing to raise legal issues and remedies that are not specific to his personal legal situation?

73 Part X of the OLA covers the proceedings that may be brought when the Act is not complied with. The applicant meets the tests in subsection 77(1): "Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV or

V, or in respect of section 91, may apply to the Court for a remedy under this Part." Section 76 gives jurisdiction to the Federal Court.

74 But in what circumstances may an applicant act in the public interest? Three factors were laid down by the Supreme Court of Canada in Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607. This judgment followed three previous decisions of that Court involving statutory challenges: Thorson v. Canada (Attorney General of Canada), [1975] 1 S.C.R. 138; Canada (Minister of Justice) v. Borowski, [1981] 2 S.C.R. 575 and Nova Scotia (Board of Censors) v. McNeil, [1978] 2 S.C.R. 662.

75 The three tests are as follows:

1. The applicant must raise a serious and justiciable issue;
2. He must have a genuine interest; and
3. There must be no other reasonable and effective manner in which the issue may be brought before the Court.

76 The respondents allege that the applicant only has standing in respect of his personal situation and that he cannot call for relief of a general and structural nature on behalf of the public interest. The respondents argue that the applicant, to attain standing, must demonstrate that there are no other reasonable and effective ways to submit the questions of public interest to the Court. In this regard, they cite Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236.

77 They submit that in the case at bar, the Commissioner of Official Languages, and not the applicant, would be the person in the best position to raise questions of public interest.

78 The applicant explains that he fulfills the three criteria applied in Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCTD 239 to uphold his standing on behalf of the public interest. But, in the alternative, he asks that the Court award him this status because the Supreme Court, in Finlay, supra, allowed for judicial discretion to grant standing even if the three criteria were not fulfilled.

79 In this case there is no doubt that the applicant raises a serious question and that he has a genuine interest in the subject matter of the application. However, is there some other, more reasonable and effective manner in which the issue may be brought before the courts? Perhaps the Commissioner could have exercised the remedy herself: English version: "78(1)(a) ... may apply to the Court for a remedy ..." following the conclusion of her investigation. But, based on my analysis of paragraph 78(1)(a) and subsection 78(2), I think both the complainant (the applicant in this proceeding) and the Commissioner may exercise the remedy under paragraph 78(1)(a). In the present circumstances, using my discretion, I grant the applicant standing on behalf of the public interest.

80 I will allow the parties and the intervener to make submissions to the Court on the non-monetary remedies claimed by the applicant.

(d) Does section 79 of the OLA prevail over the other federal statutes?

81 Section 82 of the OLA provides that in the event of any inconsistency between Parts I to V and any other Act of Parliament or regulation thereunder, those Parts prevail to the extent of the inconsistency. Section 79 is in Part X of the OLA, a part that is not mentioned in section 82 of the OLA. But the OLA is a quasi-constitutional statute and by its very nature prevails over other legislation.

82 Here, I adopt the position of Mr. Justice Dubé in Canada (Commissioner of Official Languages) v. Air Canada, supra, that section 79 is one of a kind and does not appear in other similar legislation. I believe that Parliament introduced this section because it thought it was important that the Court be able to obtain a more accurate portrait of the context so as best to determine the appropriate relief.

83 Consequently, I think that when a question must be decided under the OLA, section 79 prevails over the other rules of evidence. In my opinion, this section should be considered an exception to the general rules in evidentiary matters. To limit the scope of this section would, I think, conflict with Parliament's intention to allow the Court to obtain an overall appreciation of the situation.

(e) Is section 25 of the OLA applicable in the circumstances?

84 Subsection 10(1) of the ACPPA stipulates that the OLA applies to Air Canada. Under Part IV of the OLA, Air Canada has the duty to provide its customers with the opportunity to communicate in either of the official languages.

85 Section 25 of that Act provides that a federal institution that provides services through another person or organization on its behalf has a duty to ensure that this third party makes those services available in either official language as if the federal institution was itself providing the services. The interpretation of this section has not been unanimous in the past. Air Canada did not consider its subsidiaries to be third parties, and did not think section 25 applied to its subsidiaries. But with the amendment to subsection 10(2) of the ACPPA, Parliament decided to impose the section 25 OLA obligation on Air Canada on its subsidiaries, using the parameters set out in section 7 of the Regulations.

86 I do not think it is necessary to answer the question as posed, since in my opinion subsection 10(2) of the ACPPA is very clear and unambiguous. Nor do I need to question whether, in the past, Air Canada was under the same duty in regard to its subsidiaries as the one prescribed for third parties in section 25 of the OLA.

4. In view of the legal situation of the applicant and the respondents, particularly in the wake of the orders issued under the Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36 (CCAA), is the applicant entitled to relief other than that already provided under the CCAA?

87 The CCAA and the OLA are two federal statutes addressing two totally different concerns. The challenge, therefore, is to reconcile these two statutes when they are to apply simultaneously.

88 The purpose of the CCAA is to allow a company facing bankruptcy to propose a recovery plan to its creditors that would be more advantageous than the consequences of a bankruptcy and at the same time guarantee the survival of the business. Once the recovery plan is accepted and ratified by the court, it binds all of the creditors affected by the arrangement.

89 In the case at bar, Air Canada asked for and obtained protection under the CCAA. A number of orders were issued by Farley J. of the Ontario Superior Court, some ratifying a recovery plan with all of the consequences that this entails, inter alia.

90 The applicant was required to present the monetary portion of his claim ($525,000) to a [TRANSLATION] "claims officer concerning Air Canada and some of its subsidiaries", namely, the retired former judge, Mr. Boudreault. The latter determined the value of the applicant's claim at $1,175. In paragraph 40, Mr. Boudreault stated:

> [TRANSLATION] Concerning the claimant's request for an order as to costs and disbursements, although Mr. Thibodeau, who is not a lawyer, is not entitled to counsel fees, Lavigne v. Minister of Human Resources Development, FCA, Docket A-104-97 (T-1977-94), subsection 400(4) of the Federal Court Rules, 1998, might "to a certain extent ... satisfy, what fairness could dictate in that respect", as the Honourable Mr. Justice Marceau says in paragraph [2]. Absent any evidence, and since it appears that the case will continue in the Federal Court in regard to the other conclusions, I defer to that Court in this regard.

91 The applicant, dissatisfied with this decision and the dividend of about $80 he would receive, decided to appeal to the Ontario Superior Court.

92 His appeal was dismissed by Mr. Justice Rouleau who wrote, at paragraph 27 of his decision:

> [TRANSLATION] Mr. Thibodeau also referred to the high costs of the lawsuit. If the costs incurred by Mr. Thibodeau are high, a court will take this into account when the time comes to determine costs. The question of costs was not decided by Mr. Boudreault and was deferred to the Federal Court to be decided following the hearing on the non-monetary aspects of Mr. Thibodeau's suit.

No appeal was filed in the Ontario Court of Appeal.

93 Having examined Mr. Justice Farley's orders, and in particular the order dated August 24, 2004, at paragraphs 9, 29, 32 and 34 (correspondence and documents resulting from the reorganization of Air Canada under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, documents filed by the respondents), I am satisfied that the entire monetary portion of Mr. Thibodeau's claim is now settled, other than the question of costs and disbursements.

94 I will also have to determine the non-monetary relief requested that is just and appropriate in the circumstances.

5. Do the provisions of the OLA, the ACPPA and the Regulations prevail over the provisions of trade agreements or collective agreements?

95 The collective agreements with Air Canada are under the jurisdiction of the Canada Labour Code, R.S.C. 1985, c. L-2 (CLC) pursuant to section 91 of the Constitution Act, 1867, and section 4 of the CLC.

96 The CLC is a federal statute covered by section 82 of the OLA. Consequently, as that section provides, Parts I to V of the OLA prevail over inconsistent provisions of this statute and the regulations thereunder. Based on this principle, it can be concluded that the CLC must comply with the requirements arising out of the OLA insofar as the latter applies.

97 We know that the OLA applies to Air Canada. The collective agreements under the aegis of the CLC must not be incompatible with the implementation of the OLA's purpose. If some incompatibility develops, the OLA will prevail over the provisions of the collective agreement.

98 Pages 17-21 of the book by W.B. Rayner, The Law of Collective Bargaining (Carswell, 1995), are relevant:

> 17.5 The Collective Agreement and Other Statutes
>
> The existence of statutes that may touch on the matter in dispute under the collective agreement is reflective in two ways. First, the statute may purport to limit rights given under the collective agreement. Secondly, the statute, while not directly applicable to the claim under the agreement, may assist in interpreting the meaning of the agreement. The first category is essentially a question of precedence, i.e., does the statute or the agreement govern, while the second raises the issue of whether the arbitrator can apply and interpret the statute.
>
> The most fundamental issue of precedence occurs when the statute restricts or changes the operation of the collective bargaining process and restricts the effect of negotiated agreements ...

99 The author goes on to say that if the statute and the collective agreement come into conflict, the statute prevails.

> There is not one law for the arbitrator and another law for the rest of the society, and so if the collective agreement is in conflict with the statute, the statute prevails... .
>
> Our first question then can be readily answered. A provision in a collective agreement which conflicts with a statute is void even in cases where the conflict results from a proper interpretation of the statute rather than a direct provision purporting to void some parts of collective agreements.

100 These principles were laid down by the Supreme Court of Canada in McLeod v. Egan, [1975] 1 S.C.R. 517. They were restated in the recent decision of the Ontario Labour Relations Board in King-Con Construction Ont. Ltd., [2004] O.L.R.D. No. 773, by vice-chair Jack J. Slaughter, at paragraph 28:

> ... In MCLEOD, the Employer had disciplined an employee who refused to work more than 48 hours per week. The collective agreement contained broad management rights clause, and did not prohibit the Employer from scheduling an employee for more than 48 hours per week. Nevertheless, the Court concluded "that an arbitrator must look beyond the four corners of the collective agreement to determine the limits of an Employer's right to manage operations" (see para. 26) and made the Employer's management rights subject to the overtime limits specified in the EMPLOYMENT STANDARDS ACT, 1968, S.O. 1968 c. 35. Accordingly, the Court found the statutory limitation on overtime in the EMPLOYMENT STANDARDS ACT operated to modify the scope of the Employer's management rights under the collective agreement.

101 In this case, Air Canada had a duty to ensure that its subsidiaries were providing services in both official languages on routes with a significant demand. The principle that statutes prevail over collective agreements applies in this case. Air Canada must make the necessary arrangements with its unions to ensure compliance with the OLA, bearing in mind that this statute is quasi-constitutional in nature.

ORDER

THE COURT ORDERS that:

1. The applicant's proceeding against Air Canada Regional Inc. be dismissed without costs;
2. The applicant's proceeding against Air Canada be allowed;

3. The applicant shall serve and file his written submissions regarding costs and disbursements in a book not exceeding 10 pages, excluding appendices and authorities, no later than September 8, 2005. Air Canada shall do likewise no later than September 23, 2005. The applicant may file a reply no later than September 28, 2005.
4. The applicant shall serve and file his written submissions concerning the non-monetary claims in a book not exceeding 15 pages, excluding appendices and authorities, no later than September 8, 2005. Similarly, the intervener is urged to submit its own written submissions within the same period. Air Canada shall do likewise no later than September 23, 2005. The applicant and the intervener will have until September 28, 2005 for their reply.
5. After September 28, 2005, the parties will make oral arguments. In this regard, the court administrator will set a date for hearing at Ottawa and so notify them. This hearing will be held in French for a period not exceeding four hours for the entire case.
6. An order shall follow.

Certified true translation : Kelley Harvey

cp/e/qw/qlscl

** Translation **

Case Name:

Thibodeau v. Air Canada

Between
Air Canada, Appellant, and
Michel Thibodeau, Respondent, and
Commissioner of Official Languages of Canada, Intervener

[2007] F.C.J. No. 404

2007 FCA 115

165 A.C.W.S. (3d) 542

375 N.R. 195

Dockets A-442-05, A-630-05

Federal Court of Appeal
Ottawa, Ontario

Desjardins, Létourneau and Noël JJ.A.

Heard: March 20, 2007.
Judgment: March 22, 2007.

(29 paras.)

Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Appeal or review -- Particular circumstances -- Where litigant acting on own behalf -- Appeal by successful plaintiff from costs award dismissed -- Plaintiff was self-represented -- There were no issues of unusual complexity warranting a deviation from the rule that costs would be assessed in accordance with Column II of the table in Tariff B -- The costs awarded were reasonable and the disbursements were appropriate given the terms of the Ontario Superior Court's orders following Air Canada's proposal under the Companies' Creditors Arrangement Act -- Federal Courts Rules, Rule 407.

Constitutional law -- Canadian Charter of Rights and Freedoms -- Language rights -- Appeal by airline from orders requiring it to apologize and pay costs to passenger not served in French dismissed -- No evidence showed that the airline exercised due diligence to ensure that it complied with its obligations under the Official Languages Act -- Official Languages Act, s. 77.

Transportation law -- Aeronautics -- Offences -- Regulation -- Airlines -- Liability -- Appeal by airline from orders requiring it to apologize and pay costs to passenger not served in French dismissed -- No evidence showed that the airline exercised due diligence to ensure that it complied with its obligations under the Official Languages Act.

Appeal by Air Canada from two decisions allowing Thibodeau's application for a remedy against it for violations of the Official Languages Act. Thibodeau appealed from the quantum of costs awarded to him. Thibodeau alleged Air Canada was unable to serve him in French on a flight from Montreal to Ottawa, on which the only flight attendant was a unilingual Anglophone. Air Canada was ordered to formally apologize to Thibodeau and to pay him $3,500 in costs and $1,877 in disbursements. The costs were awarded to Thibodeau for his review and analysis of the case law. He was self-represented. In his cross-appeal, Thibodeau sought costs of $43,920.

HELD: Appeal by Air Canada dismissed; cross-appeal by Thibodeau dismissed. No evidence showed Air Canada acted with due diligence in attempting to comply with its obligations under the Act. Air Canada took no steps to ensure it was ready to comply with the Act until it came into force, despite the fact it knew what its obligations were several months earlier. There was no evidence Air Canada took steps to ensure its bilingual flight attendants worked on flights where French-speaking personnel were needed. There were no issues of unusual complexity warranting a deviation from the rule that costs would be assessed in accordance with Column II of the table in Tariff B. The costs awarded to Thibodeau were reasonable and the disbursements were appropriate given the terms of the Ontario Superior Court's orders following Air Canada's proposal under the Companies' Creditors Arrangement Act. He was awarded $7,000 for his costs of the appeal in addition to the disbursements claimed of $285.

Statutes, Regulations and Rules Cited:

Air Canada Public Participation Act, R.S.C. 1985 (4th Supp.), s. 10, s. 10(2)

Canadian Aviation Regulations, SOR/96-443, s. 705.43(1), s. 705.43(2)

Canadian Charter of Rights and Freedoms, 1982, s. 20

Companies' Creditors Arrangement Act

Federal Courts Rules, Rule 400(3)(a), Rule 400(3)(i), Rule 407

Official Languages Act, R.S.C. 1985 (4th Supp.), s. 26, s. 28, s. 29, s. 77(1)

Counsel:

René Cadieux, Louise-Hélène Sénécal and David Rhéault, for the Appellant.

Michel Thibodeau, for the Respondent.

Pascale Giguère and Amélie Lavictoire, for the Intervener.

The judgment of the Court was delivered by

1 **LÉTOURNEAU J.A.**:-- This is an appeal against two decisions of Mr. Justice Beaudry (judge) of the Federal Court, dated August 24, 2005 (2005 FC 1156), and December 1, 2005 (2005 FC 1621).

2 In these decisions, Beaudry J. allowed the respondent's application for remedy against the appellant under subsection 77(1) of the *Official Languages Act*, R.S.C. 1985 (4th Supp.) (OLA).

3 In Federal Court, the respondent, representing himself, alleged an infringement of his language rights insofar as, contrary to section 10 of the *Air Canada Public Participation Act*, R.S.C. 1985 (4th Supp.) (ACPPA), Air Ontario, a subsidiary of Air Canada, was unable to serve him in French on a flight from Montréal to Ottawa. The flight took place on August 14, 2000. The fact that the lone flight attendant on duty was a unilingual Anglophone is not contested.

4 The decision dated December 1, 2005, ordered the appellant to send the respondent a formal letter apologizing for the violation of his language rights. The decision also ordered the appellant to pay the respondent $5,375.95, including $1,876.95 in disbursements. The difference of $3,500 was awarded to the respondent for his review and analysis of the case law.

5 The respondent has filed a cross-appeal against the $5,375.95 lump sum determined by Beaudry J. He claims fees and disbursements totalling $43,920 instead of the amount awarded by the judge.

Analysis of the grounds in support of the appeal

6 Six grounds of appeal, five of which are incidental, were invoked by the appellant against the two decisions. Only one of these grounds concerns the merits of the case. I will consider only this ground, since it is sufficient to dispose of this matter.

7 I will then deal with the appellant's argument to the effect that the respondent is not entitled to costs because he represented. I hasten to add that the appellant has paid the respondent $5,375.95 in

execution of the Federal Court judgment. The appellant added at the hearing that it did not intend to claim the reimbursement of this amount should the appeal be allowed. Nevertheless, the appellant submits that this remains an important matter of principle, considering the cross-appeal, in which a considerable increase in this amount is sought.

8 As was done at the hearing for greater efficiency, I will deal with this issue when analysing the cross-appeal.

9 In Federal Court, there was a debate over the nature and intensity of the obligation under subsection 10(2) of the ACPPA. The first two subsections of section 10 read as follows:

> **10.** (1) The Official Languages Act applies to the Corporation.
>
> (2) Subject to subsection (5), if air services, including incidental services, are provided or made available by a subsidiary of the Corporation, the Corporation has the duty to ensure that any of the subsidiary's customers can communicate with the subsidiary in respect of those services, and obtain those services from the subsidiary, in either official language in any case where those services, if provided by the Corporation, would be required under Part IV of the Official Languages Act to be provided in either official language. **10.** (1) La Loi sur les langues officielles s'applique à la Société.
>
> (2) Sous réserve du paragraphe (5), la Société est tenue de veiller à ce que les services aériens, y compris les services connexes, offerts par ses filiales à leurs clients le soient, et à ce que ces clients puissent communiquer avec celles-ci relativement à ces services, dans l'une ou l'autre des langues officielles dans le cas où, offrant elle-même les services, elle serait tenue, au titre de la partie IV de la Loi sur les langues officielles, à une telle obligation.

10 Following arguments, the judge concluded that the appellant was subject to an obligation of result under section 10, not a mere obligation of means. While the former is met by delivering a a specific and defined result, the later is met where the debtor of the obligation has acted with prudence and diligence with a view to obtaining the agreed result.

11 On appeal, the intervener, the Commissioner of Official Languages, submitted that the intensity of the appellant's obligation under subsection 10(2) of the ACPPA should not be assessed in accordance with the Quebec civil law model, but rather on the basis of the statutory framework established under Part IV of the OLA and section 20 of the *Canadian Charter of Rights and Freedoms*.

12 Relying on a literal interpretation of section 10 and a comparative interpretation with sections 26, 28 and 29 of the OLA and subsections 705.43(1) and 705.43(2) of the *Canadian Aviation Regulations*, SOR/96-443, the appellant argued that, no matter what model is used, it was entitled to

raise a due diligence defence to explain and justify its failure to comply with section 10. In other words, the obligation under section 10 is not absolute and does not entail absolute liability in case of breach.

13 No matter what the nature and intensity of the obligation under subsection 10(2) of the ACPPA may be, and assuming, without deciding the point, that the appellant is entitled to a due diligence defence, there is no evidence on record giving rise to such a defence.

14 In fact, nothing in the affidavit of Chantal Dugas in support of the appellant's submissions allows me to infer, much less conclude, that the appellant acted with diligence so as to comply with the ACPPA and the obligations imposed on it under subsection 10(2).

15 The amendment adding the second subsection to section 10 of the ACPPA came into force on July 7, 2000. However, the appellant and Air Ontario had known since February 2000, when the bill to amend the SCPPA was tabled, that language obligations would soon be imposed on Air Ontario, although I realize that they did not know what the final content of those obligations would be: Appeal Record, volume 1, page 196. However, the evidence on record does not show that the appellant took any steps between February to June 2000 (when the bill was passed) to comply with or enforce the language obligations imposed by the ACPPA.

16 Moreover, when the bill was passed in June 2000, only 9 of Air Ontario's 179 flight attendants had working knowledge of French. In spite of that and the fact that subsection 10(2) of the ACPPA came into force at the beginning of July, it was only on some unspecified date in September 2000, after the incident involving the respondent, that the appellant began offering intensive language training courses to its flight attendants.

17 As far as the courses are concerned, the record does not contain any evidence about their duration, frequency or availability or about how many participants registered for them.

18 Finally, there is no evidence on record to the effect that efforts were made to assign the nine persons who had working knowledge of French to routes where the use of French was required.

19 The due diligence defence, which is well known in the context of regulatory offences under penal law, requires more than passivity: see *Lévis (City of) v. Tétreault*, [2006] 1 S.C.R. 420. At paragraph 30 of this unanimous judgment of the Supreme Court, Lebel J. wrote, "The concept of diligence is based on the acceptance of a citizen's civic duty to take action to find out what his or her obligations are". Once those obligations are known, they must be respected or precautions must be taken which a reasonable person would have taken to respect them under the circumstances: *ibidem*, at paragraph 15, *R. v.Chapin* [1979] 2 S.C.R. 121.

20 The appellant has the burden of proving due diligence. Assuming without deciding that such a defence was available, the appellant did not discharge that burden.

Analysis of the cross-appeal

21 The purpose of awarding costs is limited to providing the party receiving them with partial compensation: *Sherman v. The Minister of National Revenue*, 2004 FCA 29, at paragraph 8. Under Rule 407 of the *Federal Courts Rules*, they are assessed in accordance with Column III of the table in Tariff B. Tariff B is a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party. Column III concerns cases of average or usual complexity: *ibidem*, paragraphs 8 and 9.

22 I do not consider it appropriate to derogate from the principle of Rule 407 and proceed as the respondent did in Federal Court and on appeal by calculating costs according to Column V of the table in Tariff B. The nature and content of the issues do not warrant derogation from this principle.

23 In addition, the respondent is not a lawyer and cannot receive legal fees, including those specified in the Tariff.

24 However, given the three-fold objective of costs, i.e. providing compensation, promoting settlement and deterring abusive behaviour, case law has acknowledged that it is appropriate to award some form of compensation to self-represented parties, particularly when that party is required to be present at a hearing and foregoes income because of that: see *Sherman v. Minister of National Revenue*, [2003] 4 FCA 865. However, the compensation awarded may at best be equal to what the party could have obtained under the Tariff if it had been represented by a lawyer: see *Sherman, supra*, 2004 FCA 29, at paragraph 11. It is generally a fraction of that amount. This is what the Federal Court judge did.

25 I do not see in the award of $5,375.95 any error in the judge's exercise of his discretion which would warrant or require our intervention. The $1,876.95 in disbursements were incurred for the proceedings before the Federal Court. The amount awarded by the judge was less than the amount of disbursements actually incurred by the respondent. The judge was bound by the terms of the Ontario Superior Court's orders dated April 1, 2003, and September 30, 2004, ratifying the Consolidated Plan of Reorganization, Compromise and Arrangement: see *In the Matter of the Companies' Creditors Arrangement*, C.S. Ont., docket No. 03-CL-4932. The respondent could not be compensated for the time spent and the disbursements incurred before September 30, 2004.

26 As far as the disbursements for this appeal are concerned, the respondent submitted a claim in the amount $284.62 to which he is entitled. He claims costs in an amount of $10,800 calculated, as already mentioned, according to Column V of the table in the Tariff. This amount includes some 63 units for legal fees which he cannot claim and 10 units for the assessment of these fees. Since I plan to award a lump sum, no amount may be awarded for the assessment of costs.

27 However, the respondent was required to defend himself on appeal. He had to analyze the appellant's memorandum and prepare a written reply. To say the least, the appellant was not stingy with the written material it produced: two voluminous binders of legislation; four binders of

authorities, which were even more voluminous; and seven impressive binders for the Appeal Record, all for an appeal based on a due diligence defence not supported by the evidence. Even with substantial compensation, the respondent, who legitimately and successfully asserted quasi-constitutional rights, will continue pay the price for having to fight an appeal that seems far more oppressive than deserving.

28 There is no doubt that the respondent had to devote time and energy to defending himself, not to mention the fact that he had to be present in Court to answer the oral arguments made by the opposing party. I am of the opinion that in this appeal it is necessary to derogate from Rule 407 and award costs according to Column V. Considering Rules 400(3)(*a*) (result of the proceeding) and 400(3)(*i*) (any conduct of a party that tended to unnecessarily lengthen the duration of the proceeding), as well as the regulatory and deterrent functions of costs, I would award the respondent the disbursements claimed, namely, $284.62 plus costs established at $7,000 for a total of $7,284.62.

Conclusion

29 I would dismiss the appeal with costs established at $7,284.62, including disbursements, and I would dismiss the cross-appeal.

Certified true translation: Michael Palles

cp/e/qlecl/qlprp/qlcxm/qlhcs