Federal Court of Appeal | Cour d'appel fédérale

Date: 20210713

Docket: A-334-19

Citation: 2021 FCA 141

CORAM: **NEAR J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and AIR TRANSAT A.T. INC.

Respondents

Heard by online video conference hosted by the registry on May 20, 2021.

Judgment delivered at Ottawa, Ontario, on July 13, 2021.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: NEAR J.A.
MACTAVISH J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20210713

Docket: A-334-19

Citation: 2021 FCA 141

CORAM: **NEAR J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and AIR TRANSAT A.T. INC.

Respondents

REASONS FOR JUDGMENT

WOODS J.A.

[1] Dr. Gábor Lukács is seeking to challenge a decision which purported to allow Air Transat A.T. Inc. (Air Transat) to credit payments it made to passengers towards penalties owing to the Receiver General for Canada. The payments and penalties relate to extended tarmac delays experienced on certain Air Transat flights and deteriorating conditions on board the aircraft during those delays.

[2] Air Transat brought an interlocutory motion to dismiss Dr. Lukács' challenge on the basis that he lacks standing. The Federal Court granted Air Transat's motion (2019 FC 1148), and Dr. Lukács now appeals to this Court.

Background

[3] On July 31, 2017, a number of flights were diverted to the Ottawa Macdonald-Cartier International Airport. Among those flights were Air Transat Flight Nos. 157 and 507 (the Flights).

[4] The Flights were delayed on the tarmac for an extended period. The Canadian Transportation Agency (the Agency) received 72 complaints from passengers on board the Flights. The complaints related to deteriorating conditions on board the Flights, including an inadequate supply of food and drinks, high temperatures, and passengers becoming physically ill. Passengers remained on board the aircraft throughout the delay.

[5] The Agency inquired into the delays and determined that Air Transat had failed to properly apply the terms and conditions of its tariff relating to offering drinks and snacks to passengers and disembarking (Agency Determination). The Agency ordered Air Transat to compensate all passengers on the Flights for expenses incurred as a result of its failure to properly apply its tariff. The Agency issued further orders that are not relevant to this appeal.

[6] On the same day that the Agency Determination was issued, a Designated Enforcement Officer (the Officer) assigned by the Agency issued a notice of violation to Air Transat. The notice of violation levied an administrative monetary penalty against Air Transat for its failure to properly apply its tariff. The notice set a penalty of $295,000 and stipulated in part that "[t]he penalty of $295,000 CAD must be paid to the 'Receiver General for Canada.'"

[7] In the cover letter to the notice of violation, the Officer established a credit mechanism described as follows:

> Full payment of the amount specified will be accepted in complete satisfaction of the penalty. A credit up to the amount of the penalty will be applied and accepted as payment in lieu upon provision of evidence, to the satisfaction of the Chief Compliance Officer, of the amount of compensation provided to passengers on the affected flights, excluding the refund of out of pocket expenses.

[8] Prior to the issuance of the notice of violation, Air Transat offered $400 to passengers on board Flight 157. On the same day as the issuance of the notice of violation, Air Transat offered $500 to passengers on board both Flights, taking into consideration sums already paid to passengers. As far as I can determine, the record does not state the amount that Air Transat ultimately paid to the Receiver General for Canada.

[9] An investigation report authored by the Officer further describes the basis of the penalty. The Officer relied on the Agency Determination in concluding that Air Transat failed to properly apply its tariff. The Officer determined that Air Transat committed a violation vis-à-vis each passenger on board the Flights and fixed the penalty at $500 per passenger. In fixing the quantum of the penalty, the Officer noted that the amounts were reasonable in light of this being

Air Transat's first violation and were comparable to the amount of compensation Air Transat offered to passengers of Flight 157. The investigation report makes no mention of the credit mechanism established in the cover letter to the notice of violation.

Application for judicial review

[10] Dr. Lukács commenced a judicial review of the Officer's decision. In the judicial review application, Dr. Lukács sought an Order setting aside the penalty and remitting the matter for redetermination. He also sought a declaration that the Agency / Officer does not have jurisdiction to: (a) reduce the amount of a penalty after it has been assessed; and (b) divert a penalty to private recipients. Dr. Lukács also requested that the Agency provide further information related to this matter.

[11] Air Transat brought a motion in response to Dr. Lukács' application. The motion sought to dismiss Dr. Lukács' application on the ground that Dr. Lukács lacks standing to challenge the Officer's decision. The Agency also brought a motion concerning Dr. Lukács' request for further information. The Agency's motion has not been determined.

[12] The Agency took no position on Air Transat's motion before the Federal Court and did not participate in this appeal.

The decision of the Federal Court

[13] The motion was set down for hearing in advance of the judicial review application. The question that the Federal Court considered was whether Dr. Lukács should be granted public interest standing to challenge the Officer's decision. As described in the Federal Court's reasons, Dr. Lukács submitted that his background as a passenger rights advocate qualifies him to be granted standing, and that his application raises three justiciable issues (at para. 37):

> (1) whether the Officer had the statutory authority to give "credit" with respect to the amounts owing pursuant to a notice of violation;
>
> (2) whether the Officer used secret law by relying on the unpublished 2012 Enforcement Manual which conflicts with the published 2013 Enforcement Manual; and
>
> (3) whether the Officer exercised public powers unreasonably in treating [Air Transat's] violations as first or second violations and not providing reasons to support the "credit" given to [Air Transat].

[14] The Court relied on the framework to determine public interest standing from the Supreme Court of Canada's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524. It provided for a three-factor test: (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.

[15] In its reasons, the Court discussed only the first justiciable issue raised by Dr. Lukács. The other two justiciable issues were not explicitly discussed.

[16] On the first justiciable issue, the Federal Court concluded that Dr. Lukács did not satisfy any of the three factors described in *Downtown Eastside*.

[17] As for whether the issue is a serious justiciable issue, the Court determined that it was not serious since it was not a substantial constitutional issue or an important issue.

[18] As for whether Dr. Lukács had a real stake or genuine interest in this issue, the Court concluded that he did not since he had no genuine interest in the manner in which a penalty is to be paid.

[19] As for whether the application was a reasonable and effective means to bring the matter to the courts, the Court concluded that the issue does not transcend the interests of those most directly affected, the travelling public, and that the "effect of the Officer's decision is to provide compensation for the passengers affected …" (at para. 52). The Court therefore determined that Dr. Lukács had not shown that his application "is a 'reasonable and effective way' to challenge the Officer's decision as to how the penalty should be paid …" (at para. 53).

[20] The Federal Court ultimately held that Dr. Lukács "failed to meet any of the elements" of the public interest standing test and granted Air Transat's motion to dismiss the judicial review.

Positions of the parties

[21] As a threshold matter, Dr. Lukács suggests that determining standing prior to hearing the application is premature as the record remains unsettled. Dr. Lukács also argues that the Federal Court was obligated to explicitly exercise its discretion as to whether it should determine standing at a preliminary stage and failed to do so.

[22] With respect to his standing, Dr. Lukács argues that the Federal Court failed to properly apply the overarching analytic framework set out in *Downtown Eastside* and each factor of the public interest standing test. He submits that these errors led the Federal Court to wrongly conclude that he should be denied public interest standing.

[23] Air Transat submits that the Federal Court did not err because Dr. Lukács does not have standing to maintain the application. It focussed its submissions on the three factors of the public interest standing test. In taking the position that the issues raised by Dr. Lukács are not serious justiciable issues, Air Transat referred the Court to the lack of standing for affected passengers to challenge decisions of an Officer, that granting standing could open the "floodgates" to similar challenges in other administrative monetary penalty regimes, that Dr. Lukács seeks to interfere with prosecutorial discretion, and that the regulatory regime has since undergone significant changes. Air Transat submits that the issues raised are frivolous and vexatious.

[24] Air Transat argues that Dr. Lukács "does not have any particular or specialized interest in the administration of the public purse," and therefore has no real stake or interest in the issues raised. In support of this position, Air Transat suggests that the issue before the Officer was not one of passenger rights. Rather, the issue was whether a penalty should be issued, the quantum of that penalty, and the manner in which it should be paid.

[25] Air Transat takes the position that there are other reasonable and effective means for Dr. Lukács to bring the issues raised before the courts, such as filing a complaint with the Agency or petitioning to the Governor in Council.

Issues and standard of review

[26] Dr. Lukács raises a threshold issue of whether the Federal Court erred in determining standing with final effect on a preliminary motion. If the Federal Court did not err in this regard, the remaining issue in this appeal is whether the Federal Court erred in its determination of public interest standing.

[27] The appellate standard of review applies to this appeal. Questions of law are to be determined on the correctness standard, and questions of fact and questions of mixed fact and law (excluding extricable questions of law) are to be determined on the basis of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331.

Analysis

[28] Before the Federal Court was a motion to dismiss the application for judicial review on the ground that Dr. Lukács lacks standing to bring the application. The Federal Court decided that standing should be denied and the application should be dismissed.

[29] For the reasons below, I am of the view that the Federal Court erred.

[30] In general, the Court will grant an interlocutory motion to dismiss an application for judicial review only where the circumstances suggest "that the proceeding is doomed to fail": *Bernard v. Canada (Attorney General),* 2019 FCA 144 at para. 33. This is the same threshold as the "plain and obvious" test (*Wenham v. Canada (Attorney General),* 2018 FCA 199, 429 D.L.R. (4th) 166).

[31] Interlocutory motions to dismiss on the basis of an alleged lack of standing have been resolved on a number of occasions in this Court by applying the "doomed to fail" legal test: *Bernard* at para. 39; *Canada (Health) v. Canadian Generic Pharmaceutical Association,* 2007

FCA 375, 371 N.R. 46 at para. 5; *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, 370 N.R. 336 at para. 22.

[32] In this case, the Federal Court did not determine standing by applying the "doomed to fail" test. Instead, the Federal Court simply made a final determination as to whether Dr. Lukács should be granted or denied public interest standing.

[33] This Court discussed the approach taken by the Federal Court in *Apotex* (at paras. 13-14). The Court recognized that a judge has the discretion to make a final determination on standing in the context of a motion to strike out an application for judicial review. However, the Court cautioned that it may be more appropriate for the final disposition of the standing question to be heard with the merits. In this regard, the Court acknowledged that a judge may not be in a position to make a fully informed decision on standing in a preliminary motion and that judicial reviews are supposed to be decided summarily. Accordingly, such discretion should be exercised sparingly – and explicitly.

[34] Further criteria for the exercise of this discretion are described by the Supreme Court of Canada in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 at para. 16: "It depends on the nature of the issues raised and whether the court has sufficient

material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted."

[35] The Federal Court did not apply the criteria described in *Finlay* and *Apotex* in this case. The failure to apply these criteria is an error of law: *British Columbia (Minister of Forests) v. Okanagan Indian Band,* 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 43.

[36] In the circumstances, it is appropriate for this Court to make the decision that the Federal Court should have made. In my view, the question of standing should be left to be determined at the hearing on the merits.

[37] The *Finlay* criteria aim to ensure that a court has all that it needs to make a proper determination of standing. In this case, the evidentiary record remains unsettled. Dr. Lukács has sought further material from the Agency in connection with the underlying application for judicial review. The Agency objected to providing some of the material sought and has brought a

motion seeking to confirm that its production of material is complete. Dr. Lukács contests the Agency's motion, which remains outstanding.

[38] If Dr. Lukács receives the material he seeks, it may impact the arguments that he raises on the merits of the application for judicial review and on the standing issue. This is not a case where the Court has "sufficient material before it" as contemplated in *Finlay*.

[39] A consideration of the criteria described in *Apotex* supports this conclusion. In this case, the unsettled evidentiary record does not put this Court in a position to make a "fully informed decision" on standing: *Apotex* at para. 13.

[40] As a result, it is preferable that the question of standing be heard with the merits.

[41] This conclusion is sufficient to dispose of the issues in this appeal. For clarity, these reasons should not be read as endorsing other aspects of the Federal Court's reasons.

Disposition

[42] I would allow the appeal, set aside the order of the Federal Court, and remit the matter to the Federal Court to be heard with the merits of the judicial review application.

[43] With respect to costs, Dr. Lukács has requested his disbursements of this appeal and an allowance for time and effort. In my view, it is appropriate to award disbursements only.

"Judith Woods"
J.A.

“I agree.
D.G. Near J.A.”

“I agree.
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-334-19
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY and AIR TRANSAT A.T. INC.
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	MAY 20, 2021
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	NEAR J.A. MACTAVISH J.A.
DATED:	JULY 13, 2021

APPEARANCES:

Dr. Gábor Lukács	FOR THE APPELLANT (ON HIS OWN BEHALF)
R. Benjamin Mills	FOR THE RESPONDENT (AIR TRANSAT A.T. INC.)

SOLICITORS OF RECORD:

Conlin Bedard LLP Ottawa, Ontario	FOR THE RESPONDENT (AIR TRANSAT A.T. INC.)
Canadian Transportation Agency Gatineau, Québec	FOR THE RESPONDENT (CANADIAN TRANSPORTATION AGENCY)