SCC File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

DELTA AIR LINES INC.

APPLICANT
(Moving Party)

- and -

DR. GÁBOR LUKÁCS

RESPONDENT
(Responding Party)

APPLICATION FOR LEAVE TO APPEAL
(DELTA AIR LINES INC., APPLICANT)
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
33 Yonge St, Suite 201
Toronto, ON M5E1G4

Carlos P. Martins
Tel.: (416) 982-3808
Fax: (416) 982-3801
Email: cmartins@lexcanada.com

Counsel for the Applicant, Delta Air Lines Inc.

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email:mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Applicant, Delta Air Lines Inc.

Dr. Gábor Lukács

Self-Represented Respondent

CANADIAN TRANSPORTATION AGENCY
Air and Accessible Transportation Branch
15 Eddy Street, 17th Floor
Gatineau, Quebec K1A 0N9

Agency Secretariat
Tel: 1-888-222-2592
Fax: 819-953-5253

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(DELTA AIR LINES INC., APPLICANT)
(Pursuant to Rule 25(1)(a) of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE THAT DELTA AIR LINES INC. hereby applies for Leave to Appeal to the Court, pursuant to section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, from the judgment of the Federal Court of Appeal, docket A-135-15, made September 7, 2016, and for an order granting leave to appeal or such further or other order that the said Court may deem appropriate.

AND FURTHER TAKE NOTICE that this Application for Leave is made on the following grounds:

1. The Federal Court of Appeal erred by allowing the appeal of the Respondent Dr. Gábor Lukács.

2. The Federal Court of Appeal erred in holding that the Canadian Transportation Agency (the "Agency") is prohibited from applying the law of standing as developed by courts of civil jurisdiction when exercising its statutory discretion to decline to investigate and inquire into a complaint brought before it. In doing so, the Federal Court Appeal undermined the broad, discretionary language set out in the Agency's governing statute by mandating that the Agency must hear air transportation complaints unless the complaint is "futile or devoid of any merit on its face".

3. The Federal Court of Appeal has radically departed from the post-*Dunsmuir* jurisprudence by undertaking a *de novo* interpretation of the Agency's statutory mandate and authority and concluding that the Agency's decision was not reasonable because it did not match the Federal Court of Appeal's interpretation of the Agency's statutory regime. In effect, the Federal Court of Appeal applied a correctness review that will have serious implications for all future reviews of Agency decisions.

4. The Federal Court of Appeal's Decision contains critical errors in the interpretation of the *Canada Transportation Act*, S.C. 1996, c. 10 and the *Air Transportation Regulations*, SOR/88-58 and the significance of these errors highlights the importance of deference to the Agency when interpreting its governing statute.

5. The Federal Court of Appeal's Decision, if allowed to stand, permits the court to substitute its own erroneous interpretation of the Agency's complex, specialized governing statute, with the result that all future reviews of Agency decisions may now be reviewed without any deference to the expertise of the Agency. The Federal Court of Appeal's Decision completely undermines this Court's decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 SCR 650.

6. If granted leave, this case provides this Court with the opportunity to clarify the general powers of the Agency as set out in *VIA Rail* in a post-*Dunsmuir* landscape. This case will also allow this Court to clarify whether, and in what circumstances, administrative tribunals may grant public interest standing.

Dated at Toronto in the Province of Ontario, this 3rd day of November, 2016.

Tae Mee Park

Counsel for the Applicant,
DELTA AIR LINES INC.

BERSENAS JACOBSEN CHOUEST
THOMSON BLACKBURN LLP
33 Yonge St, Suite 201
Toronto, ON M5E1G4
Carlos P. Martins
Tae Mee Park
Andrew W. MacDonald
Tel.: (416) 982-3800

Ottawa Agent for Counsel for the Applicant,
DELTA AIR LINES INC.

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email:mfmajor@supremeadvocacy.ca

Fax: (416) 982-3801
Email: cmartins@lexcanada.com

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Dr. Gábor Lukács
6507 Roslyn Road
Halifax, NS B3L 2M8

Canadian Transportation Agency
Air and Accessible Transportation Branch
15 Eddy Street, 17th Floor
Gatineau, Quebec K1A 0N9

Agency Secretariat
Tel: 1-888-222-2592
Fax: 819-953-5253

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the Supreme Court Act.

Office des transports du Canada

Canadian Transportation Agency

DECISION NO. 425-C-A-2014

November 25, 2014

COMPLAINT by Gábor Lukács against Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle.

File No. M4120-3/14-04165

COMPLAINT

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain practices of Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle (Delta) relating to the transportation of large (obese) persons are "discriminatory", contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58, as amended, and inconsistent with the Agency's findings in Decision No. 6-AT-A-2008.

BACKGROUND

[2] On September 5, 2014, the Agency issued Decision No. LET-C-A-63-2014, in which the Agency noted that it was not clear whether Mr. Lukács has an interest in Delta's practices governing the carriage of obese persons. The Agency provided Mr. Lukács with the opportunity to file submissions regarding his standing, and opened pleadings.

[3] In his submission dated September 19, 2014, Mr. Lukács requested that the Agency amend Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large" throughout the Decision to adequately identify the nature of the complaint.

PRELIMINARY MATTER

Should the Agency vary Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large"?

[4] Mr. Lukács submits that the complaint concerns discriminatory practices relating to the transportation of large passengers stated in an e-mail dated August 20, 2014, and that Decision No. LET-C-A-63-2014 incorrectly labels the complaint as one that concerns the transportation of "obese persons". Delta argues that the word "large" is a euphemism and that the characterization of the complaint as one concerning "obese persons" is entirely accurate and appropriate as the practices described in the e-mail concern a passenger who cannot fit in a single seat.

[5] In his complaint, Mr. Lukács used the wording "transportation of large (obese) passengers". It is therefore not clear to the Agency why Mr. Lukács now objects to the Agency using the word "obese" in Decision No. LET-C-A-63-2014. Based on this, the Agency will not vary that Decision by replacing the word "obese" with "large". However, as Delta uses the word "large" in the policy at issue, the Agency will use the word "large" throughout this Decision.

ISSUE

[6] Does Mr. Lukács have standing in this complaint?

POSITIONS OF THE PARTIES

[7] Mr. Lukács states that section 111 of the ATR and subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) serve as a preventative function rather than merely offering remedies or compensation *post facto*. Mr. Lukács refers to Decision No. 746-C-A-2005 (*Black v. Air Canada*), in which the Agency held, at paragraph 7:

> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.

[8] Mr. Lukács states that it is important to note that in that Decision, the Agency used "persons" in the plural form, which demonstrates that the Agency was mindful of the public benefit of section 111 of the ATR, and that the purpose of such challenges goes well beyond the individual applicant's personal benefit.

[9] Mr. Lukács states that the question of "standing" to challenge the terms or conditions applied by a carrier was also addressed by the Agency in *Black v. Air Canada*, more specifically at paragraph 5:

> The Agency is of the opinion that it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and conditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR. In this regard, the Agency notes that subsection 67.2(1) of the CTA provides that, on the basis of a "complaint in writing to the Agency by any person", the Agency may take certain action if the Agency determines that the terms or conditions at issue are unreasonable or unduly discriminatory. The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR, the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions" [...]

[10] Mr. Lukács contends that the above findings were reaffirmed in Decision No. 215-C-A-2006 (*O'Toole v. Air Canada*), Decision No. LET-C-A-155-2009 (*Lukács v. Air Canada*) and Decision No. LET-C-A-104-2013 (*Krygier v. several carriers*), and argues that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier.

[11] Mr. Lukács contends that Delta refuses to transport passengers or forces passengers to buy multiple seats based on the personal characteristics of an individual or group and that in light of the public policy purpose of section 111 of the ATR, he is not required to be a member of the group discriminated against in order to have standing.

[12] Delta counters that in *Black v. Air Canada*, because of the basis of Air Canada's objection (that there must be "a real and precise factual background"), the reasons did not deal with the considerations normally reviewed in cases which address standing, and there was no explicit holding on the basis of standing. Delta argues that in this case, the issue of standing is squarely raised.

[13] According to Delta, the holding in *Black v. Air Canada* can be explained on the basis that Mr. Black had a direct interest in the matter and had standing as of right based on the fact that terms imposed by Air Canada affected Mr. Black's rights and would have prejudicially affected him had he travelled with Air Canada. Delta contends that in *Black v. Air Canada*, the Agency reasoned that a person who could be prejudicially affected by the terms complained of should not be required to be subjected to those terms as a precondition of bringing a complaint. Delta argues that the same analysis would explain all the cases which have followed *Black v. Air Canada.*

[14] Mr. Lukács asserts that Delta mistakenly argues that the issue of standing has not been squarely raised in *Black v. Air Canada*, and Delta's contention with respect to *Black v. Air Canada* and the subsequent cases raising the issue of standing is woefully misguided.

[15] Mr. Lukács submits that the Supreme Court of Canada (Supreme Court), in *A.G. (Que.) v. Carrières Ste-Thérèse Ltée,* [1985] 1 S.C.R. 831, at paragraph 28, noted that Parliament does not speak in vain, and that the phrase "any person" was inserted into the legislative text for a reason. Mr. Lukács claims that Delta has failed to address the argument that the right to challenge terms and conditions pursuant to subsection 67.2(1) of the CTA and section 111 of the ATR is conferred upon "any person", and has failed to propose any alternative interpretation for the phrase "any person" that Parliament chose to include in subsection 67.2(1) of the CTA. Mr. Lukács asserts that in light of this, the Agency should find that these rights are collective (similar to language rights pursuant to the *Official Languages Act*, R.S.C., 1985, c. 31 [4th supp.]) and serve the travelling public at large.

[16] Mr. Lukács also submits that it is settled law that private interest standing cannot be founded on hypothetical possibilities, and he refers to *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726 (*Downtown Eastside Sex Workers v. Attorney General*).

[17] Mr. Lukács asserts that consequently, the Agency could not have reached the conclusion it did in *Black v. Air Canada* based on speculations, such as those proposed by Delta, given that the Agency did not speculate that Mr. Black could be travelling on Air Canada the next day. Instead, Mr. Lukács states that the Agency was mindful of the public benefit of section 111 of the ATR.

[18] Mr. Lukács maintains that any doubts that *Black v. Air Canada* might have left as to the issue of standing were resolved in *Krygier v. several carriers*, where the applicant's standing was directly challenged, and the Agency held that: "the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint". Mr. Lukács contends that in *Krygier v. several carriers,* the Agency reached its conclusion without any reference to the personal circumstances of the applicant and in that case, there was no trace of any consideration of the nature suggested by Delta that the applicant might be affected by the challenged terms and conditions.

Burden of proof

[19] Mr. Lukács states that when standing is raised, the burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy the legal test for public interest standing.

[20] Delta submits that Mr. Lukács provides no legal basis for this submission. Delta argues that the opposite is true as revealed by the Federal Court of Appeal in *Public Mobile Inc. v. Canada (Attorney General),* [2011] 3 F.C.R. 344, where J.A. Sexton writing for a unanimous court at paragraph 54 clearly states that "an applicant for public interest standing must satisfy the court" that the test for public interest standing is met. Thus, Delta argues that it is Mr. Lukács who bears the onus of satisfying the Agency that he is entitled to be granted public interest standing, and not Delta to disprove such entitlement.

[21] According to Mr. Lukács, Delta confuses the question of burden of proof with respect to standing when the issue is raised as a preliminary matter with determination of standing in a hearing of an application on its merits. Mr. Lukács states that the *Globalive Wireless Management Corp. v. Public Mobile Inc.,* 2011 FCA 194 case cited by Delta concerned a judgment on the merits of an application for judicial review, which also addressed the issue of standing. Mr. Lukács argues that, in this case, standing was raised as a preliminary issue, before the parties had an opportunity to tender evidence and fully test the evidence of the opposing party and, therefore, the burden of proof is on Delta to demonstrate that the low threshold test is not satisfied.

Private interest standing

[22] Mr. Lukács states that the complaint is not about discrimination against "obese persons", but rather about discrimination against "large persons". He asserts that he is six feet tall, weighs approximately 175 pounds and, as such, he would or could be viewed as a "large person" by Delta's agents. Mr. Lukács contends that in the absence of a clear and consistent statement from Delta about the scope of its practices, it is impossible to conclude that he would not be personally subject to Delta's discriminatory practices due to his physical characteristics. Therefore,

Mr. Lukács argues that he has a private, personal interest in Delta's practices relating to the transportation of "a large person". In addition, Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[23] Delta states that according to the Federal Court of Appeal in *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] 2 F.C. 500 and *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, to be "directly affected" and thus having "direct standing" means that the practice must affect Mr. Lukács's legal rights, impose legal obligations upon him, or else prejudicially affect him in some way.

[24] With respect to Mr. Lukács's submission that he is six feet tall and weighs 175 pounds, Delta indicates that according to a national survey conducted by *Maclean's* Magazine (in 2012), the average Canadian male is five feet nine inches tall and weighs 185 pounds. Delta points out that Mr. Lukács's is only approximately four percent taller than the average Canadian male, and approximately four percent lighter.

[25] According to Mr. Lukács, Delta purports to rely on a national survey conducted by *Maclean's* Magazine as the evidentiary basis for its claim regarding the average size of a Canadian male. Mr. Lukács submits that information published in newspapers and magazines are inadmissible hearsay, and that the Agency should ignore the citation. In any event, Mr. Lukács states that Delta has correctly acknowledged that he is taller than the average Canadian male, thus making him a "large" passenger, and that Delta has provided no evidence as to the meaning of "large" found in its practices, which makes it impossible to conclude with certainty that Mr. Lukács is not "large".

[26] Delta contends that the complaint concerns persons who cannot fit in a single seat by virtue of being obese. Delta argues that given that Mr. Lukács is lighter than the average Canadian, despite being slightly taller, it is patently clear that he does not have a direct interest in the subject matter of the proposed complaint and his rights are not affected by the impugned practices nor would he suffer any prejudice if he elected to travel with Delta.

Public interest standing

[27] Mr. Lukács states that he has public interest standing, and that the legal test for public interest standing requires the consideration of three factors, which are set out in *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC) [*Fraser v. Canada*]:

1. Is there a serious issue to be tried?
2. Does the party seeking public interest standing have a genuine interest in the matter?
3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

1. Is there a serious issue to be tried?

[28] Mr. Lukács states that in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), the Agency established a two-step test for determining whether terms or conditions are "unduly discriminatory":

> [...] In the first place, the Agency must determine whether the term or condition of carriage applied is "discriminatory". In the absence of discrimination, the Agency need not pursue its investigation. If, however, the Agency finds that the term or condition of carriage applied by the domestic carrier is "discriminatory", the Agency must then determine whether such discrimination is "undue".

[29] Mr. Lukács points out that in *Black v. Air Canada*, the Agency applied the same test for determining whether terms or conditions are "unjustly discriminatory" within the meaning of section 111 of the ATR:

> [35] The Agency is therefore of the opinion that in determining whether a term or condition of carriage applied by a carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA or "unjustly discriminatory" within the meaning of section 111 of the ATR, it must adopt a contextual approach which balances the rights of the travelling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers operating in Canada. This position is also in harmony with the national transportation policy found in section 5 of the CTA.

[30] With respect to the meaning of "discriminatory," Mr. Lukács contends that the Agency adopted the interpretation of the Supreme Court in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143:

> [...] discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligation, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages, available to other members of society.

[31] Mr. Lukács asserts that Delta's practices are discriminatory in that they impose a disadvantage on a certain group of passengers based on their personal characteristics, namely, the size and/or shape of their body, and that it is arguable that the practices are "unjustly discriminatory" and contrary to subsection 111(2) of the ATR. Mr. Lukács contends that whether Delta's practices are "unjustly discriminatory" is a serious issue to be tried, meeting the first branch of the test.

2. Does the party seeking public interest standing have a genuine interest in the matter?

[32] Mr. Lukács states that he is a Canadian air passenger rights advocate who has filed more than two dozen successful complaints with the Agency, which have led to substantial improvements and landmark decisions. He adds that he has one complaint before the Agency, four proceedings before the Federal Court of Appeal, and that he is acting as a representative for a passenger in a disability-related complaint.

[33] Mr. Lukács submits that an electronic search of the Agency's decisions reveals 46 decisions mentioning him and/or decisions resulting from his complaints, and argues that based on this, he has a demonstrated long-standing, real, and continuing interest in the rights of air passengers and therefore meets the second branch of the test.

3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

[34] Mr. Lukács points out that in *Fraser v. Canada*, this branch of the test was explained as follows:

> Thus, in order to find that there is a reasonable and effective alternate means to litigate the issue, the A.G. must prove, on the balance of probabilities, that:
>
> a) there is a person who is more directly affected than the applicants; and
> b) that person might reasonably be expected to initiate litigation to challenge the legislation at issue.

[35] Mr. Lukács states that in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 S.C.R. 524 (*Canada v. Downtown Eastside Sex Workers*), at paragraph 51, the Supreme Court provided several examples of the types of interrelated matters that may be useful to take into account when assessing the third branch of the test:

> 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. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

> 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 [...] [Emphasis added]

[36] Mr. Lukács asserts that there is a public interest in eliminating any discrimination, a conduct that is inconsistent with the Canadian values enshrined in the *Canadian Charter of Rights and Freedoms* (Charter) and the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, and this is particularly so with respect to "unjust discrimination", alleged in this case, which is an extreme form of discrimination. Mr. Lukács argues that these considerations militate in favour of granting him public interest standing.

[37] According to Mr. Lukács, there is no realistic alternative means for bringing Delta's outrageous practices before the Agency as such proceedings are legally complex and carriers are represented by highly skilled counsels. Mr. Lukács states that because of his expertise, he is in a unique position to meaningfully respond to the legal arguments crafted by such skilled counsels and that any other complainant would be forced to hire a lawyer and incur very substantial expenses.

[38] Delta contends that the essential issue in this case is whether, in the words of the Supreme Court in the *Canada v. Downtown Eastside Sex Workers* case, 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".

[39] Delta points out that in *Canada v. Downtown Eastside Sex Workers,* the Supreme Court cautioned, at paragraph 51, that:

> 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. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized. [Emphasis added]

[40] With this guidance from the Supreme Court in mind, Delta submits that it is helpful to consider certain information available on the Agency's Web site, which provides any person with an easy step-by-step tool for completing a complaint in approximately 15 minutes.

[41] Delta states that there exists an expedient method for filing an application, and that the Supreme Court cautioned that the alternative should "be considered in light of the practical realities, not theoretical possibilities". According to Delta, the practical reality in this case is that, in 2013 and the first nine months of 2014, the Agency issued 36 decisions in respect of consumer complaints relating to the air mode, and of these 36 decisions, 11 relate to complaints filed by Mr. Lukács. Delta points out that the total number of persons who participated as complainants was approximately 105 (although it concedes that one single case involved 83 complainants).

[42] Delta argues that there is no discussion of standing in any of the 11 cases initiated by Mr. Lukács which led to decisions in 2013 or 2014, and argues that comments made respecting the *Black v. Air Canada* Decision are applicable in this case as each of the 11 decisions can be explained on the basis of an implicit finding that Mr. Lukács could potentially have been prejudicially affected by the practice, term or condition complained of. Delta also points out that in none of these cases were there any suggestion that Mr. Lukács should be granted public interest standing.

[43] Delta maintains that the Agency provides an accessible medium for lodging consumer complaints, and encourages the participation of self-represented complainants through its informal and non-binding dispute resolution services. Delta adds that the Agency provides experienced mediators at no cost and its rules and procedures are relatively informal by comparison to courts. Therefore, Delta submits that a complainant need not be an expert litigant nor have the assistance of an experienced counsel as it is both practical and reasonable for a complainant who is unjustly affected by a practice, procedure, term or condition of an air carrier to bring a complaint to the Agency.

[44] Mr. Lukács submits that the availability of various forms of non-binding dispute resolution is not a relevant, and certainly not a determinative, consideration in this context.

[45] According to Mr. Lukács, Delta appears to misconstrue the meaning of "alternative means" as the correct interpretation of "alternative means" is the presence of another person who has private interest standing, and who is likely to challenge the impugned action, policy or law before the court or tribunal. Mr. Lukács asserts that Delta has to do more than show the "mere possibility" of a challenge to the impugned practices by a directly affected private litigant, as it was noted in *Fraser v. Canada,* at paragraph 109:

> In order to show there is a "reasonable and effective" alternative, it is necessary to show more than a possibility that such litigation might occur. The "mere possibility" of a challenge by a directly affected private litigant will not result in the denial of public interest standing [...] [Emphasis added]

[46] Regarding Delta's argument that a complaint can be filed "in approximately 15 minutes", Mr. Lukács submits that this is based on the misconception that an average passenger is familiar with the ATR and its section 111. Mr. Lukács asserts that while there may be particularly determined, dedicated and able passengers who might possibly be able to answer the questions found on the Agency's Web site in a meaningful way in relation to an undue or unjust discrimination complaint, this remains a "mere possibility".

[47] Mr. Lukács argues that Delta's claim regarding the number of decisions released by the Agency with respect to consumer complaints does not help Delta's argument, as a number of these complainants were represented by counsel (due to the complexity of the issues), and the fact that the Agency does not require complainants to be represented by counsel does not mean that they can effectively and successfully represent themselves. Mr. Lukács adds that the Agency's new Dispute Rules has a 90-page "companion document" which cannot be simple or accessible for an average passenger.

[48] Mr. Lukács submits that there is no obligation to be represented by counsel before the Federal Court, and most documents can be filed electronically using a simple interface; however, this does not render legal representation unnecessary, and does not demonstrate accessibility of the court and access to justice. Therefore, Mr. Lukács maintains that while there may be a theoretical possibility of this complaint being brought forward by another individual, it is no more than a "mere possibility", and this cannot be a basis for denying him public interest standing.

ANALYSIS AND FINDINGS

[49] Mr. Lukács argues that section 111 of the ATR and subsection 67.2(1) of the CTA serve as a preventive function rather than offering remedies *post facto,* and that the findings in *Black v. Air Canada*, which were reaffirmed in *O'Toole v. Air Canada, Lukács v. Air Canada* and *Krygier v. several carriers*, indicate that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier. Mr. Lukács also argues that in light of the public policy purpose of section 111 of the ATR and its preventive nature, he is not required to be a member of the group discriminated against in order to have standing.

[50] Mr. Lukács submits that in *Krygier v. several carriers*, standing was directly challenged, and the Agency held that the principles outlined in *Black v. Air Canada* applied in that case, and the Agency reached its conclusion without any reference to the personal circumstances of the applicant or how the applicant would be affected by the terms and conditions he was challenging. With respect to this submission, the Agency finds that the principles outlined in *Black v. Air Canada* do not apply in this case as the issue is not whether there is a need for a real and precise factual background but rather, as will be seen, whether Mr. Lukács has private interest standing and/or public interest standing.

Burden of proof

[51] It is important to start the analysis of the issue of standing by reminding that this case relates to a tariff issue, not an issue related to accessible transportation for persons with a disability.

[52] That being said, the Agency raised the issue of standing. Although Mr. Lukács is not required to be a member of the group "discriminated" against in order to have standing, he must have a sufficient interest in order to be granted standing. Hence, notwithstanding the use of the words "any person" in the ATR, the Agency, as any other court, will not determine rights in the absence of those with the most at stake. Determining otherwise would, as noted by the Supreme Court in *Canada v. Downtown Eastside Sex Workers*, "[...] be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized."

[53] Standing can be acquired in two ways, either as a private interest standing or as a public interest standing.

Private interest standing

[54] Private interest standing arises from the basic principle that a person who has a direct personal interest in the question to be litigated is legally entitled to invoke the jurisdiction of the court (see *Ogden v. British Columbia Registrar of Companies*, 2011 BCSC 1151, at paragraph 11).

[55] More particularly, in order to have standing, an applicant, such as Mr. Lukács, must be "aggrieved" or "affected", or have some other "sufficient interest" (Jones & de Villars, in *Principles of Administrative Law*, 2009, at pages 646-647). A person "aggrieved" or "affected" is one whose interests are affected more than those of the general public or community in issue.

[56] Further, the Supreme Court, in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (*Finlay v. Canada*), citing *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, stated that:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[57] In *Canada v. Downtown Eastside Sex Workers*, at paragraph 1, the Supreme Court stated that "[l]imitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government [...]"

[58] Considering this, the Agency must determine whether Mr. Lukács is a person who is "aggrieved" or "affected", or has some other "sufficient interest".

[59] As part of his argument concerning private interest standing, Mr. Lukács states that he would or could be considered a "large person" by Delta's agents as he is six feet tall and weighs approximately 175 pounds. Mr. Lukács also submits that in the absence of the precise meaning of a "large person", it is not possible to conclude that he could not be personally subject to the discriminatory practices due to his physical characteristics.

[60] In this regard, the Agency is of the opinion that it is not clear, as it is not supported, on what basis Mr. Lukács considers that a six-foot tall and 175-pound person is a "large person" and, for the purpose of Delta's policy, that he would not be able to sit in his seat without encroaching into the seat next to his.

[61] Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[62] Concerning the production and interrogatory mechanisms available, the Agency reminded the parties, in Decision No. LET-C-A-76-2013 (*Lukács v. United Air Lines, Inc.*) that:

> [16] [...] an applicant cannot file a complaint and then expect that any lack of information or documentation that, in the applicant's view, could be relevant in explaining or supporting the application be compensated for by inundating the respondent with questions or requests for production of documents.

[63] The Agency is of the opinion that the same rationale applies here as it is not appropriate for Mr. Lukács to submit that he is a "large person" and then to submit that to be certain of that, he should have the right to use the production and interrogatories mechanisms available pursuant to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104. As noted by the Agency in *Lukács v. United Air Lines, Inc.*, a proceeding before the Agency and the right to direct questions to the other party cannot turn into a commission of inquiry, or a "fishing expedition".

[64] The Agency finds that while Mr. Lukács describes himself as a "large person", this does not make him a "large person" for the purpose of Delta's policy and it is obvious, based on his comments regarding the need for interrogatories, that he has doubts as to whether Delta's policy even applies to him. It was for Mr. Lukács to file a complete application with the Agency, which would have included evidence that he is a "large person" for the purpose of Delta's policy at issue. How could the Agency find that Mr. Lukács has private interest standing, or more particularly, that he is a person "aggrieved" or "affected", or has some other "sufficient interest", which would give him the right to "invoke the jurisdiction of the Agency on the issue" when it is clear that Mr. Lukács is not certain himself. As pointed out by the Supreme Court of British Columbia in *Downtown Eastside Sex Workers Society v. Attorney General,* "private interest standing cannot be founded on hypothetical possibilities". In that regard, the Agency finds that Mr. Lukács's "private interest" submissions are founded on such hypothetical possibilities. On this basis, it is impossible for the Agency to find that Mr. Lukács is "aggrieved" or "affected", or has some other "sufficient interest".

[65] The Agency therefore finds that Mr. Lukács has no private interest standing in this case.

Public interest standing

[66] Mr. Lukács refers to the case of *Fraser v. Canada* for the proposition that public interest standing requires the consideration of the three following factors:

1. Is there a serious issue to be tried?
2. Does the party seeking public interest standing have a genuine interest in the matter?
3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

[67] It is important to clarify that the second factor of *Fraser v. Canada* was phrased differently than what Mr. Lukács is proposing. Indeed, the Ontario Superior Court of Justice wrote: "Does the UFCW have a genuine interest in the validity of the legislation?"

[68] This clarification is important as it is consistent with the three factors established by the Supreme Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 (*Thorson v. Attorney General*), *The Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (*Nova Scotia Board of Censors v. McNeil*) and *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575 (*Minister of Justice v. Borowski*) in which there was a challenge to the constitutionality or operative effect of legislation. Those cases led to a three-part test that a party needs to satisfy in order to be granted public interest standing:

1. Is there a serious issue as to the validity of the legislation?
2. Is the party seeking public interest affected by the legislation or does the party have a genuine interest as a citizen in the validity of the legislation?
3. Is there another reasonable and effective manner in which the issue may be brought to the court?

[69] In light of those cases, public interest was granted in cases where the constitutionality of legislation was contested if that three-part test was met.

[70] In *Finlay v. Canada,* the Supreme Court noted that one of the issues in that case was whether the second part of the test established in *Thorson v. Attorney General, Nova Scotia Board of Censors v. McNeil* and *Minister of Justice v Borowski* could also apply to a non-constitutional challenge to the statutory authority for administrative action. The Supreme Court concluded that it could.

[71] This conclusion was reiterated in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236, where the Supreme Court indicated that the *Finlay v. Canada* case made it clear that public interest standing could be granted to challenge an exercise of administrative authority as well as legislation. The Supreme Court also concluded that the principle for granting public interest standing that it had already established did not need to be expanded beyond that.

[72] Of note, in the *Canada v. Downtown Eastside Sex Workers* case referred to by both parties, which involved a Charter challenge to the prostitution provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, the Supreme Court reminded the parties that the limitations on standing were explained in *Finlay v. Canada.*

[73] Although the Supreme Court made it clear in *Canada v. Downtown Eastside Sex Workers*, at paragraph 36, "that the three factors should not be viewed as items on a checklist or as technical requirements" but "[...] should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes", the Supreme Court also made it clear, at paragraph 37, that the "[...] plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing [...]"

[74] Even looking at the three factors cumulatively and in light of their purposes, the fact remains that, in regard to the second factor, the challenge made by Mr. Lukács is not related to the constitutionality of legislation or to the non-constitutionality of administrative action. Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.

[75] The Agency finds that Mr. Lukács does not have public interest standing.

CONCLUSION

[76] The Agency finds that Mr. Lukács lacks both private interest standing and public interest standing and, accordingly, the Agency dismisses his complaint.

(signed)

Geoffrey C. Hare
Member

(signed)

Sam Barone
Member

Office des transports du Canada

Canadian Transportation Agency

LET-C-A-63-2014

September 5, 2014

File No. M4120-3/14-04165

BY E-MAIL: lukacs@AirPassengerRights.ca

Gábor Lukács
6507 Roslyn Road
Halifax, Nova Scotia
B3L 2M8

BY E-MAIL: andrea.novak@delta.com

Delta Air Lines, Inc.
1030 Delta Blvd. Dept. 982
Atlanta, Georgia
30354

Attention: Andrea Novak
International Senior Paralegal

Dear Sir/Madam:

Re: Certain practices relating to the transportation of obese persons

This refers to the attached complaint filed by Gábor Lukács with the Canadian Transportation Agency alleging that certain practices by Delta Air Lines, Inc. (Delta) relating to the transportation of obese persons are "discriminatory", contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58, as amended, and inconsistent with the Agency's findings in Decision No. 6-AT-A-2008 (Accessible transportation complaint: Additional Fares and Charges – one person, one fare; https://www.otc-cta.gc.ca/eng/ruling/6-at-a-2008).

It is not clear to the Agency that, on the basis of his submission, Mr. Lukács has an interest in Delta's practices governing the carriage of obese persons. As such, his standing (or *locus standi*) in this matter is in question.

To enable the Agency to further consider this issue, Mr. Lukács is provided with the opportunity to file submissions with the Agency regarding his standing by not later than September 19, 2014. Delta will then have 5 business days from receipt of Mr. Lukács' submissions to answer. On receipt of Delta's answer, Mr. Lukács will have 3 business days to file his reply. The parties must copy each other when their respective submissions are filed with the Agency.

Should you have any questions regarding the foregoing, you may contact Mike Redmond by telephone at 819-997-1219 or facsimile at 819-953-5686.

BY THE AGENCY:

(signed)

Geoffrey C. Hare
Member

Federal Court of Appeal

Cour d'appel fédérale

Date: 20160907

Docket: A-135-15

Citation: 2016 FCA 220

CORAM: **WEBB J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC.

Respondents

Heard at Halifax, Nova Scotia, on April 25, 2016.

Judgment delivered at Ottawa, Ontario, on September 7, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: WEBB J.A.
SCOTT J.A.

Federal Court of Appeal | Cour d'appel fédérale

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Appellant

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CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC.

Respondents

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is a statutory appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 [the *Act*] of a decision rendered by the Canadian Transportation Agency (the Agency) dismissing a complaint of discriminatory practices filed by Dr. Gábor Lukács (the appellant) against Delta Air Lines Inc. (the respondent) on the preliminary basis that he lacks standing to bring this complaint.

[2] This case essentially raises the issue of standing in proceedings before the Agency. The appellant argues that the Agency applied the wrong legal principles and fettered its discretion in denying him public interest standing to challenge Delta's policies and practices. Having carefully considered the parties' written and oral submissions, I am of the view that the appeal must be granted.

I. Background

[3] On August 24, 2014, the appellant filed a complaint with the Agency alleging that certain practices of the respondent relating to the transportation of "large (obese)" persons are discriminatory, contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58 (the *Regulations*) and also contrary to a previous decision of the Agency concerning the accommodation of passengers with disabilities. The appellant relied on an email dated August 20, 2014 from a customer care agent of Delta responding to a concern of a passenger ("Omer") regarding a fellow passenger who required additional space and who therefore made Omer feel "cramped".

[4] In that email, Delta apologized to Omer and set out the guidelines it follows to ensure that large passengers and people sitting nearby are comfortable. It reads as follows:

> Sometimes, we ask the passenger to move to a location in the plane where there's more space. If the flight is full, we may ask the passenger to take a later flight. We recommend that large passengers purchase additional seats, so they can avoid being asked to rebook and so we can guarantee comfort for all.
>
> Appellant's Appeal Book, p. 21

[5] Since it was not clear to the Agency whether Dr. Lukács had an interest in Delta's practices on the basis of the facts before it, he was provided with the opportunity to file submissions with the Agency regarding his standing. Dr. Lukács filed his submissions on September 19, 2014, Delta responded on September 26, 2014, and Dr. Lukács replied on October 1, 2014. In its Decision No. 425-C-A-2014 dated November 25, 2014, the Agency dismissed Dr. Lukács' complaint for lack of standing.

II. The impugned decision

[6] The Agency first distinguished *Krygier v. WestJet et al.*, Decision No. LET-C-A-104-2013 [*Krygier*] and *Black v. Air Canada,* Decision No. 746-C-A-2005 [*Black*], on the basis that the issue in those cases was not the standing of the complainants but the need for a "real and precise factual background". Furthermore, the Agency found that although Dr. Lukács was not required to be a member of the group discriminated against in order to have standing, he must nonetheless have a "sufficient interest". The use of the term "any person" in the *Act* did not mean that the Agency should determine issues in the absence of the persons with the most at stake. On that basis, the Agency found that, at 6 feet tall and 175 pounds, nothing suggested that Dr. Lukács himself would ever be subject to Delta's policy regarding large persons that would not be able to sit in their seat without encroaching into the neighbouring seat.

[7] With respect to public interest standing, the Agency took note of the three-part test established by the Supreme Court in the trilogy of *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; and *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575, 130

D.L.R. (3d) 588. The Agency further relied on *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 [*Canadian Council of Churches*] and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 [*Finlay*] in expressing the view that public interest standing does not extend beyond cases in which the constitutionality of legislation or the non-constitutionality of administrative action is contested. Such being the case, Dr. Lukács could not rely on public interest standing to bring his complaint before the Agency.

III. Issues

[8] Dr. Lukács conceded at the hearing that he does not have a direct and personal interest in this case, and as a result he does not claim standing on that basis. The issues upon which the parties disagree can be formulated as follows:

A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2(1) of the *Act* and 111(2) of the *Regulations*?

B. Did the Agency err in finding that public interest standing is limited to cases in which the constitutionality of legislation or the non-constitutionality of administrative action is challenged?

[9] As I dispose of the current matter on the basis of the issues raised in the above point A, the following analysis will not address the questions raised in point B.

IV. Relevant statutory provisions

[10] Airlines operating flights within, to or from Canada are required to create a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and includes the terms and conditions which are enforceable in Canada (see ss. 67 of the *Act* and 100(1) of the *Regulations*).

[11] For the purposes of this proceeding, a few provisions are of particular relevance. The first is section 37 of the *Act*, which grants the Agency the power to inquire into a complaint:

37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.	37 L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

[12] The second, subsection 67.2(1) of the *Act*, sets out the powers of the Agency if it finds terms or conditions in a tariff that are unreasonable or unduly discriminatory:

67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.	67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

[13] Lastly, subsection 111(2) of the *Regulations* further expands on prohibited discrimination:

111(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,	111 (2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :
(a) make any unjust discrimination against any person or other air carrier;	a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;
(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or	b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;
(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.	c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

V. The standard of review

[14] At its core, this case calls into question the general principles the Agency should apply when determining whether a party has standing to file a complaint under subsection 67.2(1) of the *Act*. Of course, the actual decision of whether to grant standing engages the exercise of discretion, and as such it must be reviewed by this Court on a standard of reasonableness. To the extent that determining the standing requirements for a complaint under subsection 67.2(1) also requires an analysis of the particular requirements of the *Act* and the related statutes and case law, it is also entitled to a high degree of deference.

[15] Of course, it could be argued that since Parliament has provided, through legislation, a right of appeal from the Agency to this Court on questions of law, correctness is the applicable standard. Such a view would be mistaken, however, as it is clear since the Supreme Court of

Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that the correctness standard will only apply to constitutional questions; questions of law of central importance to the legal system as a whole and that are outside of the adjudicator's expertise; questions regarding the jurisdictional lines between two or more competing specialized tribunals; and the exceptional category of true questions of jurisdiction. The highest Court has repeated on a number of occasions that this is a very narrow exception to the general principle that an adjudicative administrative tribunal's interpretation of its enabling legislation is reviewable on a standard of reasonableness (see, for example, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 33-34, [2011] 3 S.C.R. 654; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 24, [2011] 3 S.C.R. 471; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 55, [2014] 2 S.C.R. 135; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 26–27, [2013] 3 S.C.R. 895; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para. 34, 481 N.R. 25). In my view, the criteria for standing under subsection 67.2(1) does not raise broad questions relating to the Agency's authority, and does not raise a question of central importance to the legal system as a whole; on the contrary, that question falls squarely within the Agency's expertise. As a result, the task of this Court is rather limited and is restricted to determining whether the decision of the Agency falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law.

A. *Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2 (1) of the Act and 111(2) of the Regulations?*

[16] As recently stated by this Court in *Lukács v. Canadian Transport Agency*, 2016 FCA 202 at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency "may" inquire into, hear and determine a complaint. There is no question, therefore, that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources.

[17] Counsel for the respondent infers from the permissive (as opposed to mandatory) nature of section 37, the power of the Agency to refuse to inquire into, hear and decide complaints lodged by complainants who do not have standing to bring forward the complaint. It is not clear, however, on what basis the principles governing standing before courts of law ought to be transposed to a regulatory regime supervised and enforced by an administrative body like the Canadian Transportation Agency.

[18] The rationale underlying the notion of standing has always been a concern about the allocation of scarce judicial resources and the corresponding need to weed out cases brought by persons who do not have a direct personal legal interest in the matter. Such preoccupations are warranted in a judicial setting, where the objective is to determine the individual rights of private litigants, the accused and individuals directly affected by state action (see *Canada (Attorney*

General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 at para. 22, [2012] 2 S.C.R. 524; *Canadian Council of Churches* at p. 249). As such, the general rule required that a person have a sufficient personal interest in the matter to bring a claim forward. The ability to seek declaratory or injunctive relief in the public interest is usually reserved for the Attorney General, who might allow a private individual to bring such a claim only on consent (*Finlay* at para. 17). Similar rules may also be appropriate before a quasi-judicial tribunal, established to dispose of disputes between a citizen and the government or one of its delegated authorities. It is far from clear that these strict rules developed in the judicial context, however, should be applied with the same rigour by an administrative agency mandated to act in the public interest.

[19] I agree with the appellant that the Agency erred in superimposing the jurisprudence with respect to standing on the regulatory scheme put in place by Parliament, thereby ignoring not only the wording of the *Act* but also its purpose and intent. In enacting the *Act*, Parliament chose to create a regulatory regime for the national transportation system, and resolved to achieve a number of policy objectives (set out in section 5 of the *Act*). Within that framework, the role of the Agency is not only to provide redress and grant monetary compensation to persons adversely affected by national transportation actors, but also to ensure that the policies pursued by the legislator are carried out.

[20] Administrative bodies such as the Agency are not courts. They are part of the executive branch, not the judiciary. Their mandates come in all shapes and sizes, and their role is different from that of a court of law. Often, such bodies are created to provide greater and more efficient

access to justice through less formal procedures and specialized decision-makers that may not have legal training. Moreover, not all administrative bodies follow an adversarial model similar to that of courts. If an administrative body has important inquisitorial powers, ensuring that the particular parties before them are in a position to present extensive evidence of their particular factual situations may be less important than in a court of law, where judges are expected to take on a passive role and decide on the basis of the record and arguments presented to them by the parties.

[21] For that reason, the Supreme Court of Canada has recognized that the procedure before administrative bodies must be consistent, above all, with their enabling statute, and need not replicate court procedure if their functions are different from that of a traditional court (see *Innisfil Township v. Vespra Township*, [1981] 2 S.C.R. 145 at pp. 167-168, [1981] A.C.S. No. 73. In a similar vein, the Supreme Court recognizes the importance of the particular statutory regime and the procedural choices made by the administrative body itself when it comes to determining the content of the duty of fairness (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 24 and 27, 174 D.L.R. (4th) 193 [*Baker*]). To the extent that courts have exhibited a tendency to impose court-like procedures on administrative bodies in the context of judicial review for breach of procedural fairness obligations in the wake of *Baker*, they have often been met with criticism (see, for example, David Mullan, "Tribunal Imitating Courts – Foolish Flattery or Sound Policy?" (2005) 28 Dal. L.J. 1; Robert Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 2 (Toronto: Carswell, 2010) at pp. 901 to 905).

[22] Recognition of the particularity of administrative bodies has been reflected as well in decisions on standing and participation rights before administrative bodies. For example, this Court recently considered the particular language of the National Energy Board's enabling statute (most notably, the terms "directly affected", and "relevant information or expertise" used therein), and gave a wide margin of appreciation to the Board in deciding who should participate in its own proceedings. In so doing, this Court recognized the Board's expertise in managing its own process in light of its particular mandate (see *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at para. 72, [2015] 4 F.C.R. 75).

[23] Turning now to the Agency, it has a role both as a specialized economic regulator and a quasi-judicial body that decides matters in an adversarial setting. For example, the Agency has regulation-making powers and specialized enforcement officers with investigative powers that verify compliance of carriers with the *Act* and its relevant regulations (see ss. 177 and 178 of the *Act*). The Agency also hears applications for a variety of licenses and other authorizations and complaints which may, or may not, involve disputes between opposing parties (consider, for instance, air travel complaints under s. 85.1; applications to interswitch railway lines under s. 127; and competitive line rate-setting applications under s. 132).

[24] The *Act* distinguishes between "complaints" and "applications", and uses different terminology to describe the types of persons who are entitled to file them. The term "application" is used in Part III of the *Act* on Railway Transportation, and is usually accompanied by a specific descriptor of the party entitled to bring the application. For example, an application to establish competitive line rates is made "[o]n the application of a shipper" (s. 132(1) of the *Act*); an

application to determine the carrier's liability is made "on the application of the company" (s. 137(2) of the *Act*); an application regarding running rights and joint track usage may be made by a railway company (s. 138 of the *Act*); and an application to determine the net salvage value of a railway line is made "on application by a party to a negotiation" (s. 144(3.1) of the *Act*). Applications are governed by the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104, which are generally based on an adversarial model, with some variations. Of particular note are Rules 21 and 29 which allow the Agency to grant intervener status to a person that has a "substantial and direct interest", and Rule 23 which allows an "interested person" to file a position statement.

[25] In contrast, the term "complaint" is mainly used in Part II – Air Transportation, and is almost always accompanied by the broad phrase "any person" (ss. 65, 66, 67.1, 67.2 of the *Act*). It is particularly telling that the phrase "any person" appearing in section 67.1 and subsection 67.2(1) is used to refer to those complainants who can bring a complaint in writing to the Agency. This is to be contrasted to the phrase "person adversely affected" appearing in subsection 67.1(b) and subparagraph 86(1)(h)(iii), which is more restrictive and determinative of who can seek monetary compensation. The use of those different phrases in the same act must be given effect and is indicative of Parliament's intention to distinguish between those who can bring a complaint to obtain a personal remedy and those who can bring a complaint as a matter of principle and with a view to ensuring that the broad policy objectives of the *Act*, which includes the prevention of harm, are enforced in a timely manner, not just remedied after the fact.

[26] Dr. Lukács' complaint is brought under subsection 67.2(1). To the extent that this provision is at play (an issue that is not for this Court to decide and which is not the subject of this proceeding), it is incumbent on the Agency to intervene at the earliest possible opportunity, in order to prevent harm and damage that could result from unreasonable and unduly discriminatory terms or conditions of carriage, rather than to merely compensate those who have been affected *ex post facto*. This is precisely why the Agency is given the authority not only to compensate individuals who were adversely affected by an airline's conduct (s. 67.1(a)) and to take corrective measures (s. 67.1(b)), but also to disallow any tariff or tariff rule that is found to be unreasonable or unduly discriminatory and then to substitute the disallowed tariff or tariff rule with another one established by the Agency itself (*Regulations*, s. 113).

[27] In that perspective, the fact that a complainant has not been directly affected by the fare, rate, charge, or term or condition complained of and may not even meet the requirements of public standing, should not be determinative. If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint. This is not to say, once again, that each and every complaint filed with the Agency has to be dealt with and decided, but that complaints that appear to be serious on their face cannot be dismissed for the sole reason that the person complaining has not been directly and personally affected or does not comply with other requirements of public standing. When read in its contextual and grammatical context, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.

[28] This interpretation is indeed consistent with the Agency's own analysis in a number of previous decisions. In *Black*, for example, the respondent submitted that the complainant had not established that he was sufficiently affected by the policies challenged and that he did not have the requisite direct personal interest standing or public interest standing. The Agency dismissed that argument and wrote:

> [...] The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR [Air Transportation Regulations], the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions". The Agency further notes that subsection 111(1) of the ATR provides, in part, that "All tolls and terms and conditions of carriage [...] that are established by an air carrier shall be just and reasonable [...]". The Agency is of the opinion that the word "established" does not limit the requirement that terms or conditions of carriage be just and reasonable to situations involving "a real and precise factual background involving the application of terms and conditions", but extends to situations where a person wishes, on principle, to challenge a term or condition that is being offered.
>
> [...]
>
> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.
>
> *Black*, paras. 5 and 7

[29] That ruling was followed more recently in *Krygier*. Contrary to the appellant's submissions, these decisions do not only stand for the proposition that the absence of a real and precise factual background does not deprive the Agency of jurisdiction to hear a complaint, but also for the (overlapping) principle that it is not necessary for a complainant to have been

personally affected by a term or condition for the Agency to assert jurisdiction under subsection 67.2(1) of the *Act* and section 111 of the *Regulations*.

[30] For all of the foregoing reasons, I am of the view that the Agency erred in law and rendered an unreasonable decision in dismissing the complaint of Dr. Lukács for lack of standing. The Agency does not necessarily have to investigate and decide every complaint and is certainly empowered to dismiss without any inquiry those that are futile or devoid of any merit on their face; it cannot, however, refuse to look into a complaint on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions. In so doing, the Agency unreasonably fettered its discretion.

[31] Having so decided, it will not be necessary to address the second, alternative ground of appeal raised by the appellant. The public interest standing is a concept that has been developed in a judicial setting to bring more flexibility to the strict rules of standing. It is meant to ensure that statutes and regulations are not immune from challenges to their constitutionality and legality as a result of the requirement that litigants be directly and personally affected. Such a notion has no bearing on a complaint scheme designed to complement a regulatory regime, all the more so in a context where the administrative body tasked to apply and enforce the regime may act of its own motion pursuant to sections 111 and 113 of the *Regulations*.

VI. Conclusion

[32] For these reasons, I would allow the appeal, set aside Decision No. 425-C-A-2014 of the Canadian Transportation Agency, and direct that the matter be returned to the Agency to

determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint. I would also award the appellant his disbursements in this Court and a modest allowance in the amount of $750, such amounts to be payable by the Agency.

"Yves de Montigny"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-135-15
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC.
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	APRIL 25, 2016
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	WEBB J.A. SCOTT J.A.
DATED:	SEPTEMBER 7, 2016

APPEARANCES:

Dr. Gábor Lukács	FOR THE APPELLANT (ON HIS OWN BEHALF)
Allan Matte	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Gerard Chouest	FOR THE RESPONDENT DELTA AIR LINES, INC.

SOLICITORS OF RECORD:

Legal Services Branch Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Bersenas Jacobsen Chouest Thomson Blackburn LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT DELTA AIR LINES, INC.

Sep. 7. 2016 3:11PM CAS No. 1053 P. 2/20

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160907

Docket: A-135-15

Ottawa, Ontario, September 7, 2016

CORAM: **WEBB J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES INC.

Respondents

JUDGMENT

The appeal is allowed. The matter is returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint. Costs in the amount of $750 plus disbursements in this Court are awarded to the appellant, to be payable by the Canadian Transportation Agency.

"Wyman W. Webb"
J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150212

Docket: 14-A-70

Ottawa, Ontario, February 12, 2015

Present: **DAWSON J.A.**
STRATAS J.A.
RYER J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

and

CANADIAN TRANSPORTATION AGENCY
and DELTA AIR LINES, INC.

Respondents

ORDER

UPON a motion in writing for an order pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 granting the Moving Party leave to appeal a decision made by the Canadian Transportation Agency dated November 25, 2014 and bearing Decision No. 425-C-A-2014;

THIS COURT ORDERS that the motion is granted.

"Eleanor R. Dawson"
J.A.

"DS"
"CMR"

PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. Nearly a decade ago, in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, this Court held that the Canadian Transportation Agency (the "Agency") is an "expert and specialized body"[1] that is "expected to bring its transportation policy knowledge and experience to bear on its interpretation of its assigned statutory mandate".[2] Further, this Court found that Parliament had entrusted the Agency with "extensive authority to govern its own process" and that "[c]onsiderable deference is owed to procedural rulings made by a tribunal with the authority to control its own process"[3].

2. The Federal Court of Appeal's decision in this case[4] flies in the face of that ruling – and of the jurisprudential trend since the release of *Dunsmuir v New Brunswick*[5] – by cavalierly interfering with the Agency's ability to control its own process. The Appeal Decision exemplifies why this Court has held that reviewing courts "may not be as well qualified" as a given specialized administrative agency to interpret that agency's legislative and regulatory regime "given the broad policy context within which that agency must work"[6] and that, therefore, the agency "holds the interpretative upper hand".[7]

3. The proposed appeal will provide this Court the opportunity to clarify the ambit and limits of the Agency's authority under the *Canada Transportation Act*[8] (the "Act") to determine when it will hear complaints brought against those subject to its regulatory authority. In addition, it will allow this Court to address whether and how the principles underlying the law of standing should be applied in the administrative law context.

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[1] 2007 SCC 15, [2007] 1 SCR 650 ("*VIA Rail*") at para 8.
[2] *Ibid* at para 98.
[3] *Ibid* at paras 230-231.
[4] Reasons for Judgment of the Federal Court of Appeal, September 7, 2016, reported at 2015 (the "Appeal Decision"), [Tab 2C].
[5] 2008 SCC 9, [2008] 1 SCR 190 ("*Dunsmuir*").
[6] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 ("*McLean*") at para 31, citing *National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at p. 1336, *per* Wilson J.
[7] *Ibid* at para 40.
[8] S.C. 1996, c. 10.

4. In its decision, the Agency decided not to hear a complaint alleging that certain alleged practices of Delta Air Lines, Inc. ("Delta") are unjustly discriminatory because the complainant, Dr. Gábor Lukács ("Lukács"), did not demonstrate either that he had a sufficient interest in the practices complained of or that he should be accorded public interest standing. The Agency declined to determine these issues "in the absence of those with the most at stake."[9]

5. The Court of Appeal overturned the Agency Decision, holding that, even though the Agency's complaint scheme is permissive, the general law of standing has no application to an administrative tribunal such as the Agency. The effect of this ruling is that, unless complaints submitted to it are "futile or devoid of merit on their face", the Agency must hear them regardless of whether the complainant has an interest in the matter.

6. The Court of Appeal's holding strips away a fundamental gatekeeping tool from tribunals that administer complaint schemes and will encourage "curious busybodies" to launch complaints in which they do not have a demonstrated or sufficient interest. Moreover, if allowed to stand, the Appeal Decision will undermine the principle of deference to the expert and specialized Agency in deciding when the complaint process should be triggered, a consequence that has serious implications not just for the Agency, but for other tribunals too.

B. Facts

7. Lukács is a mathematician by education and profession. He has filed more than two dozen complaints before the Agency challenging the tariffs of several air carriers, both domestic and international. He has also been a party to several appeals and applications for judicial review emanating from disputes he has commenced before and against the Agency.

8. Delta is an international air carrier based in the United States that is licensed by the Agency to provide international service to and from Canada.

9. In August 2014, Lukács filed a written complaint with the Agency alleging that Delta's practices relating to the transportation of "large (obese) persons" are discriminatory and contrary

[9] Canadian Transportation Agency Decision No. 425-C-A-2015, November 25, 2014, at para 52 (the "Agency Decision"), [Tab 2A].

to subsection 111(2) of the *Air Transportation Regulations*[10] (the "ATR"). The complaint was founded on the basis of an email sent by a Delta customer care representative to a passenger known only as "Omer". The Delta representative apologized to "Omer" for any inconvenience he had encountered while sitting next to a passenger who required "additional space" and briefly described the "guidelines" Delta follows to accommodate passengers who require additional space due to their size, as well as those "sitting nearby".[11]

10. Specifically, Lukács alleged that the following practices are discriminatory, contrary to the ATR and to the findings of the Agency in a prior Agency decision concerning the accommodation of passengers with disabilities:[12]

> (1) in certain cases, Delta refused to transport large (obese) passengers on the flights on which they hold a confirmed reservation, and require them to travel on later flights; and
>
> (2) Delta requires large (obese) passengers to purchase additional seats to avoid the risk of being denied transportation.

11. The Agency issued a preliminary decision holding that it was not clear whether Lukács had an interest in Delta's practices governing the carriage of obese persons and thus, that his standing in the matter was in question. The Agency invited submissions on that preliminary issue.[13] Lukács and Delta each filed detailed submissions.

12. Lukács submitted that he qualified as a "large" person affected by the allegedly discriminatory practice and therefore had private interest standing. Alternatively, he argued that he met the test for public interest standing. Delta disputed both of these assertions.

13. The Agency ruled that: (a) Lukács did not qualify for direct or private interest standing because the allegedly discriminatory practice does not personally affect him as he does not require more than one seat to travel; and (b) Lukács did not meet the elements of the test for public interest standing.

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[10] SOR/88-58.
[11] Complaint of Dr. Gábor Lukács to the Agency dated August 24, 2014, [Tab 4A].
[12] Canadian Transportation Agency Decision No. 6-AT-A-2008 dated January 10, 2008 (online: https://otc-cta.gc.ca/eng/ruling/6-at-a-2008).
[13] Canadian Transportation Agency Decision No. LET-C-A-63-2014 dated September 5, 2014, [Tab 2B].

14. Lukács obtained leave to appeal the Agency Decision. At the appeal stage, Lukács conceded that he did not have a direct and personal interest in the case and did not claim to have standing on that basis.[14]

15. The Court of Appeal defined the issues as follows (para 8):

a. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2(1) of the Act and 111(2) of the *Regulations*?

b. Did the Agency err in finding that public interest standing is limited to cases in which the constitutionality of legislation or the non-constitutionality of administrative action is challenged?

16. The Court determined the case on the basis of the first issue alone. It held that the Agency had erred in applying the general law of standing to Lukács's complaint, distinguishing between courts and administrative bodies such as the Agency. In de Montigny JA's view, the rationale underlying the notion of standing – "a concern about the allocation of scarce judicial resources and the corresponding need to weed out cases brought by persons who do not have a direct personal legal interest in the matter" – should not be "superimposed" onto the regulatory scheme administered by the Agency.[15] The Court noted that "the role of the Agency is not only to provide redress and grant monetary compensation to persons adversely affected by national transportation actors, but also to ensure that the policies pursued by the legislator are carried out."[16]

17. In its reasons, the Court of Appeal briefly reviewed the caselaw that stands for the proposition that administrative tribunals may impose court-like procedures, but are not required to do so,[17] noting that the imposition of stricter procedures on tribunals has been met with criticism.[18] In its conclusion, however, the Court of Appeal held that the Agency's adoption and application of the "judicial" law of standing was unreasonable and constituted a reviewable error.

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[14] Appeal Decision at para 8, [Tab 2C].
[15] *Ibid* at para 18.
[16] *Ibid* at para 19.
[17] *Ibid* at para 20-22.
[18] *Ibid* at para 21.

18. The Court of Appeal did not give respectful attention to the reasons of the Agency, or to the reasons that could be offered in support of its decision.[19] Despite paying lip service to the limited nature of its role, the Court of Appeal did exactly what that court has held should not be done: it began by interpreting the statutory regime and deciding on a correct meaning itself, rather than assessing whether the Agency's interpretation fell within the range of reasonable outcomes. This is a correctness review, not a reasonableness review.[20]

19. Having taken this improper analytical approach, the Court of Appeal concluded that the Agency's decision was unreasonable simply because it was inconsistent with the Court's *de novo* interpretation of the Agency's statutory mandate and authority. In doing so, the Court of Appeal made critical errors in reading the Act and the ATR that underscore the importance of deference to administrative tribunals and undermine the wide ambit of the Agency's authority, as confirmed by this Court in *VIA Rail*.

PART II – QUESTIONS IN ISSUE

20. This case raises the following issues of national and public importance:

> **Does the Canadian Transportation Agency have the authority to decline to hear complaints on the basis of lack of standing?**
>
> **Is the law of standing, including public interest standing, applicable in the administrative law context?**

PART III – STATEMENT OF ARGUMENT

A. Legislative framework

i. *Canada Transportation Act*

21. As this Court noted in *VIA Rail*, the Act is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes.

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[19] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 54-56. The Agency issued another decision involving the standing of Lukács three days before the hearing of the appeal in the within case. In *Lukács v Porter Airlines Inc.* (22 April 2016), Agency Decision No. 121-C-A-2016 ("Decision No. 121"), the Agency expanded on its reasoning on the law of standing (online: https://www.otc-cta.gc.ca/eng/ruling/121-c-a-2016). The Court of Appeal did not refer to this decision.

[20] *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 28.

When interpreting the Act, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate.[21]

22. The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament.[22] Section 5 of the Act sets out the National Transportation Policy, which includes the declaration that

> a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada.[23]

23. The Agency fulfills two key functions. In one, it acts as an economic regulator by "making determinations and issuing licences and permits to carriers which function within the ambit of Parliament's authority". In the other, it is a quasi-judicial tribunal that resolves commercial and consumer transportation-related disputes, including accessibility-related issues for persons with disabilities.[24]

24. The Act is divided into seven parts, the most relevant of which are Part I – Administration, under which the general powers of the Agency are set out, and Part II – Air Transportation, which governs the regulation of commercial air transportation.

25. Part V of the Act, "Transportation of Persons with Disabilities", sets out the Agency's obligation to interpret and apply the Act in a manner consistent with the purpose and provisions of human rights legislation.[25]

26. Under the Act, the Agency has been granted "all the powers, rights and privileges that are vested in a superior court" with respect to, *inter alia*, "all matters necessary or proper for the

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[21] *VIA Rail*, *supra* at para 98.
[22] The Act, s. 3.
[23] *Ibid*, s. 5.
[24] *Lukács v Canada (Transportation Agency)*, 2014 FCA 76 at paras 50-52.
[25] *VIA Rail*, *supra* at para 117.

exercise of its jurisdiction."[26] In addition, the Agency has broad rule-making powers,[27] under which it has established court-like rules which govern its dispute resolution proceedings.[28]

27. Section 26 provides that the Agency "may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency."

28. Section 37 of the Act grants the Agency the discretionary power to inquire into a complaint:

> The Agency **may** inquire into, hear and determine a complaint concerning any act, matter or thing prohibited sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency. [emphasis added]

29. Part II of the Act begins with certain defined terms at section 55, including "tariff", which means "a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services."

30. Part II governs licences for domestic service, scheduled international service and unscheduled international service. Domestic licences allow the licensee to operate air services between points within Canada, while international licences allow the operation of air services between Canada and other countries.

31. The Act treats the different kinds of licence differently: specific provisions that govern the fares, tariffs, and terms and conditions of carriage of domestic service licenses do not apply to international service licences. For example, and of particular import in this case, subsection 67.2(1) provides:

> **67.2(1)** If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

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[26] The Act, s. 25.
[27] *Ibid*, s. 17.
[28] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (the "Rules"). These replaced the *Canadian Transportation Agency General Rules*, SOR/2005-35.

32. There is no equivalent to s. 67.2(1) in the Act that is applicable to international service licences, such as the one held by Delta. Nevertheless, the Court of Appeal based its reasoning on its interpretation of this provision.

ii. *Air Transportation Regulations*

33. The ATR also treats different classes of licence differently.

34. Carriers' tariffs are governed under Part V of the ATR, with domestic licence tariffs addressed under Division I (sections 105 through 107.1) and international licence tariffs governed under Division II (sections 108 through 135).

35. Subsection 111(2) of the ATR, which falls under Division II relating exclusively to international service tariffs, provides:

> 111(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,
>
> (a) make any unjust discrimination against any person or other air carrier;
>
> (b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or
>
> (c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

36. Section 113 provides that the Agency "may", without qualifying language, suspend any international tariff or portion of an international tariff that appears not to conform with certain provisions of Division II, including section 111, or disallow those that do not conform with those provisions. It may also establish and substitute another tariff for one it disallows.

B. The Federal Court of Appeal's Decision demonstrates why the Agency should be accorded the "highest degree of deference"

37. The Agency is responsible for interpreting its own legislation, including what its statutory responsibility includes.[29] In *VIA Rail*, this Court articulated the relationship between the Agency and the Federal Court of Appeal in the following way:

> The Agency has the expertise and specialized knowledge. That is why it is the body charged with balancing all the competing interests, including cost and the public interest. The court is a reviewing body, not a court of first instance.[30]

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[29] *VIA Rail*, *supra* at para 100.

38. In the Appeal Decision, the Court recognized that the applicable standard of review was reasonableness and that the question of whether or not the Agency has the power to determine standing "falls squarely within the Agency's expertise." It noted that its task "is rather limited and is restricted to determining whether the decision of the Agency falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law."[31]

39. On that standard, the Federal Court of Appeal was only entitled to interfere with the Agency Decision if "the ordinary tools of statutory interpretation lead to a single reasonable interpretation" of the Agency's statutory authority and the Agency adopted an interpretation different from that lone interpretation.[32]

i. The Agency's Air Travel Complaints Scheme

40. Neither the Act nor the ATR dictates when or how the Agency must deal with consumer complaints about air carriers' tariffs. The design and administration of a complaint scheme has been left entirely to the discretion of the Agency.

41. As noted above, section 37 provides for a permissive power of the Agency to inquire into, hear and determine a complaint concerning matters within the Agency's authority.

42. Section 85.1 of the Act requires the Agency to "review" a complaint made "under any provision of [Part II]", but it does not go so far as to require a hearing or "inquiry" under section 37 or otherwise. It, too, is permissive.

43. Subsection 85.1(1) provides that the Agency "shall review and may attempt to resolve the complaint". It also gives the Agency discretion as to whether or not it mediates or arranges for mediation of the complaint.

44. Subsection 85.1(3) provides that, if the complaint is not resolved to the complainant's satisfaction, "the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made." That is, it is left to the discretion of the Agency as to whether or not it hears, or deals with, a complaint.

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[30] *Ibid* at para 243.
[31] Appeal Decision at para 15, [Tab 2C].
[32] *McLean*, *supra* at para 38.

45. Section 85.1 was amended in 2007.[33] The contrast between the current provision and its predecessor, which was enacted in 2000,[34] further supports the idea that the Agency has wide control over when and how it will deal with air travel complaints.

46. Under the former provision, Parliament created a dedicated "Air Travel Complaints Commissioner". Unlike the current scheme, the former subsection 85.1(3) provided that the Commissioner "shall review and attempt to resolve every complaint filed under subsection (2)".

47. In 2007, Parliament determined that the Air Travel Complaints Commissioner was no longer necessary and its functions were transferred to the Agency itself. In so doing, however, Parliament removed any legislated positive duty to resolve every complaint it received.

48. Currently, the Agency consists of not more than five members appointed by the Governor in Council.[35] The Agency's members are responsible for making a variety of rulings, which includes issuing orders, decisions and permits of different kinds. According to the Agency's website, its members made 1,135 rulings in 2014-2015, 1,370 in 2013-2014, and 1,629 in 2012-2013.[36]

49. In the exercise of its statutory authority, the Agency has instituted a complaints scheme through which it reviews complaints related to air travel.[37] Under this scheme, the Agency receives hundreds of complaints each year relating both to domestic air services and to international air services.[38]

50. The Act and the ATR include requirements in respect of air carriers' tariffs and terms and conditions of carriage and grant the Agency powers to enforce these requirements. But the legislative framework does not mandate the circumstances in which the Agency must review a carrier's tariff. Parliament has empowered the Agency to hear complaints and review tariffs, but

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[33] *An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts*, SC 2007, c.19, s. 25.
[34] *An Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence*, SC 2000, c.15, s. 7.1.
[35] The Act, s. 7(2). Temporary members may be appointed pursuant to s. 9(1), but not more than three may hold office at any one time (s. 9(3)).
[36] Agency website at https://www.otc-cta.gc.ca/eng/statistics-2014-2015
[37] The Agency's air travel complaints scheme is accessible online at: https://services.otc-cta.gc.ca/eng/air-complaints
[38] Agency website at https://www.otc-cta.gc.ca/eng/statistics-2014-2015

it has left to the discretion of the Agency, as a specialized body with a mandate to regulate a broad and complex industry, the determination of when and how it will do so.

51. The Court of Appeal's decision is directly contrary to the permissive legislative scheme Parliament enacted and the discretion it has entrusted to the Agency. As noted above, the Agency's statutory mandate is complex and the various sections of the Act and the ATR may not seem very clear at first glance. As this Court has noted, the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker.[39] The Court of Appeal has overlooked the expertise the Agency brings to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority. Moreover, the Court of Appeal's own inexpert interpretation of the Agency's legislative regime and authority does not even constitute a reasonable alternative to that of the Agency, much less the "single reasonable interpretation".

ii. The Federal Court of Appeal's demonstrated lack of expertise

52. The Court of Appeal's disregard for the Agency's expertise is highlighted by a crucial error in its reasoning. It based its holding on a flawed interpretation of a provision of the Act that has no application to Lukács's complaint against Delta. At paragraph 14 of the Appeal Decision, Justice de Montigny stated that "[a]t its core, this case calls into question the general principles the Agency should apply when determining whether a party has standing to file a complaint under subsection 67.2(1) of the Act".

53. In particular, de Montigny JA relied heavily on the fact that subsection 67.2(1) uses the "broad phrase "'any person'" (para 25). That subsection provides:

> 67.2(1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

54. In the Court's interpretation, the use of "any person" means that the Agency is prohibited from refusing to consider a complaint on the basis that the complainant is not affected by and/or

[39] *McLean*, *supra* at para 33.

does not have a sufficient interest in its subject matter. In contrast, the Agency dismissed Lukács's complaint because he was not able to show that he was affected by, could be affected by or otherwise had a sufficient interest in the Delta practice he complained was discriminatory.

55. The emphasis put on this provision by the Court of Appeal constitutes a crucial flaw in its reasoning and it reveals the Court of Appeal's lack of understanding of the legislative scheme and of the Agency's authority, powers and role.

56. Most fundamentally, subsection 67.2(1) has no application whatsoever to Delta or any complaint lodged against it. Delta does not hold a domestic licence. Subsection 67.2(1) only applies to holders of domestic licences.

57. Sections 111 and 113 of the ATR apply to holders of international licences, but not to domestic licenses. Neither provision contains any reference at all to complaints or complainants,[40] whether brought by "any person" or otherwise. Instead, on their face, these sections grant the Agency with the unqualified authority to suspend or disallow international tariffs that do not conform with section 111.[41]

58. The Court of Appeal appears to have been oblivious to the distinction that exists between the Agency's authority and powers over domestic and international tariffs.[42] The fact that this error directly led the Court to interfere with the Agency's interpretation of its home statute and the ambit of its authority is an issue of public importance: if left to stand, the Agency will be

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[40] In *Lukács v Canadian Transportation Agency*, 2016 FCA 202, the same panel of the Federal Court of Appeal as in this case relied on the fact that there is no "complaint provision" in Part V.1 of the ATR, which governs air transportation advertising prices, in dismissing a judicial review application Lukács brought against the Agency earlier this year (the hearing was two days after it heard the appeal in this case). On the Court's reasoning in that case, the lack of a "complaint provision" similar to s. 135.4 of the ATR under Part V ("Where the Agency, on receiving a complaint or of its own motion…") in Part V.1 meant that the Agency was not required to decide Lukács's complaint and refused to grant an order in *mandamus*. The panel's own logic, applied to this case, should have led it to the conclusion that the Agency was not required to hear Lukács's complaint against Delta. Section 135.4, which contains the word "complaint", is in Division III of Part V, which applies to the tariffs of transborder charter licence holders. There is no provision that contains the word "complaint" in Division II of Part V, which applies to international service tariffs.

[41] In Decision No. 121, *supra*, the Agency made this very point in relation to the s. 113.1 of the ATR, which is similar to s. 113 (paras 40-43). In addition, because the complaint in that case involved a domestic carrier, the Agency provided its view of the meaning of "any person" in the provisions of the Act relating to domestic tariffs, as discussed below.

[42] For example, at paragraphs 11-12 of the Appeal Decision, the Court characterized s. 111(2) of the ATR as "further expand[ing]" on s. 67.2(1) of the Act, rather than constituting a similar, but separate regime.

bound by jurisprudence purporting to interpret something within its area of expertise that is wrong on its face.

59. Apart from its improper and erroneous reliance on it, the Court of Appeal's interpretation of s. 67.2(1) is also wrong. The clause on which the Court of Appeal put so much emphasis actually restricts the authority of the Agency to act. Rather than serving to require the Agency to review a domestic tariff on receipt of any complaint in writing, s. 67.2(1) does not allow such a review unless it receives a written complaint.

60. According to the Agency, it has the power to review an international tariff on its own motion even in the absence of a complaint, but it lacks this power with respect to domestic tariffs.[43] This is so because s. 113 of the ATR does not contain any qualifying language similar to that found in s. 67.2(1) of the Act. That is, on its interpretation, the Agency has wider discretion and authority over the enforcement of international tariffs than over domestic tariffs.

61. In this case, the Agency instituted a process to determine whether it would conduct a review of Delta's tariff and practices, something over which, in its expert view, it has discretion. The Court of Appeal paid no mind to the Agency's expert view and has essentially transformed a condition precedent to the exercise of the Agency's authority (in the domestic setting) – a written complaint – into a trigger that imposes a positive duty on the Agency to exercise its authority and expend resources (in the international setting).

62. The Agency did not comment on the use of the phrase "any person" in s. 67.2(1) in its underlying decision, presumably because it recognized it had no relevance to Lukács's complaint. However, in a subsequent decision related to a domestic licence tariff that involved s. 67.1, a similar provision of the Act (and one on which the Court of Appeal also opined at para 25),[44] the Agency interpreted the phrase directly.[45] Lukács was the complainant in that case too;

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[43] Canadian Transportation Agency, *Annual Report 2014-2015: Making transportation efficient and accessible for all* (Ottawa: CTA, 2015) at 44
online: https://www.otc-cta.gc.ca/sites/default/files/annual_report_2014-2015_en.pdf

[44] The Court found the contrast between "any person" in ss. 67.1 and 67.2(1) and "any person adversely affected" in s. 67.1(b) significant. While it cannot be doubted that Parliament intended that the Agency only have the power to order compensation for persons who have been "adversely affected" by a domestic carrier's application of a fare not set out in its tariff, the Court's leap to concluding that this must mean that Parliament intended that the Agency could not decline to hear a complaint brought by "any person" in the world is without merit. In addition to the reasons set out by the Agency in Decision No. 121, the fact that the phrase in the

the Agency dismissed his complaint for lack of standing.[46] The Agency's considered interpretation is directly contrary to the one offered by the Court of Appeal below.

63. In part, in that case the Agency relied on the Ontario Court of Appeal's interpretation of "any person" in *Galganov v Russell (Township)*[47] in holding that, in context, "any person" does not grant "universal standing" and should be interpreted as meaning "any person who has standing under the common law relating to standing."[48] The Agency held that interpreting its statutory regime as requiring it to grant "universal standing" would detract from its "capacity to act as an expeditious, efficient, and effective recourse for those persons who actually were, or would be, directly and personally affected by" an air carrier's contravention of the Act or ATR.[49]

64. The Agency, having in mind its myriad roles and responsibilities, including the hundreds of complaints it resolves each year, held that it was entitled, authorized and required to consider the broader implications granting "universal standing" might have on its ability to carry out its duties to the public. The Agency is far better placed to make this assessment than are the courts.

iii. Further Errors and Implications for Future Reviews

65. The Appeal Decision contained additional uninformed reasoning that further demonstrates the Court of Appeal's flawed understanding of the Agency's enabling statute and role as a quasi-judicial tribunal. Because the Appeal Decision is binding authority, unless it is corrected, the Agency will be left with the obligation to apply clearly erroneous jurisprudence in its decisions and proceedings going forward.

French version of the Act ("S'il conclut, sur dépôt d'une plainte…") does not use "toute personne" or anything similar might have been considered by the Court in this part of its analysis. As well, earlier versions of the Act, in which s. 67.1 included "or of its own motion" ("ou de sa propre initiative") after "on complaint …by any person", might also have formed part of its interpretative analysis. As it stands, the most that can be concluded from the difference identified by the Court is that Parliament wanted to be certain that the Agency was not ordering carriers to redress persons who had not suffered any loss.

[45] Decision No. 121. This decision is dated April 22, 2016. The appeal before the Federal Court of Appeal in the within case was heard on April 25, 2016. There is no indication that the Federal Court of Appeal was aware of the Agency's April 22, 2016 decision.

[46] The Agency also dismissed the complaint on the basis of mootness.

[47] 2012 ONCA 409 ("*Galganov*"), leave to appeal to SCC ref'd, [2012] SCCA No 369.

[48] Agency Decision No. 121, *supra* at paras 37-38, citing para 15 of *Galganov*, *supra*.

[49] *Ibid* at para 43.

66. For example, the Court of Appeal held that it was significant that the Act distinguishes between "applications" and "complaints", with the former used in Part III, which governs railway transportation, and the latter "mainly used" in Part II – Air Transportation. The Court reasoned that it was also significant that Part III usually specifies the party entitled to bring an application, while Part II usually allows "any person" to bring a complaint.[50]

67. If there were as much significance as the Court views in the difference between "application" and "complaint", one would expect that the expert Agency would know this. A cursory review of the Act shows that the Court of Appeal's reasoning is plainly incorrect. Both terms have broad meanings and neither is defined in the Act; they are not used as consistently as the Court suggests. Sometimes the Act provides that an application, not a complaint, may be brought by "any person"[51]. Sometimes it provides that a complaint, not an application, may be brought by a specific party.[52] Sometimes it provides that an application may be brought by a specific party under Part II, rather than Part III.[53] Sometimes it provides that a complaint may be brought by "any person" under Part III, rather than Part II.[54]

68. For instance, under Part III, the Agency is empowered to make certain orders on receipt of noise and vibration complaints. Section 95.3 provides that the Agency "may order a railway company to make changes to its operation" on receipt "of a complaint made by any person that a railway company is not complying with section 95.1".

69. This construction is similar to that found in s. 67.2(1) and other provisions found in Part II. One might presume that the Agency is not required to entertain any noise complaint against a railway company brought by anyone in the world, and that it has the discretion only to weigh in where it receives a complaint from a person who is actually affected by the noise complained of. The effect of the Appeal Decision is to remove that basic, common sense discretion and authority of the Agency in the context both of complaints against air carriers and railway companies.

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[50] Appeal Decision at paras. 24-25 [Tab 2D].
[51] See the Act, ss. 22, 91(1).
[52] See ss. 120.1(1), 144(6) and (7).
[53] See ss. 64(2).
[54] See ss. 95.3(1), 116(1).

70. The Court of Appeal compounded its error by holding, without citing any authority, that the Agency-made Rules applicable to adjudicative or dispute proceedings, which the court noted "are generally based on an adversarial model", only apply to railway transportation "applications" and do not apply to air transportation "complaints" (paras 24-25). This, too, is patently incorrect.

71. In fact, all air travel complaints that the Agency hears, including the more than two dozen brought by Lukács, are subject to the Agency's court-like Rules.[55] The Rules apply to "dispute proceedings"[56] which are defined as "any contested matter that is commenced by application to the Agency."[57] Under the Rules, "application" is defined as "a document that is filed to commence a proceeding before the Agency under any legislation or regulations that are administered in whole or in part by the Agency."[58] Therefore, Lukács's "complaint" in this case under the Act is an "application" under the Rules, a fact the Court of Appeal paid no mind to.

72. The Court of Appeal's flawed reasoning and incorrect reading of the legislative scheme underscores the need for deference to the Agency's expertise in interpreting its governing statute and regulations, and administering the complex regime for which it is responsible.

73. The Court of Appeal's significant analytical errors demonstrate that it is not as expert as the Agency to interpret the Act and the ATR. Far from being the "single reasonable interpretation", the Court's interpretation is wrong. In the Agency Decision and in Decision No. 121, the Agency has put forward a reasonable interpretation of its statutory authority, under which it has the power to decline to hear complaints for lack of standing. That interpretation should be restored.

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[55] The Agency Decision the Court of Appeal was reviewing in this case made specific reference to the Rules at para 63, from which the Court of Appeal should have inferred, if it was not certain, that the Rules applied to Lukács's complaint. It is not clear on what basis the Court of Appeal determined that the Rules do not apply to complaints against air carriers.
[56] The Rules, r. 2.
[57] *Ibid*, r. 1.
[58] *Ibid*.

iv. Other legislative schemes do require administrative bodies to deal with complaints

74. A useful contrast can be drawn between the permissive scheme governing the Agency and the legislative scheme governing the Commissioner of Official Languages.

75. Under the *Official Languages Act*[59] ("OLA"), the Commissioner has been granted the power to investigate complaints regarding the use and status of Canada's official languages. Subsection 58(1) provides, in part:

> **Investigation of complaints**
>
> **58(1)** Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission…

76. Unlike sections 37 or 67.2 (or 65, 66, 67.1 or 85.1) of the Act (or s. 113 of the ATR, for that matter), the OLA uses "shall" rather than "may" in its grant of power. The Act and the ATR are permissive where the OLA creates an obligation.

77. Section 58 of the OLA goes on to specifically address who may bring a complaint:

> **Who may make complaint**
>
> **(2)** A complainant may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue.

78. The OLA, unlike the Act, is explicit in allowing any person (or group of persons), whether or not they have a direct or personal interest in the subject matter of the complaint, to bring a complaint to the Commissioner. In combination, subsections 58(1) and (2) impose an explicit, positive duty on the Commissioner to investigate complaints brought by persons regardless of whether they have a direct interest.[60]

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[59] RSC 1985, c.31 (4th Supp).

[60] Section 58 of the OLA sets out the circumstances under which the Commissioner may exercise his right to refuse or cease to investigate a complaint, including where the subject matter of the complaint is trivial, or the complaint is frivolous.

79. The *Canadian Human Rights Act*[61] ("CHRA") is also explicit in allowing persons who have not been directly affected by a discriminatory practice to bring a complaint to the Canadian Human Rights Commission. Section 40 of that act begins:

> **Complaints**
>
> **40(1)** Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
>
> **Consent of victim**
>
> **(2)** If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

80. Section 41 of the CHRA requires the Commission to deal with any complaint, except in certain prescribed situations, including, as provided for in s. 40(2), if the Commission exercises its discretion not to deal with a complaint brought by a non-victim of a discriminatory practice.

81. The Act governing the Agency is quite different. It does not explicitly state that a person without an interest in the subject complained of may bring a complaint and it does not require the Agency to hear an air travel complaint, whether or not the complainant has an interest. Rather, it is open-ended and permissive. The logical, common sense interpretation of the provisions of the Act is that the Agency may determine whether or not it will hear a complaint.

82. Guidance is also found closer to home. Section 116 of the Act, which falls under Part III, obliges the Agency to investigate certain kinds of complaint brought against railway companies:

> **Complaint and investigation concerning company's obligations**
>
> **116(1)** On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall
>
> (a) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and
>
> (b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

[61] RSC 1985, c. H-6.

83. The use of different words in the Act[62] indicates Parliament's intention to distinguish between when Agency action with respect to a complaint is permitted and when it is required. Effect must be given to this distinction.

84. Courts may deny a party standing to avoid opening floodgates to unnecessary proceedings, screen out the mere busybody, ration scarce resources, and/or avoid a risk of hearing inadequately presented cases.[63] The Agency has all the powers, rights and privileges of a superior court that are necessary for the proper exercise of its jurisdiction (s. 25 of the Act). The application of the law of standing is an exercise of discretion. The Act (including s. 37) grants the Agency wide discretion to hear or not hear complaints and nothing restricts it.

85. The Agency has been entrusted with the licensing and regulation of air carriers and enforcement of the legislative and regulatory requirements imposed on those carriers. As part of that complex task, the Agency administers an air travel complaints scheme, through which it invites, reviews and hears complaints from members of the travelling public. It has a broad obligation to serve the public and the public interest.

86. But the Agency is not required to hear and decide every complaint brought before it. Nor is it restricted in the Act or the ATR as to how to make that decision. The Agency has been given broad discretion to fulfill its duties by Parliament. It is entitled to institute processes to ensure that it expends its time and resources on complaints from those "with the most at stake". That is what it did in this case.

C. Public interest standing in the administrative law context

87. If leave is granted, the proposed appeal would raise an additional issue of public importance: do administrative tribunals have the common law power to grant public interest standing in their proceedings?

88. Before the Agency and the Court of Appeal the parties made submissions assuming that the Agency has the authority to grant public interest standing to those who do not have standing otherwise. On the Court of Appeal's view, this question did not require an answer.

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[62] This is in addition to the amendments made to s. 85.1, noted above, in which "shall" was changed to "may".
[63] *Galganov*, *supra* at para 15.

89. This Court in *Finlay v Canada (Minister of Finance)*[64] expanded the application of public interest standing to non-constitutional challenges to administrative action, permitting the applicant to challenge a decision of the Province of Manitoba regarding federal public expenditures by way of an application for declaration before the Federal Court. Because it was not in issue, this Court did not address whether public interest standing could be applied by administrative tribunals in their own proceedings.

90. Some Canadian administrative tribunals have determined that, as statutory bodies, they do not have the power to grant public interest standing.[65] The British Columbia Supreme Court,[66] the Alberta Court of Queen's Bench,[67] and the Alberta Court of Appeal[68] agree with this view. However, other administrative tribunals (including the Agency in this case) have at least assumed that they do have this power.[69]

91. The proposed appeal would provide this Court the opportunity to clarify whether, and in what circumstances, administrative tribunals may grant public interest standing.

PART IV – SUBMISSIONS CONCERNING COSTS

92. Delta does not seek costs and submit that no costs should be awarded against it.

PART V – ORDERS SOUGHT

93. Delta respectfully submits that leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of November, 2016.

Bersenas Jacobsen Chouest Thomson Blackburn LLP
Carlos P. Martins/Tae Mee Park/Andrew W. MacDonald

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[64] [1986] 2 SCR 607.
[65] See eg. Decision No. 619/05, 2005 ONWSIAT 1645, 205 CarswellOnt 8146 para 77 (ONWSIAT); *D'Orazio v Ontario Human Rights Commission*, 2014 HRTO 111, *Water Matters Society of Alberta v Director, Southern Region, Operations Division, Alberta Environment and Water*, 2012 CarswellAlta 1901 at paras 131ff (Alta Environmental Appeals Board).
[66] *Gagne v Sharpe*, 2014 BCSC 2077 at para 77.
[67] *Alberta Wilderness Association v Alberta (Environmental Appeal Board)*, 2013 ABQB 44 at para 27.
[68] *CUPE Local 40 v. WMI Waste Management of Canada Inc*, 1996 ABCA 6 at para 23.
[69] See eg. *TWU v Telus Corp*, [2004] CIRB No 278, 2004 CarswellNat 3315 at paras 349-352 (CIRB); *Platinum Produce Company v Director, Ministry of the Environment*, 2014 CarswellOnt 1002 at p 28ff (Appendix B: Reasons for order granting standing) (Ont. Eviron. Review Board); *Burgoon v British Columbia (Regional Water Manager)*, 2008 CarswellBC 456 at para 12 (BC Environ. Appeal Board).

PART VI – TABLE OF AUTHORITIES

AT PARA.

Case

Administrative Tribunal Decisions

PART VII – STATUTES, REGULATIONS, RULES, ETC.

***Canada Transportation Act*, SC 1996, c.10**

Application generally

3 This Act applies in respect of transportation matters under the legislative authority of Parliament.

National Transportation Policy

Declaration

5 It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and

***Loi sur les transports au Canada*, LC 1996, c.10**

Champ d'application

3 La présente loi s'applique aux questions de transport relevant de la compétence législative du Parlement.

Politique nationale des transports

Déclaration

5 Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des

(e) governments and the private sector work together for an integrated transportation system.

marchandises du Canada;

d) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

Agency continued

7 (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

Maintien de l'Office

7 (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

Composition of Agency

(2) The Agency shall consist of not more than five members appointed by the Governor in Council, and such temporary members as are appointed under subsection 9(1), each of whom must, on appointment or reappointment and while serving as a member, be a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Composition

(2) L'Office est composé, d'une part, d'au plus cinq membres nommés par le gouverneur en conseil et, d'autre part, des membres temporaires nommés en vertu du paragraphe 9(1). Tout membre doit, du moment de sa nomination, être et demeurer un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

Chairperson and Vice-Chairperson

(3) The Governor in Council shall designate one of the members appointed under subsection (2) to be the Chairperson of the Agency and one of the other members appointed under that subsection to be the Vice-Chairperson of the Agency.

Président et vice-président

(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).

Temporary members

9 (1) The Minister may appoint temporary members of the Agency from the roster of individuals established by the Governor in Council under subsection (2).

Membres temporaires

9 (1) Le ministre peut nommer des membres à titre temporaire à partir d'une liste de personnes établie par le gouverneur en conseil au titre du paragraphe (2).

Roster

(2) The Governor in Council may appoint any individual to a roster of candidates for the purpose of subsection (1).

Liste

(2) Pour l'application du paragraphe (1), le gouverneur en conseil peut nommer les personnes à inscrire sur la liste de candidats qui y est prévue.

Maximum number

(3) Not more than three temporary members shall hold office at any one time.

Term of temporary members

(4) A temporary member shall hold office during good behaviour for a term of not more than one year and may be removed for cause by the Governor in Council.

No reappointment

(5) A person who has served two consecutive terms as a temporary member is not, during the twelve months following the completion of the person's second term, eligible to be reappointed to the Agency as a temporary member.

Copies of documents obtainable

22 On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

Agency powers in general

25 The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Compelling observance of obligations

26 The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Inquiry into complaint

Nombre maximal

(3) L'Office ne peut compter plus de trois membres temporaires.

Durée du mandat

(4) Les membres temporaires sont nommés à titre inamovible pour un mandat d'au plus un an, sous réserve de révocation motivée par le gouverneur en conseil.

Renouvellement du mandat

(5) Les membres temporaires ayant occupé leur charge pendant deux mandats consécutifs ne peuvent, dans les douze mois qui suivent, recevoir un nouveau mandat.

Copies conformes

22 Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Pouvoirs généraux

25 L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

Pouvoir de contrainte

26 L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

Enquêtes sur les plaintes

37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

PART II - Air Transportation

…

Licence for Domestic Service

…

Notice period

64(2) A licensee shall not implement a proposal referred to in subsection (1) or (1.1) until the expiry of 120 days, or 30 days if the service referred to in that subsection has been in operation for less than one year, after the notice is given or until the expiry of any shorter period that the Agency may, on application by the licensee, specify by order.

Fares or rates not set out in tariff

67.1 If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to

(a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;

(b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's failure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and

(c) take any other appropriate corrective measures.

When unreasonable or unduly discriminatory terms or conditions

67.2 (1) If, on complaint in writing to the

37 L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

PARTIE II - Transport aérien

…

Service intérieur

…

Délai

64(2) Le licencié ne peut donner suite au projet mentionné aux paragraphes (1) ou (1.1) avant l'expiration soit des cent vingt jours ou, dans le cas où le service visé à ces paragraphes est offert depuis moins d'un an, des trente jours suivant la signification de l'avis, soit du délai inférieur fixé, à sa demande, par ordonnance de l'Office.

Prix, taux, frais ou conditions non inclus au tarif

67.1 S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a, contrairement au paragraphe 67(3), appliqué à l'un de ses services intérieurs un prix, un taux, des frais ou d'autres conditions de transport ne figurant pas au tarif, l'Office peut, par ordonnance, lui enjoindre :

a) d'appliquer un prix, un taux, des frais ou d'autres conditions de transport figurant au tarif;

b) d'indemniser toute personne lésée des dépenses qu'elle a supportées consécutivement à la non-application du prix, du taux, des frais ou des autres conditions qui figuraient au tarif;

c) de prendre toute autre mesure corrective indiquée.

Conditions déraisonnables

67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a

Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

Prohibition on advertising

(2) The holder of a domestic licence shall not advertise or apply any term or condition of carriage that is suspended or has been disallowed.

Air Travel Complaints

Review and mediation

85.1 (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.

Report

(2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.

Complaint not resolved

(3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the

appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

Interdiction d'annoncer

(2) Il est interdit au titulaire d'une licence intérieure d'annoncer ou d'appliquer une condition de transport suspendue ou annulée.

Plaintes relatives au transport aérien

Examen et médiation

85.1 (1) L'Office ou son délégué examine toute plainte déposée en vertu de la présente partie et peut tenter de régler l'affaire; il peut, dans les cas indiqués, jouer le rôle de médiateur entre les parties ou pourvoir à la médiation entre celles-ci.

Communication aux parties

(2) L'Office ou son délégué fait rapport aux parties des grandes lignes de la position de chacune d'entre elles et de tout éventuel règlement.

Affaire non réglée

(3) Si l'affaire n'est pas réglée à la satisfaction du plaignant dans le cadre du présent article, celui-ci peut demander à l'Office d'examiner la plainte conformément aux dispositions de la présente partie en vertu desquelles elle a été déposée.

Inhabilité

(4) Le membre de l'Office ou le délégué qui a tenté de régler l'affaire ou joué le rôle de médiateur en vertu du présent article ne peut agir dans le cadre de procédures ultérieures, le cas échéant, devant l'Office à l'égard de la plainte en question.

Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

PART III - Railway Transportation

Application for certificate of fitness

91 (1) Any person may apply for a certificate of fitness for a railway, including a person who owns or leases the railway or controls, either directly or indirectly, a person who owns or leases the railway.

Complaints and investigations

95.3 (1) On receipt of a complaint made by any person that a railway company is not complying with section 95.1, the Agency may order the railway company to undertake any changes in its railway construction or operation that the Agency considers reasonable to ensure compliance with that section.

Complaint and investigation concerning company's obligations

116 (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall

(a) conduct, as expeditiously as possible, an investigation of the complaint that, in

Prolongation

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

Inclusion dans le rapport annuel

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

PARTIE III - Transport ferroviaire

Demande

91 (1) Toute personne, notamment le propriétaire ou le locataire d'un chemin de fer ou celui qui contrôle directement ou indirectement l'un d'eux, peut demander le certificat d'aptitude.

Plaintes et enquêtes

95.3 (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne se conforme pas à l'article 95.1, l'Office peut ordonner à celle-ci de prendre les mesures qu'il estime raisonnables pour assurer qu'elle se conforme à cet article.

Plaintes et enquêtes

116 (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.

its opinion, is warranted; and

(b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

Unreasonable charges or terms

120.1 (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

Frais ou conditions déraisonnables

120.1 (1) Sur dépôt d'une plainte de tout expéditeur assujetti à un tarif applicable à plus d'un expéditeur — autre qu'un tarif visé au paragraphe 165(3) — prévoyant des frais relatifs au transport ou aux services connexes ou des conditions afférentes, l'Office peut, s'il les estime déraisonnables, fixer de nouveaux frais ou de nouvelles conditions par ordonnance.

Remedy if bad faith by a railway company

144(6) If, on complaint in writing by the interested person, the Agency finds that the railway company is not negotiating in good faith and the Agency considers that a sale, lease or other transfer of the railway line, or the company's operating interest in the line, to the interested person for continued operation would be commercially fair and reasonable to the parties, the Agency may order the railway company to enter into an agreement with the interested person to effect the transfer and with respect to operating arrangements for the interchange of traffic, subject to the terms and conditions, including consideration, specified by the Agency.

Défaut par le chemin de fer de négocier de bonne foi

144(6) Saisi d'une plainte écrite formulée par l'intéressé, l'Office peut, s'il conclut que la compagnie ne négocie pas de bonne foi et que le transfert à l'intéressé, notamment par vente ou bail, des droits de propriété ou d'exploitation sur la ligne en vue de la continuation de son exploitation serait commercialement équitable et raisonnable pour les parties, ordonner à la compagnie de conclure avec l'intéressé une entente pour effectuer ce transfert et prévoyant les modalités d'exploitation relativement à l'interconnexion du trafic, selon les modalités qu'il précise, notamment la remise d'une contrepartie.

Remedy if bad faith by an interested person

(7) If, on complaint in writing by the railway company, the Agency finds that the interested person is not negotiating in good faith, the Agency may order that the railway company is no longer required to negotiate with the person.

Défaut par l'intéressé de négocier de bonne foi

(7) Saisi d'une plainte écrite formulée par la compagnie, l'Office peut décider que la compagnie n'est plus tenue de négocier avec l'intéressé s'il conclut que celui-ci ne négocie pas de bonne foi.

***Air Transportation Regulations*, SOR/88-58**

PART V - Tariffs

DIVISION II - International

111(1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any

***Règlement sur les transports aériens*, DORS/88-58**

PARTIE V - Tarifs

SECTION II - Service international

111 (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de

respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

113 The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

(a) take the corrective measures that the Agency considers appropriate; and

(b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

DIVISION III - Transborder Charters

quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

113 L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa a).

113.1 Si un transporteur aérien n'applique pas les prix, taux, frais ou conditions de transport applicables au service international qu'il offre et figurant à son tarif, l'Office peut lui enjoindre :

a) de prendre les mesures correctives qu'il estime indiquées;

b) de verser des indemnités à quiconque pour toutes dépenses qu'il a supportées en raison de la non-application de ces prix, taux, frais ou conditions de transport.

SECTION III - Vols affrétés transfrontaliers

Pouvoirs de l'Office

Powers of the Agency

135.4 Where the Agency, on receiving a complaint or of its own motion, determines that any term or condition of carriage set out in a tariff is unjust or unreasonable, the Agency may

(a) suspend or disallow the tariff or a portion thereof;

(b) establish and substitute another tariff or portion thereof for the suspended or disallowed tariff or portion thereof; or

(c) prohibit an air carrier from advertising, offering or applying the suspended or disallowed tariff or portion thereof.

135.4 Si l'Office détermine, à la suite d'une plainte ou de son propre chef, que des conditions de transport figurant dans un tarif sont injustes ou déraisonnables, il peut :

a) suspendre ou refuser tout ou partie du tarif;

b) établir un autre tarif ou partie de tarif et le substituer au tarif ou à la partie de tarif suspendu ou refusé;

c) interdire au transporteur aérien d'annoncer, d'offrir ou d'appliquer tout ou partie du tarif suspendu ou refusé.

***Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104**

Interpretation

Definitions

1 The following definitions apply in these Rules.

application means a document that is filed to commence a proceeding before the Agency under any legislation or regulations that are administered in whole or in part by the Agency. (*demande*)

dispute proceeding means any contested matter that is commenced by application to the Agency. (*instance de règlement des différends*)

***Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)*, DORS/2014-104**

Définitions

Définitions

1 Les définitions qui suivent s'appliquent aux présentes règles.

demande Document introductif d'une instance déposé devant l'Office en vertu d'une loi ou d'un règlement qu'il est chargé d'appliquer en tout ou en partie. (*application*)

instance de règlement des différends Affaire contestée qui est introduite devant l'Office au moyen d'une demande. (*dispute proceeding*)

Application

Dispute proceedings

2 Subject to sections 3 and 4, these Rules apply to dispute proceedings other than a matter that is the subject of mediation.

Application

Instances de règlement des différends

2 Sous réserve des articles 3 et 4, les présentes règles s'appliquent aux instances de règlement des différends, à l'exception de toute question qui fait l'objet d'une médiation.

***Official Languages Act*, RSC 1985, c.31 (4th Supp)**

Investigations

Investigation of complaints

58 (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied with

***Loi sur les langues officielles*, LRC (1985), ch. 31 (4e suppl)**

Plaintes et enquêtes

Plaintes

58 (1) Sous réserve des autres dispositions de la présente loi, le commissaire instruit toute plainte reçue — sur un acte ou une omission — et faisant état, dans l'administration d'une institution fédérale, d'un cas précis de non-reconnaissance du statut d'une langue officielle, de manquement à une loi ou un règlement fédéraux sur le statut ou l'usage des deux langues officielles ou encore à l'esprit de la présente loi et à l'intention du législateur.

Dépôt d'une plainte

(2) Tout individu ou groupe a le droit de porter plainte devant le commissaire, indépendamment de la langue officielle parlée par le ou les

in the administration of the affairs of any federal institution.

Who may make complaint

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue.

Discontinuance of investigation

(3) If in the course of investigating any complaint it appears to the Commissioner that, having regard to all the circumstances of the case, any further investigation is unnecessary, the Commissioner may refuse to investigate the matter further.

Right of Commissioner to refuse or cease investigation

(4) The Commissioner may refuse to investigate or cease to investigate any complaint if in the opinion of the Commissioner

(a) the subject-matter of the complaint is trivial;

(b) the complaint is frivolous or vexatious or is not made in good faith; or

(c) the subject-matter of the complaint does not involve a contravention or failure to comply with the spirit and intent of this Act, or does not for any other reason come within the authority of the Commissioner under this Act.

Complainant to be notified

(5) Where the Commissioner decides to refuse to investigate or cease to investigate any complaint, the Commissioner shall inform the complainant of that decision and shall give the reasons therefor.

plaignants.

Interruption de l'instruction

(3) Le commissaire peut, à son appréciation, interrompre toute enquête qu'il estime, compte tenu des circonstances, inutile de poursuivre.

Refus d'instruire

(4) Le commissaire peut, à son appréciation, refuser ou cesser d'instruire une plainte dans l'un ou l'autre des cas suivants :

a) elle est sans importance;

b) elle est futile ou vexatoire ou n'est pas faite de bonne foi;

c) son objet ne constitue pas une contravention à la présente loi ou une violation de son esprit et de l'intention du législateur ou, pour toute autre raison, ne relève pas de la compétence du commissaire.

Avis au plaignant

(5) En cas de refus d'ouvrir une enquête ou de la poursuivre, le commissaire donne au plaignant un avis motivé.

***Canadian Human Rights Act*, RSC 1985, c. H-6**

Complaints

40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

Consent of victim

(2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

Investigation commenced by Commission

***Loi canadienne sur les droits de la personne*, LRC (1985), ch. H-6**

Plaintes

40 (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

Consentement de la victime

(2) La Commission peut assujettir la recevabilité d'une plainte au consentement préalable de l'individu présenté comme la victime de l'acte discriminatoire.

Autosaisine de la Commission

(3) La Commission peut prendre l'initiative de la plainte dans les cas où elle a des motifs raisonnables de croire qu'une personne a

(3) Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint.

commis un acte discriminatoire.

Commission to deal with complaint

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

Irrecevabilité

41 (1) Sous réserve de l’article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu’elle estime celle-ci irrecevable pour un des motifs suivants :

a) la victime présumée de l’acte discriminatoire devrait épuiser d’abord les recours internes ou les procédures d’appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n’est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

e) la plainte a été déposée après l’expiration d’un délai d’un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

From lukacs@AirPassengerRights.ca Sun Aug 24 15:08:21 2014
Date: Sun, 24 Aug 2014 15:08:18 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretariat <secretariat@otc-cta.gc.ca>
Subject: Discrimantory practices by Delta Airlines

Dear Madam Secretary:

I am writing to complain concerning the practices of Delta Airlines set out in the attached email concerning the transportation of large (obese) passengers:

1. in certain cases, Delta Airlines refuses to transport large (obese) passengers on the flights on which they hold a confirmed reservation, and require them to travel on later flights;

2. Delta Airlines requires large (obese) passengers to purchase additional seats to avoid the risk of being denied transportation.

It is submitted that these practices are discriminatory, contrary to subsection 111(2) of the Air Transportation Regulations, and they are also contrary to the findings of the Agency in Decision No. 6-AT-A-2008 concerning the accommodation of passengers with disabilities.

Sincerely yours,
Dr. Gabor Lukacs

[Part 2: ""]

The following attachment was sent,
but NOT saved in the Fcc copy:
A Application/PDF (Name="2014-08-24--Delta-to-Shubert--large_passengers_may_be_bumped.pdf") segment of about 135,062 bytes.

From: **Contact Delta** ContactUs.Delta@delta.com
Subject: Re: CC-Past Travel Compliment or Complaint-Complaint-Airport (KMM36513423V70481L0KM)
Date: August 20, 2014 at 4:57 AM
To: omer767@gmail.com

Hello Omer,

RE: Case Number 13384069

Thanks for letting us know the discomfort you were caused on your flight with us on August 12. I'm really sorry for the inconvenience you encountered while sitting next to a passenger who required additional space.

Being cramped during a long or a short flight is not a good experience. I realize how uncomfortable it must have been when you were unable to sit comfortably in your seat. Here are the guidelines we follow to help make a large passenger, and the people sitting nearby, comfortable. Sometimes, we ask the passenger to move to a location in the plane where there's more space. If the flight is full, we may ask the passenger to take a later flight. We recommend that large passengers purchase additional seats, so they can avoid being asked to rebook and so we can guarantee comfort for all. It's obvious, this was not the case.

Delta Choice Gift
As a goodwill gesture, I'm sending a $50.00 Delta Choice gift. The Delta Choice gift code will arrive in a separate email within three business days. This will include a customer ID and instructions on how to redeem the gift. Please check your spam folder if you don't see the email in your inbox.

We appreciate the time you took to bring this experience to our attention. I hope that your next trip with us is pleasant in every way.

Regards,

Veron M. Fernandes
You Share, We Care

Original Message Follows:

Delta Air Lines Customer Care Form