Federal Court of Appeal | Cour d'appel fédérale

Date: 20220427

Docket: A-257-20

Citation: 2022 FCA 71

CORAM: **STRATAS J.A.**
LOCKE J.A.
MACTAVISH J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

SWOOP INC.

Respondent

and

CANADIAN TRANSPORTATION AGENCY

Intervener

Heard by online video conference hosted by the Registry on April 27, 2022.
Judgment delivered from the Bench at Ottawa, Ontario, on April 27, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on April 27, 2022).

STRATAS J.A.

[1] The law requires domestic carriers like the respondent to identify a "basic fare" to customers: *Canada Transportation Act*, S.C. 1996, c. 10, ss. 55, 67(1)(*b*). Where "compliance …

[is] impractical", the Canadian Transportation Agency can grant exemptions: s. 80(1)(*c*) of the Act. The Agency granted the respondent an exemption from this requirement.

[2] The Agency characterized the respondent as "an ultra-low-cost carrier" that "offer[s] only 'unbundled' fares". In its view, the basic fare requirement was "impractical for [the respondent] to comply with" because the respondent does not intend to offer "any version of a fare with the features of a basic fare".

[3] The appellant, a public interest litigant, appeals the Agency's granting of that exemption. To succeed, he must persuade us the Agency erred in law: s. 41(1) of the Act. We are not so persuaded.

[4] The appellant argues that the Agency improperly relied on the respondent's preferred business model as a factor in its analysis. We disagree. This does not constitute legal error. Subsection 80(1) of the Act gives the Agency a broad discretion to issue exemptions from legislative and regulatory requirements "on such terms and conditions as it deems appropriate". Paragraph 80(1)(*c*) of the Act explicitly sets the criteria for an exemption as necessity, undesirability or practicality. As a legal matter, the Agency had to conduct a grounded, real-life assessment of the relevant, actual considerations before it, including the business plans the respondent intends to implement and the provisions of the Act on basic fares in sections 55 and 67 of the Act, and assess necessity, undesirability and practicality. This the Agency did: see respondent's memorandum of fact and law at paras. 74-75.

[5] The appellant suggests that the respondent was not allowed to formulate a business plan that does not provide for a basic fare until it had received an exemption from the Agency. But the Act does not forbid the formulation of such a business plan. With the exemption granted, the business plan is in compliance with the Act and, subject to any other provisions of the legislation, may be implemented.

[6] The appellant also argues that the Agency failed to apply its own pre-established test under this section correctly. But it is the Act that governs, not whatever past practices the Agency has followed. Here, the Agency had to read paragraph 80(1)(*c*) correctly and follow any other relevant provisions of the Act. It did so. In any event, we are not persuaded the Agency in fact failed to apply its own pre-established test.

[7] Finally, the appellant argues that the Agency owed him procedural fairness. It should have notified him and received his input before making its decision. We reject this.

[8] Putting aside specific legislative provisions to the contrary and any procedural undertakings or rulings made by an administrative decision-maker, members of the general public with only a policy interest—even a keen interest—in the matter do not have rights to advance notice or participation in the decisions of administrative decision-makers: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44 at p. 653 S.C.R.; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297. This is especially so in the case of discretionary decisions with significant policy content and only generalized or diffuse impact on the wider public, such as the one here. Were it otherwise, in the case of federal

Cabinet meetings, the line-up of participants who would have to be heard would stretch across the Ottawa River.

[9] The case before us can be usefully contrasted with cases where the administrative decision will target or affect either the legal rights or the significant, direct, tangible, and focused practical interests of an individual or a readily discernable set of individuals. In these sorts of cases, subject to legislative requirements, notice and participation rights can arise to the extent required by the circumstances: *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671 and *Martineau v. Matsqui Institution* (1979), [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385, both citing *Ridge v. Baldwin*, [1964] A.C. 40; see *Baker v. Canada (Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

[10] The appellant, an enthusiastic, self-appointed protector of the interests of the travelling public, has done much work that many praise. But for the purposes of hearing rights and the law of procedural fairness in administrative decisions like this one, the appellant remains a member of the general public with no right to advance notification and participation. The circumstances here are different from another case, *Lukács v. Canadian Transportation Agency*, 2016 FCA 174, in which the appellant was given participatory rights because of his direct interest acquired by virtue of having had participatory rights in prior, closely related issues. The circumstances are also different from cases where the appellant has a direct interest by virtue of being a complainant and his complaint was the focus of the Agency's investigation and proceeding, or where the appellant has otherwise been granted standing to act as a litigant before the Agency.

[11] Overall, in this case, we see no legal error on the part of the Agency.

[12] Therefore, we will dismiss the appeal with costs to the respondent fixed in the amount of $1,000.00, all-inclusive.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-257-20

APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED FEBRUARY 19, 2020, NO. A-2020-28

STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. SWOOP INC. and CANADIAN TRANSPORTATION AGENCY
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	APRIL 27, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. LOCKE J.A. MACTAVISH J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

Dr. Gábor Lukács	ON HIS OWN BEHALF
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