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)

FACTUM OF DELTA AIR LINES INC., APPELLANT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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A. Overview

1. The central issue in this appeal is whether the Canadian Transportation Agency (the "Agency") has the authority to decline to hear an air travel complaint through its formal adjudicative process on the basis of lack of standing.

2. In *Dunsmuir*[1] and many decisions since, this Court has confirmed that deference is owed to an administrative tribunal's interpretation and application of its home statutory scheme. In *VIA Rail*, which preceded *Dunsmuir* and related specifically to the authority of the Agency, it was held that reviewing courts should "refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority."[2] The Agency is an "expert and specialized body"[3] that has been entrusted with "extensive authority to govern its own process" and "[c]onsiderable deference is owed to procedural rulings made by a tribunal with the authority to control its own process"[4].

3. In its decision, the Agency determined it is within its authority to apply the law of standing and, exercising its discretion using that analysis, decided that the respondent, Gábor Lukács ("Lukács"), had neither private interest nor public interest standing to bring his complaint against Delta Air Lines Inc. ("Delta"). It dismissed Lukács's complaint on that basis.

4. In the decision under appeal, the Federal Court of Appeal ("FCA") purported to apply the deferential reasonableness standard of review to the Agency's decision. In reality, it showed no deference at all to the Agency's expertise, authority to control its own process, and exercise of discretion. The FCA set aside the Agency's decision, holding that, having regard to the wording, purpose and intent of the Agency's home statute, the general law of standing may not be applied by an administrative tribunal such as the Agency.

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[1] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 ("*Dunsmuir*").
[2] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650 ("*VIA Rail*") at para 89.
[3] *Ibid* at para 8.
[4] *Ibid* at paras 230-231.

5. The FCA did not pay respectful attention to the Agency's reasons or the reasons that could be offered in support of its decision to determine whether that decision was reasonable. Instead, it engaged in its own analysis of the meaning of the Agency's home statutory scheme – and imposed its own view of the Agency's role, purpose and priorities. This approach to judicial review was flawed and contrary to the FCA's own jurisprudence. Compounding this error in approach, the FCA committed numerous errors of interpretation, law and logic in its *de novo* analysis. Its decision demonstrates why deference should be accorded to administrative tribunals by reviewing courts.

6. There is nothing in the statutory scheme to suggest that the Agency may not apply the law of standing in the context of its air travel complaints scheme. The FCA therefore incorrectly set aside the Agency's dismissal of Lukács's complaint. Further, in basing its decision on the Agency's public duty to enforce its statutory scheme, the court below exceeded its jurisdiction in improperly interfering with how the Agency carries out its public duties and functions.

B. Statement of Facts

i. Relevant provisions of the *Canada Transportation Act*

7. The Agency's home statute, the *Canada Transportation Act* (the "Act"),[5] is highly specialized regulatory legislation with a strong policy focus. 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.[6]

8. First established by Parliament as the Board of Railway Commissioners for Canada in 1904, the Agency is Canada's oldest independent expert tribunal and regulatory body.[7] Today, it has a broad mandate in respect of transportation matters under the legislative authority of Parliament, including air transportation. Section 5 of the Act sets out the National Transportation Policy, which, before setting out somewhat more detailed direction, begins:

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[5] *Canada Transportation Act*, SC 1996, c.10 (the "Act").
[6] *VIA Rail*, *supra* at para 98.
[7] *The Railway Act*, 1903, 3 Edw. VII, c. 58, s. 8 [Book of Authorities, Tab 6].

> **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 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…[8]

9. 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, more recently, consumer transportation-related disputes, including accessibility-related issues for persons with disabilities.[9]

10. 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.

11. Part III governs the regulation of railway transportation. Part V, "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.[10]

12. Under the Act, the Agency has been granted broad discretionary powers to carry out its regulatory and adjudicative functions; many of the details of how it is to carry out these functions have been left to its determination.

13. For example, the Agency itself has been granted powers to make regulations on numerous matters,[11] subject to the approval by the Governor in Council.[12]

14. Under Part I, s. 25 grants the Agency "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 exercise of its jurisdiction."

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[8] The Act, s. 5.
[9] *Lukács v Canada (Transportation Agency)*, 2014 FCA 76 at paras 50-52.
[10] *VIA Rail*, *supra* at para 117.
[11] See eg. ss. 86, 86.1, 92(3), 128, 170(1), 177 of the Act.
[12] The Act, s. 36.

15. In addition, it has broad rule-making powers, including respecting "the manner of and procedures for dealing with matters and business before the Agency."[13] Under this power, it has established court-like rules that govern its adjudicative, dispute resolution proceedings.[14]

16. 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."

17. Section 27 provides that, on an application made to it, the Agency may grant the whole or part of the application or "may make any order or grant any further or other relief that to the Agency seems just and proper."

18. The Agency may review, rescind or vary its decisions and orders, or re-hear applications, in appropriate circumstances;[15] its decisions and orders may be made orders of the Federal Court or of any superior court;[16] and it may enforce a decision or order by its own action before or after it is made an order of a court.[17]

19. Section 37 of the Act grants the Agency a wide discretionary power to inquire into, hear and determine complaints relating to matters within its jurisdiction:

> 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]

20. Part II of the Act begins with certain defined terms at s. 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."

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[13] The Act, s. 17(b).
[14] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (the "Rules").
[15] The Act, s. 32.
[16] The Act, s. 33(1).
[17] The Act, s. 33(4).

21. Part II governs licences for domestic service, for scheduled international service and for 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.

22. The Act treats the different classes of licence separately: specific provisions that govern the fares, tariffs, and terms and conditions of carriage of domestic service licenses do not apply to international service licences, and vice versa.

23. Among these are several provisions that grant the Agency authority to take certain actions in respect of a domestic service licence if it receives complaints relating to particular matters (see ss. 65, 66, 67.1, 67.2). Of particular import in this case is s. 67.2(1):

> **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.

24. Subsection 67.2(1) is not applicable to international service licences, such as the one held by Delta. Despite this, the FCA relied on its interpretation of this provision in setting aside the Agency's decision.

25. Section 85.1 of the Act deals specifically with air travel complaints. That section is permissive. It provides that the Agency "shall review and may attempt to resolve" or mediate a complaint made under any provision of Part II, including s. 67.2(1). If the complaint is not resolved, the complainant may request the Agency to deal with the complaint in accordance with the provision(s) in Part II under which it has been made.[18]

ii. Relevant provisions of the *Air Transportation Regulations*

26. Like the Act, the *Air Transportation Regulations*[19] (the "ATR") also treat different classes of licence separately.

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[18] The Act, s. 85.1(3).
[19] *Air Transportation Regulations*, SOR/88-58 (the "ATR")

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

28. Section 2.1 defines "toll" for the purposes of the ATR as meaning, "any fare, rate or charge established by an air carrier in respect of the shipment, transportation, care, handling or delivery of passengers or goods or of any service that is incidental to those services."

29. Particularly relevant to this case, s. 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.

30. Section 113 provides that the Agency "may", without any qualifying language (i.e. a complaint is not required for the Agency to act), suspend any international tariff or portion of an international tariff that appears not to conform with certain provisions of Division II, including s. 111, or disallow those that do not conform with those provisions. It may also establish and substitute another tariff for one it disallows.

31. In this sense, the combination of ss. 111(2) and 113 of the ATR provide a similar, though not identical, authority to the Agency in the international sphere to that granted by s. 67.2(1) of the Act in the domestic sphere.

iii. The Agency's decision that Lukács lacked standing

32. Lukács is a mathematician by education and profession. He has filed numerous complaints with 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/or against the Agency. He has

challenged not only the Agency's decisions, but the policies and procedures the Agency has instituted in order to make them.[20]

33. 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.

34. In August 2014, Lukács filed a brief written complaint with the Agency alleging that Delta's practices relating to the transportation of "large (obese) persons" are discriminatory and contrary to s. 111(2) of the ATR. No mention was made of s. 67.2(1) of the Act. The complaint was based entirely on a short email sent by a Delta customer care representative to a passenger known only as "Omer".[21] In the email, 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".[22]

35. Specifically, Lukács complained that the following alleged practices are discriminatory, contrary to the ATR and inconsistent with the findings of the Agency in a prior decision concerning the accommodation of passengers with disabilities flying on domestic service flights:

> 1. in certain cases, [Delta] 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] requires large (obese) passengers to purchase additional seats to avoid the risk of being denied transportation.

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[20] See eg. *Lukács v Canada (Transportation Agency)*, 2014 FCA 76, *supra* and *Lukács v Canada (Transport, Infrastructure and Communities)*, 2015 FCA 200.

[21] No other information about "Omer" was provided in the complaint, including whether he or his flight had anything to do with Canada.

[22] Complaint of Dr. Gábor Lukács to the Agency dated August 24, 2014, [Appellant's Record, Tab 7, pp 37-38].

36. The Agency issued a Preliminary Decision stating that it was unclear 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.[23]

37. 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.

38. The Agency implicitly decided that it had the authority to determine whether to proceed with Lukács's complaint by applying the law of standing. In its reasons, it cited this Court's articulation of the basic rationale for applying the law of standing: to guard against becoming overburdened with marginal or redundant cases, to screen out complaints from "busybodies", and to ensure that the contending views of those "most directly affected" are considered by the decision-maker.[24] It then held that: (a) Lukács did not qualify for direct or private interest standing; and (b) granting public interest standing was not appropriate.

39. In particular, the Agency held that Lukács was unable to show that the allegedly discriminatory practice could apply to him because he was not able to provide evidence that he qualified as a "large person".

40. Before the Agency, Lukács argued that he should be allowed to make use of the production and interrogatory mechanisms available under the Rules to seek evidence as to the precise meaning of "large person".[25] In its decision the Agency referred to a previous ruling, also involving a complaint brought by Lukács, in which it had held that "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." The Agency

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[23] Agency Decision No. LET-C-A-63-2014 dated September 5, 2014 (the "Preliminary Decision") [Appellant's Record, Tab 1, p 1].

[24] 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.

[25] Agency Decision, *ibid* at para 61 [Appellant's Record, Tab 2, p 13].

held that "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.'"[26]

iv. The Federal Court of Appeal's decision

41. Lukács was granted leave to appeal the Agency Decision.[27] 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.[28]

42. The FCA defined the issues on the appeal before it 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?

43. The FCA made its determination on the basis of the first issue alone. It held that the Agency had erred in applying the law of standing to Lukács's complaint, distinguishing between courts and administrative bodies. 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.[29] He 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."[30]

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[26] *Ibid* at paras 62-63, [Appellant's Record, Tab 2, p 13].
[27] Order of the Federal Court of Appeal, dated February 12, 2015 [Appellant's Record, Tab 3, p 16].
[28] *Lukács v Canada (Transportation Agency)*, 2016 FCA 220 ("Appeal Decision") at para 8, [Appellant's Record, Tab 5, p 22].
[29] *Ibid* at para 18 [Appellant's Record, Tab 5, pp 26-27].
[30] *Ibid* at para 19 [Appellant's Record, Tab 5, p 27].

44. In its reasons, the FCA briefly reviewed the caselaw that stands for the proposition that administrative tribunals may impose court-like procedures, but are not required to do so,[31] noting that the imposition of stricter procedures on tribunals has been met with criticism.[32] In its conclusion, the FCA turned this principle on its head, holding that the Agency's adoption and application of the "judicial" law of standing was unreasonable and constituted a reviewable error.

v. The Agency's decision in *Lukács v Porter Airlines Inc.*

45. On April 22, 2016, three days before the hearing of the appeal before the FCA in the within matter, the Agency issued a decision in which it held that Lukács should not be granted private interest, "statutory" or public interest standing in a complaint he had brought against Porter Airlines Inc.[33] His complaint was dismissed on those, as well as other, grounds.

46. The Porter Decision stemmed from a complaint invoking provisions in both the Act and the ATR and related to both domestic and international service. The Agency engaged in a more robust statutory analysis in that decision than it did in the decision in issue here. It held, in part:

a. the application of the law of standing to the Agency's complaints proceedings achieves three key objectives: ensuring that (1) scarce resources are economized; (2) "the most urgent cases (those that actually affect people, as opposed to theoretical cases)" are heard quickly and efficiently; and (3) the best evidence is before the decision maker (para 19);
b. unlike in previous cases in which Lukács had implicitly been granted standing by the Agency, there was "no potential" that he would "ever be affected" by the alleged contravention (para 23);
c. section 37 of the Act does not grant "universal standing", as contended by Lukács – rather, it is discretionary and permits the Agency to decide not to hear a complaint, including for lack of standing (para 34);

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[31] *Ibid* at para 20-22 [Appellant's Record, Tab 5, pp 27-29].
[32] *Ibid* at para 21 [Appellant's Record, Tab 5, p 28].
[33] *Lukács v Porter Airlines Inc.*, Agency Decision No. 121-C-A-2016, dated April 22, 2016 (the "Porter Decision").

d. through the Act, Parliament intended that the Agency pursue the public policy goals set out in the National Transportation Policy at s. 5 while also achieving the "practical goals underlying the creation of all administrative tribunals: expeditiousness, efficiency, and effectiveness" (para 32);
e. Lukács's interpretation is inconsistent with and would undermine this purpose in that it would risk "unduly burdening the Agency with frivolous or duplicative cases brought by those without sufficient interest to bring them" (para 32);
f. the use of "any person" in certain provisions of the Act (in this case, s. 67.1) does not create "universal standing" and instead should be read to mean "any person who has standing under the common law relating to standing", citing a decision of the Court of Appeal for Ontario[34] (para 38);
g. section 113.1 of the ATR (which is similar in construction and purpose to s. 113) is a grant of remedial power, makes no mention of "complaints", and does not create any right to standing or to bring an application before the Agency (paras 41-43); and
h. where they are silent on the issue – i.e. where they do not specifically create a right to have a complaint heard – the common law of standing applies to provisions of the Act and the ATR (para 43).

PART II – QUESTIONS IN ISSUE

Issue 1: Was the FCA correct in finding that the Agency may not apply the law of standing in the context of its air travel complaints scheme?

Issue 2: Was the Agency's decision not to hear Lukács's complaint on the basis that he lacked standing reasonable?

[34] *Galganov v Russell (Township)*, 2012 ONCA 409, leave to appeal to SCC refused, [2012] SCCA No 369 ("*Galganov*").

PART III – STATEMENT OF ARGUMENT

Issue 1: Was the FCA correct in finding that the Agency may not apply the law of standing in the context of its air travel complaints scheme?

A. The Purpose and Application of the Law of Standing

47. The law of standing governs who has a right to be heard in adjudicative proceedings.

48. In *Downtown Eastside*, Cromwell J. explained the rationale of the law of standing, as it has been developed and applied by courts in Canada:

> The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations 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.[35]

49. In that case, it was confirmed that courts should take a flexible, discretionary approach to relaxing the traditional limitations on standing in public law cases. They should exercise their discretion to grant or refuse public interest standing through a "purposive and flexible approach" and "in a way that serves the underlying purposes of the law of standing."[36]

50. Among the concerns justifying limitations on standing that have been identified in the jurisprudence are those relating to the allocation of scarce resources and the potential for so-called "busybodies" to sap them. If, through the relaxation of standing rules, courts were to "become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits" this could have important consequences for "the effective operation of the court system as a whole."[37] The effective screening out of "mere busybodies" is, in part, a recognition that those "with a personal stake in the outcome of a case should get priority in the allocation of judicial resources."[38]

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[35] *Downtown Eastside*, *supra* at para 1, citing *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 ("*Finlay*") at 631.
[36] *Downtown Eastside*, *ibid* at para 3.
[37] *Ibid* at para 26.
[38] *Ibid* at para 27.

51. The three factors to be considered when determining whether to grant public interest standing are: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. This Court has determined that granting discretionary public interest standing may be appropriate in cases seeking to challenge the constitutionality of legislation or the statutory authority for administrative action.[39]

B. Standard of Review: The Agency is to be Accorded Considerable Deference

52. In *Alliance Pipeline*, Fish J. summarized the *Dunsmuir* standard of review framework as follows:

> [26] Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'"; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*". On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity"; (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues.[40]

53. In *Alberta Teachers'*, a majority of this Court held that "[w]hen considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness."[41]

54. The Agency is responsible for interpreting its own legislation, including what its statutory responsibility includes.[42] In *VIA Rail*, this Court articulated the relationship between the Agency and the Federal Court of Appeal in the following way:

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[39] *Ibid* at para 32 citing *Finlay*, *supra*.
[40] *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 at para 26 (citations omitted).
[41] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 ("*Alberta Teachers'*") at paras 30, 34 and 39. See also eg. *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 ("*McLean*") at paras 22, 23, 40; *Mouvement laïque Québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 at para 46.
[42] *VIA Rail*, *supra* at para 100.

> 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.[43]

55. The reasonableness standard recognizes that administrative tribunals and other administrative decision-makers are given "a margin of appreciation within the range of acceptable and rational solutions."[44] The range of acceptable and rational solutions depends on the context of the decision under review and all relevant factors and is a "flexible deferential standard that varies with the context and the nature of the impugned administrative act."[45]

56. In *Catalyst Paper*, this Court outlined some of the factors that a reviewing court should consider in determining what lies within the range of possible reasonable outcomes in the context of a challenge to a municipal bylaw. In that case, it was concluded that the court must consider the degree of discretion given to the decision-maker and the legislative context in which its powers are given.[46]

57. In *Delios*, the FCA described reasonableness review as entailing a series of steps designed to ensure that the reviewing court focuses its effort on actually examining the reasonableness of the administrative decision under review. This is meant to guard against the court making findings of its own, then comparing the administrative body's decision to those and "finding any inconsistency to be unreasonable."[47] In *Delios*, the FCA held:

> … we begin by identifying the precise issue that was before the administrative decision-maker, noting any legislative methodologies or authorizing provisions that must be followed. To the extent the administrator interpreted those methodologies or authorizing provisions, the reasonableness of those interpretations also falls to be considered. Then we proceed to the core of reasonableness review. Bearing in mind the margin of appreciation that the administrator must be given – a margin that can be narrow, moderate or wide according to the circumstances – we examine the administrator's

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[43] *Ibid* at para 243.
[44] *Dunsmuir*, *supra* at para 47.
[45] *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 ("*Catalyst Paper*") at paras 17-18 & 23.
[46] *Ibid* at paras 18-25.
[47] *Delios v Canada (Attorney General)*, 2015 FCA 117 ("*Delios*") at para 28.

> decision in light of the evidentiary record and the law, to examine whether the decision is acceptable and defensible on the facts and the law.[48]

58. Administrative decision-makers are presumed to be masters of their own procedure, so long as they comply with the rules of fairness.[49] Considerable deference is owed to procedural decisions of administrative tribunals.[50] The question of who may participate in a tribunal's decision-making process is one that is governed by the applicable statute. Often, statutes provide that only persons who are "directly affected" by a decision have any participation rights. Where the statutory scheme does not define the parties with precision, however, the determination of who may participate in a particular administrative proceeding is left to the discretion of the tribunal, subject to appropriate review by the courts.[51]

59. As discussed in more detail below, the Act grants the Agency the power to hear and determine complaints on certain matters within its jurisdiction. It does not define or articulate how or when that power must be exercised. The statutory scheme is almost completely silent as to how a complaint regarding a licensed air carrier is to be processed. The Act does not define in any way when such a complaint will or should be heard on its merits or who may bring a complaint. The design, administration and functioning of an air travel complaints scheme has been left entirely to the Agency's discretion.

60. 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."[52]

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[48] *Ibid* at para 26.
[49] *Prassad v Canada (Minister of Employment & Immigration)*, [1989] 1 SCR 560 at 568-569; *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 685. See also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*") at para 27.
[50] *VIA Rail*, *supra* at paras 230-231.
[51] Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham, ON: LexisNexis Canada, 2011) at 27 [Book of Authorities, Tab 7].
[52] Appeal Decision, *supra* at para 15, [Appellant's Record, Tab 5, pp 24-25].

61. On that standard, the FCA 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 failed to adopt that lone interpretation.[53]

C. The Agency Has Been Granted Wide Discretion to Carry Out and Administer Its Regulatory, Enforcement and Quasi-Judicial Functions

62. In its reasons, the Agency did not engage in a detailed analysis of its statutory scheme or articulate at length why it has the statutory authority to refuse to hear a complaint on the basis of lack of standing. Instead, it implicitly decided that it does have this authority under the Act and, on the basis of that authority, and exercising its discretion in application of the law of standing, dismissed Lukács's complaint against Delta.

63. The fact that the Agency did not include a comprehensive analysis of its authority in its reasons does not mean that the FCA was free to interfere. The FCA was required to give respectful attention to the reasons of the Agency, or to the reasons that could be offered in support of its decision.[54] On the appeal, the court below was required to defer to the Agency's implicit decision that it may refuse to hear and determine a complaint where the complainant is unable to show that he has standing to bring it.

64. In its decision, the Agency was clearly cognizant of the main concerns underlying the law of standing, including those relating to the effective use of resources and the disadvantages of determining rights in the absence of those with the most at stake.[55] In addition, as noted above, three days before the hearing of the appeal in this case, the Agency issued another decision involving the standing of Lukács in which it expanded on its reasoning on the law of standing.[56] The FCA did not refer to this decision in its reasons.

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[53] *McLean*, *supra* at para 38.

[54] *Alberta Teachers'*, *supra* at paras 54-56.

[55] Agency Decision, *supra* at paras 52-57 [Appellant's Record, Tab 2, pp 11-12]. The Agency also declined to hear a complaint for lack of standing in *ATU Local 279 v OC Transpo*, Agency Decision No. 431-AT-MV-2008.

[56] See para 46 above.

65. Despite paying lip service to the limited nature of its role, the FCA 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 correctness review, not reasonableness review.[57]

66. Having taken this improper analytical approach, the FCA 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 authority and mandate. In doing so, the court below made critical errors in interpreting the Act and the ATR that underscore the importance of according deference to administrative tribunals.

i. The Agency has a permissive, discretionary power to hear complaints concerning air transportation

67. In effect, the Appeal Decision holds that the statutory scheme imposes a duty on the Agency to hear Lukács's complaints whether or not he is affected by the matter complained of and without regard to the factors considered in the public interest standing analysis. Especially given that the Agency does not share this view, one would expect to find a clear indication in the statute that this was Parliament's intention.

68. However, there is no provision in the statutory scheme that requires the Agency to hear every complaint it receives or that prohibits the Agency's application of the law of standing to help it determine whether or not to hear a complaint. Neither the Act nor the ATR dictates with any specificity when or how the Agency must deal with consumer complaints about air carriers' tariffs at all. While the Agency has received and processed consumer complaints regarding air carrier licensees for many years, Parliament has largely taken a hands-off approach to the design of the Agency's consumer complaints scheme.

69. There are only two provisions in the Act that relate to the Agency's powers and/or obligations in respect of complaints it receives about air carriers: ss. 37 and 85.1.

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[57] *Delios*, *supra* at para 28.

70. Section 85.1 is the only provision that relates to how the Agency is to process an air travel complaint. While it requires the Agency to "review" a complaint, it does not go so far as to require a hearing of its merits. In that regard, it is permissive.

71. In particular, s. 85.1(1) provides that the Agency "shall review and may attempt to resolve the complaint". The provision does not oblige the Agency to attempt to resolve every complaint it receives; whether an attempt is made is left to the Agency's discretion.

72. 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." Again, it is left to the discretion of the Agency as to whether or not it "deals with" any given complaint.

73. The provision governing the Agency's authority to "deal with", or formally inquire into, hear and determine, a complaint is s. 37. In combination, ss. 85.1 and 37 reflect the two-level complaint scheme the Agency uses to process complaints regarding air transportation. Section 85.1 relates to the Agency's informal resolution process, while s. 37 relates to its authority to undertake a more formal, quasi-judicial adjudication of complaints under the Rules it has designed for that purpose.

74. Section 37 is found in Part I of the Act and applies to all areas of the Agency's regulatory authority, not just air transportation. It provides for a general, entirely permissive power to inquire into, hear and determine complaints concerning things or acts within the Agency's authority to prohibit or require to be done.

75. Under s. 37, the Agency may choose, in its discretion, to inquire into, hear and/or determine a complaint on condition that it relates to something that is prohibited or required to be done under a provision of any federal legislation that is administered by the Agency. Thus, because s. 111(2) of the ATR prohibits an international service licensee from having "unjustly discriminatory" terms or conditions and s. 113 empowers the Agency to take action in respect of such terms or conditions, s. 37 of the Act empowers it to inquire into, hear and determine any complaint along these lines. The same is true under s. 67.2(1), which prohibits a domestic service

licensee from having "unreasonable or unduly discriminatory" terms or conditions and provides that the Agency may take action in respect of such terms or conditions.[58]

76. As held in the Porter Decision, s. 37 does not require the Agency to hear complaints; it is discretionary.[59] Neither does it prohibit the application of the law of standing to screen out complaints if the Agency thinks it appropriate in the circumstances.

ii. Where Parliament intends to require administrative bodies, including the Agency, to deal with or hear complaints, it says so

77. Parliament's use of the expression "shall" is to be construed as imperative, while the expression "may" is to be construed as permissive.[60] As seen above, under s. 37, the Agency "may" hear complaints on a wide variety of matters other parts of the legislative scheme empower it to administer. Under s. 85.1, while it "shall" review complaints brought under provisions of Part II, it "may" attempt to resolve them and may be requested to "deal with" them under those provisions.

78. Section 85.1 was amended in 2007.[61] The contrast between the current provision and its predecessor, which was enacted in 2000,[62] further supports the idea that the Agency has wide control over when and how it deals with air travel complaints.

79. Under the former provision, Parliament created a dedicated "Air Travel Complaints Commissioner". Unlike the current scheme, s. 85.1(3) provided that the Commissioner "shall

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[58] In *Canadian National Railway Co v Brocklehurst*, [2001] 2 FCR 141 (FCA), it was determined that the Agency had no jurisdiction to hear noise complaints made in respect of a railway company because no provision of the Act conferred any jurisdiction on the Agency to administer such matters. In response, Parliament amended the Act by adding ss. 95.1-95.4.

[59] Porter Decision, *supra* at para 34.

[60] *Interpretation Act*, RSC 1985, c. I-21, s 11.

[61] *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 [Book of Authorities, Tab 5].

[62] *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 ("2000 Amendment Act"), s. 7.1 [Book of Authorities, Tab 4]

review and attempt to resolve every complaint filed under subsection (2)". The dedicated Commissioner was created at the time of the acquisition of Canadian Airlines by Air Canada. Parliament was of the view that this required a dedicated Agency official to monitor, attempt to resolve and report on consumer complaints in the industry.[63]

80. By 2007, Parliament had determined that the Commissioner was no longer necessary and it was abolished.[64] In amending s. 85.1, Parliament removed any legislated positive duty to attempt to resolve every complaint received. Instead of providing that the Agency "shall" attempt to resolve all complaints, as the Commissioner had to do, Parliament deliberately limited the Agency's duty to "reviewing" complaints brought under provisions of Part II of the Act. Whether it attempts to resolve a given complaint or proceeds further with it has been left by the legislator to the Agency's judgment and discretion.

81. Parliament has imposed positive duties on the Agency in other parts of the Act where that was its intention. For example, s. 116, under Part III, obliges the Agency to investigate and determine complaints brought against railway companies relating to their service obligations:

> **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.[65]

82. Under s. 116.3, on request of the Minister, the Agency "must inquire into" and report on whether a company named by the Minister is complying with ss. 116.2(1) or (4).[66]

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[63] Legislative Summary of Bill C-11: Transportation Amendment Act prepared by David Johansen and Allison Padova, Library of Parliament, dated May 26, 2006, revised September 27, 2007 re Clause 25.
[64] *Ibid*.
[65] The Act, s 116(1).
[66] The Act, s 116.3.

83. The use of different words in the Act 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. Similarly, the *Canada Marine Act*, aspects of which are the responsibility of the Agency, imposes obligations in respect of complaints received by the Agency through the use of the word "shall". In both of ss. 52 and 94, Parliament has legislated that when complaints of unjust discrimination in certain fees are filed with it, the Agency "shall consider the complaint without delay and report its findings".[67]

85. A useful contrast can be also drawn between the permissive scheme governing the Agency's statutory authority to hear complaints in respect of air transportation and the legislative scheme governing other federal agencies, such as the Commissioner of Official Languages.

86. Under the *Official Languages Act* ("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:

> **58(1)** Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission…[68]

87. Unlike ss. 37 or 85.1 of the Act, 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.

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

> **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.

89. 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 its subject matter, to bring a complaint to

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[67] *Canada Marine Act*, SC 1998, c.10, ss 52 and 94.
[68] *Official Languages Act*, RSC 1985, c.31 (4th Supp), s. 58(1).

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.

90. While the Commissioner may exercise her right to refuse or cease to investigate a complaint, Parliament has specifically legislated the circumstances under which that discretion may be exercised, including where the subject matter of the complaint is trivial, or the complaint is frivolous.[69] Where Parliament intends to limit an administrative body's ability to resort to the law of standing in determining whether to hear a complaint on matters within its jurisdiction, it is explicit in doing so.

91. Other acts are also explicit in setting out who is entitled to bring a complaint and what must be done with it once it is filed. Like the OLA, the *Canadian Human Rights Act* ("CHRA") allows 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.[70]

92. Under s. 41, the Commission "shall deal with" a 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.[71]

93. The Act governing the Agency is quite different. It does not explicitly state that a person without an interest in the matter 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

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[69] *Ibid*, s. 58(4).
[70] *Canadian Human Rights Act*, RSC 1985, c. H-6, s 40.
[71] *Ibid*, s 41.

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.[72]

iii. The FCA based its decision on a flawed interpretation of provisions of the Act that had no application to Lukács's complaint

94. As discussed above, the only provision that relates to the Agency's authority to hear and determine complaints about air carriers is s. 37. Again, that provision applies widely to the Agency's authority to require or prohibit acts in all areas of its jurisdiction. In addition, it is broadly worded and permissive in its language. Having regard to s. 37, the FCA acknowledged that there is "no question" 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."[73]

95. Despite recognizing as obvious the fact that the expert Agency has a discretionary gatekeeping function, the FCA refused to accept that it was reasonable for the Agency to apply the law of standing – an archetypal gatekeeping tool – in exercise of that function.

96. Justice de Montigny explicitly rejected the contention that the permissive nature of s. 37 is consistent with a "power to refuse to inquire into, hear and decide complaints lodged by complainants who do not have standing to bring forward the complaint."[74] In the court's view, the application of the law of standing by the Agency ignored "not only the wording of the Act but also its purpose and intent."[75]

97. The court below began its statutory analysis of the Agency's home statute by observing that it is significant that the Act distinguishes between "applications" and "complaints."

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[72] Another example of legislation that is more specific than the Act is s. 55.2 of the *National Energy Board Act*, RSC 1985, c. N-7, under which the NEB "shall" consider representations by any person it considers to be "directly affected" by the application to be decided and "may consider" those of any person it considers to have relevant information or expertise.

[73] Appeal Decision, *supra* at para 16 [Appellant's Record, Tab 5, p 26].

[74] *Ibid* at para 17 [Appellant's Record, Tab 5, p 26].

[75] *Ibid* at para 19 [Appellant's Record, Tab 5, p 27].

According to the Appeal Decision, the former "is used" in Part III, which governs railway transportation, and the latter is "mainly used" in Part II – Air Transportation. In addition, the FCA held that it is "particularly telling" that while Part III "usually" specifies the party entitled to bring an application, Part II "almost always" allows "any person" to bring a complaint.[76]

98. The apparent point of this analysis was in support of an assertion that the Agency-made Rules applicable to adjudicative or dispute proceedings only apply to railway transportation "applications" and do not apply to air transportation "complaints".[77] Justice de Montigny noted that the Rules "are generally based on an adversarial model, with some variations." He also took particular note of Rules 21 and 29, under which intervener status may be granted to a person the Agency is satisfied has "a substantial and direct interest" in the proceeding in question.[78]

99. An obvious indication that the reviewing court did not pay "respectful attention" to the reasons under review is the fact that it apparently missed the Agency's specific reference to the Rules at paragraph 63 of those reasons. The FCA did not cite any authority in support of its contention that the Rules only apply to railway transportation "applications" and it is not clear on what basis it determined that they do not apply to complaints against air carriers.

100. In fact, all air travel complaints that the Agency formally hears are subject to the Agency's court-like Rules. The Rules apply to "dispute proceedings"[79] which are defined as "any contested matter that is commenced by application to the Agency."[80] 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."[81] Therefore, Lukács's "complaint" is an "application" under the Rules.

101. In any event, if there were as much significance as the FCA sees in the use of "application" as opposed to "complaint" in the Act, one would expect that the expert Agency

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[76] *Ibid* at paras 24-25 [Appellant's Record, Tab 5, pp 29-30].
[77] *Ibid* at paras 24-25[Appellant's Record, Tab 5, pp 29-30].
[78] *Ibid* at para 24 [Appellant's Record, Tab 5, pp 29-30].
[79] The Rules, r 2.
[80] *Ibid*, r 1.
[81] *Ibid*.

would know this. A cursory review of the Act shows that the FCA's reasoning is plainly incorrect. Neither term is defined in the Act, both have broad meanings, and 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"[82]. Sometimes it provides that a complaint, not an application, may be brought by a specific party.[83] Sometimes it provides that an application may be brought by a specific party under Part II, rather than Part III.[84] Sometimes it provides that a complaint may be brought by "any person" under Part III, rather than Part II.[85]

102. 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".

103. 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 to weigh in only where it receives a complaint from a person who is actually affected by the noise complained of.

104. The construction of s. 95.3, in its use of "complaint…by any person", is similar to that of the "complaints" provisions in Part II of the Act on which the FCA put such emphasis.

105. In particular, de Montigny JA relied on the fact that s. 67.2(1) uses the "broad phrase 'any person'".[86] For ease of reference, 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.

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[82] See the Act, ss. 22, 91(1).
[83] See ss. 120.1(1), 144(6) and (7).
[84] See s. 64(2).
[85] See ss. 95.3(1), 116(1).
[86] Appeal Decision, *supra* at para 25 [Appellant's Record, Tab 5, p 30].

106. 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".

107. 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 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 alleged Delta practice he complained of.

108. The emphasis put on this provision by the FCA reveals its lack of understanding of the legislative scheme and of the Agency's authority, powers and role. Most fundamentally, s. 67.2(1) has no application whatsoever to Delta or any complaint lodged against it. Subsection 67.2(1) only applies to holders of domestic licences. Delta does not hold a domestic licence. No reliance should have been put on this provision at all.

109. The FCA's interpretation of s. 67.2(1) is also wrong. The clause on which the FCA put so much emphasis does not entitle a complainant to have a complaint heard, it actually restricts the authority of the Agency to act. This is clear on a plain reading of the provision and provisions like it. It is made clearer when these provisions are read in the context of the larger statutory scheme and with reference to earlier versions of the Act.

110. First, s. 67.2(1) and similar provisions of the Act do not confer any sort of right on "any person" to file a complaint or, more to the point, to have their complaints heard by the Agency. Instead, these provisions confer powers on the Agency to take prescribed actions in respect of prescribed matters within its jurisdiction. However, these discretionary regulatory and enforcement powers may only be exercised if the Agency has received a complaint about the matters set out in the applicable provision. In its construction, s. 67.2(1) is restrictive in that it does not allow the exercise of statutory power unless it receives a written complaint. The phrase "any person" means only that the conferral of the prescribed discretionary power does not depend on the identity of the person making the complaint.

111. This meaning is perhaps clearer in the French version s 67.2(1) of the Act:

> **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.

112. In French, there is no equivalent to the phrase "any person", normally rendered as "toute personne", at all. The point is that the existence of "a complaint/une plainte" is a condition precedent to the Agency's authority to do what s. 67.2(1) empowers it to do.

113. As part of its analysis, the FCA found the contrast between "any person" in s. 67.1 and 67.2(1) and "any person adversely affected" in s. 67.1(b) significant.[87] While ss. 67.1(a) and (c) authorize the Agency to order a carrier to take corrective measures the Agency deems appropriate if it has received a complaint "by any person", s. 67.1(b) specifies that it may only order the carrier to compensate "any person adversely affected" – in French, "toute personne lésée" – by the carrier's contravention of its tariff.

114. 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 carrier's application of a fare not set out in its tariff, the FCA's leap to concluding that this must mean that Parliament intended that the Agency may not decline to hear a complaint brought by "any person" in the world is without merit. The most that can be concluded from the difference identified by the reviewing court is that Parliament wanted to be certain that the Agency does not order carriers to pay money to persons who have not suffered any loss.

115. Second, the provisions containing the phrase "complaint …by any person" must be read in the larger context of the statutory scheme. When provisions like s. 67.2(1) are compared with similar provisions in the ATR, the fact that "complaint …by any person" is a restriction on the Agency's authority to act rather than a conferral of rights on individuals is apparent. Under s. 67.2(1) the Agency may only suspend or disallow the terms and conditions of a licensee's domestic service if it has received a complaint in writing. In contrast, s. 113 of the ATR does not contain any qualifying language similar to that found in s. 67.2(1) of the Act. It grants the

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[87] Appeal Decision, *supra* at para 25 [Appellant's Record, Tab 5, p 30].

Agency the power to suspend or disallow the terms and conditions of a licensee's international service on its own motion whether or not it has received a complaint.

116. The Agency's home statutory scheme grants it wider discretion and authority over the enforcement of the statutory requirements imposed on international air carriage than of those applicable to domestic carriage. In the Porter Decision, the Agency made this very point when comparing s. 113.1 of the ATR, which is similar to s. 113, with s. 67.1 of the Act, which is similar to s. 67.2(1).[88] The FCA appears to have been oblivious to the distinction that exists between the Agency's authority and powers over domestic and international tariffs.[89]

117. Third, the legislative evolution of the provisions in Part II of the Act further confirms the fact that the phrase "complaint … by any person" is meant only to specify the conditions under which the Agency's power may be exercised and nothing more. When initially enacted in 2000, s. 67.1, but not s. 67.2(1), began "If, on complaint in writing by any person or of its own motion…" ("ou de sa propre initiative").[90] At that time, Parliament thought it necessary to give a wider authority to the Agency to take action where carriers were not applying their domestic tariffs as written than in respect of terms and conditions of carriage that may have been unreasonable or unduly discriminatory. With the 2007 amendments to the Act, Parliament restricted the Agency's authority under s. 67.1.

118. The Agency alluded only briefly to the use of the phrase "any person" in the statutory scheme, holding that "notwithstanding" those words, it would not "determine rights in the absence of those with the most at stake."[91] However, in the subsequent Porter Decision, which related in part to Lukács's complaint about a domestic licence tariff under a similar provision of

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[88] Porter Decision, *supra* at paras 40-43.

[89] For example, at paragraphs 12-13 of the Appeal Decision, *supra* [Appellant's Record, Tab 5, pp 23-24], 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. Another example is found in paragraph 26 of the Appeal Decision, discussed below.

[90] 2000 Amendment Act, *supra*, s. 6 [Book of Authorities, Tab 4]

[91] Agency Decision, *supra* at para 52 [Appellant's Record, Tab 2, p 11].

the Act to s. 67.2(1), the Agency interpreted the phrase directly. The Agency's considered interpretation in that case is directly contrary to the one offered by the FCA below.

119. In part, in that case the Agency relied on the Court of Appeal for Ontario's interpretation of "any person" in *Galganov*. In *Galganov* it was held 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."[92] 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 the ATR.[93]

120. The FCA's statutory interpretation was flawed. Properly understood, there is nothing in the specific wording of the statutory scheme that fetters the Agency's discretion to decide whether or not to formally hear a given complaint. The Agency has put forward a reasonable interpretation of its statutory scheme and authority, under which it has the power to decline to hear complaints for lack of standing. In the Agency's expert view, it may exercise its discretion to screen out complaints in the manner it did in this case and in the Porter Decision. There was no basis for finding this interpretation unreasonable.

iv. The FCA exceeded its jurisdiction in interfering with how the Agency carries out its functions

121. The FCA's reasoning appears to have been driven not so much by specific words in the Act but by the broader notion that the application of the law of standing is contrary to the Act's "purpose and intent."[94] The court held that the early dismissal of complaints on the basis of standing is not consistent with the Agency's role in pursuing the goals of the National Transportation Policy and its duty to enforce the Act and the ATR. In Delta's submission, in prohibiting the Agency from applying the law of standing on this basis, the FCA overstepped its jurisdiction by interfering with how the Agency carries out its regulatory and enforcement functions.

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[92] Porter Decision, *supra* at paras 37-38, citing para 15 of *Galganov*, *supra*.
[93] Porter Decision, *ibid* at para 43.
[94] Appeal Decision, *supra* at para 19 [Appellant's Record, Tab 5, p 27].

The Agency's public duty to enforce the Act and the ATR

122. In the FCA, Lukács acknowledged that he is not directly or personally affected by the alleged discriminatory practice about which he complained.[95] The Appeal Decision is not based on the existence of any duty the Agency owes specifically to Lukács by virtue of his having been affected by anything Delta has allegedly done or might do. Instead, it is based on the Agency's public duty to enforce the Act and the ATR. This is seen in several passages in the decision under appeal.

123. At paragraph 18 of the Appeal Decision, de Montigny JA outlined the rationale and rules applied by courts to determine whether a person has standing before commenting that, in his view, it is "far from clear that these strict rules developed in the judicial context…should be applied with the same rigour by an administrative agency mandated to act in the public interest." In holding that the application of the law of standing by the Agency ignored the "purpose and intent" of the Act, the FCA emphasized the Agency's duty to "ensure that the policies pursued by the legislator are carried out."[96]

124. After concluding its flawed interpretation of the Agency's home statutory scheme, de Montigny JA turned to the allegation made in Lukács's complaint, stating:

> [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 the 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

[95] *Ibid* at para 8 [Appellant's Record, Tab 5, p 22].
[96] *Ibid* at para 19 [Appellant's Record, Tab 5, p 27].

> discriminatory and then to substitute the disallowed tariff or tariff rule with another one established by the Agency itself (*Regulations*, s. 113).[97]
>
> [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. (emphasis added)

125. The existence of the Agency's legal duty to enforce the Act and the ATR is obviously not in issue. What the FCA has jurisdiction to do in respect of that duty very much is.

The Agency's public duty to enforce the Act is not judicially enforceable

126. The rule of law requires that delegated executive powers are exercised by administrative bodies in accordance with the statutory powers conferred upon them and in a manner that is reasonable, and fair to those affected by a given exercise of power. Judicial interference with an administrative decision is warranted where the tribunal has exceeded its statutory authority or violated the duty of procedural fairness in making it. However, in general, an administrative body's duty to enforce a legislative scheme, on its own, does not provide a basis for a court to interfere with how that duty is carried out. For example, in *Northern Lights Fitness Products*, the Federal Court held:

> The Respondents agree that they are under a duty to enforce the relevant legislation, but argue that the decision as to how and when this will occur is purely a matter of policy. I

[97] This passage is another example of the FCA's lack of comprehension of the Act and the ATR. Section 67.1 not only has no application to international service, it does not apply to unreasonable/unduly discriminatory terms or conditions of carriage in the domestic sphere. The Agency may only order compensation (under s. 67.1(b), not (a), as indicated by the court) and corrective measures (under s. 67.1(c), not (b) as indicated by the court) where, on complaint, it finds that the carrier has applied a fare, rate, charge or term or condition not set out in its domestic service tariffs. In addition, having erroneously stated that Lukács's complaint was brought under s. 67.2(1) (and having erroneously applied and interpreted it), the court cited s. 113 of the ATR as the source of the Agency's power to disallow a tariff and substitute a new one even though s. 67.2(1) provides the Agency with a similar power.

> agree with their position. The nature of the duty owed is to *enforce* the law, and only complete inaction in this respect may give rise to a judicial remedy. An important distinction must be drawn between requiring a government body to take some enforcement action, which the Court can do, and determining the manner of enforcement, which the Court cannot do.
>
> …
>
> Upon reviewing the evidence presented, I must conclude that the Respondents have not been completely inactive with regard to the sport nutrition products market. Though it appears that relatively few resources have been dedicated to this sector, some "enforcement", mostly in the form of compliance, has taken place. While I am sympathetic with the Applicant's charge that the measures taken were not coercive enough, the effectiveness of these actions are matters beyond the jurisdiction of this Court. The choice of measures is discretionary in nature, within the bounds of reasonableness, and the exercise of this discretion is more appropriately questioned in the political forum where the Respondents are answerable.[98]

127. Similarly, in *Distribution Canada*, Strayer J held that "a distinction has generally been drawn in the jurisprudence between a court requiring a public officer to enforce the law in cases where he has failed completely to do so, on the one hand, and a court telling a public officer how to enforce the law on the other. The former is possible but the latter is not."[99]

128. In upholding this decision, the FCA noted that "[o]nly one who is charged with such public duty can determine how to utilize his resources. This is not a case where the Minister has turned his back on his duties, or where negligence or bad faith has been demonstrated."[100]

129. In this context, it is important to revisit the Agency's two roles as quasi-judicial tribunal and economic regulator. The air travel complaints scheme has been designed by the Agency to include a formal adjudicative or court-like process through which disputes between consumers and licensed carriers may be heard and determined. As we have seen, there is nothing in the

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[98] *Northern Lights Fitness Products Inc v Canada (Minister of National Health & Welfare)* (1994), 55 CPR (3d) 39, 1994 CarswellNat 482 (FCTD) at paras 17 & 23 (emphasis in the original) [Book of Authorities, Tab 3].
[99] *Distribution Canada Inc v Minister of National Revenue* (1990), 46 Admin LR 34, 1990 CarswellNat 727 (FCTD) at para 11 [Book of Authorities, Tab 1].
[100] *Distribution Canada Inc v Minister of National Revenue*, [1993] 2 FCR 26 (FCA) at para 30.

legislative scheme that dictates how or when this formal process must be engaged. Whether a complaint is referred to this process is up to the Agency.

130. Of course, the Agency, like any administrative body, is subject to the duty of procedural fairness. The particular context in which a complaint is filed may require that it be heard and that the complainant be given a right to file evidence and submissions at a hearing. The factors outlined in *Baker* and other cases govern that determination. Procedural fairness has not been raised at any point during this proceeding.

131. Lukács, like anyone, may file complaints and request that the Agency inquire into and enforce the requirements and prohibitions imposed on carriers by the Act and the ATR. He is not entitled, however, to use the courts to force the Agency to do so unless he can show that the Agency owes him that duty. Given that there is no specific statutory duty to do so, unless the duty of procedural fairness requires it in particular circumstances, Lukács may not use the courts to force the Agency to formally hear his complaints.

132. This is made clear if one imagines that, instead of issuing the Preliminary Decision requesting submissions on and then holding a hearing in respect of the question of Lukács's standing, the Agency had simply refused to proceed with his complaint against Delta. In such a case, Lukács would have to seek an order in *mandamus* to force the Agency to hear his complaint. As it happens, the very same panel of the FCA whose decision is in issue here considered just this set of facts in a judicial review application hearing two days after the hearing of the appeal in this case. The decision in that case confirms that courts have no jurisdiction to order the Agency to hear a complaint in the absence of a statutory duty to do so.[101]

133. The application for judicial review stemmed from Lukács's complaint alleging that Expedia Inc. was not in compliance with Part V.1 of the ATR, which governs the advertising of prices for air services. On receipt of the complaint, the Agency decided not to commence a formal pleadings process under its Rules because it viewed the enforcement of the air pricing

[101] *Lukács v Canada (Transportation Agency)*, 2016 FCA 202 ("*Lukács v CTA*").

advertising provisions as falling within its role as an economic regulator. Lukács was informed of this decision by email and in a formal letter from the Chair and CEO of the Agency.[102]

134. In its decision in that case, the FCA first held that deference was owed to the Agency's interpretation of its home statute and "the question of the Agency's statutory duty" to hear and determine Lukács's complaint.[103] The parties and the court agreed that the eight requirements set out in *Apotex*[104] must be satisfied before an order of *mandamus* is to be issued.

1) there must be a legal duty to act;
2) the duty must be owed to the applicant;
3) there must be a clear right to performance of that duty;
4) where the duty sought to be enforced is discretionary, certain additional principles apply;
5) no adequate remedy is available to the applicant;
6) the order sought will have some practical value or effect;
7) the Court finds no equitable bar to the relief sought; and
8) on a balance of convenience an order of *mandamus* should be issued.[105]

135. The FCA held that Lukács failed to meet the very first requirement, thus ending the inquiry: "the Agency has no statutory duty to inquire into complaints that fall within Part V.1 of the ATR."[106] Important to the court's reasoning was that s. 37 of the Act "is permissive and imposes no obligation to hear every complaint. If Parliament had intended to create an obligation to assess every complaint contemplated, it would have used the term 'shall' instead of 'may'."[107]

136. Delta submits that the FCA's conclusion in that case was correct. However, contrary to the comments of Scott JA, the same conclusion would hold even in the case of complaints brought under so-called "complaint provisions" unless the applicant could prove that the duty of procedural fairness required the Agency to hear and determine the complaint under the *Baker* factors. That is, because no provision anywhere in the Act or the ATR imposes a statutory obligation on the Agency to "hear" a complaint, the only possible source of any such duty is the duty of procedural fairness.

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[102] *Ibid* at para 6.
[103] *Ibid* at para 15.
[104] *Apotex Inc v Canada (Attorney General)*, [1994] 1 FCR 742, aff'd [1994] 3 SCR 1100.
[105] *Lukács v CTA*, *supra* at para 29.
[106] *Ibid* at para 30.
[107] *Ibid* at para 32.

137. Scott JA based his finding that the Agency did not owe a legal duty on the fact that the ATR does not contain "complaint provisions" in Part V.1 "similar to s. 135.4 for unjust or unreasonable tariffs (Part V)". However, as in the case of ss. 65, 66, 67.1 and 67.2(1) of the Act, s. 135.4 does not impose a statutory obligation on the Agency.[108] It merely includes language that specifies the conditions in which the Agency has been empowered to act: "Where the Agency, on receiving a complaint or of its own motion, determines that…it may…"

138. The fact that Lukács may not use the courts to force the Agency to inquire into and hear particular complaints or enforce particular provisions of the Act and the ATR does not mean that he has no recourse when the Agency declines to pursue the priorities he has identified. The other two branches of government remain available to him. Thus, he may lobby for legislative amendments to the Act or he may pressure the executive branch of government to direct the Agency. Section 40 of the Act provides that the Governor-in-Council may vary or rescind any decision or order of the Agency and make another that is binding on it. Section 43 provides that the Governor-in-Council may issue policy directions which the Agency is required to follow.

The only source of any duty to hear an air travel complaint is the duty of procedural fairness

139. While the Agency may exercise its discretion under s. 37 to hold a hearing on receipt of any complaint, it is not required by the Act itself to do so. Similarly, the Agency may exercise its discretion, as master of its process (and because there are no relevant statutory limitations), to

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[108] Delta disputes that the mere inclusion of the word "complaint" in a provision results in a duty to hear it. That said, even on a proper understanding of the statutory scheme, by the panel's own logic in *Lukács v CTA* 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. By contrast, neither of the provisions granting the Agency regulatory and enforcement power under Division II of Part V, which applies to international service tariffs like Delta's (ss. 113 and 113.1), contains the word "complaint". (In an *obiter* comment relating to the Agency's decision in *Witvoet v First Air*, Agency Decision No. 378-C-A-2000, Scott JA appears to have assumed that s. 135.4 in Division III applies to provisions found in Division I of Part V. This reading of the legislative scheme was incorrect.)

accord party status – or standing – to the person who filed the complaint (or anyone else), it is not required by the Act itself to do so.

140. Therefore, in the context of its particular statutory scheme, only where procedural fairness requires it will a judicially enforceable duty to hear a complaint lie.

141. This conclusion makes sense in the context of the broad powers Parliament has granted to the Agency so that it may fulfill its many, complex statutory responsibilities in pursuit of the National Transportation Policy goals set out at s. 5 of the Act. This delegation of power necessarily includes discretion as to how the Agency allocates its resources, how it prioritizes its various duties to the public, and how it carries out its numerous and varied public functions.

142. In fulfilling its responsibilities to the public, the Agency has often implicitly granted standing to complainants who may not qualify for standing to bring a claim in a court of law. As someone who frequently files complaints against carriers before the Agency, Lukács has often taken advantage of this grant of status and the rights to present evidence, engage the documentary production and interrogatory mechanisms available under the Agency's Rules, make submissions, and seek leave to appeal that go with it.

143. But the Agency's past discretionary decisions to grant standing to complainants who may not have qualified for it in a court do not require it to hear every person who files a complaint.

144. In this case, on receipt of Lukács's complaint, the Agency instituted a preliminary process under its dispute proceedings Rules to determine whether it would hear that complaint on its merits. It made a similar choice in the case of the complaint that Lukács filed which led to the Porter Decision. In the decision under review and, more explicitly in the Porter Decision, the Agency held that it was authorized to consider the broader implications granting "universal standing" might have on its ability to carry out its duties to the public.

145. Having regard to its statutory scheme and responsibilities, the Agency's choice to hear submissions on and apply the law of standing in this case and in the Porter Decision should be understood as a means of determining whether it had a duty to hear Lukács's complaint on its merits – or whether inquiring into its subject matter constituted a good use of its time and

resources. If Lukács had been able to show that he was directly affected by or had a sufficient interest in the matter in issue, and the context was such that the duty of procedural fairness required it, the Agency would have been obligated to hold a hearing as a quasi-judicial tribunal mandated to resolve certain kinds of disputes.

146. However, where a contested hearing is not required by the duty of procedural fairness, the Agency should be understood to be carrying out its functions as an economic regulator, which include its public duty to enforce the Act and the ATR. The duty of fairness applies to all administrative decisions that affect the rights, privileges or interests of an individual.[109] Participatory rights ensure that "those affected by the decision" have an opportunity to put forward their views and evidence for consideration.[110] In the absence of a legal duty, neither Lukács nor the FCA may interfere with how the Agency carries out those regulatory enforcement functions, including by requiring it to inquire into particular matters, to hold a hearing or to grant standing to any person who brings a complaint.

The Agency's decision that it has the authority to apply the law of standing was reasonable

147. In *Lukács v CTA*,[111] the Agency explicitly determined that the matter Lukács had complained about was one that fell under its economic regulator role and chose not to engage its dispute proceedings process at all. In that case, the FCA properly recognized that this was within its authority to do and not something with which the court could interfere.

148. The broad powers and wide discretion the Agency has been granted under the Act mean that the same determination could have been made in this case, with the same result. That said, it was certainly within the Agency's authority to choose to apply the law of standing in the context of Lukács's complaint and the FCA was incorrect to hold that it could not.

149. Courts may deny a party standing to avoid opening floodgates to unnecessary proceedings, screen out the busybody, ration scarce resources, and/or avoid a risk of hearing

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[109] *Baker*, *supra* at para 20.
[110] *Ibid* at para 22.
[111] *Lukács v CTA*, *supra*.

inadequately presented cases.[112] The Agency has numerous responsibilities beyond those associated with resolving air travel complaints. It 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.

150. The FCA's decision is directly contrary to the permissive legislative scheme Parliament enacted and the powers and discretion it has entrusted to the Agency. The Agency's statutory mandate is complex and involves the balancing of many different interests, factors and considerations in its overall goal of ensuring an efficient national transportation system in Canada. The FCA 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 FCA'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".

151. In context, the application of the law of standing to Lukács's complaint against Delta was an exercise of discretionary authority the Agency was entitled to undertake.

Issue 2: Was the Agency's decision not to hear Lukács's complaint on the basis that he lacked standing reasonable?

152. The Agency's decision to dismiss Lukács's complaint because he lacked both private interest and public interest standing was reasonable.

153. Lukács conceded at the hearing before the FCA 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."[113]

154. Given the wide discretion and broad powers granted by Parliament to the Agency, Delta does not dispute its authority to apply a version of this Court's public interest standing jurisprudence to determine whether it should hear and determine an air travel complaint brought

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[112] *Galganov*, *supra* at para 15.
[113] Appeal Decision, *supra* at para 8. [Appellant's Record, Tab 5, p 22].

by persons or groups who do not have a direct interest in the matter complained of. In that sense, it is a tool that the Agency may choose to use to determine whether to inquire further into a complaint or to hold a hearing.

155. In this case, the Agency determined that granting public interest standing was not appropriate because Lukács's complaint challenged neither the constitutionality of legislation nor the legality of administrative action.[114]

156. Both Lukács and the FCA relied on past decisions of the Agency in which it held that it could hear and determine complaints brought by persons "who wish, on principle, to contest a term or condition of carriage". After quoting the Agency's decision in *Black*[115] and noting its decision in *Krygier*,[116] the FCA held that "these decisions … [stand] for the … 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" to hear a complaint. That may be true, but in concluding from this that the Agency must inquire into the merits of any complaint ignores the crucial difference between a discretionary authority and a statutory obligation.

157. As argued above, these discretionary decisions to hear complaints "on principle" do not require the Agency to hear and determine all complaints about terms and conditions of carriage forevermore. In any event, both in this case and in the Porter Decision the Agency distinguished the facts before it from those in issue in its earlier decisions. Unlike in *Black* and *Krygier*, not only was there no evidence that Lukács had been directly affected by the matter complained of, there was no evidence that he could ever be so affected. In addition, in neither this case nor in the Porter Decision did Lukács present evidence to the Agency that anyone at all had been affected

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[114] Agency Decision, *supra* at para 74 [Appellant's Record, Tab 2, p 15]. In the Porter Decision, the Agency applied the three factors this Court identified in *Downtown Eastside* in holding that Lukács should not be granted public interest standing.

[115] *Black v Air Canada*, Agency Decision No. 746-C-A-2005, dated December 23, 2005 ("*Black*").

[116] *Krygier v. several carriers*, Agency Decision No. LET-C-A-104-2013 ("*Krygier*") [Book of Authorities, Tab 2].

by the matters complained of. The Agency certainly did not fetter its discretion; its decision was reasonable.

158. The Agency acted within its authority in instituting a preliminary hearing to determine whether to formally hear Lukács's complaint, having regard to his level of interest in its subject matter. This was a reasonable exercise of discretion by a regulatory body and tribunal with wide powers over its processes and numerous, complex responsibilities. In the circumstances of this complaint, neither Lukács nor the Federal Court of Appeal have any right to interfere with how the Agency carries out its functions.

PART IV – SUBMISSIONS CONCERNING COSTS

159. Delta does not seek costs and asks that no costs be awarded against it.

PART V – ORDERS SOUGHT

160. The Appellant seeks an Order allowing this appeal and reinstating the decision of the Canadian Transportation Agency.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2017.

Carlos P. Martins
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Andrew W. MacDonald
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

AT PARA.

Jurisprudence

Legislation/Regulations/Rules

Texts / Commentary