Federal Court  Cour fédérale

Date: 20190906

Docket: T-1063-18

Citation: 2019 FC 1148

Ottawa, Ontario, September 6, 2019

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

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

Respondents

ORDER AND REASONS

I. INTRODUCTION

[1] By Notice of Application for judicial review filed on December 29, 2017, Dr. Gabor Lukacs (the "Applicant") seeks the following relief:

1. an Order setting aside the amount of the penalty, and remitting the violations to the Canadian Transportation Agency [the Agency] for the penalties to be reassessed by a Designated Enforcement Officer;

2. a declaration that the Agency and/or the Designated Enforcement Officer of the Agency have no jurisdiction to directly or indirectly:

    a) reduce the amount of a penalty after it has been assessed in a notice of violation; and

    b) divert to private recipients, such as passengers, statutory penalties owed and payable to the Receiver General of Canada;

3. an Order setting aside the portion of the "Cover letter and notice of violation" purporting to reduce the amount of penalty payable by Air Transat A.T. Inc.;

4. costs and/or reasonable out-of-pocket expenses of this application; and

5. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

[2] By a Notice of Motion dated April 2, 2018, Air Transat A.T. Inc. ("Air Transat" or "the Respondent") seeks an Order dismissing the Notice of Application, with costs.

II. BACKGROUND

[3] On December 29, 2017, the Applicant filed a Notice of Application for judicial review in the Federal Court of Appeal pursuant to section 28 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. The Applicant named the Respondent and the Canadian Transportation Agency (the "Agency") as Respondents.

[4] By letter dated January 29, 2018, the Respondent sought direction from the Federal Court of Appeal about how to address the issues of that Court's jurisdiction over the Application for Judicial Review and the standing of the Applicant to pursue the Application.

[5] On February 23, 2018, Justice Gleason, J.A. issued a direction instructing the Agency and Air Transat to bring a motion forthwith pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), addressing these issues.

[6] On April 5, 2018, in response to the directions from Gleason, J.A., Air Transat filed its motion to dismiss this Application for judicial review**.** In its Notice of Motion, the Respondent challenged both the jurisdiction of the Federal Court of Appeal to adjudicate the Application for judicial review and the standing of the Applicant to pursue it.

[7] By letter dated April 16, 2018, the Agency informed the Court that it takes no position respecting the Air Transat's motion to dismiss the Application for judicial review.

[8] On May 30, 2018, Justice Stratas issued an Order to transfer the Application for judicial review and all other motions pending before the Federal Court of Appeal respecting the Application, to the Federal Court, pursuant to Rule 45 of the Rules. He found that the Federal Court of Appeal does not have original jurisdiction over an application for judicial review of a decision of a Designated Enforcement Officer (the "Officer") pursuant to section 28 of the *Federal Courts Act*, *supra.*

[9] Justice Stratas found that the Officer is a "federal board, commission or other tribunal" within the meaning of section 2 of the Act, and is separate from the Agency. He also found that the Federal Court has original jurisdiction over an application for judicial review pursuant to section 18 of the *Federal Courts Act, supra,* of a decision made by an officer.

[10] The Agency filed a motion in writing pursuant to the Rules, on March 23, 2018, seeking an order confirming that it has satisfied the Applicant's request pursuant to Rule 317, that is for production of the tribunal record.

[11] The Applicant responded to this motion by filing a motion record on April 3, 2018, contesting the sufficiency of the Certified Tribunal Record (the "CTR") that the Agency had filed on January 29, 2018.

[12] This Motion has not been adjudicated pending the disposition of the motion on standing, pursuant to the Direction issued by Justice Walker on November 9, 2018.

[13] The following details are taken from the CTR and the affidavits of the Applicant, that is the affidavit sworn on February 1, 2018 and the affidavit sworn on April 16, 2018.

[14] The Applicant, in his first affidavit, describes himself as a passenger rights advocate and provides details about his activities in that regard, including appearances before a parliamentary committee and participation, as a litigant, before the Federal Court of Appeal and the Supreme Court of Canada, representing the interests of passengers.

[15] In his second affidavit, the Applicant provided some information about the incident giving rise to the within Application, including exhibits.

[16] Air Transat is a commercial air carrier.

[17] The factual context for this proceeding is a flight delay.

[18] On July 31, 2017, Air Transat Flights 157 and 507 were diverted to the Ottawa MacDonald-Cartier International Airport.

[19] Flight 157 was delayed on the tarmac for 5 hours and 51 minutes. Flight 507 was delayed on the tarmac for 4 hours and 41 minutes. Passengers remained onboard for the duration of the delay.

[20] The Agency received 48 complaints from passengers onboard Flight 157 and 24 complaints from passengers on Flight 507, about the inadequate supply of food and drinks on the aircrafts during the delays and deteriorating conditions onboard.

[21] On August 2, 2017, the Agency issued decision number LET-A-47-2017.

[22] Air Transat was given the opportunity to show cause why the Agency should not find that it did not properly apply the terms and conditions set out in the Tariff, as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58 (the "Regulations"). Air Transat took the position that its staff had satisfied its obligations under the Tariff.

[23] The Agency appointed an Inquiry Officer to collect evidence and report findings to the Agency.

[24] On August 9, 2017, the Agency issued decision LET-A-49-2017, saying that it would convene an oral hearing regarding Air Transat's actions. The oral hearing explored two questions, that is whether the Respondent properly applied the terms and conditions set out in its International Scheduled Services Tariff, CTA (A) No. 4 (the "Tariff"), pursuant to subsection 110(4) during the incident, and whether the Tariff provisions are reasonable pursuant to subsection 111(1) of the Regulations.

[25] Oral hearings were held in Ottawa on August 30 and 31, 2017. Testimony was heard from passengers on Flights 507 and 157, and witnesses from the Respondent and other regulatory organizations.

[26] The Agency, in a Determination A-2017-194 (the "Determination") dated November 30, 2017, found that the Respondent had contravened subsection 110(4) of the Regulations. It found that the Respondent had failed to properly apply Rules 5.2d) and 21.3c) of its Tariff, on Flights 507 and 157, regarding the offer of drinks and snacks, and with respect to disembarking. It also found that those rules are unreasonable because they do not take into account the needs of passengers where there are extended delays.

[27] On November 30, 2017, the Agency advised Air Transat that the matter was under review by an Officer and that a "Notice of Violation may issue this afternoon as well."

[28] On November 30, 2017, the Officer issued a Cover letter and Notice of Violation. The Notice of Violation provides in part as follows:

> The penalty of **$295,000 CAD** must be paid to "The Receiver General for Canada" on or before the date mentioned below and the payment should be sent to …
>
> Full payment of the amount specified above will be accepted in complete satisfaction of the penalty and no further proceedings under Part VI of the CTA shall be taken against Air Transat A.T. Inc., in respect of the violation(s).

[29] The Officer advised the Respondent that the compensation provided to passengers on the affected flights, excluding the refund for out of pocket expenses, would be applied and accepted as payment up to the amount of the penalty. In the Cover letter, the Officer said the following with respect to payment of the penalty:

> 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.

III. SUBMISSIONS

A. *The Respondent's submissions*

[30] The Respondent submits that the Applicant does not have direct standing and does not meet the test to be granted public interest standing.

[31] The Respondent submits that the Applicant does not have direct standing because he is not "directly affected" by the matter, in that the decision at issue does not affect his legal rights,

impose legal obligations on him or prejudicially affect him in some way; see the decision in *Forest Ethics Advocacy Association v. National Energy Board*, [2015] 4 F.C.R. 75 at paragraph 30.

[32] The Respondent argues that the Applicant has not demonstrated that he meets the factors in the test for public interest standing, as set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524 at paragraph 37. It submits that the Application does not raise a serious justiciable issue because it does not raise a constitutional issue or challenge a matter that has application beyond the interests of the parties subject to the decision.

[33] The Respondent argues that the Applicant has not demonstrated a "real stake or genuine issue" regarding the Officer's decision because he did not participate in the Agency's proceeding which led to the Determination. It also submits that a "passenger rights advocate" does not have a real stake in the diversion of funds or quantum of penalties issued in a specific case.

[34] The Respondent argues that this Application for judicial review is not a reasonable means to bring this matter to court. It submits that Part VI of the CTA provides that the parties to an Administrative Monetary Penalty are the Agency or Minister and the entity which has a notice of violation issued against it.

[35] The Respondent also argues that it is relevant that passengers do not have standing in the Administrative Monetary Penalty process. It submits that since a passenger who was directly

affected by the matter is not entitled to participate in the proceeding, then an uninvolved advocate should not have standing to judicially review the decision.

[36] The Respondent further contends that granting standing to the Applicant in this matter will open the floodgates for similarly situated individuals because the same Administrative Monetary Penalty procedure is included or referenced in more than 50 federal statutes.

B. *The Applicant's Submissions*

[37] The Applicant argues that this Application raises three justiciable issues:

(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 the Respondent's violations as first or second violations and not providing reasons to support the "credit" given to the Respondent.

[38] The Applicant argues that these issues are serious because they concern how administrative monetary penalties are managed by the Agency.

[39] The Applicant submits that, as an air passenger rights advocate, he has a genuine interest in ensuring that air carriers comply with their statutory obligations and that meaningful enforcement actions are taken where an air carrier fails to comply. He argues that he has a genuine interest in the review of the Officer's decision despite not having participated in the

inquiry leading to the Determination because the Officer's decision and the Determination are two separate processes.

[40] The Applicant argues that this Application for judicial review is "a reasonable and effective means to bring the challenge to the court." He submits the denial of his public interest standing would immunize the Officer's decision from judicial review.

[41] Accordingly, the Applicant submits that he ought to be granted public interest standing.

IV. DISCUSSSION AND DISPOSITION

[42] The sole issue arising in the motion is the standing of the Applicant to pursue the within notice of Application. The merits of the Application, although discussed tangentially in oral submissions, are not addressed in the following discussion.

[43] The test for granting public interest standing was recently discussed by the Supreme Court of Canada in its decision in *Downtown Eastside, supra*, as follows:

> 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.

[44] The issue of whether the Officer acted outside her statutory authority by providing a "credit" to the Respondent does not meet the standard of "serious justiciable issue" because it is not a substantial constitutional issue or important issue, as discussed in *Downtown Eastside, supra*.

[45] In *Downtown Eastside, supra*, the Supreme Court of Canada said the following at paragraph 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. … 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.

[46] In my view, the Applicant has not demonstrated a real stake or genuine interest in the issue raised. Although he has consistently engaged with passenger rights issues, has a reputation as a "passenger rights advocate" and has shown a continuing interest in similar matters involving the Canadian Transportation Agency, the issue he raises in this Application for judicial review is the legality of the award of compensation to affected passengers in a way that redirects funds from the Consolidated Revenue Fund.

[47] The collection of funds for the Consolidated Revenue Fund is a matter that may concern the Minister of National Revenue. Although there is no evidence that the Minister was informed

about the decision of the Officer, there is equally no evidence to rebut the presumption that the Officer has acted lawfully in the exercise of her discretion.

[48] I am not persuaded that the Applicant has shown he has a "real stake or a genuine interest" in the manner in which a penalty is to be paid, by an offending party.

[49] In my opinion, the Applicant has not proposed a reasonable manner to bring the issue to court. The relevant factors are set out in *Downtown East Side Sex Workers, supra* at paragraph 51, as follows:

> 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.…
> >
> > • 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. …
>
> • 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. … 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.

[50] I acknowledge, as does Air Transat, that the Applicant has expertise in advocating for passenger rights. However, I am not persuaded that he has shown that the issue he raises "transcends the interests of those most directly affected" by the decision in question.

[51] The travelling public is the group that would be "most directly affected."

[52] The effect of the Officer's decision is to provide compensation for the passengers affected by the tarmac delays.

[53] In my opinion, the Applicant has not shown that his Application for judicial review in all the circumstances is a "reasonable and effective way" to challenge the Officer's decision as to how the penalty should be paid by the Respondent.

[54] According to the decision in *Downtown Eastside, supra*, a person seeking the exercise of discretion to win public interest standing must meet the three elements of the test referred to

above. In this case, the Applicant has failed to meet any of the elements and he will not be granted public interest standing.

V. CONCLUSION

[55] The motion is granted and the Notice of Application is dismissed, on the grounds that the Applicant has not shown that he should be granted public interest standing.

[56] It follows that it is not necessary for the Court to address the Agency's motion about the sufficiency of the CTR.

[57] The Respondent Air Transat shall have its costs in respect of this motion and the Application for judicial review.

ORDER

THIS COURT ORDERS that the motion is granted, the Notice of Application is dismissed with costs to Air Transat A.T. Inc., on the motion and in respect to the Application for judicial review.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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