Date: 20080505

Docket: 08-A-11

Citation: 2008 FCA 168

Present: PELLETIER J.A.

BETWEEN:

AIR CANADA, JAZZ AIR LP, as represented by its general partner, Jazz Air Holdings GP Inc. carrying on business as Air Canada Jazz and WEST JET

Moving Parties

and

CANADIAN TRANSPORTATION AGENCY and THE ESTATE OF ERIC NORMAN, JOANNE NEUBAUER and the COUNCIL OF CANADIANS WITH DISABILITIES

Responding Parties

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 5, 2008.

REASONS FOR ORDER BY: PELLETIER J.A.

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REASONS FOR ORDER

PELLETIER J.A.

[1] In response to the motion by the applicants (Air Canada, Jazz Air LP and West Jet) for leave to appeal from the Canadian Transportation Agency's decision No. 6-AT-A-2008 (the One Person-One Fare decision (1P1F)), the Agency has filed a comprehensive Memorandum of Fact and Law (Memorandum). In its Memorandum, the Agency acknowledges that the applicants have not asserted any question of jurisdiction. The Agency takes the position that its statutory right to be heard on the appeal (see subsection 41(4) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the Act)) allows it to participate in the debate beyond simply addressing questions of jurisdiction and of its administrative procedures.

[2] The applicants have moved to strike the Agency's Memorandum on the ground that its Memorandum amounts to a defence of its decision on the merits and is improper.

[3] The Agency relies on the Supreme Court of Canada's decision in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 (*CAIMAW)* as authority for the proposition that an administrative tribunal can speak in defence of its own decision where it is argued that the decision is patently unreasonable:

> … In my view, the Industrial Relations Council has standing before this Court to make submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers.
>
> [*CAIMAW*, at para. 35.]

[4] The Court supported its reasoning by reference to *B.C.G.E.U. v. British Columbia (Industrial Relations Council) (B.C.C.A.),* 26 B.C.L.R. (2d) 145, where the British Columbia Court of Appeal held that at page 153:

> … But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

[5] To the extent that this analysis is rooted in the idea that a patently unreasonable decision is reviewable because it is made without jurisdiction, it has been overtaken by events. Reviewability

and jurisdiction have been decoupled in the sense while a decision based upon a patently unreasonable error is reviewable, it is not reviewable because it necessarily results in the loss of the jurisdiction.

[6] Reviewability of a decision no longer depends upon an allegation of excess of jurisdiction: see paragraph 28 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, where the following appears:

> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[7] To that extent, the fact that an allegation of patent unreasonableness is made does not (and has not for some time) automatically raise an issue of jurisdiction. As a result, *CAIMAW* must be applied with care. In this case, it is admitted that no issue of jurisdiction, in the sense of *vires*, is raised so that there is no need for the Tribunal to show that, despite the allegation of patent unreasonableness, its decision was made within jurisdiction.

[8] As for the policy ground advanced by the British Columbia Court of Appeal, namely that a tribunal's explanation may make reasonable that which would appear unreasonable to one not blessed with the tribunal's expertise, it is not apparent that any such explanation is offered in the Agency's Memorandum. The Tribunal reviews each of the applicants' arguments, refers to the

paragraphs in its decision where the issue was dealt with, and concludes, in most cases, that its decision was based on its assessment of the evidence and was not perverse, capricious or made without regard for the evidence: see paragraphs 25, 33, 42 and 47. On other issues, the Tribunal argued the merits of the objection: "the issues raised by the Moving Parties do not reveal any serious point to urge nor any question of law that is fairly arguable" (paragraph 49), "the Agency clearly applied the correct test to this and other related issues when it stated its conclusion on undue hardship:…" (paragraph 52), "the Agency respectfully submits that it considered this argument and the evidence in support of it and determined that it was unable to asses the impact of this …[followed by a reference to the relevant passage of the decision]" (paragraph 57).

[9] In my view, the Agency's Memorandum does not raise any argument that was not made by the respondents, or that could not have been made by them.

[10] Even if the Agency had demonstrated through the exercise of its expertise that something which appeared unreasonable was in fact reasonable, what could a reviewing court make of such submissions? In *Dunsmuir*, the majority of the Supreme Court described the contents of the concept of reasonableness:

> … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [*Dunsmuir*, at paragraph 47.]

[11] To the extent that CAIMAW suggests that a tribunal can remedy any defects in the justification, transparency and intelligibility of its decision by means of a Memorandum of Argument in support of the decision, it must be taken as having been overtaken by the development of the law. If the reasonableness of a decision is a function of its transparency and intelligibility, in other words, of the quality of the reasons given to support it, then it seems to me that a decision which can only be supported by facts or arguments which are not found in the reasons themselves is unreasonable. To hold otherwise is to give a tribunal an opportunity to file supplementary reasons in the guise of a Memorandum of Fact and Law every time one of its decisions is challenged.

[12] On balance, I am not satisfied that the Memorandum filed by the Agency comes within the principles enunciated in *CAIMAW*. It is simply a restatement of the Tribunal's position on the merits of the case. This creates an air of partisanship in a case where one of the possible outcomes is an order that all or part of the decision be returned to the Agency for consideration in accordance with directions given by this Court. The Agency must preserve its impartiality and the appearance of impartiality, notwithstanding the standing which subsection 40(4) affords it. It cannot do so if it adopts an adversial position with respect to the applicants.

[13] As a result, there will be an order that the Agency's Memorandum and supporting material are not to be considered in the disposition of the application for leave to appeal. Given that the Agency has admitted that the appeal raises no issue of jurisdiction, properly speaking, no useful purpose will be served by allowing it to file a further Memorandum.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	08-A-11
STYLE OF CAUSE:	*AIR CANADA, JAZZ AIR LP as represented by its general partner, Jazz Air Holdings GP Inc. carrying on business as Air Canada Jazz and West Jet and CANADIAN TRANSPORTATION AGENCY and The Estate of Eric Norman, Joanne Neubauer and the Council of Canadians with Disabilities*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	PELLETIER J.A.
DATED:	May 5, 2008

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