SCC File No. 37276

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

DELTA AIR LINES INC.

APPELLANT
(Respondent)

– and –

DR. GÁBOR LUKÁCS

RESPONDENT
(Appellant)

– and –

ATTORNEY GENERAL OF ONTARIO,
CANADIAN TRANSPORTATION AGENCY,
COUNCIL OF CANADIANS WITH DISABILITIES,
INTERNATIONAL AIR TRANSPORT ASSOCIATION

INTERVENERS

CONDENSED BOOK OF DR. GÁBOR LUKÁCS, RESPONDENT

(Pursuant to Rule 45 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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Date: 20160907

Docket: A-135-15

Citation: 2016 FCA 220

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

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
AND DELTA AIR LINES, INC.

Respondents

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

"Yves de Montigny"
J.A.

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

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

Parliament in respect of that particular mode of transportation, the order or regulation made under this Act prevails.

Competition Act

(2) Subject to subsection (3), nothing in or done under the authority of this Act, other than Division IV of Part III, affects the operation of the *Competition Act*.

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.

Loi sur la concurrence

(2) Sous réserve du paragraphe (3), les dispositions de la présente loi — sauf celles de la section IV de la partie III — et les actes accomplis sous leur régime ne portent pas atteinte à l'application de la *Loi sur la concurrence*.

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

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;

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

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

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.

Interpretation

Definitions

6 In this Act,

Agency means the Canadian Transportation Agency continued by subsection 7(1); (*Office*)

carrier means a person who is engaged in the transport of goods or passengers by any means of transport under the legislative authority of Parliament; (*transporteur*)

Chairperson means the Chairperson of the Agency; (*président*)

goods includes rolling stock and mail; (*marchandises*)

member means a member of the Agency appointed under subsection 7(2) and includes a temporary member; (*membre*)

Minister means the Minister of Transport; (*ministre*)

rolling stock includes a locomotive, engine, motor car, tender, snow-plough, flanger and any car or railway equipment that is designed for movement on its wheels on the rails of a railway; (*matériel roulant*)

shipper means a person who sends or receives goods by means of a carrier or intends to do so; (*expéditeur*)

sitting day of Parliament means a day on which either House of Parliament sits; (*jour de séance*)

superior court means

(a) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(d) in Nova Scotia, British Columbia, Prince Edward Island, Yukon and the Northwest Territories, the Supreme Court,

Définitions

Définitions

6 Les définitions qui suivent s'appliquent à la présente loi.

cour supérieure

a) La Cour supérieure de justice de l'Ontario;

b) la Cour supérieure du Québec;

c) la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

d) la Cour suprême de la Nouvelle-Écosse, de la Colombie-Britannique, de l'Île-du-Prince-Édouard, du Yukon ou des Territoires du Nord-Ouest;

e) la Section de première instance de la Cour suprême de Terre-Neuve-et-Labrador;

f) la Cour de justice du Nunavut. (*superior court*)

expéditeur Personne qui expédie des marchandises par transporteur, ou en reçoit de celui-ci, ou qui a l'intention de le faire. (*shipper*)

jour de séance Tout jour où l'une ou l'autre chambre du Parlement siège. (*sitting day of Parliament*)

marchandises Y sont assimilés le matériel roulant et le courrier. (*goods*)

matériel roulant Toute sorte de voitures et de matériel muni de roues destinés à servir sur les rails d'un chemin de fer, y compris les locomotives, machines actionnées par quelque force motrice, voitures automotrices, tenders, chasse-neige et *flangers*. (*rolling stock*)

matière toxique par inhalation Gaz ou matière inclus dans la classe 2.3 du *Règlement sur le transport des marchandises dangereuses* ou, en application de l'alinéa 2.28c) de ce règlement, inclus dans la classe 6.1 du même règlement. Sont notamment comprises dans la présente définition les marchandises dangereuses dont le numéro ONU indiqué à la colonne 1 de la Liste des marchandises

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Powers of Agency

Policy governs Agency

24 The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

Agency powers in general

25 The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Power to award costs

25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.

Costs may be fixed or taxed

(2) Costs may be fixed in any case at a sum certain or may be taxed.

Payment

(3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.

Scale

(4) The Agency may make rules specifying a scale under which costs are to be taxed.

Compelling observance of obligations

26 The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Attributions de l'Office

Directives

24 Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec les directives générales qui lui sont données en vertu de l'article 43.

Pouvoirs généraux

25 L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

Pouvoirs relatifs à l'adjudication des frais

25.1 (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.

Frais fixés ou taxés

(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.

Paiement

(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.

Tarif

(4) L'Office peut, par règle, fixer un tarif de taxation des frais.

Pouvoir de contrainte

26 L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

Inquiries

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.

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.

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.

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.

Enquêtes

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.

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.

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.

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

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.

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

Révision et appel

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.

Appel

41 (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour

municipal government declares an emergency under federal or provincial law, and that government directly or indirectly requests that the air service be provided to respond to the emergency.

Public interest

(4) The Minister may, by order, prohibit the provision of an air service under subsection (3) or require the discontinuance of that air service if, in the opinion of the Minister, it is in the public interest to do so.

Not a statutory instrument

(5) The order is not a statutory instrument within the meaning of the *Statutory Instruments Act*.

1996, c. 10, s. 56; 2007, c. 19, s. 14.

56.1 [Repealed, 2007, c. 19, s. 15]

56.2 [Repealed, 2007, c. 19, s. 15]

56.3 [Repealed, 2007, c. 19, s. 15]

56.4 [Repealed, 2007, c. 19, s. 15]

56.5 [Repealed, 2007, c. 19, s. 15]

56.6 [Repealed, 2007, c. 19, s. 15]

56.7 [Repealed, 2007, c. 19, s. 15]

Prohibitions

Prohibition re operation

57 No person shall operate an air service unless, in respect of that service, the person

(a) holds a licence issued under this Part;

(b) holds a Canadian aviation document; and

(c) has the prescribed liability insurance coverage.

Licence not transferable

58 A licence issued under this Part for the operation of an air service is not transferable.

Prohibition re sale

59 No person shall sell, cause to be sold or publicly offer for sale in Canada an air service unless, if required under this Part, a person holds a licence issued under this Part in respect of that service and that licence is not suspended.

1996, c. 10, s. 59; 2007, c. 19, s. 16.

fédéral, le gouvernement d'une province ou une administration municipale déclare en vertu d'une loi fédérale ou provinciale qu'une situation de crise existe et présente directement ou indirectement une demande en vue d'obtenir ce service pour faire face à la situation de crise.

Intérêt public

(4) Le ministre peut, par arrêté, interdire la fourniture d'un service aérien au titre du paragraphe (3) ou exiger qu'il y soit mis fin s'il estime qu'il est dans l'intérêt public de le faire.

Loi sur les textes réglementaires

(5) Les arrêtés ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

1996, ch. 10, art. 56; 2007, ch. 19, art. 14.

56.1 [Abrogé, 2007, ch. 19, art. 15]

56.2 [Abrogé, 2007, ch. 19, art. 15]

56.3 [Abrogé, 2007, ch. 19, art. 15]

56.4 [Abrogé, 2007, ch. 19, art. 15]

56.5 [Abrogé, 2007, ch. 19, art. 15]

56.6 [Abrogé, 2007, ch. 19, art. 15]

56.7 [Abrogé, 2007, ch. 19, art. 15]

Interdictions

Conditions d'exploitation

57 L'exploitation d'un service aérien est subordonnée à la détention, pour celui-ci, de la licence prévue par la présente partie, d'un document d'aviation canadien et de la police d'assurance responsabilité réglementaire.

Incessibilité

58 Les licences d'exploitation de services aériens sont incessibles.

Opérations visant le service

59 La vente, directe ou indirecte, et l'offre publique de vente, au Canada, d'un service aérien sont subordonnées à la détention, pour celui-ci, d'une licence en règle délivrée sous le régime de la présente partie.

1996, ch. 10, art. 59; 2007, ch. 19, art. 16.

Complaints re non-compliance

65 Where, on complaint in writing to the Agency by any person, the Agency finds that a licensee has failed to comply with section 64 and that it is practicable in the circumstances for the licensee to comply with an order under this section, the Agency may, by order, direct the licensee to reinstate the service referred to in that section

(a) for such a period, not exceeding 120 days after the date of the finding by the Agency, as the Agency deems appropriate; and

(b) at such a frequency as the Agency may specify.

1996, c. 10, s. 65; 2007, c. 19, s. 18.

Plaintes relatives aux infractions

65 L'Office, saisi d'une plainte formulée par écrit à l'encontre d'un licencié, peut, s'il constate que celui-ci ne s'est pas conformé à l'article 64 et que les circonstances permettent à celui-ci de se conformer à l'arrêté, ordonner à celui-ci de rétablir le service pour la période, d'au plus cent vingt jours après la date de son constat, qu'il estime indiquée, et selon la fréquence qu'il peut fixer.

1996, ch. 10, art. 65; 2007, ch. 19, art. 18.

Unreasonable fares or rates

66 (1) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic service between two points and that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of the service is unreasonable, the Agency may, by order,

(a) disallow the fare, rate or increase;

(b) direct the licensee to amend its tariff by reducing the fare, rate or increase by the amounts and for the periods that the Agency considers reasonable in the circumstances; or

(c) direct the licensee, if practicable, to refund amounts specified by the Agency, with interest calculated in the prescribed manner, to persons determined by the Agency to have been overcharged by the licensee.

Prix ou taux excessifs

66 (1) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points, d'une part, et qu'un prix ou un taux, ou une augmentation de prix ou de taux, publiés ou appliqués à l'égard de ce service sont excessifs, d'autre part, l'Office peut, par ordonnance :

a) annuler le prix, le taux ou l'augmentation;

b) enjoindre au licencié de modifier son tarif afin de réduire d'une somme, et pour une période, qu'il estime indiquées dans les circonstances le prix, le taux ou l'augmentation;

c) lui enjoindre de rembourser, si possible, les sommes qu'il détermine, majorées des intérêts calculés de la manière réglementaire, aux personnes qui, selon lui, ont versé des sommes en trop.

Complaint of inadequate range of fares or rates

(2) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic service between two points and that it is offering an inadequate range of fares or cargo rates in respect of that service, the Agency may, by order, direct the licensee, for a period that the Agency considers reasonable in the circumstances, to publish and apply in respect of that service one or more additional fares or cargo rates that the Agency considers reasonable in the circumstances.

Gamme de prix insuffisante

(2) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points, d'une part, et que celui-ci offre une gamme de prix ou de taux insuffisante à l'égard de ce service, d'autre part, l'Office peut, par ordonnance, enjoindre au licencié, pour la période qu'il estime indiquée dans les circonstances, de publier et d'appliquer à l'égard de ce service un ou plusieurs prix ou taux supplémentaires qu'il estime indiqués dans les circonstances.

Relevant information

(3) When making a finding under subsection (1) or (2) that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of a domestic service between two points is unreasonable or that a licensee is offering an inadequate range of fares or cargo rates in

Facteurs à prendre en compte

(3) Pour décider, au titre des paragraphes (1) ou (2), si le prix, le taux ou l'augmentation de prix ou de taux publiés ou appliqués à l'égard d'un service intérieur entre deux points sont excessifs ou si le licencié offre une gamme de prix ou de taux insuffisante à l'égard d'un service

Confidentiality of information

(8) The Agency may take any measures or make any order that it considers necessary to protect the confidentiality of any of the following information that it is considering in the course of any proceedings under this section:

(a) information that constitutes a trade secret;

(b) information the disclosure of which would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and

(c) information the disclosure of which would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

1996, c. 10, s. 66; 2000, c. 15, s. 4; 2007, c. 19, s. 19.

Confidentialité des renseignements

(8) L'Office peut prendre toute mesure, ou rendre toute ordonnance, qu'il estime indiquée pour assurer la confidentialité des renseignements ci-après qu'il examine dans le cadre du présent article :

a) les renseignements qui constituent un secret industriel;

b) les renseignements dont la divulgation risquerait vraisemblablement de causer des pertes financières importantes à la personne qui les a fournis ou de nuire à sa compétitivité;

c) les renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations — contractuelles ou autres — menées par la personne qui les a fournis.

1996, ch. 10, art. 66; 2000, ch. 15, art. 4; 2007, ch. 19, art. 19.

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.

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

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, 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, 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.

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 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.

Mandatory suspension or cancellation

72 (1) The Agency shall suspend or cancel a scheduled international licence where the Agency determines that, in respect of the service for which the licence was issued, the licensee ceases to meet any of the requirements of subparagraphs 69(1)(a)(i) to (iii).

Discretionary suspension or cancellation

(2) The Agency may suspend or cancel a scheduled international licence

(a) where the Agency determines that, in respect of the service for which the licence was issued, the licensee has contravened, or does not meet the requirements of, any regulation or order made under this Part or any provision of this Part other than subparagraphs 69(1)(a)(i) to (iii); or

(b) in accordance with a request from the licensee for the suspension or cancellation.

Reinstatement condition

(3) The Agency shall not reinstate the scheduled international licence of a Canadian that has been suspended for sixty days or longer unless the Canadian establishes to the satisfaction of the Agency that the Canadian meets the prescribed financial requirements.

Licence for Non-scheduled International Service

Issue of licence

73 (1) Subject to any directions issued to the Agency under section 76, on application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a non-scheduled international service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of the service to be

Suspension ou annulation obligatoire

72 (1) L'Office suspend ou annule la licence s'il est convaincu que le licencié ne répond plus à telle des conditions mentionnées aux sous-alinéas 69(1)a)(i) à (iii).

Suspension ou annulation facultative

(2) L'Office peut suspendre ou annuler la licence :

a) s'il est convaincu que le licencié a, relativement au service, enfreint des conditions autres que celles mentionnées au paragraphe (1) ou telle des dispositions de la présente partie ou de ses textes d'application;

b) sur demande du licencié.

Rétablissement de la licence

(3) L'Office ne peut rétablir la licence d'un Canadien suspendue depuis au moins soixante jours que si celui-ci justifie du fait qu'il remplit les exigences financières réglementaires.

Service international à la demande

Délivrance aux Canadiens

73 (1) Sous réserve des directives visées à l'article 76, l'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service international à la demande au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement au service à offrir.

Disclosure of information required

83 A licensee shall, at the request of the Agency, provide the Agency with information or documents available to the licensee that relate to any complaint under review or any investigation being conducted by the Agency under this Part.

Notification of agent required

84 (1) A licensee who has an agent in Canada shall, in writing, provide the Agency with the agent's name and address.

Appointment and notice of agent

(2) A licensee who does not have a place of business or an agent in Canada shall appoint an agent who has a place of business in Canada and, in writing, provide the Agency with the agent's name and address.

Notice of change of address

85 Where the address of a licensee's principal place of business in Canada or the name or address of the licensee's agent in Canada is changed, the licensee shall notify the Agency in writing of the change without delay.

Air Travel Complaints

Review and mediation

85.1 (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.

Report

(2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.

Complaint not resolved

(3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to 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.

Obligation

83 Le licencié est tenu, à la demande de l'Office, de lui fournir les renseignements et documents dont il dispose concernant toute plainte faisant l'objet d'un examen ou d'une enquête de l'Office sous le régime de la présente partie.

Mandataire

84 (1) Le licencié qui a un mandataire au Canada est tenu de communiquer par écrit à l'Office les nom et adresse de celui-ci.

Constitution obligatoire

(2) Le licencié qui n'a pas d'établissement ni de mandataire au Canada est tenu d'en nommer un qui y ait un établissement et de communiquer par écrit à l'Office les nom et adresse du mandataire.

Avis de changement

85 En cas de changement de l'adresse de son principal établissement ou de celle de son mandataire au Canada, ou s'il change de mandataire, le licencié est tenu d'en aviser sans délai par écrit l'Office.

Plaintes relatives au transport aérien

Examen et médiation

85.1 (1) L'Office ou son délégué examine toute plainte déposée en vertu de la présente partie et peut tenter de régler l'affaire; il peut, dans les cas indiqués, jouer le rôle de médiateur entre les parties ou pourvoir à la médiation entre celles-ci.

Communication aux parties

(2) L'Office ou son délégué fait rapport aux parties des grandes lignes de la position de chacune d'entre elles et de tout éventuel règlement.

Affaire non réglée

(3) Si l'affaire n'est pas réglée à la satisfaction du plaignant dans le cadre du présent article, celui-ci peut demander à l'Office d'examiner 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.

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,

(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

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) 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

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.

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.

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.

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.

Advertising regulations

86.1 (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.

Contents of regulations

(2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a

Règlement concernant la publicité des prix

86.1 (1) L'Office régit, par règlement, la publicité dans les médias, y compris dans Internet, relative aux prix des services aériens au Canada ou dont le point de départ est au Canada.

Contenu des règlements

(2) Les règlements exigent notamment que le prix des services aériens mentionné dans toute publicité faite par

Maximum portion of traffic

(4) The portion of a movement of traffic in respect of which a competitive line rate may be established must not exceed 50 per cent of the total number of kilometres over which the traffic is moved by rail or 1 200 km, whichever is greater.

Exception

(5) On application of a shipper, the Agency may establish a competitive line rate for a greater portion of a movement of traffic if the Agency is satisfied that no interchange exists within the maximum portion referred to in subsection (4).

No other rates may be established

(6) If a competitive line rate has been established for a movement of traffic of a shipper, no other competitive line rate may be established in respect of that movement while the rate is in effect.

Application to Agency to establish competitive line rates

132 (1) On the application of a shipper, the Agency shall, within forty-five days after receiving the application, establish any of the following matters in respect of which the shipper and the local carrier do not agree:

(a) the amount of the competitive line rate;

(b) the designation of the continuous route;

(c) the designation of the nearest interchange; and

(d) the manner in which the local carrier shall fulfil its service obligations.

No final offer arbitration

(2) If a matter is established by the Agency under this section, the shipper is not entitled to submit the matter to the Agency for final offer arbitration under section 161.

Competitive line rate

133 (1) A competitive line rate in respect of the movement of traffic of a shipper is the result obtained by applying the following formula:

A + (B/C × (D - E))

where

A is the amount resulting from the application of the interswitching rate;

Condition

(4) La partie d'un transport de marchandises pour laquelle un prix de ligne concurrentiel peut être établi ne peut dépasser la plus grande des distances suivantes : 50 pour cent de la distance totale du transport par rail ou 1 200 kilomètres.

Exception

(5) Sur demande d'un expéditeur et s'il est convaincu qu'il n'y a pas de lieu de correspondance à l'intérieur de cette limite, l'Office peut établir un prix de ligne concurrentiel pour une partie d'un transport de marchandises couvrant une distance supérieure.

Prix définitif

(6) Une fois qu'un prix de ligne concurrentiel a été établi pour un transport de marchandises pour un expéditeur, aucun autre prix de ligne concurrentiel ne peut être établi pour ce transport tant que ce prix est en vigueur.

Établissement par l'Office

132 (1) Sur demande d'un expéditeur, l'Office établit, dans les quarante-cinq jours suivant la demande, tels des éléments suivants qui n'ont pas fait l'objet d'un accord entre l'expéditeur et le transporteur local :

a) le montant du prix de ligne concurrentiel;

b) la désignation du parcours continu;

c) la désignation du lieu de correspondance le plus proche;

d) les moyens à prendre par le transporteur local pour s'acquitter de ses obligations prévues par les articles 113 et 114.

Exclusion de l'arbitrage

(2) L'élément ainsi établi ne peut être assujetti à l'arbitrage prévu à l'article 161.

Prix de ligne concurrentiel

133 (1) Le prix de ligne concurrentiel applicable au transport effectué pour un expéditeur est calculé selon la formule suivante :

A + (B/C × (D - E))

où

A représente le prix fixé en application de l'alinéa 128(1)b);

Publication of list

(3) The Agency must publish the list on its Internet site.

2013, c. 31, s. 11.

Application for order

169.43 (1) A railway company may apply to the Agency, within 10 days after the day on which it is served with a copy of a submission under subsection 169.32(2), for an order declaring that the shipper is not entitled to submit to the Agency for arbitration a matter contained in the shipper's submission.

Content of order

(2) If the Agency makes the order, it may also

(a) dismiss the submission for arbitration, if the matter contained in it has not been referred to arbitration;

(b) discontinue the arbitration;

(c) subject the arbitration to any terms that it specifies; or

(d) set aside the arbitrator's decision or any part of it.

Period for making decision

(3) The Agency must make a decision on the railway company's application made under subsection (1) as soon as feasible but not later than 35 days after the day on which it receives the application.

2013, c. 31, s. 11.

Publication de la liste

(3) L'Office publie la liste sur son site Internet.

2013, ch. 31, art. 11.

Demande d'arrêté

169.43 (1) La compagnie de chemin de fer peut, dans les dix jours suivant la signification d'un exemplaire de la demande d'arbitrage en application du paragraphe 169.32(2), demander à l'Office de prendre un arrêté déclarant qu'une question contenue dans la demande d'arbitrage de l'expéditeur ne peut lui être soumise pour arbitrage.

Contenu de l'arrêté

(2) S'il prend l'arrêté, l'Office peut en outre :

a) rejeter la demande d'arbitrage, dans le cas où l'arbitre n'en a pas encore été saisi;

b) mettre fin à l'arbitrage;

c) assujettir l'arbitrage aux conditions qu'il fixe;

d) annuler tout ou partie de la décision arbitrale.

Délai pour statuer

(3) L'Office statue sur la demande présentée en vertu du paragraphe (1) aussi rapidement que possible et en tout état de cause dans les trente-cinq jours suivant sa réception.

2013, ch. 31, art. 11.

PART V

Transportation of Persons with Disabilities

Regulations

170 (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

(a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;

(b) the training of personnel employed at or in those facilities or premises or by carriers;

PARTIE V

Transport des personnes ayant une déficience

Règlements

170 (1) L'Office peut prendre des règlements afin d'éliminer tous obstacles abusifs, dans le réseau de transport assujetti à la compétence législative du Parlement, aux possibilités de déplacement des personnes ayant une déficience et peut notamment, à cette occasion, régir :

a) la conception et la construction des moyens de transport ainsi que des installations et locaux connexes — y compris les commodités et l'équipement qui s'y trouvent —, leur modification ou la signalisation dans ceux-ci ou leurs environs;

b) la formation du personnel des transporteurs ou de celui employé dans ces installations et locaux;

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

(d) the communication of information to persons with disabilities.

c) toute mesure concernant les tarifs, taux, prix, frais et autres conditions de transport applicables au transport et aux services connexes offerts aux personnes ayant une déficience;

d) la communication d'information à ces personnes.

Incorporation by reference

(2) Regulations made under subsection (1) incorporating standards or enactments by reference may incorporate them as amended from time to time.

Incorporation par renvoi

(2) Il peut être précisé, dans le règlement qui incorpore par renvoi des normes ou des dispositions, qu'elles sont incorporées avec leurs modifications successives.

Exemption

(3) The Agency may, with the approval of the Governor in Council, make orders exempting specified persons, means of transportation, services or related facilities and premises from the application of regulations made under subsection (1).

Exemption

(3) L'Office peut, par arrêté pris avec l'agrément du gouverneur en conseil, soustraire à l'application de certaines dispositions des règlements les personnes, les moyens de transport, les installations ou locaux connexes ou les services qui y sont désignés.

Coordination

171 The Agency and the Canadian Human Rights Commission shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

Coordination

171 L'Office et la Commission canadienne des droits de la personne sont tenus de veiller à la coordination de leur action en matière de transport des personnes ayant une déficience pour favoriser l'adoption de lignes de conduite complémentaires et éviter les conflits de compétence.

Inquiry re obstacles to persons with disabilities

172 (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

Enquête : obstacles au déplacement

172 (1) Même en l'absence de disposition réglementaire applicable, l'Office peut, sur demande, enquêter sur toute question relative à l'un des domaines visés au paragraphe 170(1) pour déterminer s'il existe un obstacle abusif aux possibilités de déplacement des personnes ayant une déficience.

Compliance with regulations

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

Décision de l'Office

(2) L'Office rend une décision négative à l'issue de son enquête s'il est convaincu de la conformité du service du transporteur aux dispositions réglementaires applicables en l'occurrence.

Remedies

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

Décision de l'Office

(3) En cas de décision positive, l'Office peut exiger la prise de mesures correctives indiquées ou le versement d'une indemnité destinée à couvrir les frais supportés par une personne ayant une déficience en raison de l'obstacle en cause, ou les deux.

PART VI

General

Enforcement

False information, etc.

173 (1) No person shall knowingly make any false or misleading statement or knowingly provide false or misleading information to the Agency or the Minister or to any person acting on behalf of the Agency or the Minister in connection with any matter under this Act.

Obstruction and false statements

(2) No person shall knowingly obstruct or hinder, or make any false or misleading statement, either orally or in writing, to a person designated as an enforcement officer pursuant to paragraph 178(1)(a) who is engaged in carrying out functions under this Act.

Offence

174 Every person who contravenes a provision of this Act or a regulation or order made under this Act, other than an order made under section 47, is guilty of an offence punishable on summary conviction and liable

(a) in the case of an individual, to a fine not exceeding $5,000; and

(b) in the case of a corporation, to a fine not exceeding $25,000.

Officers, etc., of corporation re offences

175 Where a corporation commits an offence under this Act, every person who at the time of the commission of the offence was a director or officer of the corporation is guilty of the like offence unless the act or omission constituting the offence took place without the person's knowledge or consent or the person exercised all due diligence to prevent the commission of the offence.

Time limit for commencement of proceedings

176 Proceedings by way of summary conviction in respect of an offence under this Act may be instituted within but not later than twelve months after the time when the subject-matter of the proceedings arose.

Administrative Monetary Penalties

Definition of *Tribunal*

176.1 For the purposes of sections 180.1 to 180.7, ***Tribunal*** means the Transportation Appeal Tribunal of

PARTIE VI

Dispositions générales

Mesures de contrainte

Déclarations fausses ou trompeuses

173 (1) Nul ne peut, sciemment, faire de déclaration fausse ou trompeuse ni fournir de renseignements faux ou trompeurs à l'Office, au ministre ou à toute personne agissant au nom de l'Office ou du ministre relativement à une question visée par la présente loi.

Entrave

(2) Il est interdit, sciemment, d'entraver l'action de l'agent verbalisateur désigné au titre du paragraphe 178(1) dans l'exercice de ses fonctions ou de lui faire, oralement ou par écrit, une déclaration fausse ou trompeuse.

Infraction et peines

174 Quiconque contrevient à la présente loi ou à un texte d'application de celle-ci, autre qu'un décret prévu à l'article 47, commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'une personne physique, d'une amende maximale de 5 000 $;

b) dans le cas d'une personne morale, d'une amende maximale de 25 000 $.

Dirigeants des personnes morales

175 En cas de perpétration par une personne morale d'une infraction à la présente loi, celui qui, au moment de l'infraction, en était administrateur ou dirigeant la commet également, sauf si l'action ou l'omission à l'origine de l'infraction a eu lieu à son insu ou sans son consentement ou qu'il a pris toutes les mesures nécessaires pour empêcher l'infraction.

Prescription

176 Les poursuites intentées sur déclaration de culpabilité par procédure sommaire sous le régime de la présente loi se prescrivent par douze mois à compter du fait générateur de l'action.

Sanctions administratives pécuniaires

Définition de *Tribunal*

176.1 Pour l'application des articles 180.1 à 180.7, ***Tribunal*** s'entend du Tribunal d'appel des transports du

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.

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).

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.

(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

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 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.

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) 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.

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;

(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.

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

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

(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;

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

(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) 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.

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 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.

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.

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.

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 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;

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

(6) The filing advice shall be in the form set out in Schedule IV and shall contain a description of the tariff filed therewith, including,

(a) in the case of a tariff that is filed with the Agency by an air carrier operating a scheduled international service and that contains tolls, or terms and conditions, required to be agreed on with another air carrier, a statement that all those tolls or terms and conditions have been so agreed on; and

(b) in the case of a tariff that is filed with the Agency by an air carrier operating a scheduled international service and that contains tolls or terms and conditions that are required to be filed in another country, a statement that all those tolls or terms and conditions have been filed with the appropriate aeronautical authorities of the country to which the service is provided.

(7) Every tariff and filing advice sent to the Agency shall be addressed to the Secretary, Canadian Transportation Agency, Ottawa, Canada, K1A 0N9, Attention: Tariffs Division.

SOR/93-253, s. 2; SOR/96-335, s. 59; SOR/98-197, s. 7.

(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.

(6) L'avis de dépôt doit être établi conformément à l'annexe IV et contenir une description du tarif déposé, y compris :

a) dans le cas d'un tarif déposé auprès de l'Office par un transporteur aérien exploitant un service international régulier, lequel tarif contient des taxes ou des conditions auxquelles un autre transporteur aérien doit donner son assentiment, une déclaration indiquant que toutes les taxes et toutes les conditions ont été acceptées par cet autre transporteur aérien;

b) dans le cas d'un tarif déposé auprès de l'Office par un transporteur aérien exploitant un service international régulier et qui contient des taxes ou des conditions devant être déposées dans un autre pays, une déclaration indiquant que toutes ces taxes ou conditions ont été déposées auprès des autorités aéronautiques compétentes du pays à destination duquel est offert le service.

(7) Les tarifs et les avis de dépôt envoyés à l'Office doivent être adressés au secrétaire, à l'attention de la Division des tarifs, Office des transports du Canada, Ottawa, Canada, K1A 0N9.

DORS/93-253, art. 2; DORS/96-335, art. 59; DORS/98-197, art. 7.

Filing Time

115 (1) Every tariff or amendment to a tariff shall be filed with the Agency at least 45 days before the tariff or amendment comes into force, except

(a) where a different period is specified in an international agreement, convention or arrangement respecting civil aviation to which Canada is a party; or

(b) where the tariff or amendment is filed at least one working day before it comes into force

(i) to publish tolls for an additional aircraft to be used in, or to cancel tolls respecting an aircraft to be withdrawn from, a non-scheduled international service, other than a service that is operated at a toll per unit of traffic,

(ii) by an air carrier operating a non-scheduled international service in accordance with section 16; or

(c) by order of the Agency.

Délais

115 (1) Les tarifs ou les modifications à ceux-ci doivent être déposés auprès de l'Office au moins 45 jours avant leur entrée en vigueur, sauf dans les cas suivants :

a) un autre délai est stipulé dans une convention, une entente ou un accord international en matière d'aviation civile auquel le Canada est partie;

b) le tarif ou la modification est déposé au moins un jour ouvrable avant son entrée en vigueur :

(i) soit pour publier les taxes applicables à un aéronef supplémentaire affecté à un service international à la demande, autre que celui exploité selon une taxe unitaire applicable au trafic, ou pour annuler les taxes visant un aéronef devant être retiré de ce service,

(ii) soit par un transporteur aérien exploitant un service international à la demande conformément à l'article 16;

c) un autre délai est prévu par un arrêté de l'Office.

(2) The period prescribed by subsection (1) shall not commence until a tariff or amendment is received by the Agency, and the mailing thereof does not constitute receipt by the Agency.

SOR/90-740, s. 4; SOR/93-253, s. 2; SOR/96-335, s. 60; SOR/2017-19, s. 8(F).

Public Inspection of Tariffs

116 (1) Every air carrier shall keep available for public inspection at each of its business offices a copy of every tariff in which the air carrier participates that applies to its international service.

(2) Every air carrier shall display in a prominent place at each of its business offices a sign indicating that the tariffs for the international service it offers, including the terms and conditions of carriage, are available for public inspection at its business offices.

(3) Every air carrier shall, for a period of three years after the date of any cancellation of a tariff participated in by the carrier, keep a copy of that tariff at the principal place of business in Canada of the carrier or at the place of business in Canada of the carrier's agent.

SOR/96-335, s. 61(F); SOR/2009-28, s. 2.

Display of Terms and Conditions on Internet Sites

116.1 An air carrier that sells or offers for sale an international service on its Internet site must also display on the site the terms and conditions of carriage applicable to that service and must post a notice to that effect in a prominent place on the site.

SOR/2009-28, s. 3.

Unit Tolls

117 Every air carrier operating a scheduled international service or a non-scheduled international service that is operated at a toll per unit of traffic shall publish all its tolls for those services

(a) in the case of passenger transportation, at a fare per person; and

(b) in the case of goods transportation, at a rate per pound, or other specified unit.

SOR/96-335, s. 62.

Charter Tolls

118 (1) Subject to subsection (2), every air carrier operating a non-scheduled international service on a charter

(2) Les délais visés au paragraphe (1) commencent à la date où l'Office reçoit le tarif ou la modification et non à la date de mise à la poste.

DORS/90-740, art. 4; DORS/93-253, art. 2; DORS/96-335, art. 60; DORS/2017-19, art. 8(F).

Consultation des tarifs

116 (1) Le transporteur aérien met à la disposition du public, dans ses bureaux, une copie de tout tarif auquel il est partie pour un service international.

(2) Il pose à ses bureaux, dans un endroit bien en vue, une affiche indiquant que les tarifs, notamment les conditions de transport, pour le service international qu'il offre sont à la disposition du public pour consultation à ses bureaux.

(3) Les transporteurs aériens doivent conserver à leur principal établissement au Canada, ou à l'établissement de leur agent au Canada, un exemplaire des tarifs annulés auxquels ils étaient parties, pendant trois ans à compter de la date d'annulation de ces tarifs.

DORS/96-335, art. 61(F); DORS/2009-28, art. 2.

Publication des conditions sur les sites Internet

116.1 Si le transporteur aérien vend ou offre en vente un service international sur son site Internet, il y publie les conditions de transport et y affiche bien en vue un avis en ce sens.

DORS/2009-28, art. 3.

Taxes unitaires

117 Les transporteurs aériens qui exploitent un service international régulier ou qui exploitent un service international à la demande moyennant une taxe unitaire applicable au trafic doivent publier les taxes de ces services de la façon suivante :

a) à un prix par personne, pour le transport des passagers;

b) à un taux par livre ou autre unité désignée, pour le transport des marchandises.

DORS/96-335, art. 62.

Taxes d'affrètement

118 (1) Sous réserve du paragraphe (2), les transporteurs aériens qui exploitent un service international à la

basis shall publish all its tolls for those services at a rate per mile, where distance can be measured, or at a rate per hour where distance cannot be measured, which tolls shall be applicable to the entire capacity of the aircraft.

(2) An air carrier that operates a non-scheduled international service on a charter basis may, in lieu of tolls described in subsection (1), establish specific point-to-point flat sum charter prices.

SOR/96-335, s. 63.

Currency

119 All tolls shall be expressed in Canadian currency and may also be expressed in terms of currencies other than Canadian.

Manner of Tariff Filing

120 (1) Tariffs in any medium may be filed with the Agency provided that, where a medium other than paper is to be used, the Agency and the filer have signed an agreement for the processing, storage, maintenance, security and custody of the data base.

(2) Tariffs shall be maintained in a uniform and consistent manner and shall be numbered consecutively with the prefix "CTA(A)" and every issuing air carrier or agent of the carrier shall number tariffs in the carrier's or agent's own series.

SOR/93-253, s. 2(F); SOR/96-335, s. 64.

121 [Repealed, SOR/96-335, s. 64]

Contents of Tariffs

122 Every tariff shall contain

(a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

(b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified; and

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

demande par affrètements doivent publier les taxes de ces services selon un taux par mille lorsque la distance est mesurable et selon un taux à l'heure dans les autres cas, pour la capacité entière de l'aéronef.

(2) Les transporteurs aériens qui exploitent un service international à la demande par affrètements peuvent établir des prix forfaitaires pour les vols affrétés entre des points déterminés, au lieu des taxes visées au paragraphe (1).

DORS/96-335, art. 63.

Devises

119 Les taxes doivent être indiquées en devises canadiennes et peuvent être données en outre en devises étrangères.

Modalités de dépôt

120 (1) Les tarifs peuvent être déposés auprès de l'Office sur tout support. Toutefois, si le support choisi n'est pas le papier, l'Office et le déposant doivent, avant le dépôt, conclure une entente pour le traitement, le stockage, la mise à jour, la sécurité et la garde de la base de données.

(2) Les tarifs doivent être uniformes et cohérents et être numérotés consécutivement, le numéro étant précédé de « OTC(A) ». Le transporteur aérien émetteur ou son agent doit numéroter les tarifs suivant ses propres séries.

DORS/93-253, art. 2(F); DORS/96-335, art. 64.

121 [Abrogé, DORS/96-335, art. 64]

Contenu des tarifs

122 Les tarifs doivent contenir :

a) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

b) les taxes ainsi que les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes ayant une déficience,

(ii) acceptance of children for travel,

(iii) compensation for denial of boarding as a result of overbooking,

(iv) passenger re-routing,

(v) failure to operate the service or failure to operate on schedule,

(vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(vii) ticket reservation, cancellation, confirmation, validity and loss,

(viii) refusal to transport passengers or goods,

(ix) method of calculation of charges not specifically set out in the tariff,

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

(xii) procedures to be followed, and time limitations, respecting claims.

SOR/93-253, s. 2; SOR/96-335, s. 65.

123 [Repealed, SOR/96-335, s. 65]

Supplements

124 (1) A supplement to a tariff on paper shall be in book or pamphlet form and shall be published only for the purpose of amending or cancelling that tariff.

(2) Every supplement shall be prepared in accordance with a standard form provided by the Agency.

(3) Supplements are governed by the same provisions of these Regulations as are applicable to the tariff that the supplements amend or cancel.

SOR/93-253, s. 2(F); SOR/96-335, s. 66.

(ii) l'admission des enfants,

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

(iv) le réacheminement des passagers,

(v) l'inexécution du service et le non-respect de l'horaire,

(vi) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(vii) la réservation, l'annulation, la confirmation, la validité et la perte des billets,

(viii) le refus de transporter des passagers ou des marchandises,

(ix) la méthode de calcul des frais non précisés dans le tarif,

(x) les limites de responsabilité à l'égard des passagers et des marchandises,

(xi) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xii) la marche à suivre ainsi que les délais fixés pour les réclamations.

DORS/93-253, art. 2; DORS/96-335, art. 65.

123 [Abrogé, DORS/96-335, art. 65]

Suppléments

124 (1) Les suppléments à un tarif sur papier doivent être publiés sous forme de livres ou de brochures et ne doivent servir qu'à modifier ou annuler le tarif.

(2) Les suppléments doivent être conformes au modèle fourni par l'Office.

(3) Les suppléments sont régis par les dispositions du présent règlement qui s'appliquent aux tarifs qu'ils modifient ou annulent.

DORS/93-253, art. 2(F); DORS/96-335, art. 66.

Decision No. 161-A-2010

May 3, 2010

May 3, 2010

PROPOSED Tariff Revisions filed by Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta, Delta Shuttle and Song to reflect the Warsaw System, the Montreal Convention and the Intercarrier Agreement on Passenger Liability.
File No. M4110-38

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[3] In Decision No. LET-A-104-2007 dated June 1, 2007, which was issued in response to Delta's proposed tariff revisions, the Agency stated that:

A preliminary review of Delta's proposed tariff filing suggests that certain provisions may be unclear, vis-à-vis those which appear in the Montreal Convention, and that the absence from the tariff filing of certain significant provisions that are set out in the Montreal Convention, results in Delta's tariff provisions lacking clarity. As such the Agency is of the preliminary opinion that the tariff provisions do not afford to passengers all of the rights that are extended by the Montreal Convention, thereby rendering such provisions unjust and unreasonable, contrary to subsection 111(1) of the ATR (Air Transportation Regulations).

[4] The Agency stated further that:

The Agency is of the preliminary opinion that, in order to satisfy regulatory requirements, Delta's tariff provisions governing limits of liability must be worded in such a fashion as to allow consumers to easily understand all of the rights that are bestowed on them by the Montreal Convention and the Warsaw Convention, and that such provisions should accurately and fully represent that which is set out in these Conventions. With regard to the latter point, the Agency is of the preliminary opinion that, generally, it is unacceptable that a carrier's tariff refer to another document, unrelated to the tariff, that the reader must review to determine all of the terms and conditions applicable to travel, particularly when these terms and conditions relate to a matter as important as liability.

[5] Consequently, the Agency suspended the applicable tariff revisions, and provided Delta with the opportunity to show cause why the Agency should not disallow these revisions as being unreasonable, and therefore contrary to subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)).

[18] The Agency remains committed to the principle, as articulated in Decision No. LET-A-104-2007, that a carrier's tariff should be a stand-alone document avoiding references to other documents unrelated to the tariff. Passengers should be able to fully understand their rights in law simply by reading the tariff and without reviewing specific articles of treaties to discern the terms and conditions that apply to their flight.

CONCLUSION

[19] In light of the above, the Agency:

1. Disallows the tariff filing submitted on April 19, 2007 to the Agency by the Airline Tariff Publishing Company, Agent on behalf of Delta, under Filing Advice No. 57454, International Passenger Rules and Fares Tariff No. DL-1, NTA (National Transportation Agency)(A) No. 304, proposing to revise Rule 55, Liability of Carriers, as being unjust and unreasonable, and therefore contrary to subsection 111(1) of the ATR (Air Transportation Regulations).
2. Directs Delta, within 21 days from the date of this Decision, to file in the aforementioned tariff with the Agency, the tariff language submitted to the Agency by ATA on June 25, 2009 and approved by DOT by Order 2009-12-20, Docket OST-2005-22617, dated December 23, 2009. Consistent with all filed tariffs, this matter may be subject to further review on the Agency's own motion or in response to a complaint.
3. Expects ATA to advise immediately the carriers affected by Order 2009-12-20 to amend their tariffs filed with the Agency to reflect this language.

Members

- Geoffrey C. Hare
- Raymon J. Kaduck

Member(s)

Geoffrey C. Hare
Raymon J. Kaduck

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Date modified:
2010-05-03

Letter Decision No. LET-A-47-2017

August 2, 2017

Air Transat A.T. Inc. carrying on business as Air Transat (Air Transat) – Tarmac Delay

Case number: 17-03788

The Canadian Transportation Agency (Agency) notes that, on Monday, July 31, 2017, it was widely reported by numerous media outlets that hundreds of passengers aboard two Air Transat flights (Flight No. 157 from Brussels and Flight No. 507 from Rome) experienced a tarmac delay after their flights heading to Montreal were diverted to Ottawa due to severe weather.

Initial media reports suggest each tarmac delay lasted for between four to six hours, during which time:

• passengers were not able to disembark the aircraft;

• air conditioning on-board the aircraft was unavailable;

• drinking water and food supplies were depleted; and,

• external temperatures ranged up to 28°C.

Several passengers resorted to calling 911 to alert emergency responders to their situation. Upon arrival, paramedics distributed water to passengers.

MANDATE OF THE AGENCY

The Agency is responsible for ensuring that air carriers abide by the terms and conditions of their respective tariffs, as required by *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)):

> 110(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.

…

> 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.

Furthermore, section 26 of the *Canada Transportation Act,* S.C., 1996, c. 10, as amendedprovides as follows:

> The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Given the seriousness of the situation, the Agency, of its own motion, has decided to examine whether Air Transat properly applied the terms and conditions of carriage set out in its Tariff Containing Rules Applicable to Scheduled Services for the Transportation of Passengers and Baggage or Goods Between Points in Canada on the One Hand and Points Outside Canada (Except the United States) on the Other Hand, CTA(A) No. 4 (Tariff), pursuant to section 113.1 of the ATR (Air Transportation Regulations).

ISSUE

Did Air Transat properly apply the terms and conditions set out in its international tariff as required by subsection 110(4) of the ATR (Air Transportation Regulations)?

ANALYSIS AND FINDINGS

The terms and conditions of carriage of the Air Transat's tariff on file with the Agency and applicable to this situation are set out in the Appendix to this Decision.

Numerous media outlets have reported that Air Transat may not have complied with its tariff, which requires the following:

> …If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so. If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.

Given that the delays were reported to have greatly exceeded 90 minutes, Air Transat should have, according to its tariff, offered passengers the option of disembarking until it was time to depart.

Air Transat appears not to have made that option available according to media reports. This is particularly concerning given the reports that Air Transat did not have sufficient drinking water nor air conditioning available for passengers, despite the heat. In addition, the Ottawa Macdonald–Cartier

International Airport is reported to have claimed that it had stairs available to permit passengers to disembark, and it had water, snacks, and other essentials available for emergencies like this one, but Air Transat allegedly failed to request any assistance.

In light of the above, the Agency is of the preliminary opinion that Air Transat has contravened subsection 110(4) of the ATR (Air Transportation Regulations) in failing to properly apply the terms and conditions set out in its international tariff, as required by subsection 110(4) of the ATR (Air Transportation Regulations).

DIRECTION TO SHOW CAUSE

The Agency provides Air Transat with the opportunity to show cause why the Agency should not find that Air Transat did not properly apply the terms and conditions set out in its international tariff, as required by subsection 110(4) of the ATR (Air Transportation Regulations).

Air Transat will have until 5 p.m. Gatineau time on Friday, August 4, 2017 to provide its response to this Show Cause.

Air Transat is reminded that a failure to respond to this Show Cause will result in the Agency finalizing its preliminary finding that Air Transat did not properly apply the terms and conditions set out in its international tariff, as required by subsection 110(4) of the ATR (Air Transportation Regulations). This may, in turn, result in the Agency issuing an order for appropriate corrective measures, including compensation for any expenses incurred by passengers as a result of Air Transat's failure to properly apply the terms and conditions set out in its international tariff.

Any questions or other correspondence in regards to this matter should refer to Case No. 17-03788 and be filed through the Agency's Secretariat e-mail address secretariat@otc-cta.gc.ca.

APPENDIX

Air Transat A.T. Inc. CTA(A) No. 4

TARIFF CONTAINING RULES APPLICABLE TO SCHEDULED SERVICES FOR THE TRANSPORTATION OF PASSENGERS AND BAGGAGE OR GOODS BETWEEN POINTS IN CANADA ON THE ONE HAND AND POINTS OUTSIDE CANADA (EXCEPT THE UNITED STATES) ON THE OTHER HAND

Note: General Rules applicable to Scheduled Services between Canada and the United States are published by Airline Tariff Publishing Company in Tariff number NTA (National Transportation Agency)(A) No. 241.

(C) RULE 5. CONDITIONS OF CARRIAGE

5.1 Substitution of Aircraft or Air Carrier:

The Carrier may without notice, and subject to any necessary approval of the CTA or government authority, substitute an aircraft of the same or any other appropriate type for the aircraft agreed upon for a flight. The Carrier may also substitute another Air Carrier to operate flights on its behalf. The Carrier will inform passengers of the identity of the operating Air Carrier.

5.2 Responsibility for schedules and operations (Subject to Rule 21):

a. The Carrier will endeavor to transport passengers and baggage with reasonable dispatch. Times shown in schedules, scheduled contracts, tickets, air waybills or elsewhere are not guaranteed. Flight schedules are subject to change without notice. Notwithstanding, the Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reason for the delay or change.
b. Where a routing modification subsequent to the purchase of travel results in a change from a direct service to a connecting service, the Carrier will, upon request by the passenger, provide a full refund of the unused portion of the fare paid.
c. Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier. Notwithstanding, if the baggage does not arrive on the same flight, the Carrier will take steps to deliver the baggage to the passenger's residence/hotel as soon as possible. The Carrier will take steps to inform the passenger on the status of delivery and will provide the passenger with an overnight kit, as required.
d. If a flight is delayed for/advanced by more than four (4) hours in comparison to the originally scheduled departure time, the Carrier will provide the passenger with a meal voucher. If the flight is delayed for/advanced by more than eight (8) hours and requires an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not originate their travel at that airport. If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so. If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.

Member(s)

Scott Streiner
Sam Barone

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Date modified:
2017-08-02

Letter Decision No. LET-A-49-2017

August 9, 2017

Air Transat A.T. Inc. carrying on business as Air Transat (Air Transat) – tarmac delays

Case number: 17-03788

On August 2, 2017, the Canadian Transportation Agency (Agency) issued Decision No. LET-A-47-2017 following media reports of conditions experienced by passengers during extensive tarmac delays of Air Transat Flight Nos. 157 and 507 at the Ottawa MacDonald-Cartier International Airport on July 31, 2017. In its Decision, the Agency provided Air Transat with the opportunity to show cause why the Agency should not find that Air Transat did not properly apply the terms and conditions set out in its *International Scheduled Services Tariff*, CTA(A) No. 4 (Tariff) during these incidents, as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)).

ORAL HEARING

Upon review of Air Transat's August 4, 2017 response to the Agency's show cause decision, the Agency has decided to convene an oral hearing in order to better understand the airline's actions and what Air Transat calls "a confluence of factors beyond our control", which it asserts caused the events in question. The hearing will be held on August 30 and 31, 2017 in Ottawa at a location yet to be determined.

The scope of this oral hearing will be limited to investigating the circumstances of the tarmac delays experienced by passengers of Air Transat Flight Nos. 157 and 507 on July 31, 2017. The Agency will consider two issues in this proceeding:

1. Did Air Transat properly apply its Tariff during these incidents, pursuant to subsection 110(4) of the ATR (Air Transportation Regulations)?
2. Are Air Transat's applicable Tariff provisions reasonable, pursuant to subsection 111(1) of the ATR (Air Transportation Regulations)?

Broader questions regarding industry-wide rules around tarmac delays will not be addressed at the hearing but rather, will be dealt with through public consultations on air passenger rights regulations, which are expected to begin if and when the *Transportation Modernization Act* (Bill C-49) currently before Parliament is passed and receives royal assent.

INQUIRY OFFICER

To prepare the ground for an efficient hearing, the Agency hereby appoints Jean-Michel Gagnon, an employee of the Agency and a designated enforcement officer based in Montréal, as Inquiry Officer, pursuant to subsection 38(1) of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended.

The Inquiry Officer is required to:

1. conduct interviews and take written statements from individuals and organizations directly involved in, or affected by, the incidents;
2. obtain any documents, records and information that the Inquiry Officer may deem to be relevant to the inquiry;
3. submit a summary report to the Agency no later than August 25, 2017;
4. conduct the inquiry in a diligent and rigorous manner; and,
5. refrain from making public statements about the scope and timing of the inquiry.

In conducting this work, Mr. Gagnon may exercise all of the powers described in section 39 of the *Canada Transportation Act*.

Individuals or organizations directly involved in, or affected by, the incidents should contact Jean Michel Gagnon at enquete-inquiry@otc-cta.gc.ca or at 819-635-4108 on or before August 11, 2017 in order that he may take their statements.

Member(s)

Scott Streiner
Sam Barone

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Date modified:
2017-08-09

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 10, 2017 Decided July 28, 2017

No. 16-1101

FLYERS RIGHTS EDUCATION FUND, INC., D/B/A FLYERSRIGHTS.ORG, AND PAUL HUDSON,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,
RESPONDENTS

On Petition for Review of an Order of
the Federal Aviation Administration

Joseph E. Sandler argued the cause and filed the briefs for petitioner.

Karen Schoen, Attorney, U.S. Department of Justice, argued the cause for respondents. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney at the time the brief was filed, and *Mark B. Stern*, Attorney.

Before: ROGERS, MILLETT, and PILLARD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

Opinion concurring in part and concurring in the judgment filed by *Circuit Judge* ROGERS.

MILLETT, *Circuit Judge*: This is the Case of the Incredible Shrinking Airline Seat. As many have no doubt noticed, aircraft seats and the spacing between them have been getting smaller and smaller, while American passengers have been growing in size. Paul Hudson and the Flyers Rights group became concerned that this sharp contraction in passenger seating space was endangering the safety, health, and comfort of airline passengers. So they petitioned the Federal Aviation Administration to promulgate rules governing size limitations for aircraft seats to ensure, among other things, that passengers can safely and quickly evacuate a plane in an emergency. The Administration denied the petition, asserting that seat spacing did not affect the safety or speed of passenger evacuations. To support that conclusion, the Administration pointed to (at best) off-point studies and undisclosed tests using unknown parameters. That type of vaporous record will not do—the Administrative Procedure Act requires reasoned decisionmaking grounded in actual evidence. Accordingly, we grant the petition for review in part and remand to the Administration.

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Congress has charged the Federal Aviation Administration with ensuring the safety and security of commercial airline passengers. *See* 49 U.S.C. §§ 44701, 40101(d); *see also Wallaesa v. Federal Aviation Admin.*, 824 F.3d 1071, 1079 (D.C. Cir. 2016). In fulfilling that role, the Administration has "'*plenary authority* to [m]ake and enforce safety regulations governing the design

Decision No. 6-AT-A-2008

January 10, 2008

IN THE MATTER OF an application filed by the Estate of Eric Norman, Joanne Neubauer and the Council of Canadians with Disabilities pursuant to subsection 172(1) of the Canada Transportation Act, S.C., 1996, c. 10, as amended, against Air Canada, Jazz Air LP, as represented by its general partner, Jazz Air Holding GP Inc. carrying on business as Air Canada Jazz, WestJet, the Gander International Airport Authority and the Air Transport Association of Canada concerning the fares and charges to be paid by persons with disabilities who require additional seating to accommodate their disabilities to travel by air on domestic air services; and

IN THE MATTER OF oral hearings held from May 30 to June 3, 2005; on October 14, 2005; from November 14 to 29, 2006; and on December 12, 2006, to assist the Canadian Transportation Agency in its consideration of this application.

File No.: U3570-14/04-1

Executive summary[1]

Introduction

[1] The Canadian Transportation Agency (the Agency) is an independent quasi-judicial tribunal of the Government of Canada. Part V of the Agency's enabling statute, the *Canada Transportation Act* (the CTA), contains accessible transportation provisions which confer on the Agency the responsibility to eliminate undue obstacles to the mobility of persons with disabilities within the federal transportation network. The importance attached by Parliament to a federal transportation network that is accessible to persons with disabilities is reflected both in Canada's national transportation policy contained in section 5 of the CTA and in the substantive accessible transportation provisions which mandate the elimination of undue obstacles in the federal transportation network through regulation or complaint adjudication in a wide range of areas including "tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services. This is the context of the Agency's Decision which is being released.

Order for corrective measures

[23] In light of the undue obstacle findings against the Gander Airport Authority and Air Canada, Air Canada Jazz and WestJet, the Agency ordered the respondents to amend their current policies and procedures in order to incorporate a "one person - one fare" regime for persons with disabilities who require additional seating to travel on domestic air services by implementing the following corrective measures:

1. Gander International Airport Authority

[24] The Gander Airport Authority shall not charge or collect an airport improvement fee for additional seats needed by persons with disabilities who are required to travel with Attendants, on domestic air services, under the carriers' tariffs.

2. Air Canada, Air Canada Jazz and WestJet

[25] The carrier respondents shall not charge a fare for additional seats provided to the following persons with disabilities:

- those persons who are required, under the terms of the carriers' tariff, to be accompanied by an Attendant;
- those persons who are disabled as a result of obesity; and
- those other persons who require additional seating for themselves to accommodate their disability to travel by air.

[26] With respect to the implementation of corrective measures, in recognition of the need for the respondents to, in the case of the carrier respondents, develop new or modify existing eligibility screening mechanisms so that they can properly apply the new policies, and, in the case of the Gander Airport Authority, establish a procedure to determine how to identify those persons with disabilities who are required by air carrier domestic tariffs to travel with an Attendant, the Agency determined that a twelve-month period is reasonable for the finalization and implementation of the corrective measures ordered.

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

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.

[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

and expires as of March 31 in any given year. It is true that by section 9 of the Act the Minister's power to cancel licences is restricted to situations where there has been a breach of a condition of the licence, and no doubt in exercising that power of cancellation the Minister or his representatives would have to act fairly: see *Lapointe v. Min. of Fisheries & Oceans* (1984), 9 Admin. L.R. 1 (F.C.T.D.). But licences terminate each year and by section 7 the Minister has an "absolute discretion" in the issuance of new licences. I am therefore unable to find a legal underpinning for the "vesting" of a licence beyond the rights which it gives for the year in which it was issued.

an et tous expirent le 31 mars de chaque année. Il est vrai qu'aux termes de l'article 9 de la Loi, le Ministre ne peut exercer son pouvoir de révoquer les permis que dans les seuls cas où il y a eu manquement à une condition du permis, et il ne fait pas de doute que dans l'exercice de ce pouvoir de révocation, le Ministre ou ses représentants doivent agir équitablement: voir *Lapointe c. Min. des Pêches et Océans* (1984), 9 Admin. L.R. 1 (C.F. 1re inst.). Mais les permis prennent fin chaque année et aux termes de l'article 7, le Ministre exerce une «discrétion absolue» en ce qui concerne la délivrance de nouveaux permis. Il m'est donc impossible de trouver un fondement juridique à l'«octroi» d'un permis au-delà des droits qui sont accordés pour l'année pour laquelle il est délivré.

In *Delisle v. Canada*, [1991] F.C.J. No. 459 (T.D.), it was held that the power conferred on the Minister by s. 7 of the *Fisheries Act* to issue a fishing licence implied the discretionary power to refuse to issue such a licence. 34

Dans la décision *Delisle c. Canada*, [1991] A.C.F. nº 459 (QL), on a statué que le pouvoir de délivrer un permis de pêche, que l'art. 7 de la *Loi sur les pêches* conférait au Ministre, comportait implicitement le pouvoir discrétionnaire de refuser de délivrer ce permis.

While the existence of regulations under s. 43 of the *Fisheries Act* may restrict the Minister's absolute discretion (*R. v. Halliday* (1994), 129 N.S.R. (2d) 317 (S.C.)), that is not an issue in this appeal. 35

Bien que le pouvoir discrétionnaire absolu du Ministre puisse être restreint par l'existence de règlements pris en vertu de l'art. 43 de la *Loi sur les pêches* (*R. c. Halliday* (1994), 129 N.S.R. (2d) 317 (C.S.)), cette question n'est pas soulevée dans le présent pourvoi.

It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister: see *Thomson v. Minister of Fisheries and Oceans*, F.C.T.D., No. T-113-84, February 29, 1984. 36

Je suis d'avis que le pouvoir discrétionnaire d'autoriser la délivrance de permis, qui est conféré au Ministre par l'art. 7, est, à l'instar de son pouvoir discrétionnaire de délivrer des permis, restreint seulement par l'exigence de justice naturelle, étant donné qu'il n'y a actuellement aucun règlement applicable. Le Ministre doit fonder sa décision sur des considérations pertinentes, éviter l'arbitraire et agir de bonne foi. Il en résulte un régime administratif fondé principalement sur le pouvoir discrétionnaire du Ministre: voir *Thomson c. Ministre des Pêches et Océans*, C.F. 1re inst., nº T-113-84, 29 février 1984.

This interpretation of the breadth of the Minister's discretion is consonant with the overall policy of the *Fisheries Act*. Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop 37

Cette interprétation de la portée du pouvoir discrétionnaire du Ministre est conforme à la politique globale de la *Loi sur les pêches*. Les ressources halieutiques du Canada sont un bien commun qui appartient à tous les Canadiens. En vertu de la *Loi sur les pêches*, le Ministre a l'obli-

only requirement, in fact, is that there *be* judicial review in order to ensure, in particular, that decision-makers do not exercise authority they do not have. I see nothing in its elaboration of rule of law principles that precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, as in the four categories singled out for correctness review in *Dunsmuir*.

constitutionnels, il faut qu'il y ait un certain nombre de normes de contrôle. En fait, tout ce qui est exigé c'est qu'il y *ait* des contrôles judiciaires pour faire en sorte notamment que les décideurs administratifs n'exercent pas de pouvoirs qui ne leur sont pas impartis. Je ne vois rien dans son analyse des principes de primauté du droit qui empêcherait l'adoption d'une seule norme de contrôle, tant que cette dernière permet la déférence à l'égard du décideur *et* la possibilité de conclure, lorsque la primauté du droit l'exige, qu'il ne peut y avoir qu'une seule issue, comme dans le cas des quatre catégories de questions soumises à l'application de la norme de la décision correcte suivant *Dunsmuir*.

[32] A single standard of reasonableness still invites the approach outlined in *Dunsmuir*, namely:

[32] L'adoption d'une norme unique de la décision raisonnable appelle toujours la démarche énoncée dans *Dunsmuir*, c'est-à-dire :

. . . reasonableness is concerned . . . with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

Le caractère raisonnable tient [. . .] à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. [par. 47]

[33] Approaching the analysis from the perspective of whether the outcome falls within a range of defensible outcomes has the advantage of being able to embrace comfortably the animating principles of both former categories of judicial review. Courts can apply a wider range for those kinds of issues and decision-makers traditionally given a measure of deference, and a narrow one of only one "defensible" outcome for those which formerly attracted a correctness review. Most decisions will continue to attract deference, as they did in *Dunsmuir*, which means, as Justice Evans noted

[33] Envisager l'analyse en posant la question de savoir si la décision appartient aux issues pouvant se justifier présente l'avantage de bien cadrer avec les principes qui animaient l'une et l'autre des deux anciennes catégories de contrôle judiciaire. Les cours de justice peuvent circonscrire largement la gamme des issues dans les cas où les décideurs — ou le type de questions — appelaient traditionnellement une démarche empreinte de déférence et étroitement — en reconnaissant une seule issue « pouvant se justifier » — dans les cas où les questions entraînaient auparavant l'application de la norme de la décision correcte. La plupart des décisions continueront à commander la déférence, comme l'explique la Cour dans *Dunsmuir*, ce qui signifie, pour citer le juge Evans :

[that] a court may be more likely to conclude that a range of reasonable interpretative choices exists, and that deference is meaningful, when the tribunal's authority is conferred in broad terms. If, for example, a tribunal is authorized to make a decision on the basis of the public interest, a reviewing court may well decide that the tribunal has

[TRADUCTION] . . . [qu']une cour de justice sera plus encline à conclure à l'existence de plusieurs choix interprétatifs raisonnables et à faire preuve de déférence dans les cas où le pouvoir du tribunal administratif lui est conféré en termes larges. Si, par exemple, ce tribunal est habilité à trancher des questions d'intérêt public, il se

a range of choices in selecting the factors it will consider in making its decision. At this point, questions of law shade imperceptibly into questions of discretion. Reasonableness review permits the court to determine whether the factors considered by the tribunal are rationally related to the generally multiple statutory objectives. It is not the court's role to identify the factors to be considered by the tribunal, let alone to reweigh them. [Footnote omitted; p. 110.]

[34] Even in statutory interpretation, the interpretive exercise will usually attract a wide range of reasonable outcomes. This Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, for example, found that the Minister had considerable latitude in interpreting a statutory provision that required decisions be made in the "national interest".

[35] But there may be rare occasions where only one "defensible" outcome exists. In *Mowat*, for example, this Court found that the ordinary tools of statutory interpretation made it clear that the administrative body under review did not have the authority to award costs in a specific context. In the particular circumstances of that case, no other result fell within the range of reasonable outcomes. Similarly, this Court has set aside decisions when they fundamentally contradicted the purpose or policy underlying the statutory scheme: *Halifax*.

[36] The four categories, however, which were identified as attracting correctness under *Dunsmuir* based on rule of law principles, always yield only one reasonable outcome.

[37] I acknowledge that no attempt to simplify the review process will necessarily guarantee consistent outcomes. Even under the current *Dunsmuir* model, there have been cases in this Court where judges applied the same standard, yet came to different conclusions about the decisional effect of applying

peut que la cour siégeant en révision décide qu'il dispose de plusieurs choix lorsqu'il s'agit de déterminer les facteurs décisionnels à considérer. Les questions de droit se mueront imperceptiblement en questions relatives à l'exercice du pouvoir discrétionnaire. Le contrôle selon la norme de la décision raisonnable permet à la cour de décider si les facteurs dont le tribunal a tenu compte sont liés sur le plan rationnel aux objectifs de la loi, qui sont en général multiples. Il n'incombe pas à la cour de choisir les facteurs que le tribunal devait considérer, et encore moins de les soupeser à nouveau. [Note en bas de page omise; p. 110.]

[34] Même lorsqu'il s'agit d'interpréter une loi, l'exercice d'interprétation se soldera généralement par plusieurs issues raisonnables. La Cour dans l'arrêt *Agraira c. Canada (Sécurité publique et Protection civile)*, [2013] 2 R.C.S. 559, par exemple, a conclu que le ministre disposait d'une latitude considérable dans l'interprétation d'une disposition législative prévoyant comme critère de décision « l'intérêt national ».

[35] Or, il se peut qu'en de rares occasions il n'y ait qu'une seule issue « pouvant se justifier ». Dans l'arrêt *Mowat*, par exemple, la Cour estime qu'il ressort clairement après l'application des outils ordinaires d'interprétation législative que l'organe administratif dont la décision est contrôlée n'a pas le pouvoir d'adjuger les dépens dans le contexte. Dans les circonstances particulières de l'affaire, aucun autre résultat n'appartient aux issues raisonnables. De même, la Cour a infirmé des décisions qui vont à l'encontre de l'objet d'un régime légal ou du choix politique qui le sous-tend (*Halifax*).

[36] En revanche, les quatre catégories de questions qui commandent la norme de la décision correcte suivant *Dunsmuir* sur le fondement des principes de la primauté du droit n'emportent toujours qu'une seule issue raisonnable.

[37] Je reconnais qu'aucune tentative de simplification ne peut nécessairement garantir l'uniformité. Même à la lumière du cadre établi par l'arrêt *Dunsmuir*, il est arrivé que des juges de la Cour, ayant appliqué la même norme, aient exprimé des conclusions différentes quant à son effet sur la

to mean that all direct and indirect costs, including environmental, land use, and economic costs ("social costs"), should be considered. However, I need express no opinion on the correctness of these interpretations or on whether the requirement in the regulations that the applicant for a licence furnish such evidence also means that the Board is required to consider it, especially in light of s. 119.08(2) of the Act, which gives the Board the discretion to determine which considerations are relevant to its decision, and of the terms of s. 6(2) itself, which gives the Board the authority to dispense with proof of any of the items specifically enumerated thereafter. In this case, it is clear that the Board considered that evidence of the nature and recoverability of such costs was relevant to its decision (reasons of the Board, at p. 29).

While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations. Once the Board decides that a particular factor is relevant to its decision, there must be some evidence to support the conclusion reached relating to it. The Board must not act unreasonably in evaluating the evidence it requests to make its decision: *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

However, in this appeal, it cannot be said that the Board was without evidence on which it could reasonably have concluded that the consideration of cost recoverability was satisfied. The Board, in its decision, summarized the evidence given by Hydro-Québec on this point as follows (at p. 13):

Hydro-Québec did not supply the Board with copies of the cost-benefit analyses for the advancement of facilities required to meet its obligations under the two contracts. Nevertheless it did provide information on the methodology, assumptions and the revenues used in the

question signifierait qu'il y a lieu de tenir compte de tous les coûts directs et indirects, y compris les coûts environnementaux, l'utilisation des terres et les coûts économiques (les «coûts sociaux»). Cependant, je n'ai pas à déterminer si cette interprétation est correcte ou si l'exigence réglementaire imposée au demandeur de fournir ce genre de preuve signifie aussi que l'Office doit en tenir compte, particulièrement en raison du par. 119.08(2) de la Loi, qui lui donne le pouvoir discrétionnaire de déterminer quels facteurs sont pertinents relativement à sa décision et du libellé même du par. 6(2), qui lui donne le pouvoir de ne pas exiger la preuve des éléments qui y sont ensuite énumérés. En l'espèce, il est clair que l'Office a jugé que la preuve de la nature et de la récupération possible des coûts était pertinente relativement à sa décision (motifs de l'Office, à la p. 29).

Bien que les intimés aient raison de soutenir qu'il y a lieu de faire preuve de retenue judiciaire à l'égard de l'appréciation de la preuve faite par l'Office dans l'exercice de son pouvoir discrétionnaire, ce principe ne peut être invoqué pour valider une décision non fondée sur la preuve ou fondée sur des facteurs non pertinents. Lorsque l'Office décide qu'un facteur particulier est pertinent pour les fins de sa décision, il doit exister certains éléments de preuve qui appuient la conclusion sur ce point. L'Office ne doit pas agir de façon déraisonnable dans l'examen des éléments de preuve qu'il demande pour rendre sa décision: *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722.

Cependant, en l'espèce, on peut affirmer que l'Office disposait d'éléments de preuve lui permettant de raisonnablement conclure que le facteur de la récupération des coûts avait été respecté. Dans sa décision, l'Office a résumé ainsi les éléments de preuve présentés par Hydro-Québec sur ce point (à la p. 13):

Hydro-Québec n'a pas remis à l'Office une copie des analyses des coûts de devancement des installations nécessaires pour remplir les obligations des deux contrats. Néanmoins, elle a fourni les renseignements concernant la méthodologie, les hypothèses et les revenus

therefore ineligible for PILTs under the scheme. I do not suggest that property subject to the Act can never be given nominal value. It is possible, for example, that in some instances an assessment authority would attribute nominal value to the property if it were under its jurisdiction: see, for example, *Notre-Dame-de-l'Île-Perrot (Paroisse de) v. Société générale des industries culturelles*, [2000] R.J.Q. 345 (C.A.); *Québec (Communauté urbaine) v. Fondation Bagatelle Inc.*, 2001 CanLII 15060 (Que. C.A.), leave to appeal to SCC refused, [2002] 3 S.C.R. xii; *Gander International Airport Authority Inc. v. Gander (Town)*, 2011 NLCA 65, 313 Nfld. & P.E.I.R. 125. But implicit in the Minister's decision in this case is that any land on a national historic site which, for that reason, cannot be developed or support economically productive use has no value. A categorical position such as this fundamentally contradicts Parliament's purpose in making national historic sites subject to the Act.

lieu au versement de PRI selon le régime applicable, est incompatible avec la volonté du législateur de les inclure dans ce régime. Je ne dis pas qu'une propriété assujettie à la Loi ne peut jamais se voir attribuer une valeur nominale. Par exemple, il se peut que, dans certains cas, l'autorité évaluatrice attribue une valeur nominale à une propriété qui est de son ressort : voir, p. ex., *Notre-Dame-de-l'Île-Perrot (Paroisse de) c. Société générale des industries culturelles*, [2000] R.J.Q. 345 (C.A.); *Québec (Communauté urbaine) c. Fondation Bagatelle Inc.*, 2001 CanLII 15060 (C.A. Qué.), autorisation d'appel à la CSC refusée, [2002] 3 R.C.S. xii; *Gander International Airport Authority Inc. c. Gander (Town)*, 2011 NLCA 65, 313 Nfld. & P.E.I.R. 125. Il ressort toutefois implicitement de la décision du ministre en l'espèce que tout terrain situé sur un lieu historique national qui, pour cette raison, ne peut être aménagé ou utilisé de façon profitable sur le plan économique, n'a aucune valeur. Une telle position catégorique contredit fondamentalement l'intention du législateur d'appliquer la Loi aux lieux historiques nationaux.

[55] Discretion conferred by statute must be exercised consistently with the purposes and policies underlying its grant: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 46; see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65; *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, at p. 174; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, at paras. 39-45.

[55] Un pouvoir discrétionnaire conféré par la loi doit être exercé en conformité avec les objectifs et les politiques sous-jacents à son octroi : *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815, par. 46; voir aussi *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 65; *Oakwood Development Ltd. c. Municipalité rurale de St. François Xavier*, [1985] 2 R.C.S. 164, p. 174; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, 2001 CSC 37, [2001] 2 R.C.S. 132, par. 39-45.

[56] In my respectful view, the Minister's exercise of discretion was contrary to both the purposes and the policy of the Act. Parliament's purpose in including national historic sites within the ambit of the Act was to allow the Minister to make PILTs in respect of such sites, which should be valued under an approach that is conducive to this purpose. It cannot accord with the statutory purpose to accept that the Minister can undercut this inclusion

[56] À mon humble avis, dans l'exercice de son pouvoir discrétionnaire, le ministre a contrevenu aux objectifs de la Loi et aux politiques qui la sous-tendent. En incluant les lieux historiques nationaux dans le champ d'application de la Loi, le législateur voulait permettre au ministre de verser des PRI à l'égard de tels lieux, et ceux-ci devraient être évalués suivant une approche favorable à l'atteinte de cet objectif. Accepter que le ministre puisse

by adopting a method of valuation that renders it meaningless. The Minister's approach "had the effect of frustrating the very legislative scheme under which the power is conferred": *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 174 (internal quotation marks omitted). It was therefore unreasonable.

[57] The Minister's position is also, in my view, at odds with the broader policy of the Act, which is to treat municipalities fairly. It can hardly be thought either fair or equitable to conclude that 42 acres in the middle of a major metropolitan centre has no value for assessment purposes. While admittedly applying market value assessment principles to an historic site is a challenging enterprise, the conclusion that an historic site has no value because it cannot be developed or used in an economically productive way is "out of sync" with the equitable purpose of the PILT scheme. Of course, the presence of an historic site doubtless has spin-off benefits for the community in which it is located. But the Act is directed to fair and equitable PILTs with reference to what taxes would be payable if the site were taxable. The Minister's approach in my view unreasonably departs from that purpose.

[58] It is a challenging task to determine the market value for appraisal purposes of a property whose highest and best use is as a national historic site. While I have concluded that the Minister's approach to this task was unreasonable on the record before him, nothing that I have said in my reasons is intended to approve or adopt any particular approach to this appraisal conundrum or to suggest that the Minister, in order to act reasonably in this case, was obliged to adopt the appraisal method put forward on behalf of the municipality or was required to ignore the use restrictions inherent in the property's highest and best use as a national historic site. What will constitute a reasonable approach on the part of the Minister depends

compromettre l'inclusion des lieux historiques nationaux dans le champ d'application de la Loi en adoptant une méthode d'évaluation qui rende cette inclusion inutile ne saurait être considéré compatible avec l'objectif de la Loi. La méthode retenue par le ministre « a eu pour effet de contrecarrer l'économie même de la loi qui [. . .] confère le [pouvoir] » : *S.C.F.P. c. Ontario (Ministre du Travail)*, 2003 CSC 29, [2003] 1 R.C.S. 539, par. 174 (guillemets omis). Elle était donc déraisonnable.

[57] La position du ministre va également, à mon avis, à l'encontre de la politique générale de la Loi suivant laquelle les municipalités doivent être traitées équitablement. La conclusion qu'un terrain de 42 acres situé en plein cœur d'un grand centre métropolitain n'a aucune valeur aux fins de taxation peut difficilement être considérée juste ou équitable. Si l'application des principes d'évaluation du marché à un lieu historique constitue certes un défi, la conclusion qu'un lieu historique n'a aucune valeur parce qu'il ne peut être aménagé ou faire l'objet d'une utilisation profitable sur le plan économique ne cadre toutefois pas avec l'objectif d'équité du régime des PRI. La présence d'un lieu historique dans une collectivité a bien entendu des retombées avantageuses pour celle-ci. Cependant, la Loi vise l'administration juste et équitable des PRI en utilisant comme facteur de référence l'impôt qui serait applicable si la propriété était imposable. À mon avis, la méthode utilisée par le ministre s'écarte déraisonnablement de cet objectif.

[58] Déterminer pour les besoins d'une évaluation la valeur marchande d'une propriété dont l'utilisation optimale est celle d'un lieu historique national représente un défi de taille. Même si j'ai conclu que la façon dont le ministre a abordé cette tâche était déraisonnable, compte tenu du dossier dont il était saisi, je ne dis aucunement dans ces motifs que j'approuve ou que j'adopte une méthode en particulier à l'égard de ce délicat problème d'évaluation. Je ne laisse pas non plus entendre que le ministre, pour agir raisonnablement en l'espèce, était tenu d'adopter la méthode d'évaluation préconisée par la municipalité ou qu'il ne devait pas prendre en compte des restrictions à l'utilisation inhérentes à l'utilisation optimale de la propriété en tant que

law to which traditional principles of criminal law have but limited application."

The *Sault Ste. Marie* case recognized strict liability as a middle ground between full *mens rea* and absolute liability. Where the offence is one of strict liability, the Crown is required to prove neither *mens rea* nor negligence; conviction may follow merely upon proof beyond a reasonable doubt of the proscribed act. However, it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken. This is the hallmark of the strict liability offence: the defence of due diligence.

Thus, *Sault Ste. Marie* not only affirmed the distinction between regulatory and criminal offences, but also subdivided regulatory offences into categories of strict and absolute liability. The new category of strict liability represented a compromise which acknowledged the importance and essential objectives of regulatory offences but at the same time sought to mitigate the harshness of absolute liability which was found, at p. 1311, to "violate[s] fundamental principles of penal liability".

The Rationale for the Distinction

It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being

«sont essentiellement de nature civile et pourraient fort bien être considérées comme une branche du droit administratif à laquelle les principes traditionnels du droit criminel ne s'appliquent que de façon limitée».

Dans l'arrêt *Sault Ste-Marie*, la Cour a reconnu que la responsabilité stricte constituait un moyen terme entre la *mens rea* complète et la responsabilité absolue. Lorsqu'il s'agit d'une infraction de responsabilité stricte, le ministère public n'a pas à faire la preuve de la *mens rea* ni de la négligence; il peut obtenir une déclaration de culpabilité en prouvant simplement hors de tout doute raisonnable que l'accusé a commis l'acte prohibé. Cependant, il est loisible au défendeur d'écarter sa responsabilité en prouvant, selon la prépondérance des probabilités, qu'il a pris toutes les précautions nécessaires. Telle est la principale caractéristique de l'infraction de responsabilité stricte: la défense de diligence raisonnable.

Dans l'arrêt *Sault Ste-Marie*, la Cour a donc non seulement confirmé la distinction faite entre les infractions réglementaires et les infractions criminelles, mais elle a également subdivisé les infractions réglementaires en infractions de responsabilité stricte et de responsabilité absolue. La nouvelle catégorie d'infractions de responsabilité stricte représentait un compromis qui reconnaissait l'importance et les objectifs essentiels des infractions réglementaires tout en visant à atténuer la sévérité de la responsabilité absolue que l'on a jugé (à la p. 1311) «viole[r] les principes fondamentaux de la responsabilité pénale».

Le fondement de la distinction

On estime depuis toujours qu'il existe une raison logique de faire une distinction entre les crimes et les infractions réglementaires. Des actes ou des actions sont criminels lorsqu'ils constituent une conduite qui, en soi, est si odieuse par rapport aux valeurs fondamentales de la société qu'elle devrait être complètement interdite. Le meurtre, l'agression sexuelle, la fraude, le vol qualifié et le vol sont si répugnants pour la société que l'on reconnaît universellement qu'il s'agit de crimes. Par ailleurs, une certaine conduite est interdite, non pas parce qu'elle est en soi répréhensible mais parce que l'absence de réglementation créerait des conditions dangereuses pour les

imposed upon members of society, especially those who are particularly vulnerable.

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

That is the theory but, like all theories, its application is difficult. For example, is the single mother who steals a loaf of bread to sustain her family more blameworthy than the employer who, through negligence, breaches regulations and thereby exposes his employees to dangerous working conditions, or the manufacturer who, as a result of negligence, sells dangerous products or pollutes the air and waters by its plant? At this stage it is sufficient to bear in mind that those who breach regulations may inflict serious harm on large segments of society. Therefore, the characterization of an offence as regulatory should

membres de la société, surtout pour ceux qui sont particulièrement vulnérables.

Les lois de nature réglementaire ont pour objectif de protéger le public ou divers groupes importants le composant (les employés, les consommateurs et les automobilistes pour n'en nommer que quelques-uns) contre les effets potentiellement préjudiciables d'activités par ailleurs légales. La législation réglementaire implique que la protection des intérêts publics et sociaux passe avant celle des intérêts individuels et avant la dissuasion et la sanction d'actes comportant une faute morale. Alors que les infractions criminelles sont habituellement conçues afin de condamner et de punir une conduite antérieure répréhensible en soi, les mesures réglementaires visent généralement à prévenir un préjudice futur par l'application de normes minimales de conduite et de prudence.

Il s'ensuit que les infractions réglementaires et les crimes expriment deux concepts de faute différents. Étant donné que les infractions réglementaires ne visent pas principalement la conduite elle-même mais plutôt ses conséquences, on peut penser que la déclaration de culpabilité relative à une infraction réglementaire comporte un degré de culpabilité considérablement moins important qu'une déclaration de culpabilité relative à un crime proprement dit. Le concept de faute en matière d'infractions réglementaires repose sur une norme de diligence raisonnable et, comme tel, ne suppose pas la même réprobation morale que la faute criminelle. La déclaration de culpabilité d'un défendeur relativement à une infraction réglementaire n'indique rien de plus que le fait que celui-ci n'a pas respecté la norme de diligence prescrite.

Telle est la théorie; mais, comme toutes les théories, elle est difficile à appliquer. Par exemple, peut-on blâmer davantage la mère célibataire qui vole une miche de pain pour nourrir sa famille que l'employeur qui, par sa négligence, viole des règlements et, de ce fait, expose ses employés à des conditions de travail dangereuses, ou que le fabricant qui vend des produits dangereux ou dont l'usine pollue l'air et l'eau par suite de sa négligence? Il suffit à ce stade de ne pas perdre de vue que ceux qui violent les dispositions réglementaires peuvent causer un préjudice grave à de nombreux groupes de la société. Par con-

basis of liability in the regulatory context which fully meets the fault requirement in s. 7 of the *Charter*.

It is argued, however, that to place regulatory offences in a separate category from criminal offences, with a lower fault standard, puts the accused charged with the breach of a regulatory provision in a fundamentally unfair position. It is a violation of the principles of fundamental justice under s. 7, it is said, to allow the defendant to go to jail without having had the protection available in criminal prosecutions—that is, proof of *mens rea* by the Crown.

I cannot accept this contention. Regulatory offences provide for the protection of the public. The societal interests which they safeguard are of fundamental importance. It is absolutely essential that governments have the ability to enforce a standard of reasonable care in activities affecting public welfare. The laudable objectives served by regulatory legislation should not be thwarted by the application of principles developed in another context.

It must be remembered that regulatory offences were historically developed and recognized as a distinct category precisely for the purpose of relieving the Crown of the burden of proving *mens rea*. This is their hallmark. The tremendous importance of regulatory legislation in modern Canadian industrial society requires that courts be wary of interfering unduly with the regulatory role of government through the application of inflexible standards. Under the contextual approach, negligence is properly acceptable as the minimum fault standard required of regulatory legislation by s. 7.

What some writers have referred to as "licensing" considerations lead to the same conclusion. The regulated actor is allowed to engage in activity which potentially may cause harm to the public. That permission is granted on the understanding that the actor accept, as a condition of entering the regulated field, the responsibility to exercise reasonable care to

et respecte pleinement l'exigence de l'art. 7 de la *Charte* quant à la faute.

Il est cependant allégué qu'en classant les infractions réglementaires dans une catégorie distincte des infractions criminelles avec un degré de faute moindre, on place la personne accusée d'une infraction à une disposition réglementaire dans une situation fondamentalement injuste. Il est contraire, affirme-t-on, aux principes de justice fondamentale prévus à l'art. 7 de permettre que le défendeur soit emprisonné sans qu'il ait pu bénéficier de la protection offerte dans les poursuites pénales, c'est-à-dire la preuve de la *mens rea* par le ministère public.

Je ne peux accepter cette prétention. Les infractions réglementaires sont prévues pour assurer la protection du public. Les intérêts sociaux en jeu revêtent une importance fondamentale. Il est absolument essentiel que les gouvernements aient la capacité de faire appliquer une norme de diligence raisonnable dans les activités qui ont une incidence sur le bien-être public. Les objectifs louables auxquels servent les lois de nature réglementaire ne devraient pas être contrecarrés par l'application de principes élaborés dans un autre contexte.

Il convient de rappeler que les infractions réglementaires ont historiquement été créées et reconnues comme catégorie distincte afin précisément de dégager le ministère public de l'obligation de prouver la *mens rea*. Telle est leur principale caractéristique. L'importance énorme des lois de nature réglementaire dans la société industrielle moderne du Canada exige que les tribunaux se montrent prudents afin de ne pas intervenir indûment dans le rôle de réglementation du gouvernement en appliquant des normes inflexibles. Suivant la méthode contextuelle, la négligence peut à juste titre constituer la norme minimale de faute requise des lois de nature réglementaire par l'art. 7.

Ce que certains auteurs ont présenté comme des considérations relatives à l'«acceptation des conditions» mène à la même conclusion. La personne assujettie à une réglementation est autorisée à exercer une activité qui peut éventuellement causer un préjudice au public. Cette autorisation lui est accordée à condition qu'elle accepte, pour exercer ses activités dans le

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

soupesés de façon cumulative — à la lumière des objectifs qui sous-tendent les restrictions à la qualité pour agir — et appliqués d'une manière souple et libérale de façon à favoriser la mise en œuvre de ces objectifs sous-jacents.

[21] Je n'ai pas l'intention d'entreprendre l'examen exhaustif de la jurisprudence de la Cour en matière de qualité pour agir dans l'intérêt public. Je vais cependant en souligner certains aspects clés : l'approche téléologique, la préoccupation sous-jacente envers le principe de la légalité et l'importance de l'exercice judicieux du pouvoir judiciaire discrétionnaire. Ensuite, je vais expliquer que, à mon avis, l'examen qu'il convient d'appliquer à ces facteurs confirme la conclusion de la Cour d'appel selon laquelle il y a lieu de reconnaître aux intimées la qualité pour agir dans l'intérêt public.

(2) Les objectifs des règles de droit relatives à la qualité pour agir

[22] Les tribunaux ont reconnu depuis longtemps la nécessité de restreindre la qualité pour agir. En effet, ce ne sont pas toutes les personnes voulant débattre d'une question, sans tenir compte du fait qu'elles soient touchées par l'issue du débat ou pas, qui devraient être autorisées à le faire : *Conseil canadien des Églises*, p. 252. Cela étant dit, l'augmentation de la réglementation gouvernementale et l'entrée en vigueur de la *Charte* ont incité les tribunaux à s'éloigner d'une conception de leur rôle fondée strictement sur le droit privé, comme en témoigne l'observation d'un certain relâchement des règles traditionnelles de droit privé en ce qui concerne la qualité pour engager une poursuite : *Conseil canadien des Églises*, p. 249, et voir aussi généralement O. M. Fiss, « The Social and Political Foundations of Adjudication » (1982), 6 *Law & Hum. Behav.* 121. La Cour a reconnu que, dans le cadre d'une démocratie constitutionnelle comme celle du Canada qui est doté d'une *Charte des droits et libertés*, il existe des occasions où un litige d'intérêt public constitue la façon appropriée de procéder pour saisir les tribunaux de questions d'intérêt public d'importance.

[23] Dans les affaires de droit public, la Cour a adopté une approche téléologique pour l'élaboration

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

des règles de droit applicables à la question de la qualité pour agir. Lorsqu'il s'agit de décider s'il est justifié de reconnaître cette qualité, les tribunaux doivent exercer leur pouvoir discrétionnaire et mettre en balance, d'une part, le raisonnement qui sous-tend les restrictions à cette reconnaissance et, d'autre part, le rôle important qu'ils jouent lorsqu'ils se prononcent sur la validité des mesures prises par le gouvernement. En somme, les règles de droit relatives à la qualité pour agir tirent leur origine de la nécessité d'établir un équilibre « entre l'accès aux tribunaux et la nécessité d'économiser les ressources judiciaires » : *Conseil canadien des Églises*, p. 252.

[24] Il est utile de rappeler ici succinctement les objectifs sous-jacents que visent les règles de droit relatives à la qualité pour agir formulées par la Cour ainsi que la manière dont ils sont pris en compte.

[25] C'est dans l'arrêt *Finlay*, aux p. 631-634, qu'on trouve l'examen le plus exhaustif du raisonnement qui sous-tend les restrictions à la reconnaissance de la qualité pour agir. En effet, la Cour y a décrit les préoccupations qui, traditionnellement, ont servi à expliquer ces restrictions : l'affectation appropriée des ressources judiciaires limitées et la nécessité d'écarter les trouble-fête; l'assurance que les tribunaux entendront les principaux intéressés faire valoir contradictoirement leurs points de vue; et la sauvegarde du rôle propre aux tribunaux et de leur relation constitutionnelle avec les autres branches du gouvernement. Quelques mots sont de mise concernant chacune de ces préoccupations traditionnelles.

a) *Les ressources judiciaires limitées et les « trouble-fête »*

[26] La préoccupation au regard de l'affectation appropriée des ressources judiciaires limitées est en partie fondée sur l'argument bien connu du « raz de marée ». Le relâchement des règles concernant la qualité pour agir pourrait avoir comme résultat de conférer à plusieurs personnes le droit d'intenter des actions de nature semblable et il pourrait en résulter de [TRADUCTION] « graves inconvénients » : voir, p. ex., *Smith c. Attorney General of Ontario*,

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.

[1924] R.C.S. 331, p. 337. Le juge Cory a présenté la chose de façon convaincante au nom de la Cour dans l'arrêt *Conseil canadien des Églises* : « Ce serait désastreux si les tribunaux devenaient complètement submergés en raison d'une prolifération inutile de poursuites insignifiantes ou redondantes intentées par des organismes bien intentionnés dans le cadre de la réalisation de leurs objectifs, convaincus que leur cause est fort importante » (p. 252). Ce facteur ne vise pas les questions de commodités ni celles relatives à la charge de travail des juges, mais bien celle du fonctionnement efficace du système judiciaire dans son ensemble.

[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.

[27] La préoccupation alimentée par la volonté d'écarter les trouble-fête découle, pour sa part, non seulement de la question de la multiplicité possible des actions, mais également de la thèse selon laquelle les demandeurs qui ont un intérêt personnel dans l'issue d'une affaire devraient bénéficier d'une affectation prioritaire des ressources judiciaires. Les tribunaux doivent aussi prendre en compte l'effet que peut avoir sur les autres la décision de reconnaître la qualité pour agir dans l'intérêt public. Par exemple, une telle décision pourrait ébranler celle de ne pas intenter de poursuite prise par les personnes ayant un intérêt personnel dans une affaire. En outre, le fait de reconnaître la qualité pour agir dans le cadre d'une contestation qui est ultimement rejetée pourrait faire obstacle à des contestations engagées par des parties qui auraient « des plaintes précises fondées sur des faits » : *Hy and Zel's Inc. c. Ontario (Procureur général)*, [1993] 3 R.C.S. 675, 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

[28] Ces préoccupations concernant la multiplicité des poursuites et des demandes présentées par des « trouble-fête » sont reconnues depuis longtemps. Toutefois, il a également été reconnu qu'elles pourraient avoir été exagérées. Après tout, bien peu de gens saisiront les tribunaux d'une affaire dans laquelle ils n'ont aucun intérêt et qui, en soi, ne laisse entrevoir aucune fin légitime. Selon les mots du professeur K. E. Scott, [TRADUCTION] « [l]e demandeur passif et capricieux, le dilettante qui plaide pour le plaisir est un spectre qui hante la littérature juridique, non les salles d'audience » : « Standing in the Supreme Court — A Functional

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*

Analysis » (1973), 86 *Harv. L. Rev.* 645, p. 674. De plus, le déni catégorique de la reconnaissance de la qualité pour agir n'est pas la seule manière, ni nécessairement la plus appropriée, pour se prémunir contre ces périls. Les tribunaux peuvent vérifier le bien-fondé des demandes dès le stade préliminaire des procédures, ils peuvent intervenir afin de prévenir les abus et ils disposent du pouvoir d'adjuger des dépens. Ces avenues peuvent toutes constituer des manières plus appropriées pour remédier aux dangers de la multiplicité des poursuites ou des demandes présentées par de simples trouble-fête : voir, p. ex., *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, p. 145.

b) *L'assurance que les principaux intéressés feront valoir contradictoirement leurs points de vue*

[29] La deuxième raison sous-jacente à la restriction de la reconnaissance de la qualité pour agir a trait à la nécessité pour les tribunaux d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vue. En effet, les tribunaux agissent comme des arbitres impartiaux dans le cadre d'un système accusatoire. Ils dépendent des parties quant à la présentation complète et adroite des éléments de preuve et des arguments. Or, [TRADUCTION] « une opposition réelle » stimule les débats sur les questions en litige et l'intérêt personnel des parties dans l'issue de l'affaire contribue à la formulation exhaustive et diligente des arguments : voir, p. ex., *Baker c. Carr*, 369 U.S. 186 (1962), p. 204.

c) *Le rôle propre aux tribunaux*

[30] La troisième préoccupation a trait au rôle propre aux tribunaux et à la relation constitutionnelle qu'ils doivent entretenir avec les autres branches du gouvernement. Notre approche discrétionnaire de la qualité pour agir dans l'intérêt public est fondée sur la prémisse selon laquelle l'instance soulève une question justiciable, c'est-à-dire une question dont les tribunaux peuvent être saisis : *Finlay*, p. 632; *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49, p. 90-91; voir aussi,

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).

L. M. Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada* (2e éd. 2012), p. 6-10. Cette préoccupation commande un examen de la nature de la question et de la capacité institutionnelle des tribunaux à considérer la question.

(3) Le principe de la légalité

[31] Le principe de la légalité renvoie à deux concepts : d'abord, le fait que les actes de l'État doivent être conformes à la Constitution et au pouvoir conféré par la loi, et qu'il doit exister des manières pratiques et efficaces de contester la légalité des actions de l'État. Ce principe a été au cœur de l'évolution de la notion de qualité pour agir dans l'intérêt public au Canada. Par exemple, dans l'arrêt de principe *Thorson*, le juge Laskin a écrit que « le droit des citoyens au respect de la Constitution par le Parlement » (p. 163) milite pour la reconnaissance de la qualité pour agir et qu'une question de constitutionnalité ne devrait pas être « mise à l'abri d'un examen judiciaire en niant qualité pour agir à quiconque tente d'attaquer la loi contestée » (p. 145). Il a conclu qu'« il serait étrange et même alarmant qu'il n'y ait aucun moyen par lequel une question d'abus de pouvoir législatif, matière traditionnellement de la compétence des cours de justice, puisse être soumise à une décision de justice » (p. 145 (je souligne)).

[32] Le principe de la légalité a été analysé plus en profondeur dans l'arrêt *Finlay*. La Cour y a souligné l'« insistance répétée dans l'arrêt *Thorson* sur l'importance dans un État fédéral de pouvoir s'adresser aux tribunaux pour contester la constitutionnalité d'une loi » (p. 627). Selon le juge Le Dain, cet énoncé constituait « la considération dominante du principe dans l'arrêt *Thorson* » (*Finlay*, p. 627). Au terme d'un examen de la jurisprudence relative à la qualité pour agir dans l'intérêt public, la Cour a étendu, dans l'arrêt *Finlay*, la portée du pouvoir discrétionnaire de reconnaître la qualité pour agir dans l'intérêt public aux contestations visant des pouvoirs administratifs conférés par une loi. Cette étape a été franchie en partie parce que les contestations de cette nature étaient motivées par le souci d'assurer le respect des « limites [du] pouvoir légal » (p. 631).

[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).

[33] L'importance du principe de la légalité a été renforcée dans l'arrêt *Conseil canadien des Églises* où la Cour en a reconnu les deux volets : soit, qu'aucune loi ne doit être à l'abri d'une contestation, et que les dispositions législatives inconstitutionnelles doivent être invalidées. Selon le juge Cory, la *Loi constitutionnelle de 1982* « constitutionnalise le droit fondamental du public d'être gouverné conformément aux règles de droit » (p. 250). Ainsi, il est nécessaire que les tribunaux exercent leur pouvoir discrétionnaire de reconnaître la qualité pour agir « dans les cas où ils doivent [en décider ainsi] pour s'assurer que la loi en question est compatible avec la Constitution et la *Charte* » (p. 251). Le juge Cory a souligné que l'entrée en vigueur de la *Charte* et le nouveau rôle constitutionnel qui en a découlé pour les tribunaux commandaient l'adoption d'une interprétation « souple et libérale » de la question de la qualité pour agir (p. 250). Il a en outre souligné que la décision ne devrait pas découler d'une « application mécaniste d'une exigence technique. On doit plutôt se rappeler que l'objet fondamental de la reconnaissance de la qualité pour agir dans l'intérêt public est de garantir qu'une loi n'est pas à l'abri de la contestation » (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]

[34] Dans l'arrêt *Hy and Zel's*, le juge Major a expliqué plus en détail le raisonnement sous-jacent justifiant les restrictions à la qualité pour agir et l'équilibre qu'il faut établir entre l'application de ces restrictions et la nécessité de donner plein effet au principe de la légalité :

> S'il existe d'autres manières de soumettre la question aux tribunaux, les ressources judiciaires limitées peuvent être mieux utilisées. Ce même critère empêche toutefois les lois d'échapper au contrôle judiciaire, comme cela se serait produit dans les circonstances des affaires *Thorson* et *Borowski*. [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

(4) Le pouvoir discrétionnaire

[35] Depuis les premières décisions modernes concernant la qualité pour agir dans l'intérêt public, la question de la qualité pour agir a été considérée comme une question dont la solution est tributaire de l'exercice avisé du pouvoir discrétionnaire judiciaire. Comme l'a affirmé le juge Laskin dans *Thorson*, la qualité pour agir dans l'intérêt public « est une matière qui relève particulièrement

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.

de l'exercice du pouvoir discrétionnaire des cours de justice, puisqu'elle se rapporte à l'efficacité du recours » (p. 161); voir aussi p. 147 et 163; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265, p. 269 et 271; *Borowski*, p. 593; *Finlay*, p. 631-632 et 635. La décision de reconnaître ou non la qualité pour agir nécessite l'exercice minutieux du pouvoir discrétionnaire judiciaire par la mise en balance des trois facteurs (une question justiciable sérieuse, la nature de l'intérêt du demandeur et les autres manières raisonnables et efficaces). Le juge Cory a insisté sur ce point dans *Conseil canadien des Églises* où il a souligné que les facteurs à prendre en compte dans l'exercice de ce pouvoir discrétionnaire ne devaient pas être considérés comme des exigences techniques et que les principes qui s'y appliquent devraient être interprétés d'une façon libérale et souple (p. 256 et 253).

[36] En conséquence, les trois facteurs ne doivent pas être perçus comme des points figurant sur une liste de contrôle ou comme des exigences techniques. Ils doivent plutôt être vus comme des considérations connexes devant être appréciées ensemble, plutôt que séparément, et de manière téléologique.

(5) L'application des trois facteurs par une approche téléologique et souple

[37] Lorsqu'ils exercent le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir dans l'intérêt public, les tribunaux doivent prendre en compte trois facteurs : (1) une question justiciable sérieuse est-elle soulevée? (2) le demandeur a-t-il un intérêt réel ou véritable dans l'issue de cette question? et (3) compte tenu de toutes les circonstances, la poursuite proposée constitue-t-elle une manière raisonnable et efficace de soumettre la question aux tribunaux? : *Borowski*, p. 598; *Finlay*, p. 626; *Conseil canadien des Églises*, p. 253; *Hy and Zel's*, p. 690; *Chaoulli*, par. 35 et 188. Le demandeur qui souhaite se voir reconnaître la qualité pour agir doit convaincre la cour que ces facteurs, appliqués d'une manière souple et téléologique, militent en faveur de la reconnaissance de cette qualité. Toutes les autres considérations étant égales par ailleurs, un demandeur qui possède de plein droit la qualité pour agir sera généralement préféré.

[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:

[38] La principale question qui oppose les parties en l'espèce a trait à la formulation et à l'application du troisième de ces facteurs. Cependant, comme ils sont tous les trois intimement liés et qu'il existe un différend entre les parties en ce qui concerne au moins un d'entre eux, je vais exposer brièvement certaines des considérations pertinentes quant à chacun de ces facteurs et j'analyserai, par la suite, le rôle qu'ils jouent en l'espèce.

a) *Question justiciable sérieuse*

[39] Ce facteur concerne deux des préoccupations qui sous-tendent les restrictions traditionnelles imposées à la qualité pour agir. Dans *Finlay*, le juge Le Dain a lié la justiciabilité d'une question à la « préoccupation relative au rôle propre des tribunaux et à leur relation constitutionnelle avec les autres branches du gouvernement » et son caractère sérieux à la préoccupation relative à l'utilisation des ressources judiciaires limitées (p. 631); voir aussi, la juge L'Heureux-Dubé, dissidente, dans *Hy and Zel's*, p. 702-703.

[40] En insistant sur l'existence d'une question justiciable, les tribunaux s'assurent d'exercer leur pouvoir discrétionnaire de reconnaître la qualité pour agir d'une façon qui est cohérente avec l'objectif de demeurer dans les limites du rôle constitutionnel qui leur est propre (*Finlay*, p. 632). Dans *Finlay*, le juge Le Dain a cité l'arrêt *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, et a écrit que « lorsqu'est en cause un litige que les tribunaux peuvent trancher, ceux-ci ne devraient pas refuser de statuer au motif qu'à cause de ses incidences ou de son contexte politiques, il vaudrait mieux en laisser l'examen et le règlement au législatif ou à l'exécutif » : p. 632-633; voir aussi 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, p. 733-734; Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada*, p. 27.

[41] Ce facteur traduit aussi la préoccupation quant au risque que les tribunaux soient submergés en raison d'une « prolifération inutile de poursuites insignifiantes ou redondantes » et la nécessité

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

d'écarter les simples trouble-fête : *Conseil canadien des Églises*, p. 252; *Finlay*, p. 631-633. Comme je l'ai exposé précédemment, ces préoccupations peuvent être exagérées et doivent être appréciées en pratique en fonction des circonstances de chaque affaire plutôt que dans l'abstrait ou de façon hypothétique. Il conviendrait aussi d'examiner d'autres façons possibles de se prémunir contre ces dangers.

[42] Pour être considérée comme une « question sérieuse », la question soulevée doit constituer un « point constitutionnel important » (*McNeil*, p. 268) ou constituer une « question [. . .] importante » (*Borowski*, p. 589). L'action doit être « loin d'être futil[e] » (*Finlay*, p. 633), bien que les tribunaux ne doivent pas examiner le bien-fondé d'une affaire autrement que de façon préliminaire. Par exemple, dans l'arrêt *Hy and Zel's*, le juge Major s'est appuyé sur la norme applicable aux cas où il est tellement peu probable que l'action soit accueillie qu'on pourrait considérer son issue comme une conclusion qui « soit [. . .] assurée » (p. 690). Il a adopté cette position en dépit du fait que la Cour avait déclaré sept ans auparavant que la même Loi était constitutionnelle : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713. Le juge Major a statué qu'il était « prêt à tenir pour acquis que les nombreuses modifications apportées au cours des sept années qui ont suivi l'arrêt *Edwards Books* ont suffisamment changé la Loi pour que sa validité ne soit plus assurée » (*Hy and Zel's*, p. 690). Dans *Conseil canadien des Églises*, la Cour avait de nombreuses réserves quant à la nature de l'action envisagée, mais elle a ultimement accepté que « certains aspects de la déclaration soulev[aient] une question sérieuse quant à la validité de la loi » (p. 254). En outre, dès qu'il devient évident qu'une déclaration fait état d'au moins une question sérieuse, il ne sera généralement pas nécessaire d'examiner minutieusement chacun des arguments plaidés pour trancher la question de la qualité pour agir.

b) *La nature de l'intérêt du demandeur*

[43] Dans l'arrêt *Finlay*, la Cour a écrit que ce facteur traduisait la préoccupation de conserver les ressources judiciaires limitées et la nécessité d'écarter les simples trouble-fête (p. 633). À mon

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* (looseleaf), at ¶5.120).

avis, ce facteur concerne la question de savoir si le demandeur a un intérêt réel dans les procédures ou est engagé quant aux questions qu'elles soulèvent. Ce point est illustré dans la jurisprudence de la Cour. Dans *Finlay*, par exemple, même si, selon la Cour, le demandeur n'avait pas la qualité pour agir de plein droit, il avait néanmoins un intérêt direct et personnel quant aux questions qu'il souhaitait soulever. Dans *Borowski*, la Cour a conclu que le demandeur avait un intérêt véritable dans la contestation des dispositions disculpatoires concernant l'avortement. Il était un citoyen inquiet et un contribuable, et il avait tenté sans succès d'obtenir une décision sur la question par d'autres moyens (p. 597). La Cour a donc évalué l'engagement de M. Borowski relativement à l'objet du litige en examinant s'il avait un intérêt véritable quant à la question qu'il désirait soulever. En outre, dans l'arrêt *Conseil canadien des Églises*, il était évident pour la Cour que le demandeur avait un « intérêt véritable », vu qu'il jouissait « de la meilleure réputation possible et [qu']il a[vait] démontré un intérêt réel et constant dans les problèmes des réfugiés et des immigrants » (p. 254). En examinant la réputation du demandeur, son intérêt continu et son lien avec l'action, la Cour a ainsi évalué son « engagement », de façon à assurer une utilisation efficiente des ressources judiciaires limitées (voir K. Roach, *Constitutional Remedies in Canada* (feuilles mobiles), ¶5.120).

(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

c) *Manières raisonnables et efficaces de soumettre la question à la Cour*

[44] Ce facteur a longtemps été qualifié d'exigence stricte. Par exemple, dans *Borowski*, les juges majoritaires de la Cour ont déclaré que la personne demandant l'exercice du pouvoir discrétionnaire pour se voir reconnaître la qualité pour agir doit « démontre[r] qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour » : p. 598 (je souligne); voir aussi *Finlay*, p. 626; *Hy and Zel's*, p. 690. Ce facteur n'a cependant pas toujours été exprimé de façon aussi restrictive et a rarement été appliqué de la sorte. J'estime que nous devrions maintenant indiquer clairement qu'il s'agit d'un des trois facteurs qui doivent être analysés et soupesés par les tribunaux lors de l'exercice

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.

de leur pouvoir discrétionnaire. À mon humble avis, il serait préférable de formuler ce troisième facteur comme étant celui exigeant l'examen de la question de savoir si la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations dont je vais traiter sous peu, constitue une manière raisonnable et efficace de soumettre la question à la cour. Cette approche quant au troisième facteur correspond davantage à l'interprétation souple, discrétionnaire et téléologique de la qualité pour agir dans l'intérêt public qui sous-tend toutes les décisions prononcées par la Cour dans ce domaine.

(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

(i) La Cour n'a pas toujours exprimé ce facteur de façon rigide et l'a rarement appliqué de la sorte

[45] À mon avis, une lecture attentive des décisions rendues par la Cour permet de déceler que même si ce facteur a souvent été qualifié d'exigence stricte, la Cour ne l'a pas appliqué avec rigidité de façon constante et, en fait, n'a pas non plus examiné son application de cette manière.

[46] La formulation rigide du troisième facteur telle qu'elle a été énoncée dans l'arrêt *Borowski* n'a pas été retenue dans les deux principales affaires concernant la qualité pour agir dans l'intérêt public : voir *Thorson*, p. 161, et *McNeil*, p. 271. En outre, dans l'arrêt *Conseil canadien des Églises*, le troisième facteur a été formulé comme étant la question de savoir s'« il [y avait] une autre manière raisonnable et efficace de soumettre la question à la cour » (p. 253 (je souligne)).

[47] En outre, un grand nombre de décisions illustre que ce troisième facteur n'a pas été appliqué de façon rigide, quelle qu'ait été sa formulation. Par exemple, dans l'arrêt *McNeil*, la question en litige concernait la constitutionnalité de dispositions législatives conférant à une commission provinciale le pouvoir d'autoriser ou d'interdire la projection de films pour le public. Il était évident qu'il y avait des personnes touchées plus directement par ce régime réglementaire que ne l'était le demandeur, notamment les propriétaires de cinémas et d'autres personnes visées par ces dispositions législatives. La

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.

Cour, au terme de l'exercice de son pouvoir discrétionnaire, a tout de même confirmé la reconnaissance de la qualité pour agir dans l'intérêt public aux motifs que le demandeur, en tant que membre du public, avait un intérêt différent de celui des propriétaires de cinémas et qu'il n'y avait « pratiquement » aucune autre manière de saisir la cour d'une contestation de cette nature (p. 270-271). De même, dans l'arrêt *Borowski*, bien que plusieurs personnes fussent davantage touchées par la loi en cause, il était peu probable en pratique que ces gens puissent soumettre au tribunal une contestation de la nature de celle engagée par le demandeur (p. 597-598). Dans les deux cas, la question de savoir s'il n'y avait pas d'autres manières raisonnables et efficaces de soumettre la question à la cour a été traitée d'un point de vue pratique et pragmatique, et en fonction de la nature précise de la contestation que le demandeur avait l'intention d'engager.

[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).

[48] Même dans les cas où la qualité pour agir n'a pas été reconnue par suite de l'application de ce facteur, la Cour a insisté sur la nécessité d'exercer le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir plutôt qu'en appliquant les facteurs de façon mécanique. Le meilleur exemple de cette approche se trouve dans l'arrêt *Conseil canadien des Églises*. La Cour a déclaré d'une part que l'exercice par le tribunal de son pouvoir discrétionnaire pour reconnaître la qualité pour agir dans l'intérêt public « n'est pas nécessaire [. . .] lorsque, selon une prépondérance des probabilités, on peut établir qu'un particulier contestera la mesure » (p. 252). Toutefois, la Cour a souligné d'autre part que la décision de reconnaître ou non la qualité pour agir dans l'intérêt public relève d'un pouvoir discrétionnaire, que les principes applicables devraient être interprétés « d'une façon libérale et souple » et que le facteur relatif aux autres manières raisonnables et efficaces ne doit pas être interprété comme le résultat d'une application mécaniste d'une « exigence technique » (p. 253 et 256).

(ii) This Factor Must Be Applied Purposively

(ii) Ce facteur doit être appliqué de manière téléologique

[49] This third factor should be applied in light of the need to ensure full and complete adversarial

[49] Ce troisième facteur doit être appliqué au regard de la nécessité d'assurer un exposé complet

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 ¶5.120. 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.

des positions contradictoires des parties et de ménager les ressources judiciaires. Dans l'arrêt *Finlay*, la Cour a associé ce facteur à la préoccupation du « tribunal [. . .] d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vue » (p. 633); voir aussi Roach, ¶5.120. Dans l'arrêt *Hy and Zel's*, le juge Major a lié ce facteur à la préoccupation de ne pas surcharger inutilement les tribunaux, soulignant que « [s]'il existe d'autres manières de soumettre la question aux tribunaux, les ressources judiciaires limitées peuvent être mieux utilisées » (p. 692). Ce facteur est aussi étroitement lié au principe de la légalité, puisque les tribunaux doivent déterminer s'il est souhaitable de reconnaître la qualité pour agir en fonction de la nécessité d'assurer la légalité des mesures prises par les acteurs gouvernementaux. Pour appliquer ce facteur de manière téléologique, il est donc nécessaire que le tribunal prenne en compte ces préoccupations sous-jacentes.

(iii) Il est nécessaire d'adopter une approche souple pour évaluer le facteur relatif aux manières « raisonnables et efficaces »

[50] La jurisprudence de la Cour n'est pas très riche en enseignement sur la façon de juger du caractère « raisonnable et efficace » ou non d'une manière donnée de soumettre une question à la cour. Toutefois, en abordant la question sous l'angle téléologique, les tribunaux doivent se demander si l'action envisagée constitue une utilisation efficiente des ressources judiciaires, si les questions sont justiciables dans un contexte accusatoire, et si le fait d'autoriser la poursuite de l'action envisagée favorise le respect du principe de la légalité. Une approche souple et discrétionnaire est de mise pour juger de l'effet de ces considérations sur la décision ultime de reconnaître ou non la qualité pour agir. Par ailleurs, une analyse dichotomique répondant par un oui ou par un non à la question à l'étude n'est pas envisageable : les questions visant à déterminer si une façon de procéder est raisonnable, si elle est efficace et si elle favorise le renforcement du principe de la légalité sont des questions de degré et elles doivent être analysées en fonction de solutions de rechange pratiques, compte tenu de toutes les circonstances.

[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

[51] Il pourrait être utile de donner des exemples de certaines questions interdépendantes que les tribunaux pourraient trouver utile de prendre en compte au moment de se pencher sur le troisième facteur discrétionnaire. La liste qui suit n'est naturellement pas exhaustive et ne comprend que quelques exemples.

- Le tribunal devrait tenir compte de la capacité du demandeur d'engager une poursuite. Ce faisant, il devrait examiner notamment ses ressources et son expertise ainsi que la question de savoir si l'objet du litige sera présenté dans un contexte factuel suffisamment concret et élaboré.

- Le tribunal devrait déterminer si la cause est d'intérêt public en ce sens qu'elle transcende les intérêts des parties qui sont le plus directement touchées par les dispositions législatives ou par les mesures contestées. Les tribunaux devraient tenir compte du fait qu'une des idées associées aux poursuites d'intérêt public est que ces poursuites peuvent assurer un accès à la justice aux personnes défavorisées de la société dont les droits reconnus par la loi sont touchés. Ceci ne devrait naturellement pas être assimilé à une permission de reconnaître la qualité pour agir à quiconque décide de s'afficher comme le représentant des personnes pauvres et marginalisées.

- Le tribunal devrait se pencher sur la question de savoir s'il y a d'autres manières réalistes de trancher la question qui favoriseraient une utilisation plus efficace et efficiente des ressources judiciaires et qui offriraient un contexte plus favorable à ce qu'une décision soit rendue dans le cadre du système contradictoire. Les tribunaux devraient adopter une approche pratique et pragmatique. L'existence d'autres demandeurs potentiels, notamment ceux qui possèdent de plein droit la qualité pour agir, est pertinente, mais les chances en pratique qu'ils soumettent la question aux tribunaux ou que des manières aussi ou plus raisonnables et efficaces soient utilisées pour le faire devraient être prises en compte en fonction des réalités pratiques et non des possibilités théoriques. Lorsqu'il y a

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

d'autres demandeurs, en ce sens que d'autres actions ont été engagées relativement à la question, le tribunal devrait évaluer d'un point de vue pratique les avantages, le cas échéant, d'avoir des recours parallèles et se demander si ces autres actions vont résoudre les questions de manière aussi ou plus raisonnable et efficace. En procédant ainsi, le tribunal ne devrait pas uniquement prendre en compte les questions juridiques précises ou les points soulevés, mais plutôt chercher à savoir si le demandeur apporte une perspective particulièrement utile ou distincte en vue de régler ces points. À la lecture de l'arrêt *McNeil* par exemple, on voit que même lorsque des personnes peuvent avoir un intérêt plus direct dans la question, le demandeur peut avoir un intérêt distinct et important qui diffère de celui des autres, ce qui peut justifier que le tribunal exerce son pouvoir discrétionnaire pour lui reconnaître la qualité pour agir.

- L'incidence éventuelle des procédures sur les droits d'autres personnes dont les intérêts sont aussi, sinon plus touchés devrait être prise en compte. En effet, les tribunaux devraient porter une attention particulière aux situations où les intérêts privés et publics seraient susceptibles d'entrer en conflit. Comme il est indiqué dans l'arrêt *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, p. 1093, le tribunal devrait se demander, par exemple, si « l'échec d'une contestation trop diffuse pourrait faire obstacle à des contestations ultérieures des règles en question, par certaines parties qui auraient des plaintes précises fondées sur des faits ». L'inverse est également vrai. Ainsi, que les personnes ayant des intérêts plus directs et personnels dans la cause se soient abstenues volontairement d'engager une poursuite pourrait militer pour le refus par la cour d'exercer son pouvoir discrétionnaire de reconnaître la qualité pour agir.

(iv) Conclusion

[52] Je conclus que le troisième facteur de l'analyse de la qualité pour agir dans l'intérêt public devrait être formulé comme ceci : la poursuite proposée constitue-t-elle, compte tenu de toutes les

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

circonstances, une manière raisonnable et efficace de soumettre la question à la cour. Ce facteur, comme les deux autres, doit être apprécié d'une manière souple et téléologique en plus d'être soupesé à la lumière des autres facteurs.

(6) Appréciation des trois facteurs

[53] Je reviens aux circonstances de l'espèce pour y appliquer les trois facteurs qui doivent être pris en compte : l'affaire soulève-t-elle une question justiciable sérieuse? Les intimées ont-elles un intérêt réel ou véritable dans la question ou les questions? La poursuite constitue-t-elle, compte tenu de toutes les circonstances, une manière raisonnable et efficace de soumettre les questions à la cour? Bien qu'il n'y ait guère de désaccord quant au fait que les deux premiers facteurs favorisent la reconnaissance de la qualité pour agir, je vais les examiner tous les trois, car, à mon avis, ils doivent être appréciés cumulativement plutôt qu'individuellement. Après avoir examiné les trois facteurs suivant une approche téléologique, souple et libérale, je conclus que la Cour d'appel était justifiée de reconnaître la qualité pour agir dans l'intérêt public à la Société et à M^me^ Kiselbach.

a) *Une question justiciable sérieuse*

[54] Comme je l'ai déjà indiqué, à une exception près, nul ne conteste que l'action des intimées soulève des questions sérieuses et justiciables. La constitutionnalité des lois relatives à la prostitution constitue certainement un « point constitutionnel important » (*McNeil*, p. 268) et une « question [. . .] importante » (*Borowski*, p. 589) qui est « loin d'être futil[e] » (*Finlay*, p. 633). De fait, les intimées soutiennent que les dispositions contestées du *Code criminel* en criminalisant plusieurs des activités entourant la prostitution, nuisent à un grand nombre de femmes. Ces questions sont aussi clairement justiciables, en ce qu'elles concernent la constitutionnalité des dispositions contestées. L'examen de ce facteur appuie sans équivoque l'exercice du pouvoir discrétionnaire dont jouissent les tribunaux afin de reconnaître la qualité pour agir.

[55] L'appelant fait cependant valoir que l'action des intimées ne soulève pas de question

Case Name:

Green v. Law Society of Manitoba

Sidney Green, Appellant;
v.
The Law Society of Manitoba, Respondent, and
Federation of Law Societies of Canada, Intervener

[2017] S.C.J. No. 20

[2017] A.C.S. no 20

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2017EXP-1007

EYB 2017-277812

File No.: 36583.

Supreme Court of Canada

Heard: November 9, 2016.
Judgment: March 30, 2017.

Present: B. McLachlin C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, R. Wagner, C. Gascon and S. Côté JJ.

instant case, the general principles developed by the Court in respect of the standard of review also support the argument that reasonableness is the appropriate standard. The Law Society acted pursuant to its home statute in making the impugned rules, and in such a case there is a presumption that the appropriate standard is reasonableness: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 34 and 39. The Law Society must therefore be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 50 and 87.

25 Additionally, the Law Society has expertise in regulating the legal profession "at an institutional level": *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 33. This Court has previously recognized that self-governing professional bodies have particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions: *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 887.

B. *Are the Impugned Rules Reasonable in Light of the Law Society's Mandate Under the Act?*

26 To determine whether the impugned rules are reasonable, I am adopting a two-step approach. First, I will construe the scope of the Law Society's statutory mandate in accordance with this Court's modern principle of statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. Second, I will address whether, in light of this mandate, the impugned rules are unreasonable because they expose a lawyer to a suspension in the event of non-compliance and unreasonable having regard to their procedural protections.

(1) Statutory Mandate

27 The purpose, words, and scheme of the Act support an expansive construction of the Law Society's rule-making authority.

(a) *Object of the Act*

28 I will begin with the object of the Act. The legislature has given the Law Society a broad public interest mandate and broad regulatory powers to accomplish its mandate. This mandate must be interpreted using a broad and purposive approach: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at paras. 6-8; *The Interpretation Act*, C.C.S.M., c. I80, s. 6.

29 First of all, the Act contains an expansive purpose clause that obligates the Law Society to act in the public interest: "The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence" (s. 3(1)). The meaning of "public interest" in the context of the Act is for the Law Society to determine. In pursuing this

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)

Sam Barone
Member

(signed)

Geoffrey C. Hare
Member

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smirza@sunwing.ca

** 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

2005 CarswellNat 2349

Docket T-346-02

Federal Court
Ottawa, Ontario

Beaudry J.

Heard: May 16 and 17, 2005.
Judgment: August 24, 2005.

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

** Translation **

Case Name:

Thibodeau v. Air Canada

Between
Michel Thibodeau and Lynda Thibodeau, Applicants, and
Air Canada, Respondent, and
Commissioner of Official Languages, Intervener

[2011] F.C.J. No. 1030

[2011] A.C.F. no 1030

2011 FC 876

[2013] 2 F.C.R. 83

[2013] 2 R.C.F. 83

394 F.T.R. 160

239 C.R.R. (2d) 301

Dockets T-450-10, T-451-10

Federal Court
Ottawa, Ontario

Bédard J.

Heard: March 28 and 29, 2011.
Judgment: July 13, 2011.

(168 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Official languages of Canada -- Application by Thibodeau and his wife for order that Air Canada failed to fulfill its obligations

discretion to recognize an applicant's public interest standing has to consider the following three factors:

> 1- The applicant must raise a serious issue; in other words, there must be a real issue;
>
> 2- The applicant must have a genuine interest in the issue; and
>
> 3- There must be no other more reasonable and effective way to bring the issue before the courts.

100 Air Canada submits that the Court should not grant the applicants standing to argue systemic breaches since it would be more effective and reasonable that such remedy be exercised by the Commissioner. Air Canada further submits that the Court should consider judicial economy and emphasizes the Commissioner's memorandum, in which he points out that he is currently carrying out an audit for 2010-2011. Air Canada infers from this that it is not excluded that the Commissioner will institute proceedings according to the outcome of his audit and submits that, in that case, there would be multiple proceedings.

101 For his part, the Commissioner is of the view that the applicants have as much of an interest as he to file this application and to allege systemic breaches of its duties by Air Canada. He even argues that, in the current context, it is better that it be the applicants who act in the public interest. The Commissioner stated that, in terms of the options available to him, to enforce the OLA, the judicial route, re while important, is only used as a last resort. In addition, he is currently auditing Air Canada and he is of the opinion that it is more appropriate that the applicants act both on their own behalf and in the public interest. The Commissioner insists that, in any event, he is an intervener in this case; if he himself had instituted the proceedings, he would have filed evidence of the same nature as that filed by the applicants.

102 In *Thibodeau 1*, Justice Beaudry granted Mr. Thibodeau, who, in that case, had also instituted proceedings against Air Canada, standing to act on behalf of the public interest. The facts were similar to the ones in the case at bar: Mr. Thibodeau had filed an application against Air Canada in which he alleged that Air Canada and one of its subsidiaries, Air Ontario, had failed to comply with their duties under the OLA. As in the present case, Mr. Thibodeau alleged that Air Canada's breaches were systemic and asked the Court to make similar orders as those sought in the present case. As in this instance, Air Canada argued that Mr. Thibodeau lacked standing to act on behalf of the public and that the Commissioner was in a better position in that respect.

103 Following the *Finlay* criteria, Justice Beaudry exercised his discretion and granted Mr. Thibodeau standing on behalf of the public interest:

> [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.

104 I agree with Justice Beaudry: his remarks are entirely relevant in this case. There is no doubt that the applicants are raising serious issues and that they have an interest in the subject-matter of their application. Moreover, subsection 77(1) of the OLA clearly provides that the remedy is available to any person who has made a complaint to the Commissioner, and section 79, according to which the Court may admit in evidence information relating to any similar complaint under the OLA, makes no distinction as to the identity of the applicant. Parliament did not restrict the admissibility in evidence of such information only to cases where when the remedy is applied for by the Commissioner. It is inconceivable that Parliament would grant applicants other than the Commissioner the possibility to file information on similar complaints and then deprive the same applicants of the standing required to present it before the Court. In enacting section 79, Parliament wanted to allow both the Commissioner and applicants who meet the conditions of subsection 77(1) to raise systemic problems and to adduce in evidence information in support of such allegations.

105 In this case, the Commissioner stated that if he had instituted the present proceeding, he would have filed the same evidence as Mr. Thibodeau; in fact, much of the evidence was sent to Mr. Thibodeau for the purposes of this proceeding under paragraph 73(*b*) of the OLA.

106 Lastly, I conclude that Air Canada's position that there would potentially be multiple proceedings should the Commissioner decide to turn to the Court according to the outcome of his audit is speculation. In the exercise of my discretion, I therefore find that the applicants have public interest standing.

107 I will now move on to the allegations that Air Canada's breaches of its language duties are systemic.

108 In support of their allegation that there is a systemic problem, the applicants adduced several items of evidence which I shall review.

(i) Complaint filed against Air Canada by Mr. Thibodeau in 2002

109 The applicants have filed a similar complaint as that filed by Mr. Thibodeau against Air Canada in 2002 concerning the lack of service in French on a flight operated by Air Ontario, then an

(ii) no more than 25% of the voting interests are owned by one or more non-Canadians authorized to provide an air service in any jurisdiction, either individually or in affiliation with another person; (*Canadien*)

(ii) qu'au plus vingt-cinq pour cent de ses intérêts avec droit de vote peuvent être détenus par un ou plusieurs non-Canadiens autorisés à fournir un service aérien dans tout ressort, individuellement ou avec des personnes du même groupe. (*Canadian*)

16 Subsection 56(2) of the Act is replaced by the following:

16 Le paragraphe 56(2) de la même loi est remplacé par ce qui suit :

Specialty service exclusion

(2) This Part does not apply to the operation of specialty services provided by aircraft, including firefighting, flight training, sightseeing, spraying, surveying, mapping, photography, parachute jumping, glider towing, helicopter-lift for logging and construction, airborne agricultural, industrial and inspection services or any other prescribed service provided by aircraft.

Exclusion — services spécialisés

(2) La présente partie ne s'applique pas à l'exploitation d'un service spécialisé offert par aéronef, tel que la lutte contre les incendies, la formation en vol, les excursions aériennes, l'épandage, les levés topographiques, la cartographie, la photographie, les sauts en parachute, le remorquage de planeurs, le transport héliporté pour l'exploitation forestière et la construction, les services aéroportés agricoles, industriels ou d'inspection ou les autres services offerts par aéronef prévus par règlement.

17 The Act is amended by adding the following after section 67.2:

17 La même loi est modifiée par adjonction, après l'article 67.2, de ce qui suit :

Person affected

67.3 Despite sections 67.1 and 67.2, a complaint against the holder of a domestic license related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1) may only be filed by a person adversely affected.

Personne lésée

67.3 Malgré les articles 67.1 et 67.2, seule une personne lésée peut déposer une plainte contre le titulaire d'une licence intérieure relativement à toute condition de transport visant une obligation prévue par un règlement pris en vertu du paragraphe 86.11(1).

Applying decision to other passengers

67.4 The Agency may, to the extent that it considers it appropriate, make applicable to some or to all passengers of the same flight as the complainant all or part of its decision respecting a complaint related to any term or condition of carriage concerning any obligation prescribed by regulations made under paragraph 86.11(1)(b).

Application de la décision à d'autres passagers

67.4 L'Office peut, dans la mesure qu'il estime indiquée, rendre applicable à une partie ou à l'ensemble des passagers du même vol que le plaignant, tout ou partie de sa décision relative à la plainte de celui-ci portant sur une condition de transport visant une obligation prévue par un règlement pris en vertu de l'alinéa 86.11(1)b).

2000, c. 15, s. 8

18 (1) The portion of paragraph 86(1)(h) of the English version of the Act before subparagraph (i) is replaced by the following:

2000, ch. 15, art. 8

18 (1) Le passage de l'alinéa 86(1)h) de la version anglaise de la même loi précédant le sous-alinéa (i) est remplacé par ce qui suit :

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

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

2007, c. 19, s. 26(1)

(2) Subparagraph 86(1)(h)(iii) of the Act is replaced by the following:

2007, ch. 19, par. 26(1)

(2) Le sous-alinéa 86(1)h)(iii) de la même loi est remplacé par ce qui suit :

(iii) authorizing the Agency to direct a licensee or carrier to take the corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person

(iii) sur dépôt d'une plainte écrite, laquelle, si elle se rapporte à des conditions de transport visant des obligations prévues par un règlement pris en vertu du paragraphe 86.11(1), doit être déposée par la

adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage that are applicable to the service it offers and that were set out in its tariffs, if the Agency receives a written complaint and, if the complaint is related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1), it is filed by the person adversely affected,

(iii.1) authorizing the Agency to make applicable, to some or to all passengers of the same flight as the complainant, all or part of the Agency's decision respecting a complaint related to any term or condition of carriage concerning any obligation prescribed by regulations made under paragraph 86.11(1)(b), to the extent that it considers appropriate, and

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

(iii.1) rendre applicable, dans la mesure qu'il estime indiquée, à une partie ou à l'ensemble des passagers du même vol que l'auteur d'une plainte qui porte sur une condition de transport visant une obligation prévue par un règlement pris en vertu de l'alinéa 86.11(1)b), tout ou partie de sa décision relative à cette plainte,

19 The Act is amended by adding the following after section 86.1:

19 La même loi est modifiée par adjonction, après l'article 86.1, de ce qui suit :

Regulations — carrier's obligations towards passengers

86.11 (1) The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

(a) respecting the carrier's obligation to make terms and conditions of carriage and information regarding any recourse available against the carrier, as specified in the regulations, readily available to passengers in language that is simple, clear and concise;

(b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including

(i) the minimum standards of treatment of passengers that the carrier is required to meet and the minimum compensation the carrier is required to pay for inconvenience when the delay, cancellation or denial of boarding is within the carrier's control,

(ii) the minimum standards of treatment of passengers that the carrier is required to meet when the delay, cancellation or denial of boarding is within the carrier's control, but is required for safety purposes, including in situations of mechanical malfunctions,

(iii) the carrier's obligation to ensure that passengers complete their itinerary when the delay, cancellation or denial of boarding is due to situations outside the carrier's control, such as natural phenomena and security events, and

Règlements — obligations des transporteurs aériens envers les passagers

86.11 (1) L'Office prend, après consultation du ministre, des règlements relatifs aux vols à destination, en provenance et à l'intérieur du Canada, y compris les vols de correspondance, pour :

a) régir l'obligation, pour le transporteur, de rendre facilement accessibles aux passagers en langage simple, clair et concis les conditions de transport — et les renseignements sur les recours possibles contre le transporteur — qui sont précisés par règlements;

b) régir les obligations du transporteur dans les cas de retard et d'annulation de vols et de refus d'embarquement, notamment :

(i) les normes minimales à respecter quant au traitement des passagers et les indemnités minimales qu'il doit verser aux passagers pour les inconvénients qu'ils ont subis, lorsque le retard, l'annulation ou le refus d'embarquement lui est attribuable,

(ii) les normes minimales relatives au traitement des passagers que doit respecter le transporteur lorsque le retard, l'annulation ou le refus d'embarquement lui est attribuable, mais est nécessaire par souci de sécurité, notamment en cas de défaillance mécanique,

(iii) l'obligation, pour le transporteur, de faire en sorte que les passagers puissent effectuer l'itinéraire prévu lorsque le retard, l'annulation ou le refus d'embarquement est attribuable à une situation

(iv) the carrier's obligation to provide timely information and assistance to passengers;

(c) prescribing the minimum compensation for lost or damaged baggage that the carrier is required to pay;

(d) respecting the carrier's obligation to facilitate the assignment of seats to children under the age of 14 years in close proximity to a parent, guardian or tutor at no additional cost and to make the carrier's terms and conditions and practices in this respect readily available to passengers;

(e) requiring the carrier to establish terms and conditions of carriage with regard to the transportation of musical instruments;

(f) respecting the carrier's obligations in the case of tarmac delays over three hours, including the obligation to provide timely information and assistance to passengers, as well as the minimum standards of treatment of passengers that the carrier is required to meet; and

(g) respecting any of the carrier's other obligations that the Minister may issue directions on under subsection (2).

Ministerial directions

(2) The Minister may issue directions to the Agency to make a regulation under paragraph (1)(g) respecting any of the carrier's other obligations towards passengers. The Agency shall comply with these directions.

Restriction

(3) A person shall not receive compensation from a carrier under regulations made under subsection (1) if that person has already received compensation for the same event under a different passenger rights regime than the one provided for under this Act.

Obligations deemed to be in tariffs

(4) The carrier's obligations established by a regulation made under subsection (1) are deemed to form part of the terms and conditions set out in the carrier's tariffs in so far as the carrier's tariffs do not provide more advantageous terms and conditions of carriage than those obligations.

indépendante de sa volonté, notamment un phénomène naturel ou un événement lié à la sécurité,

(iv) l'obligation, pour le transporteur, de fournir des renseignements et de l'assistance en temps opportun aux passagers;

c) prévoir les indemnités minimales à verser par le transporteur aux passagers en cas de perte ou d'endommagement de bagage;

d) régir l'obligation, pour le transporteur, de faciliter l'attribution, aux enfants de moins de quatorze ans, de sièges à proximité d'un parent ou d'un tuteur sans frais supplémentaires et de rendre facilement accessibles aux passagers ses conditions de transport et pratiques à cet égard;

e) exiger du transporteur qu'il élabore des conditions de transport applicables au transport d'instruments de musique;

f) régir les obligations du transporteur en cas de retard de plus de trois heures sur l'aire de trafic, notamment celle de fournir des renseignements et de l'assistance en temps opportun aux passagers et les normes minimales à respecter quant au traitement des passagers;

g) régir toute autre obligation du transporteur sur directives du ministre données en vertu du paragraphe (2).

Directives ministérielles

(2) Le ministre peut donner des directives à l'Office lui demandant de régir par un règlement pris en vertu de l'alinéa (1)g) toute autre obligation du transporteur envers les passagers. L'Office est tenu de se conformer à ces directives.

Restriction

(3) Nul ne peut obtenir du transporteur une indemnité au titre d'un règlement pris en vertu du paragraphe (1) dans le cas où il a déjà été indemnisé pour le même événement dans le cadre d'un autre régime de droits des passagers que celui prévu par la présente loi.

Obligations réputées figurer au tarif

(4) Les obligations du transporteur prévues par un règlement pris en vertu du paragraphe (1) sont réputées figurer au tarif du transporteur dans la mesure où le tarif ne prévoit pas des conditions de transport plus avantageuses que ces obligations.

(d) there is a serious possibility that the life, liberty or security of a person will be endangered.

d) il y a une sérieuse possibilité que la vie, la liberté ou la sécurité d'une personne puisse être mise en danger par la publicité des débats.

Confidentiality of application

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

R.S., 1985, c. H-6, s. 52; 1998, c. 9, s. 27.

Confidentialité

(2) Le membre instructeur peut, s'il l'estime indiqué, prendre toute mesure ou rendre toute ordonnance qu'il juge nécessaire pour assurer la confidentialité de la demande visée au paragraphe (1).

L.R. (1985), ch. H-6, art. 52; 1998, ch. 9, art. 27.

Complaint dismissed

53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

Rejet de la plainte

53 (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

Complaint substantiated

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

Plainte jugée fondée

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en œuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Interest

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

R.S., 1985, c. H-6, s. 53; 1998, c. 9, s. 27.

Limitation

54 No order that is made under subsection 53(2) may contain a term

(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

(b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained those premises or accommodation in good faith.

R.S., 1985, c. H-6, s. 54; 1998, c. 9, s. 28; 2013, c. 37, s. 4.

Definitions

54.1 (1) In this section,

designated groups has the meaning assigned in section 3 of the *Employment Equity Act*; and (*groupes désignés*)

employer means a person who or organization that discharges the obligations of an employer under the *Employment Equity Act*. (*employeur*)

Limitation of order re employment equity

(2) Where a Tribunal finds that a complaint against an employer is substantiated, it may not make an order pursuant to subparagraph 53(2)(a)(i) requiring the employer to adopt a special program, plan or arrangement containing

Indemnité spéciale

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

Intérêts

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

L.R. (1985), ch. H-6, art. 53; 1998, ch. 9, art. 27.

Restriction

54 L'ordonnance prévue au paragraphe 53(2) ne peut exiger :

a) le retrait d'un employé d'un poste qu'il a accepté de bonne foi;

b) l'expulsion de l'occupant de bonne foi de locaux, moyens d'hébergement ou logements.

L.R. (1985), ch. H-6, art. 54; 1998, ch. 9, art. 28; 2013, ch. 37, art. 4.

Définitions

54.1 (1) Les définitions qui suivent s'appliquent au présent article.

employeur Toute personne ou organisation chargée de l'exécution des obligations de l'employeur prévues par la *Loi sur l'équité en matière d'emploi*. (*employer*)

groupes désignés S'entend au sens de l'article 3 de la *Loi sur l'équité en matière d'emploi*. (*designated groups*)

Restriction

(2) Le tribunal qui juge fondée une plainte contre un employeur ne peut lui ordonner, malgré le sous-alinéa 53(2)a)(i), d'adopter un programme, plan ou arrangement comportant des règles et usages positifs destinés à corriger la sous-représentation des membres des groupes désignés dans son effectif ou des objectifs et calendriers à cet effet.

Decision No. 482-A-2012

December 20, 2012

COMPLAINTS by the Public Health Agency of Canada and Queen's University against Air Canada.

File No.: M4120-3/12-00144

INTRODUCTION

Legislative context

[5] Subsection 67.2(1) of the CTA, which applies to domestic carriage, states that:

> 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.

[6] Section 111 of the ATR (Air Transportation Regulations), which applies to international carriage, states that:

> (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.

[7] As stated in Decision No. LET-A-97-2012 dated July 3, 2012, the complainants allege that Air Canada's Proposed Tariff Revisions are "unreasonable or unduly discriminatory" pursuant to subsection 67.2(1) of the CTA, and "unjust, unreasonable and unjustly discriminatory" pursuant to section 111 of the ATR (Air Transportation Regulations). The Agency notes that while the terminology used in subsection 67.2(1) of the CTA and section 111 of the ATR (Air Transportation Regulations) 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 (Air Transportation Regulations) encompass and capture the meaning of the terms used in subsection 67.2(1) of the CTA.

[8] To address this matter in an efficient manner, the Agency will consider this matter pursuant to section 111 of the ATR (Air Transportation Regulations); however, the Agency's findings will be equally applicable to Air Canada's International Cargo Tariff and Domestic Tariff.

Decision No. 666-C-A-2001

December 24, 2001
December 24, 2001

IN THE MATTER OF a complaint by Del Anderson against Air Canada concerning denied boarding policy applicable to transportation between points in Canada.
File No. M4370/A74/00-625

ANALYSIS AND FINDINGS

Is Air Canada's denied boarding policy applicable to transportation between points in Canada "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA?

As with the word "unreasonable", the phrase "unduly discriminatory" is not defined in the CTA or the ATR (Air Transportation Regulations), and it has not been considered by the Agency in the context of an air carrier's domestic tariff.

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

Further, in *O'Connell* v. *Canadian Broadcasting Corp*. (1988), 88 C.L.L.C. 17, 017, the Canadian Human Rights Tribunal held that: "a practice or rule may be found to be discriminatory, whether it involves ... "direct discrimination" (a practice or rule which is on the face of it discrimination) or "adverse impact" (a practice or rule which is on the face of it neutral, applying equally to all employees, but which has a discriminatory effect upon a discriminatory ground on an individual employee or group of employees).".

The above judicial interpretations of the word "discrimination" are well recognized in Canada and have been used by various courts and tribunals[3] . The Agency notes, however, that, contrary to the human rights and labour relations contexts in which those decisions were rendered, where the overriding principle is that no discrimination is tolerated, the CTA provides that "discriminatory" terms or conditions of carriage may be tolerated provided that they are not "**unduly** discriminatory".

The determination of whether a term or condition of carriage applied by a carrier on a domestic route is "unduly discriminatory" is, therefore, a two step process. 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".

The meaning of the word "undue" was the subject of a detailed analysis by the Federal Court of Appeal in *Via Rail Canada Inc*. v. *National Transportation Agency and Jean Lemonde*, [2001] 2 F.C. 25. In that case, the Court stated that:

> While "undue" is a word of common usage which does not have a precise technical meaning the Supreme Court has variously defined "undue" to mean "improper, inordinate, excessive or oppressive" or to express "a notion of seriousness or significance". To this list of synonyms, the Concise Oxford Dictionary adds "disproportionate".
>
> What is clear from all of these terms is that undue-ness is a relative concept. I agree with the position expressed by Cartwright J., as he then was:
>
> "Undue" and "unduly" are not absolute terms whose meaning is self-evident. Their use presupposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", excessive", "oppressive" or "wrong", or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.
>
> The proper approach to determine if something is "undue", then, is a contextual one. Undue-ness must be defined in light of the aim of the relevant enactment. It can be useful to assess the consequences or effect if the undue thing is allowed to remain in place.
>
> The Supreme Court has also recognized that the term implies a requirement to balance the interests of the various parties. In a case dealing with whether an employer had accommodated an employee's right to exercise his religion beliefs up to the point of undue hardship, Wilson J., writing for the majority, found it helpful to list some of the factors relevant to such an appraisal. She concluded by stating: "This list is not intended be exhaustive and the result which will obtain from a balancing of these factors against the right of the employee to be free of discrimination will necessarily vary from case to case".

The Agency is, therefore, of the opinion that, in determining whether a term or condition of carriage applied by a domestic carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA, 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.