SCC File No. 37276

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.

APPELLANT
(Respondent)

- and -

DR. GÁBOR LUKÁCS

RESPONDENT
(Appellant)

- and -

BENJAMIN ZARNETT

AMICUS CURIAE

- and -

ATTORNEY GENERAL (ONTARIO), CANADIAN TRANSPORTATION AGENCY, INTERNATIONAL AIR TRANSPORT ASSOCIATION, COUNCIL OF CANADIANS WITH DISABILITIES

INTERVENERS

REPLY FACTUM OF DELTA AIR LINES INC., APPELLANT

(Delivered Pursuant to Order of this Court dated July 18th 2017)

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

Carlos P. Martins / Andrew W. MacDonald
Tel.: (416) 982-3800
Fax: (416) 982-3801
Email: cmartins@lexcanada.com
amacdonald@lexcanada.com

Counsel for the Appellant

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 Appellant

DR. GÁBOR LUKÁCS

Self-Represented Respondent

GOODMANS LLP
3400-333 Bay Street
Toronto, ON M5H 2S7

Benjamin Zarnett
Tel: (416) 597-4204
Fax: (416) 979-1234
E-mail: bzarnett@goodmans.ca

Amicus Curiae

GOLBLATT PARTNERS
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 235-5327
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for *Amicus Curiae*

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office – Civil Law
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1

Heather Mackay and Edmund Huang
Tel: (416) 326-4129/(416)326-4161
Fax: (416) 326-4181
Email: heather.c.mackay@ontario.ca
edmund.huang@ontario.ca

Counsel for the Attorney General for Ontario

BURKE, ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for the Attorney General for Ontario

CANADIAN TRANSPORTATION AGENCY
15 Eddy Street, 19th Floor
Gatineau, QC K1A 0N9

Allan Matte
Tel: (819) 994-2226
Fax: (819) 953-9269
E-mail: allan.matte@otc-cta.gc.ca

Counsel for the Intervener, The Canadian Transportation Agency

CANADIAN TRANSPORTATION AGENCY
15 Eddy Street, 19th Floor
Gatineau, QC K1A 0N9

Mante Molepo
Telephone: (819) 994-4283
Fax: (819) 953-9269
E-mail: mante.molepo@otc-cta.gc.ca

Agent for the Intervener, The Canadian Transportation Agency

DLA PIPER (CANADA) LLP
2800 - 666 Burrard Street
Vancouver, BC V6C 2Z7

David Neave /Derek J. Bell / Katelyn Ellins
Tel: (604) 643-2961
Fax: (604) 605-3751
E-mail: david.neave@dlapiper.com
derek.bell@dlapiper.com
katelyn.ellins@dlapiper.com

Counsel for the Intervener,
The International Air
Transport Association

CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Colin S. Baxter
Tel: (613) 780-2012
Fax: (613) 688-0271
E-mail: cbaxter@conway.pro

Agent for the Intervener,
The International Air
Transport Association

PUBLIC INTEREST LAW CENTRE
200 - 393 Portage Avenue
Winnipeg, Manitoba R3B 3H6

Byron Williams / Joëlle Pastora Sala
Tel: (204) 985-8540
Fax: (204) 985-8544
E-mail: bywil@pilc.mb.ca

Counsel for the Intervener,
The Council of Canadians
with Disabilities

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: (613) 702-5573
Fax: (613) 702-5573
E-mail: mvincelette@powerlaw.ca

Agent for the Intervener,
The Council of Canadians
with Disabilities

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PART I – STATEMENT OF REPLY ARGUMENT

1. The Appellant, Delta Air Lines Inc. ("Delta"), files these submissions in reply to the factums of the interveners. In particular, Delta responds to the arguments filed by the Attorney General for Ontario ("Ontario") and the Council of Canadians with Disabilities (the "CCD").

2. In part, Ontario argues that an administrative tribunal's assessment of whether to inquire into a complaint "should be based on the substance of the complaint and not on the identity of the complainant."[1] However, Ontario takes no position on whether the Canadian Transportation Agency (the "Agency"), in particular, has the authority to decline to hear complaints solely on the basis of a lack of standing.[2] It appears that the CCD takes a more extreme view in advocating that the Agency is precluded from declining to hear a complaint on the basis of a lack of standing. According to the CCD, the Agency must review whether a given complaint gives rise to a serious issue to be tried, without any consideration of whether the complainant has a sufficient interest in its subject matter, and may only decline to inquire into a complaint where it "identifies a demonstrable, fact-based abuse of process" on that review.[3]

3. The arguments of both Ontario and the CCD suffer from the same central flaw that afflicts the judgment of the Federal Court of Appeal (the "FCA") below: they fail to adequately recognize the considerable deference that courts must accord to the discretionary decisions made by administrative bodies in the exercise of their statutory authority and functions.

A. Legislative Supremacy and Deference to the Agency

4. Most if not all participants in this appeal appear to acknowledge the importance of the gatekeeping or screening function of an administrative tribunal empowered to receive and inquire into complaints from the public. Not everyone effectively recognizes that policies, procedures and decisions of administrative bodies exercising this function are owed respect on judicial review and must not be interfered with by courts unless they can be shown to exceed the tribunal's statutory authority or to fall outside the range of acceptable and rational outcomes.

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[1] Factum of the Intervener, the Attorney General for Ontario, dated August 23, 2017 ("Ontario's Factum") at para 12.
[2] *Ibid* at para 1.
[3] Factum of the Intervener, Council of Canadians with Disabilities, dated August 25, 2017 ("CCD's Factum") at para 22.

5. Meaningful respect for the choices and decisions of administrative tribunals is fundamental to the maintenance of legislative supremacy. Courts have a "constitutional duty to ensure that public authorities do not overreach their lawful powers."[4] But that is not their only role in the exercise of their constitutional functions of judicial review:

> [30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law."[5]

6. The FCA recognized that the applicable standard of review is reasonableness. No party or intervener has questioned that determination. The issue the FCA had to consider, then, was whether it was reasonable for the Agency to adopt and apply policies similar to those underlying the "judicial" law of standing as part of its gatekeeper function. The positions taken by Ontario and the CCD pay no heed to the basic principles on which the "reasonableness" standard is based. As emphasized in *Newfoundland Nurses*, the "key passages" in *Dunsmuir* state:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> … What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather,

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[4] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 ("*Dunsmuir*") at para 29.
[5] *Ibid* at para 30.

> deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers"... We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision".[6]

7. On a reasonableness review the decision under review "should be presumed to be correct" and the court must seek to "supplement the administrative decision-maker's reasons" before seeking to subvert them.[7] Courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law".[8]

8. The positions taken by Ontario and the CCD, to varying degrees, downplay or ignore the deference that must be accorded to administrative bodies, generally, and particularly to those with a mandate as wide-ranging, polycentric, and complex as the Agency's. This is especially so in view of the breadth of the language in which the Agency's authority has been legislated.

9. Broad administrative mandates, including a responsibility to make decisions on the basis of the public interest, should result in more caution on the part of reviewing courts. In *Wilson*, Justice Abella adopted the following passage authored by Justice Evans:

> …a court may be more likely to conclude that a range of reasonable interpretative choices exists, and that deference is meaningful, when the tribunal's authority is conferred in broad terms. If, for example, a tribunal is authorized to make a decision on the basis of the public interest, a reviewing court may well decide that the tribunal has a range of choices in selecting the factors it will consider in making its decision. At this point, questions of law shade imperceptibly into questions of discretion. Reasonableness review permits the court to determine whether the factors considered by the tribunal are rationally related to the generally multiple statutory objectives. It is not the court's role to identify the factors to be considered by the tribunal, let alone to reweigh them.[9]

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[6] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 ("*Newfoundland Nurses*") at para 11, citing *Dunsmuir*, *supra* at paras 47-48 (emphasis in *Newfoundland Nurses*, citations omitted).
[7] *Newfoundland Nurses, ibid* at para 12.
[8] *Ibid* at para 15.
[9] *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 SCR 770 ("*Wilson*") at para 33, citing John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 CJALP 101 at 110 (emphasis added).

10. Since this Court's decision in *VIA Rail* ten years ago, it has been clear that courts owe significant deference to the Agency in particular. This Court emphasized several factors in holding that the Agency was owed the highest level of deference, including:

a. its specialized expertise;
b. "a conscious and clearly worded decision by the legislature to use a subjective or open-ended grant of power [which] has the effect of widening the delegate's jurisdiction and therefore narrowing the ambit of jurisdictional review of the legality of its actions;"
c. the "broad policy context of a specialized agency;"
d. the fact that the Agency's authority to "entertain" the complaint "depended on its own discretionary determination;" and
e. the fact that the issues raised arise in a "particularly complex" context, being the federal transportation system.[10]

11. The Agency's responsibility for interpreting its own legislation, the *Canada Transportation Act* (the "Act"), includes "what that statutory responsibility includes."[11]

12. Adjudicating complaints through its formal dispute resolution system is only one aspect of the Agency's air travel complaints scheme. It resolves most complaints less formally. The air travel complaints scheme is only one part of the Agency's larger role regulating commercial air transportation. And regulating commercial air transportation is only part of the Agency's even larger role as the regulator of Canada's national transportation system.

13. Respect for Parliament's delegation of all of these responsibilities to the Agency requires that reviewing courts refrain from interfering lightly with how it chooses to carry out its functions. The positions taken by the CCD and Ontario are not consistent with this principle.

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[10] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650 ("*VIA Rail*") at paras 88-98.
[11] *Ibid* at para 100.

B. The Agency's Approach to Gatekeeping is Reasonable

14. On this appeal, the question is if the FCA was entitled to interfere with the Agency's determination that it is within its authority to determine whether or not to inquire into a complaint on the basis of the complainant's standing, as that concept is understood and applied by the Agency. The question for judicial review is: Was it open to the Agency to adopt policies similar to those underlying the judicial approach to standing as a means of determining whether or not to inquire into Lukács's complaint?

15. It is common ground that the answer to this question lies in the interpretation of the Agency's home legislative scheme and consideration of the Agency's purpose under that scheme. The Agency implicitly determined that adopting an approach intended to guard against becoming overburdened with marginal or redundant cases, to screen out complaints from "busybodies", and/or to ensure that the contending views of those most directly affected are considered by the decision-maker was within its statutory grant of authority.[12]

16. The CCD and Ontario both point to the policy objectives of the constitutive act, the fact that tribunals are required to act in the public interest, and considerations of access to justice in their arguments. But these arguments do not support the contention that the Agency's approach to gatekeeping air travel complaints is outside the margin of appreciation or range of acceptable and rational solutions. The positions of the CCD and Ontario are mere policy preferences that are no more rational or acceptable or reasonable than the approach taken by the Agency.

17. Indeed, in the case of the CCD, in advocating that the Agency may only decline to inquire into a complaint where it identifies a "demonstrable, fact-based abuse of process", it takes a clearly unreasonable position. In the CCD's view, in any case in which the Agency declines to inquire into a complaint (which the CCD suggests it may only do if it has found it to be a demonstrable abuse of process), it should be "required to produce a record of its inquiries

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[12] Agency Decision No. 425-C-A-2014, November 25, 2014, at para 57 (the "Agency Decision"), [Appellant's Record, Tab 2, p 12], citing *Canada (Attorney General) v Downtown Eastside Sex Workers*, 2012 SCC 45, [2012] 2 SCR 524 ("*Downtown Eastside*") at para 1.

into the issue including the facts considered in making the determination and produce this record to the parties for their comments".[13]

18. There is no basis for imposing such a constricting limit on the Agency's discretionary authority in the Act. Parliament has left just about every aspect of the Agency's air travel complaints scheme to the discretion of the Agency. Courts must respect that legislative choice.

19. In contrast to this wide discretion, legislatures often choose to impose requirements or provide guidance to administrative bodies in respect of one or more of the following aspects of an administrative body's complaint scheme as part of their delegation of authority:

a. who is entitled to file a complaint or institute proceedings before a tribunal;
b. in what circumstances or in consideration of which factors the tribunal must deal with a complaint it receives;
c. in what circumstances or in consideration of which factors the tribunal must not deal with a complaint it receives; and
d. in what circumstances or in consideration of which factors the tribunal may choose whether or not to deal with a complaint it receives.

20. As previously noted, the *Canadian Human Rights Act* ("CHRA") provides examples of many of these sorts of legislative provisions relating to complaints made to the Canadian Human Rights Commission.[14] Ontario's factum references several statutes that provide other examples of these sorts of provisions. In many instances, these sorts of provisions mean that there is no room – or authority – for the tribunal to adopt and apply the policies underlying the law of standing developed by the courts: instead, the tribunal must determine standing and whether it should or must deal with a complaint exclusively on the basis of its governing statute.

21. But the Act is different from the CHRA; Parliament has not legislated any provisions of the type noted above that apply to the Agency's authority to inquire into air travel complaints.

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[13] CCD's Factum at para 22.
[14] See *Canadian Human Rights Act*, RSC 1985, c. H-6, ss 40, 40.1 & 41, which include examples of all of the provision types identified above.

22. Where Parliament has decided not to prescribe how an administrative tribunal is to determine whether or when to inquire into complaints received from members of the public, Delta submits that the correct conclusion to draw is that it has left it up to the tribunal to develop its own policies and procedures in that respect. Parliament delegated these policy decisions to the Agency, not to the courts, and they are owed deference as a result.

23. This does not mean that the Agency's discretionary authority to decide whether to inquire into a complaint is unfettered. No discretion is absolute. The Agency's discretionary decisions must be "based upon weighing of considerations pertinent to the object of the administration".[15]

24. This is what the Agency does and it is how it proceeded in this case.

25. As the FCA noted, administrative bodies are often "created to provide greater and more efficient access to justice through less formal procedures."[16] The rationale underlying the law of standing, far from being irrelevant to the Agency's gatekeeping function, actually promotes the goal of ensuring that it is able to provide meaningful access to justice to those who bring complaints that are within its mandate to deal with.

26. The concerns identified by this Court in *Downtown Eastside* and referenced by the Agency in this case are intended to ensure that a decision-maker is in a position to hear and determine disputes meaningfully, expeditiously and in accordance with its statutory mandate and responsibility. The purposes of the law of standing include ensuring that decision-makers are not overburdened with marginal cases and can screen out busybodies, and that they have the benefit of hearing contending points of view. As understood and applied by the Agency, these purposes serve to prioritize complaints brought by those actually or potentially affected by policies or tariffs complained of.

27. This promotes access to justice before the Agency, it does not detract from it.

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[15] *Roncarelli v Duplessis*, [1959] SCR 121 at 140, per Rand J.
[16] *Lukács v Canada (Transportation Agency)*, 2016 FCA 220 ("Appeal Decision") at para 20, [Appellant's Record, Tab 5, p 27].

28. In this respect, it is worth emphasizing that the Agency's view of standing is broader than that applied by civil courts, consistent with its wide authority, its dual function as both an adjudicator and a regulator, and its responsibilities to protect the fundamental right of persons with disabilities to an accessible transportation system and to provide consumer protection to air travelers. Applying that approach, the Agency hears and determines air travel complaints brought not only by those who allege they have been affected by the policy or tariff complained of, but also by those who allege that they could be so affected.

29. In determining whether to hear a particular complaint under its formal dispute resolution system, the Agency reviews the complaint and assesses whether it should expend its time and resources inquiring into it. The Agency has decided that this assessment will include an inquiry into the standing of the complainant, as it defines that concept in the context of its administrative roles and responsibilities. This analysis allows it to better ensure that its dispute resolution process and the resources it devotes to it are used to hear complaints brought by members of the traveling public who have been or are potentially affected by the matter complained of and in which appropriate and relevant issues, factual context and arguments are raised.

30. The Agency's approach to its gatekeeping function in the context of its air travel complaints scheme is reasonable, and it advances the broad policy objectives it has been mandated to pursue, including providing access to justice to air travellers in Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of September, 2017.

Carlos P. Martins
Counsel for the Appellant

Andrew W. MacDonald
Counsel for the Appellant

PART II – TABLE OF AUTHORITIES

AT PARA.

Jurisprudence

Legislation/Regulations/Rules