Federal Court of Appeal | Cour d'appel fédérale

Date: 20111212

Docket: A-355-10

Citation: 2011 FCA 347

CORAM: **LÉTOURNEAU J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

AIR CANADA

Appellant

and

TORONTO PORT AUTHORITY
and PORTER AIRLINES INC.

Respondents

Heard at Toronto, Ontario, on June 6, 2011.

Judgment delivered at Ottawa, Ontario, on December 12, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

REASONS CONCURRING IN THE RESULT BY: LÉTOURNEAU AND DAWSON JJ.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of the Federal Court (*per* Justice Hughes): 2010 FC 774. The Federal Court dismissed two applications for judicial review brought by Air Canada.

[2] Air Canada brought the two applications for judicial review in response to two bulletins issued by the Toronto Port Authority concerning the Billy Bishop Toronto City Airport (the "City Airport"). The Toronto Port Authority manages and operates the City Airport.

[3] The Federal Court judge dismissed the applications for judicial review on a number of grounds. Three of those grounds and the Federal Court judge's rulings on them were as follows:

- The Toronto Port Authority's bulletins and its conduct described in the bulletins were not susceptible to judicial review. These matters did not trigger rights on the part of Air Canada to bring a judicial review.

- In issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority was not acting as a "federal board, commission or other tribunal." Accordingly, judicial review was not available under the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Toronto Port Authority's conduct was private in nature, not public.

- Air Canada failed to establish that the bulletins and the conduct described in them offended duties of procedural fairness, were unreasonable, or were motivated by an improper purpose.

[4] Air Canada now appeals to this Court from the dismissal of both of its applications for judicial review.

[5] Following oral argument, we reserved our decision in this appeal. Somewhat later, the Supreme Court of Canada released its decision in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504. That decision was of potential significance to the second of these three grounds, and, in particular, to the public-private distinction and whether the Toronto Port Authority's conduct described in the bulletins is reviewable. Accordingly, we invited the parties to make further written submissions concerning that decision. We have now received the parties' further written submissions and we have considered them.

[6] For the reasons set out below, I agree with the Federal Court judge's dismissal of Air Canada's applications for judicial review. Like the Federal Court judge, I find that each of the above three grounds is fatal to the applications for judicial review. It follows that I would dismiss the appeal, with costs.

A. Basic facts

[7] The City Airport is located on Toronto Island. Once a quiet location frequented mainly by small aircraft and hobby fliers, it is now a bustling commercial airport. This transformation was years in the making.

[8] Key to this transformation was an agreement, entered into in 1983 among the City of Toronto, the Toronto Harbour Commissioners and the federal Minister of Transport. Known colloquially as the Tripartite Agreement, it granted to the Toronto Harbour Commissioners, and later its successor, the Toronto Port Authority, a 50-year lease for the City Airport and related facilities. Importantly, the Tripartite Agreement imposed an obligation on the Toronto Harbour Commissioners, and later the Toronto Port Authority, to regulate the number of takeoffs and landings in order to limit noise in the nearby residential neighbourhood.

[9] In 1990, Air Ontario, an Air Canada subsidiary, started operations at the City Airport. Later, another Air Canada affiliate, Jazz, operated at the City Airport.

[10] In 1998, the *Canada Marine Act*, S.C. 1998, c. 10 became law. A year later, under its provisions, the Toronto Port Authority was established and letters patent were issued to it: (1999) Canada Gazette Part I, vol. 133, no. 23 (supplement). These shall be examined later in these reasons. Under subsection 7.2(j) of the letters patent, the Toronto Port Authority was authorized to operate and manage the City Airport in accordance with the Tripartite Agreement.

[11] By 2002, the Toronto Port Authority was operating at a loss. As we shall later see, under the *Canada Marine Act*, the Toronto Port Authority was meant to be financially self-sufficient. To remedy its financial situation, the Toronto Port Authority tried to get Jazz to commit to the continuance and even the enhancement of its operations at the City Airport. In the meantime, the Toronto Port Authority started to enter into discussions with another proposed airline about

operating at the City Airport. That airline was later known as Porter, operated by the respondent Porter Airlines Inc.

[12] As part of this investigation, the Toronto Port Authority and the airline that was later to be known as Porter approached the Competition Bureau for advice about whether Porter could ramp up operations considerably at the City Airport, taking 143 of 167 takeoff and landing slots. The Competition Bureau responded. It defined the relevant market as including Lester B. Pearson International Airport, considered it to be a "close substitute" for the City Airport for Toronto air passengers, and noted Air Canada's dominance at Pearson Airport. It concluded that capping Air Canada's takeoff and landing slots at the City Airport at a low level and granting Porter a number of takeoff and landing slots at the City Airport would be justified "as an interim measure" to allow Porter to establish a viable new service at the City Airport.

[13] By 2004, Jazz reduced the number of locations served and the frequency of flights at the City Airport. By 2005, it ceased shuttle bus services to the ferry by which passengers travelled to and from the City Airport and it used only six takeoff and landing slots at the City Airport.

[14] Mindful of the coming expiration of Jazz's Commercial Carrier Operating Agreement for the City Airport, the Toronto Port Authority proposed a new agreement with Jazz. Jazz rejected the proposal and ceased all of its operations at the City Airport in 2006.

[15] Soon afterward, Porter announced the launch of its services from the City Airport. It had already signed a Commercial Carrier Agreement with the Toronto Port Authority during the previous year (2005). That agreement provided for an initial period during which Porter would receive a guaranteed number of takeoff and landing slots, following which Porter would be entitled to those slots on a "use it or lose it" basis. Porter was also entitled to participate "on a fair basis" concerning any additional slots that might become available.

[16] After Porter announced its launch, Air Canada announced plans to reinstate its services at the City Airport. In addition, Air Canada's affiliate, Jazz, started an action in the Ontario Superior Court against the Toronto Port Authority claiming damages. In this action, Jazz alleged, among other things, that the Toronto Port Authority gave Porter a monopoly on terminal facilities and the vast majority of takeoff and landing slots at the City Airport: see Amended Statement of Claim, paragraph 31, Appeal Book, volume 14, pages 5746-5747. In 2006, Jazz also filed applications for judicial review in the Federal Court, complaining of these same matters: see Notices of Application, Appeal Book, volume 15, pages 5894-5916 and 6189-6201. Later, Jazz discontinued or abandoned all of these proceedings.

[17] Porter's flights from the City Airport steadily increased. Porter, through its affiliate City Centre Terminal Corp., invested $49 million into the City Airport's infrastructure, including the building of a new terminal and, later, expanding it. For the first time in more than two decades, the City Airport began to enjoy an operating profit.

[18] Later, in September, 2009, Air Canada expressed new interest in starting service from the City Airport. At this time, the Toronto Port Authority was studying the possibility of allowing new takeoff and landing slots within the limits of the Tripartite Agreement and was open to additional carriers operating at the City Airport and engaged in discussions with all of them, including Air Canada. The Toronto Port Authority's studies and discussions continued into 2010.

[19] On December 24, 2009 and April 9, 2010, the Toronto Port Authority issued the two bulletins that are the subject of Air Canada's applications for judicial review in this case. Also on April 9, 2010, unknown to Air Canada at the time, the Toronto Port Authority and Porter entered into a new Commercial Carrier Operating Agreement, under which Porter's existing landing slots were grandparented, with the result that Porter received 157 of 202 available takeoff and landing slots at the City Airport.

[20] In its application for judicial review of the second bulletin, Air Canada seeks the setting aside of Porter's 2010 Commercial Carrier Operating Agreement, among other things. However, as we shall see, that application for judicial review concerns the Toronto Port Authority's "decisions" evidenced in the second bulletin, not the Toronto Port Authority's decision to enter into the 2010 Commercial Carrier Operating Agreement with Porter. Air Canada has not brought an application for judicial review of that decision.

B. Did the Toronto Port Authority's conduct described in the bulletins constitute administrative action susceptible to judicial review?

[21] As mentioned above, before the Federal Court were two applications for judicial review launched in response to the two bulletins. In response, the respondents submitted to the Federal Court that judicial review was not available because the Toronto Port Authority had not made a "decision" or "order" within the meaning of the *Federal Courts Act*. All that the Toronto Port Authority had done was to issue two information bulletins of a general nature. Air Canada disagreed with the respondents and submitted to the Federal Court that there was such a "decision" or "order" and so judicial review was available to it. The parties advanced substantially similar submissions in this Court.

[22] The Federal Court judge agreed with the respondents' submissions, finding that that no "decision" or "order" was present before him because the Toronto Port Authority's bulletins "do not determine anything" (at paragraph 73).

[23] Although the Federal Court judge and the parties focused on whether a "decision" or "order" was present, I do not take them to be saying that there has to be a "decision" or an "order" before any sort of judicial review can be brought. That would be incorrect.

[24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only

a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.

[25] As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.

[26] Although the parties and the Federal Court judge focused on whether a "decision" or "order" was present, in substance they were addressing something more basic: whether, in issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority had done anything that triggered any rights on the part of Air Canada to bring a judicial review.

[27] On this, I agree with the respondents' submissions and the Federal Court judge's holding: in issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority did nothing to trigger rights on the part of Air Canada to bring a judicial review.

[28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.

[29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.

[30] The decided cases offer many illustrations of this situation: *e.g.*, *1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, 375 N.R. 368 (an official's letter proposing dates for a meeting); *Philipps v. Canada (Librarian and Archivist)*, 2006 FC 1378, [2007] 4 F.C.R. 11 (a courtesy letter written in reply to an application for reconsideration); *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3 (T.D.) (an advance ruling that constitutes nothing more than a non-binding opinion).

[31] In this case, Air Canada issued two notices of application:

- The first seeks judicial review of "the December 24, 2009 decision…of the Toronto Port Authority…announcing a process…through which it intends to award slots" at the City Airport. Like the Federal Court judge, I interpret this as a judicial review of

the December 24, 2009 bulletin issued by the Toronto Port Authority and the conduct described in it.

- The second seeks judicial review of "the April 9, 2010 decision…of the Toronto Port Authority…announcing a Request for Proposals process…to allocate slots and otherwise grant access to commercial carriers seeking access" to the City Airport. Like the Federal Court judge, I interpret this as a judicial review of the April 9, 2010 bulletin issued by the Toronto Port Authority and the conduct described in it.

[32] I shall examine each of the two bulletins and assess whether they, or the conduct described in them, affected Air Canada's legal rights, imposed legal obligations, or caused Air Canada prejudicial effects.

(1) The first bulletin

[33] The first bulletin is entitled "TPA announces capacity assessment results for Billy Bishop Toronto City Airport, begins accepting formal carrier proposals." This bulletin did five things, none of which, in reality, is attacked by Air Canada in its first application for judicial review:

- It announced the results of a noise impact study and capacity assessment for the City Airport and stated that the Toronto Port Authority anticipated that between 42 and 92 additional takeoff and landing slots would be available. Nowhere in its

application for judicial review of the bulletin does Air Canada attack this study or capacity assessment. Nowhere does it attack the Toronto Port Authority's assessment of the availability of takeoff and landing slots.

- It announced that the Toronto Port Authority intended to solicit formal business proposals for additional airline service at the City Airport. In its judicial review of this bulletin, Air Canada does not attack this intention.

- It disclosed the appointment of a slot coordinator to allocate available takeoff and landing slots at the City Airport. Air Canada does not say in its application for judicial review that the slot coordinator was improperly appointed, should not have been appointed, was biased, or conducted itself in some other inappropriate way.

- It stated that all airlines providing service from the City Airport will have to enter into a commercial carrier operating agreement with the Toronto Port Authority and secure appropriate terminal space from the City Centre Terminal Corp. Air Canada does not attack this aspect of the bulletin in its application for judicial review.

- It announced that further capital expenditures on the City Airport would be required to accommodate the additional air traffic. In its judicial review, Air Canada does not attack this aspect of the bulletin.

[34] In its first notice of application attacking this bulletin and the conduct described in it, Air Canada set out the grounds for its attack. The grounds focus on the Toronto Port Authority's alleged bias in favour of Porter. Air Canada says that the matters disclosed in the first bulletin perpetuate "Porter's existing anti-competitive advantage" and prevent "meaningful competition," something that is "contrary to the purposes of the *Canada Marine Act* and contrary to the common law." Air Canada complains about "Porter's exclusive access" to the City Airport and the "significant competitive advantages" offered by the City Airport compared to other airports in the Toronto area. It adds that when new takeoff and landing slots are awarded, Porter's dominance at the City Airport will be maintained – Porter will continue to enjoy a vast majority of the overall number of takeoff and landing slots.

[35] But the first bulletin and the conduct described in it does not do any of these things. On the subject of takeoff and landing slots, the first bulletin only sets out a process for the allocation of new slots and an approximate number to be allocated under that process. In reality, Air Canada does not attack anything that the first bulletin does or describes. Instead, Air Canada is really attacking the Toronto Port Authority's earlier allocation of takeoff and landing slots to Porter, an earlier decision that is not now the subject of judicial review. As mentioned in paragraph 16, above, Air Canada's affiliate, Jazz, attacked that matter and other allegedly monopolistic matters in 2006 by way of an action and judicial reviews, but it later discontinued and abandoned those proceedings.

[36] If Air Canada's application for judicial review concerning the first bulletin were granted and the matters described in the first bulletin were set aside, the pre-existing allocation of takeoff and

landing slots to Porter – the matter that is the real focus of its complaint – would remain. But in its notice of application Air Canada does not attack that pre-existing allocation of takeoff and landing slots to Porter.

[37] Therefore, the first bulletin and the matters described in it – the matters that Air Canada attacks in its first notice of application – do not affect Air Canada's legal rights, impose legal obligations, or cause Air Canada prejudicial effects. This bulletin and the matters described in it are not the proper subject of judicial review. Other matters may perhaps be causing prejudicial effects to Air Canada, but they are not the subject of its first notice of application.

(2) The second bulletin

[38] The second bulletin is entitled "Toronto Port Authority issues formal Request for Proposals for additional carriers at Billy Bishop Toronto City Airport." This bulletin did three things, none of which, in reality, is attacked by Air Canada in its second notice of application:

- It announced that two airlines, one of which was Air Canada, expressed informal interest in participating in the request for proposals for additional airline service at the City Airport. It invited others to participate in the request for proposal process.

- It appointed an independent party to review the proposals and allocate slots based on a methodology used at other airports.

- It announced results from a capacity assessment report and stated that, based on that report and the Tripartite Agreement, 90 new takeoff and landing slots could be made available.

[39] Again, in reality, Air Canada does not attack anything that the bulletin does. Nowhere in its second notice of application for judicial review does Air Canada suggest that these things affect its legal rights, impose legal obligations, or cause prejudicial effects upon it.

[40] In its second notice of application, Air Canada states that this bulletin implements the process that was proposed in the first bulletin. But, as we have seen, the process that was proposed in the first bulletin is not the real focus of Air Canada's attack. Air Canada's real focus is the pre-existing allocation of takeoff and landing slots, something over which Jazz launched challenges in 2006 but later abandoned.

[41] By the time of its second application for judicial review, Air Canada was aware of the allocation of takeoff and landing slots to Porter, set out in Porter's 2010 Commercial Carrier Operating Agreement. Its second notice of application alludes to that agreement. But the second bulletin and the conduct described in it – the subject-matter of the second application for judicial review – do not mention or allude to Porter's 2010 Commercial Carrier Operating Agreement. The second notice of application does not seek review of the Toronto Port Authority's decision to enter into that agreement and allocate a significant number of takeoff and landing slots to Porter.

[42] Therefore, for the foregoing reasons, Air Canada's two notices of application do not attack any matter that affects Air Canada's legal rights, impose legal obligations, or cause prejudicial effects. The notices of application did not place before the Federal Court any matter susceptible to review.

[43] This is sufficient to dismiss the appeal. However, I shall go on to consider two other grounds relied upon by the Federal Court judge to dismiss Air Canada's applications for judicial review.

C. Was the Toronto Port Authority acting as a "federal board, commission or other tribunal" when it engaged in the conduct described in the bulletins?

(1) This is a mandatory requirement

[44] An application for judicial review under the *Federal Courts Act* can only be brought against a "federal board, commission or other tribunal."

[45] Various provisions of the *Federal Courts Act* make this clear. Subsection 18(1) of the *Federal Courts Act* vests the Federal Court with exclusive original jurisdiction over certain matters where relief is sought against any "federal board, commission or other tribunal." In exercising that jurisdiction, the Federal Court can grant relief in many ways, but only against a "federal board, commission or other tribunal": subsection 18.1(3) of the *Federal Courts Act*. It is entitled to grant that relief where it is satisfied that certain errors have been committed by the "federal board, commission or other tribunal": subsection 18.1(4) of the *Federal Courts Act*.

(2) What is a "federal board, commission or other tribunal"?

[46] "Federal board, commission or other tribunal" is defined in subsection 2(1) of the *Federal Courts Act*. Subsection 2(1) tells us that only those that exercise jurisdiction or powers "conferred by or under an Act of Parliament" or "an order made pursuant to [Crown prerogative]" can be "federal boards, commissions or other tribunals":

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" *« office fédéral »*	« office fédéral » "*federal board, commission or other tribunal*"
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown…	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale…

[47] These words require us to examine the particular jurisdiction or power being exercised in a particular case and the source of that jurisdiction or power: *Anisman v. Canada (Canada Border Services Agency)*, 2010 FCA 52, 400 N.R. 137.

[48] The majority of decided cases concerning whether a "federal board, commission or other tribunal" is present turn on whether or not there is a particular federal Act or prerogative underlying an administrative decision-maker's power or jurisdiction. *Anisman* is a good example. In that case the source of the administrative decision-maker's power was provincial legislation, and so judicial review under the *Federal Courts Act* was not available.

[49] In this case, all parties accept that the actions disclosed in the Toronto Port Authority's bulletins find their ultimate source in federal law.

[50] However, before us, the Toronto Port Authority submits that that alone is not enough to satisfy the requirement that an entity was acting as a "federal board, commission or other tribunal" when it engaged in the conduct or exercised the power that is the subject of judicial review. It has cited numerous cases to us in support of the proposition that the conduct or the power exercised must be of a public character. An authority does not act as a "federal board, commission or other tribunal" when it is conducting itself privately or is exercising a power of a private nature: see, for example, *DRL Vacations Ltd. v. Halifax Port Authority*, 2005 FC 860, [2006] 3 F.C.R. 516; *Halterm Ltd. v. Halifax Port Authority* (2000), 184 F.T.R. 16 (T.D.).

[51] The Toronto Port Authority's submission has much force.

[52] Every significant federal tribunal has public powers of decision-making. But alongside these are express or implied powers to act in certain private ways, such as renting and managing premises,

hiring support staff, and so on. In a technical sense, each of these powers finds its ultimate source in a federal statute. But, as the governing cases cited below demonstrate, many exercises of those powers cannot be reviewable. For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power. Absent some exceptional circumstance, the janitorial company's recourse lies in an action for breach of contract, not an application for judicial review of the tribunal's decision to terminate the contract.

[53] The Supreme Court has recently reaffirmed that relationships that are in essence private in nature are redressed by way of the private law, not public law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In that case, a government dismissed one of its employees who was employed under a contract governed by the ordinary laws of contract. The employee brought a judicial review, alleging procedural unfairness. The Supreme Court held that in the circumstances the matter was private in character and so there was no room for the implication of a public law duty of procedural fairness.

[54] Recently, on the same principles but on quite different facts, the Supreme Court found that a relationship before it was a public one and so judicial review was available: *Mavi*, *supra*.

[55] A further basis for this public-private distinction can be found in subsection 18(1) of the *Federal Courts Act* which provides that the main remedies on review are certiorari, mandamus and prohibition. Each of those is available only against exercises of power that are public in character. So said Justice Dickson (as he then was) in the context of *certiorari* in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; see also *R. v. Criminal Injuries Compensation Board, Ex p. Lain*, [1967] 2 Q.B. 864.

[56] The tricky question, of course, is what is public and what is private. In *Dunsmuir* and in *Mavi*, the Supreme Court did not provide a comprehensive answer to that question.

[57] Perhaps there can be no comprehensive answer. In law, there are certain concepts that, by their elusive nature, cannot be reduced to clear definition. For example, in the law of negligence, when exactly does a party fall below the standard of care? We cannot answer that in a short sentence or two. Instead, the answer emerges from careful study of the factors discussed in many cases decided on their own facts. In my view, determining whether a matter is public or private for the purposes of judicial review must be approached in the same way.

[58] Further, it may be unwise to define the public-private distinction with precision. The "exact limits" of judicial review have "varied from time to time" to "meet changing conditions." The boundaries of judicial review, in large part set by the public-private distinction, have "never been and ought not to be specifically defined." See the comments of Justice Dickson (as he then was) in *Martineau*, *supra* at page 617, citing Lord Parker L.J. in *Lain*, *supra* at page 882.

[59] While the parties, particularly the Toronto Port Authority, have supplied us with many cases that shed light on the public-private distinction for the purposes of judicial review, only preliminary comments necessary to adjudicate upon this case are warranted in these circumstances.

[60] In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. Some of the relevant factors disclosed by the cases are as follows:

- *The character of the matter for which review is sought.* Is it a private, commercial matter, or is it of broader import to members of the public? See *DRL v. Halifax Port Authority*, *supra*; *Peace Hills Trust Co. v. Moccasin*, 2005 FC 1364 at paragraph 61, 281 F.T.R. 201 (T.D.) ("[a]dministrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law…").

- *The nature of the decision-maker and its responsibilities.* Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative

body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?

- *The extent to which a decision is founded in and shaped by law as opposed to private discretion.* If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public: *Mavi*, *supra*; *Scheerer v. Waldbillig* (2006), 208 O.A.C. 29, 265 D.L.R. (4th) 749 (Div. Ct.); *Aeric, Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127 (T.D.). This is all the more the case if that public source of law supplies the criteria upon which the decision is made: *Scheerer v. Waldbillig*, *supra* at paragraph 19; *R. v. Hampshire Farmer's Markets Ltd.*, [2004] 1 W.L.R. 233 at page 240 (C.A.), cited with approval in *MacDonald v. Anishinabek Police Service* (2006), 83 O.R. (3d) 132 (Div. Ct.). Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review: *Irving Shipbuilding Inc, supra*; *Devil's Gap Cottager (1982) Ltd. v. Rat Portage Band No. 38B*, 2008 FC 812 at paragraphs 45-46, [2009] 2 F.C.R. 276.

- *The body's relationship to other statutory schemes or other parts of government*. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter: *Onuschuk v. Canadian Society of Immigration*, 2009 FC 1135 at paragraph 23, 357 F.T.R. 22;

Certified General Accountants Association of Canada v. Canadian Public Accountability Board (2008), 233 O.A.C. 129 (Div. Ct.); ***R. v. Panel on Take-overs and Mergers; Ex Parte Datafin plc.***, [1987] Q.B. 815 (C.A.); *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)*, [1994] N.W.T.R. 97, 22 Admin. L.R. (2d) 251 (C.A.); ***R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan***, [1993] 2 All E.R. 853 at page 874 (C.A.); ***R. v. Hampshire Farmer's Markets Ltd.***, *supra* at page 240 (C.A.). Mere mention in a statute, without more, may not be enough: *Ripley v. Pommier* (1990), 99 N.S.R. (2d) 338, [1990] N.S.J. No. 295 (S.C.).

- *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity.* For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature: *Masters v. Ontario* (1993), 16 O.R. (3d) 439, [1993] O.J. No. 3091 (Div. Ct.). A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant: *Aeric, supra*; *Canadian Centre for Ethics in Sport v. Russell*, [2007] O.J. No. 2234 (S.C.J.).

- *The suitability of public law remedies.* If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature: *Dunsmuir*, *supra*; *Irving Shipbuilding*, *supra* at paragraphs 51-54.

- *The existence of compulsory power.* The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. See *Chyz v. Appraisal Institute of Canada* (1984), 36 Sask. R. 266 (Q.B.); *Volker Stevin*, *supra*; *Datafin*, *supra*.

- *An "exceptional" category of cases where the conduct has attained a serious public dimension*. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable: *Aga Khan*, *supra* at pages 867 and 873; see also Paul Craig, "Public Law and Control Over Private Power" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 196. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment: *Irving Shipbuilding*, *supra* at paragraphs 61-62.

(3) Application of these principles to the facts of this case

[61] In my view, the matters set out in the bulletins – the matters subject to review in this case – are private in nature. In dealing with these matters, the Toronto Port Authority was not acting as a "federal board, commission or other tribunal."

[62] While no one factor is determinative, there are several factors in this case that support this conclusion.

– I –

[63] First, in engaging in the conduct described in the bulletins, the Toronto Port Authority was not acting as a Crown agent.

[64] Section 7 of the *Canada Marine Act* provides that a port authority, such as the Toronto Port Authority, is a Crown agent only for the purposes of engaging in port activities referred to in paragraph 28(2)(*a*) of the Act. Those activities are "port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent." Port authorities can engage in "other activities that are deemed in the letters patent to be necessary to support port operations" (paragraph 28(2)(*b*) of the Act) but, by virtue of section 7 of the Act, they conduct those activities on their own account, not as Crown agents.

[65] The letters patent of the Toronto Port Authority draw a distinction between matters on which it acts as a Crown agent and matters on which it does not. In section 7.1, the letters patent set out what port activities under paragraph 28(2)(*a*) of the *Canada Marine Act* that the Toronto Port Authority may do – activities for which the Toronto Port Authority is a Crown agent. In section 7.2, the letters patent set out all other activities that are necessary to support port operations – activities for which the Toronto Port Authority acts on its own account, and not as a Crown agent.

[66] Subsection 7.2(*j*) of the letters patent is most significant. In that subsection, the Toronto Port Authority is authorized to manage and operate the City Airport. For this purpose, it is not a Crown agent. Subsection 7.2(*j*) reads as follows:

7.2 *Activities of the Authority Necessary to Support Port Operations.* To operate the port, the Authority may undertake the following activities which are deemed necessary to support port operations pursuant to paragraph 28(2)(*b*) of the Act:	**7.2** *Activités de l'Administration nécessaires aux opérations portuaires.* Pour exploiter le port, l'Administration peut se livrer aux activités suivantes jugées nécessaires aux opérations portuaires conformément à l'alinéa 28(2)*b*) de la Loi:
…	[…]
(*j*) the operation and maintenance of the Toronto City Centre Airport in accordance with the Tripartite Agreement among the Corporation of the City of Toronto, Her Majesty the Queen in Right of Canada and The Toronto Harbour Commissioners dated the 30th day of June, 1983 and ferry service, bridge or tunnel across	*j*) exploitation et entretien de l'aéroport du centre-ville de Toronto conformément à l'accord tripartite conclu entre la Corporation of the City of Toronto, Sa Majesté la Reine du chef du Canada et les Commissaires du havre de Toronto le 30 juin 1983, et service de traversier, pont ou tunnel au lieu dit

the Western Gap of the Toronto harbour to provide access to the Toronto City Centre Airport.	Western Gap dans le port de Toronto pour permettre l'accès à l'aéroport du centre-ville de Toronto;

[67] Air Canada submits that the allocation of takeoff and landing slots at the City Airport is a matter relating to licensing federal real property, a matter that falls under subsections 7.1(*c*), (*e*) and (*f*) of the letters patent. It submits that takeoff and landing slots are allocated by way of "licence." Air Canada also submits that subsection 7.1(*a*), which provides for the "issuance…of authorizations respecting use…of the port," embraces the granting of takeoff and landing slots. Accordingly, says Air Canada, when the Toronto Port Authority allocates takeoff and landing slots, it does so as a Crown agent.

[68] Air Canada is correct in saying that section 7.1 of the letters patent includes "licences" over "federal real property" and the issuance of "authorizations" for use of the port. Section 7.1 reads as follows:

7.1 *Activities of the Authority Related to Certain Port Operations.* To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(*a*) of the Act to the extent specified below:	**7.1** *Activités de l'Administration liées à certaines opérations portuaires.* Pour exploiter le port, l'Administration peut se livrer aux activités portuaires mentionnées à l'alinéa 28(2)*a*) de la Loi dans la mesure précisée ci-dessous:
(*a*) development, application, enforcement and amendment of rules, orders, by-laws, practices or procedures and issuance and administration of authorizations respecting use, occupancy or operation of the port and enforcement of Regulations or making of	*a*) élaboration, application, contrôle d'application et modification de règles, d'ordonnances, de règlements administratifs, de pratiques et de procédures; délivrance et administration de permis concernant l'utilisation, l'occupation ou l'exploitation du port; contrôle

Regulations pursuant to subsection 63(2) of the Act;

d'application des Règlements ou prise de Règlements conformément au paragraphe 63(2) de la Loi;

…

[…]

(*c*) management, leasing or licensing the federal real property described in Schedule B or described as federal real property in any supplementary letters patent, subject to the restrictions contemplated in sections 8.1 and 8.3 and provided such management, leasing or licensing is for, or in connection with, the following:

c) sous réserve des restrictions prévues aux paragraphes 8.1 et 8.3, gestion, location ou octroi de permis relativement aux immeubles fédéraux décrits à l'Annexe « B » ou dans des lettres patentes supplémentaires comme étant des immeubles fédéraux, à condition que la gestion, la location ou l'octroi de permis vise ce qui suit:

(i) those activities described in sections 7.1 and 7.2;

(i) les activités décrites aux paragraphes 7.1 et 7.2;

(ii) those activities described in section 7.3 provided such activities are carried on by Subsidiaries or other third parties pursuant to leasing or licensing arrangements;

(ii) les activités décrites au paragraphe 7.3 pourvu qu'elles soient menées par des Filiales ou des tierces parties conformément aux arrangements de location ou d'octroi de permis;

(iii) the following uses to the extent such uses are not described as activities in section 7.1, 7.2 or 7.3:

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

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

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

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

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

(C) uses not otherwise within subparagraph 7.1(*c*)(iii)(A), (B)

(C) utilisations qui ne sont pas prévues aux divisions

or (D) that are described in supplementary letters patent;	7.1*c*)(iii)(A), (B) ou (D) mais qui sont décrites dans des lettres patentes supplémentaires;
(D) government sponsored economic development initiatives approved by Treasury Board;	(D) projets de développement économique émanant du gouvernement et approuvés par le Conseil du Trésor;
provided such uses are carried on by third parties, other than Subsidiaries, pursuant to leasing or licensing arrangements;	pourvu qu'elles soient menées par des tierces parties, à l'exception des Filiales, conformément aux arrangements de location ou d'octroi de permis;
…	...
(*e*) granting, in respect of federal real property described in Schedule B or described as federal real property in any supplementary letters patent, road allowances or easements, rights of way or licences for utilities, service or access;	*e*) octroi d'emprises routières, de servitudes ou de permis pour des droits de passage ou d'accès ou des services publics visant des immeubles fédéraux décrits à l'Annexe « B » ou dans des lettres patentes supplémentaires comme étant des immeubles fédéraux;
…	[...]
(*p*) carrying on activities described in section 7.1 on real property other than federal real property described in Schedule C or described as real property other than federal real property in any supplementary letters patent;	*p*) exécution des activités décrites au paragraphe 7.1 sur des immeubles, autres que des immeubles fédéraux, décrits à l'Annexe « C » ou décrits dans des lettres patentes supplémentaires comme étant des immeubles autres que des immeubles fédéraux;
provided that in conducting such activities the Authority shall not enter into or participate in any commitment, agreement or other arrangement whereby the Authority is liable jointly or jointly and severally with any other person for any debt, obligation, claim or liability.	pourvu que l'Administration ne s'engage pas de façon conjointe ou solidaire avec toute autre personne à une dette, obligation, réclamation ou exigibilité lorsqu'elle prend un engagement, conclut une entente ou participe à un arrangement dans l'exercice de ses activités.

[69] However, in my view, the licences and authorizations mentioned in section 7.1 of the letters patent do not relate to takeoff and landing slots at the City Airport. The granting of takeoff and landing slots, even if they are legally considered to be the granting of licences over federal real property, is an integral part of the operation of the City Airport, a matter that is dealt with under section 7.2.

[70] The power to operate and maintain the City Airport in section 7.2 of the letters patent is qualified by the words "in accordance with the Tripartite Agreement." Among other things, that Agreement deals with the quantity and timing of takeoffs and landings at the City Airport. As a matter of interpretation, section 7.2 explicitly embraces the subject-matter of takeoffs and landings at the City Airport. Section 7.1 cannot be interpreted to qualify or derogate from that subject-matter.

[71] I cannot interpret section 7.1 as somehow whittling down section 7.2 that vests specific power in the Toronto Port Authority to engage in "the operation and maintenance of the Toronto City Centre Airport." The normal rule of interpretation is that a specific provision such as section 7.2 prevails over a more general one such as section 7.1: *Canada v. McGregor*, [1989] F.C.J. No. 266, 57 D.L.R. (4th) 317 (C.A.).

[72] In any event, the bulletins do not grant any takeoff or landing slots. Fairly characterized, they announce studies, intentions and plans that concern the operation and maintenance of the City Airport. Takeoff and landing slots are granted under Commercial Carrier Operating Agreements.

– II –

[73] The private nature of the Toronto Port Authority is another factor leading me to conclude that the Toronto Port Authority was not acting as a "federal board, commission or other tribunal" in this case.

[74] As noted above, the Toronto Port Authority received letters patent. One condition of receiving letters patent was that the Toronto Port Authority was and would likely remain "financially self-sufficient": *Canada Marine Act*, paragraph 8(1)(*a*). Buttressing this condition is subsection 29(3) of the Act. It provides as follows:

29. (3) Subject to its letters patent, to any other Act, to any regulations made under any other Act and to any agreement with the Government of Canada that provides otherwise, a port authority that operates an airport shall do so at its own expense.	**29.** (3) Sous réserve de ses lettres patentes, des autres lois fédérales et de leurs règlements d'application ou d'une entente contraire avec le gouvernement du Canada, l'administration portuaire qui exploite un aéroport doit le faire à ses frais.

[75] Subsections 8(1) and 29(3) of the *Canada Marine Act* are indications that, in operating and maintaining the City Airport under section 7.2 of the letters patent, the Toronto Port Authority may pursue private purposes, such as revenue generation and enhancing its financial position. For the Toronto Port Authority, to a considerable extent, the matters discussed in the bulletins have a private dimension to them.

– III –

[76] I turn now to some of the other relevant factors commonly used in making the public-private determination for the purposes of judicial review. I mentioned these in paragraph 60, above.

[77] In no way can the Toronto Port Authority be said to be woven into the network of government or exercising a power as part of that network. The *Canada Marine Act* and the letters patent do the opposite.

[78] There is no statute or regulation that constrains the Toronto Port Authority's discretion. There is no statute or regulation that supplies criteria for decision-making concerning the subject-matters discussed in the bulletins. Put another way, the discretions exercised by the Toronto Port Authority that are evidenced in the bulletins are not founded upon or shaped by law, but rather are shaped by the Toronto Port Authority's private views about how it is best to proceed in all the circumstances.

[79] There is no evidence showing that on the matters described in the bulletins, and indeed in its operation and maintenance of the City Airport, the Toronto Port Authority is instructed, directed, controlled, or significantly influenced by government or another public entity. As well, there are no legislative provisions that would lead to any such finding of instruction, direction, control or influence.

[80] Finally, there is no evidence before this Court in this particular instance that would suggest that the matters described in the bulletin fall with the exceptional category of cases where conduct has attained a serious public dimension or that the matters described in the bulletin have caused or will cause a very serious, exceptional effect on the rights or interests of a broad segment of the public, such that a public law remedy is warranted.

[81] For the foregoing reasons, in engaging in the conduct described in the bulletins in this instance, the Toronto Port Authority was not acting in a public capacity, as that is understood in the jurisprudence. Therefore, judicial review does not lie in these circumstances.

D. Procedural fairness, reasonableness review and improper purpose

[82] Assuming for the moment that judicial review did lie in these circumstances, Air Canada submits that the "decisions" evidenced by the bulletins should be set aside for want of procedural fairness. However, in the particular circumstances of this case, no duty of procedural fairness arose. Such duties do not arise where, as here, the relationship is private and commercial, not public: *Dunsmuir*, *supra;* see also paragraphs 61-81, above. In different circumstances, as explained above, an action taken by the Toronto Port Authority could assume a public dimension and procedural duties could arise, but that is not the case here.

[83] Further, I find no reviewable error in the Federal Court judge's rejection of Air Canada's procedural fairness submissions and, in fact, substantially agree with his reasons at paragraphs 86-

95. In his reasons, the Federal Court judge rejected Air Canada's submission that the Toronto Port Authority was obligated to follow the World Scheduling Guidelines promulgated by the International Air Transport Association. He also held that the Toronto Port Authority did not create any legitimate expectation of consultation on the part of Air Canada, and that, in any event, Air Canada had made its views known fully to the Toronto Port Authority.

[84] Air Canada also submits that the "decisions" evidenced by the bulletins should be set aside because they are unreasonable. The Federal Court judge rejected this submission. Again, I find no reviewable error in the reasons of the Federal Court judge (at paragraphs 96-101), and substantially agree with them. In this case, the actions of the Toronto Port Authority described in the bulletins were within the range of defensibility and acceptability.

[85] Air Canada also submits that the Toronto Port Authority pursued an improper purpose. In its first notice of application, Air Canada describes this as "prefer[ring] Porter over new entrants and…perpetuat[ing] Porter's significant anti-competitive advantage into the future." Insofar as the bulletins and the conduct described in them are concerned – the only matters that are the subject of the judicial reviews in this case – the Federal Court judge stated that "[t]here is no evidence…to suggest that [the Toronto Port Authority] and Porter were doing anything more than engaging in normal, reasonable commercial activity." There is nothing to warrant interference with that factual finding. Therefore, I find no reviewable error in the Federal Court's judge's rejection of Air Canada's submissions on improper purpose. To the extent that Air Canada considers that the

bulletins, the conduct described in them, other matters or any or all of these things have resulted in damage to competition, it has its recourses under the *Competition Act*.

E. Proposed disposition

[86] For the foregoing reasons, I would dismiss the appeal with costs.

"David Stratas"

J.A.

REASONS CONCURRING IN THE RESULT (Létourneau and Dawson JJ.A.)

[87] We have read the reasons now received from our colleague Stratas J.A. We concur with his proposed disposition.

"Gilles Létourneau"
J.A.

"Eleanor R. Dawson"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	December 12, 2011

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