Court File No. **A-135-15**

FEDERAL COURT OF APPEAL

B E T W E E N :

DR.GÁBOR LUKÁCS

Appellant

- and -

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, DELTA AIR LINES, INC.

Dated: June 18, 2015

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
33 Yonge Street
Suite 201
Toronto ON M5E 1G4

GERARD A. CHOUEST LSUC#: 21598E
Tel: 416-982-3804
Fax: 416-982-3801

ELLIOT SACCUCCI LSUC#: 63850L
Tel: 416-982-3812
Fax: 416-982-3801

Solicitors for the Respondent, Delta Air Lines, Inc.

TO: **DR.GÁBOR LUKÁCS**

Halifax, NS

Lukacs@AirPassengerRights.ca

Appellant (self-represented)

AND TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Allan Matte
Tel: (819) 994-2226
Fax: (819) 953—9269
Allan.Matte@otc-cta.gc.ca

Lawyer for the Respondent, Canadian Transportation Agency

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OVERVIEW

1. These are the written submissions of Delta Air Lines Inc. ("Delta") respecting the Appellant's appeal of the decision of the Canadian Transportation Agency (the "Agency") dated November 25, 2014 and bearing decision number 425-C-A-2014 (the "Decision").

2. The Appellant's appeal engages the following issues:

   (a) The Agency's decision not to award public interest standing to the Appellant; and

   (b) The Agency's interpretation of its own enabling and closely related statutes and regulations, namely the *Canada Transportation Act*, S.C. 1996, c. 10 (the "Act") and, more relevant to the present appeal, the *Air Transportation Regulations*, SOR/88-58 as amended (the "ATR").

3. Discretionary decisions – including decisions regarding public interest standing - and decisions involving the interpretation of an administrative tribunal's own and closely related statutes attract a standard of review of reasonableness.

4. In order to be reasonable, a decision need only fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

5. It is submitted that the Agency's Decision regarding the Appellant's standing to bring the proposed complaint was correct. In the alternative, it

is submitted that the Decision was reasonable. Finally, it is submitted that no reasonable ground on which the appeal might be granted has been established, and that accordingly the appeal should be dismissed.

Martin v. Canada (Minister of Human Resources Development) (1999), 252 N.R. 141 (F.C.A.).

PART I - STATEMENT OF THE FACTS

A. THE PROCEEDINGS BELOW

6. On August 24, 2014 the Appellant filed a complaint with the Agency alleging that Delta's practice relating to the transportation of large (obese) persons is discriminatory and contrary to subsection 111 of the ATR, a provision of Division II of the ATR.

Complaint of the Appellant to the Agency, Appeal Book, Tab 3, p. 20.

["Complaint of the Appellant"].

7. On September 5, 2014 the Agency issued Decision No. LET-C-A-63-2014, in which the Agency noted that it was not clear whether the Appellant had standing in this matter and invited submissions on that preliminary issue.

Decision No. LET-C-A-63-2014, Appeal Book, Tab 4.

8. On September 19, 2014 the Appellant filed his submissions on standing with the Agency. He argued that:

(a) he was "certainly a 'large person'" and therefore had direct interest standing;

(b) he ought to be granted public interest standing;

(c) in any event, "any person" has standing to pursue a complaint pursuant to s. 111 of the ATR.

Submissions of the Appellant to the Agency on Standing, Appeal Book, Tab 5. ["Submissions of the Appellant on Standing"].

9. On November 25, 2014 the Agency released the Decision**,** which concluded that:

(a) The Appellant did not qualify for direct interest standing in the present case;

(b) The Appellant did not qualify for public interest standing in the present case; and

(c) the Agency's decisions in *Black* and *Krygier* did not assist the Appellant in the present case.

The Decision, Appeal Book, Tab 2.

10. The Appellant appeals only the second and third conclusions reached by the Agency in its Decision.

Memorandum of Fact and Law of the Appellant, para. 19. ["Submissions of the Appellant"].

B. THE STATUTORY SCHEME

11. The Respondent agrees with the points set out in paragraphs 5 through 9 of the Appellant's Memorandum of Fact and Law, with the following exceptions.

(a) The Respondent submits that the references to sections 67, 67.1 and 67.2 of the Act are irrelevant for the following reasons:

i. the complaint before the Agency is based on provisions of Division II of Part V the ATR;

ii. The subject of Part V is Tariffs and Division II addresses tariff rules applicable to a carrier, such as Delta, which provides an international service;

iii. Sections 67, 67.1 and 67.2 are found in Part II of the Act and in particular in that division of the Act which deals with Licences for Domestic Service;

iv. The Appellant does not request any remedy based on provisions of the Act dealing with Licences for Domestic Service and, if he had, the Respondent would have moved to quash any such claim on the basis that the Respondent does not provide a Canadian domestic service, is not licensed to provide such a service and, accordingly, the said provisions of the Act have no application to it.

(b) The Respondent does not adopt the distinction between "collective remedies" and "individual remedies" as set out in paragraph 8 of the Appellant's factum.

PART II - POINTS IN ISSUE

12. The following issues are engaged in the present appeal:

(a) What is the standard of review of the Agency's decision;

(b) Was the Agency's decision regarding s. 111 of the ATR reasonable in view of the facts and the law; and

(c) Was the Agency's decision regarding the awarding of public interest standing reasonable in view of the facts and the law?

PART III - STATEMENT OF ARGUMENTS

A. STANDARD OF REVIEW

13. In administrative law, decisions engaging the exercise of discretion - including decisions on public interest standing - will only be overturned where they are unreasonable.

> *New Brunswick Board of Management v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.), at paras. 51-53. ["*Dunsmuir*"].
>
> *Dr. Q v. College of Physicians and Surgeons British Columbia*, [2003] 1 S.C.R. 226 (S.C.C.), at p. 648.
>
> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 53.
>
> *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] 3 C.N.L.R. 233 (MBCA), at paras. 249-250, 261 reversed on other grounds in [2013] 1 S.C.R. 623.

> *Water Matters Society of Alberta v. Director, Southern Region Operations Division, Alberta Environment and Water* (2012), 53 Admin L.R (5th) (ABQB), at paras. 9-13, 29-30.
>
> *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers v. CEP*, [2013] 2 W.W.R. 602 (SKQB), at paras. 17-27.

14. In order to be reasonable, a decision need only fall within a range of possible, acceptable outcomes which are defensible in light of the facts and the law.

> *Dunsmuir, supra*, at para. 49.

15. When an administrative tribunal is engaged in the interpretation of its "home statute and closely related statutes which require the expertise of the administrative decision maker", the standard of reasonableness applies

> *Dunsmuir, supra*, at para. 128.
>
> *Canadian National Railway Company v. Canadian Transportation Agency*, [2011] 3 F.C.R. 264 (F.C.A.), at paras. 21-33. ["*CNR*"].

16. In coming to the Decision, the Agency considered its home and closely related statutes and its own prior decisions. The Decision is entitled to deference.

17. It is submitted that the Agency was not only reasonable but correct in concluding that in view of the facts and the law, public interest standing should not be awarded in this case, which is not a "public law case" as described by the Supreme Court of Canada in *Finlay*, *Canadian Council*

of Churches, and *Downtown Eastside* and discussed in detail in Part III (c) of this Memorandum.

B. THE AGENCY'S DECISION RESPECTING SECTION 111 OF THE ATR IS REASONABLE

(i) *Jurisdiction & Standing*

18. It is submitted that the fundamental error in the Appellant's argument arises from the failure to distinguish between two questions:

    (a) Does the Agency have jurisdiction to hear a complaint? and

    (b) If it does have jurisdiction, does it have the authority to refuse to hear the complaint on the basis that the complainant lacks standing?

19. The Respondent concedes that the Agency does have jurisdiction to hear the complaint which is the subject matter of this appeal. The Respondent submits that the Agency has the same powers, rights and privileges of a superior court, and may refuse to hear the complaint on the basis that the complainant lacks standing.

20. It is submitted that the cases relied upon by the Appellant stand for the proposition that the absence of a "real and precise factual background" does not deprive the Agency of jurisdiction to hear a complaint. The Respondent concedes this proposition.

    Black v. Air Canada, Decision No. 746-C-A-2005, para. 5.["*Black*"].

21. An important thread which runs throughout the Appellant's submissions is that "the Agency cannot avoid considering and deciding complaints falling within its jurisdiction".

Submissions of the Appellant, paras. 37-38.

22. Assuming, for the sake of the argument only, that s. 67.2 of the Act does apply, that provision does not impose any such obligation. It merely states that *if* any person makes a complaint *and* the Agency makes certain findings respecting that complaint the Agency *may* take certain actions. The Act does not require the Agency to make findings or take action.

Submissions of the Appellant, para. 37.

The Act, s. 67.2.

23. It is submitted that all the Agency decisions referred to by the Appellant can be summarized, in so far as relevant to this Appeal, as follows: the lack of a "real and precise factual background involving the application of terms and conditions" does not oust the Agency's jurisdiction to consider a complaint. None of the decisions relied on by the Appellant require the Agency to consider and decide every case referred to it and, indeed, in the *ATU Local 279 v. O.C. Transpo* case, which is relied upon by the Appellant, the Agency refused to consider a complaint within its jurisdiction because the Agency found that the complainant lacked the appropriate standing to bring the complaint.

ATU Local 279 v. OC Transpo, Decision No. 431-AT-MV-2008, paras. 11-14. ["*ATU Local 279*"].

24. In rejecting the Appellant' submissions on standing, the Agency concluded that the principles outlined in *Black* do not apply to the present case, as the issue in the present case is not whether there is a need for a "real and precise factual background" to lodge a complaint, as was the case in *Black*, but whether the Appellant had legal standing to bring the complaint.

The Decision, Appeal Book, Tab 2, para. 50.

25. The legal issue of "standing" to bring a complaint – as is engaged in this appeal – is not addressed in *Black*. Despite the fact that the word "standing" is mentioned in the line of cases relied upon by the Appellant a reading of those cases as a whole will, it is submitted, confirm that the issue the Agency dealt with is jurisdiction and not standing.

(ii) *Textual and Contextual Analysis*

26. The Agency's power to inquire into a complaint stems from sections 24-37 of the Act, which define the "Powers of the Agency", and specifically section 37, which states that:

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

27. Section 25 of the Act provides the Agency with broad powers to control its own process and jurisdiction. Specifically, s. 25 states that:

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

28. These provisions are permissive, rather than mandatory. The Agency *may* inquire into, hear and determine a complaint within its jurisdiction, and in addressing any such complaint it has the same powers, rights and privileges as are vested in a superior court.

29. As demonstrated in the *ATU Local 279* case upon which the Appellant relies, the "proper" exercise of the Agency's jurisdiction in addressing a proposed complaint requires that it have the power, right and privilege granted to it by section 25 of the Act to refuse to inquire into, hear and decide complaints lodged by complainants who do not have standing to bring forward the complaint.

> *ATU Local 279*, *supra*, at paras. 11-14.
>
> The Act, s. 25.

30. An interpretation of ss. 67.2 of the Act and 111 of the ATR such as proposed by the Appellant would *require* the Agency to inquire into, hear and decide every proposed complaint, regardless of the nature and identity of the complainant, and would render the express wording of sections 25 and 37 of the Act meaningless or pointless. As stated by the Supreme Court of Canada, courts should avoid adopting interpretations that would render any portion of statute meaningless, pointless or redundant.

> *Winters v. Legal Services Society*, [1999] S.C.J. No. 49 (S.C.C.), para. 49. ["*Winters*"].
>
> The Act, ss. 25, 37, 67.2.

The ATR, s. 111.

31. In order for each of ss. 67.2, 37 and 25 of the Act, as well as section 111 of the ATR to exist harmoniously and to be afforded their full and ordinary meaning, the Agency must be understood to have the power, right or privilege to refuse to inquire into, hear and decide complaints from complainants who do not have standing to appropriately bring the complaint.

32. Furthermore, as is stated by the Appellant in his submissions, when parliament uses different words in relation to the same subject, it must be considered intentional and indicative of a change in meaning or of a different meaning.

Submissions of the Appellant, para. 28.

Lukacs v. Canada (Transportation Agency), 2014 FCA 76, paras. 38 and 41.

33. It is submitted that an examination Division IV of the Act, concerning "Rates, Tariffs and Services" in the rail context, and specifically of the wording of s. 116 of the Act, regarding the investigation of complaints, is illustrative of parliament's intention with respect to ss. 67.2 of the Act and 111 of the ATR; s. 116 states:

> **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.

34. Unlike the permissive language used in respect of complaints concerning the carriage of passengers by air, in the rail context parliament has expressly stated that the Agency *shall* conduct an investigation, and *shall* reach a determination.

35. Thus, unlike complaints brought under s. 111 of the ATR and subsection 67.2 of the Act regarding the carriage of passengers by air, the Agency *must* hear complaints under s. 116 of the Act.

36. With respect to the transcript extracts included at paragraph 37 of the Appellant's Memorandum of Fact and Law, the Respondent submits:

(a) the alleged testimony of Ms. Moya Green is not properly before the Court on this Appeal;

(b) the alleged testimony of Ms. Moya Green does not assist in the interpretation of the Bill under discussion or of the legislation which resulted because her interpretation of Bill C-101 is contrary to the express wording of the Bill itself and of the resultant Act; and

(c) the alleged testimony of Ms. Green is contradicted by the Agency's decisions, including its decision in *ATU Local 279.*

Submissions of the Appellant, para. 37.

Bill C-101, *An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a Consequence*, 1st Sess, 35th Parl, 1995, cl 27, 38.

The Act, ss. 27, 37.

37. Accordingly, it is submitted that the Agency's Decision regarding section 111 of the ATR was reasonable in light of the facts and the law, and this ground of appeal ought to be dismissed.

C. PUBLIC INTEREST STANDING

i. *When do Courts have Discretion to Award Public Interest Standing?*

38. The traditional approach to legal standing is to limit standing to persons whose private rights are at stake or who are specially affected by the issue. An exception to the traditional approach arises in "public law cases" where Canadian courts have taken a discretionary approach to "public interest" standing.

> *Attorney General of Canada v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 S.C.R. 524 (S.C.C.), at para. 1. [*"Downtown Eastside"*].

39. Addressing the issue of public interest standing, the Supreme Court of Canada has stated that, "the whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge."

> *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 (S.C.C), at p.252-3, at para. 36 ["*Canadian Council of Churches*"].

40. Historically, and reflecting the court's specific concern for the immunization of legislation, the discretion to afford a litigant public interest standing had only existed in cases involving a challenge to the constitutionality or operative effect of legislation.

> *Finlay v. Canada (Minister of Finance),* [1986] 2 S.C.R. 607 (S.C.C.), at paras. 18, 31-34. ["*Finlay*"].
>
> *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138 (S.C.C.). ["*Thorson*"].
>
> *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265 (S.C.C.). ["*McNeil*"].
>
> *Min. of Justice of Can. v. Borowski*, [1981] 2 S.C.R. 575 (S.C.C.). ["*Borowski*"].

41. In *Finlay*, the Court considered whether the "principles reflected in *Thorson, McNeil* and *Borowski* should be extended by this court" to cases involving a "non-constitutional challenge to the authority for administrative action" and concluded that they should be so extended.

> *Finlay, supra*, at paras. 18, 35-36.

42. In *Canadian Council of Churches,* the Supreme Court of Canada revisited the Court's decision in *Finlay* and noted that: "[i]n that case Le Dain J., speaking for the court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based his conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for "the limits of statutory authority."

> *Canadian Council of Churches, supra*, at para. 33.

43. As a result of the Court's decisions in *Finlay* and the *Canadian Council of Churches*, the scope of a court's discretion to award public interest standing was extended to encompass challenges to the legality of

administrative action as well as the constitutionality and/or operative effect of legislation.

44. In *Downtown Eastside* the Court re-iterated that public interest standing exists to prevent the immunization of public acts from judicial scrutiny, stating, "[i]n determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role courts play in assessing the legality of government action."

Downtown Eastside, *supra*, at para. 23.

45. The Supreme Court of Canada termed this concept "the principle of legality", and stated that:

> [31] The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."
>
> [emphasis is the Court's]

Downtown Eastside, *supra*, at para. 31.

46. Consistent with its rulings in *Finlay* and *Canadian Council of Churches*, the Court once again confirmed in *Downtown Eastside* that public interest

standing exists to prevent the immunization of government acts, and it is submitted that the Court's jurisprudence demonstrates that the discretion to award it does not extend beyond those types of cases; namely, public law cases.

ii. *The Agency's Decision on Public Interest Standing*

47. In his appeal the Appellant takes particular issue with the Agency's conclusion at paragraph 74 of the Decision, which he frames as "the erroneous premise that public interest standing is not available in the present case."

Submissions of the Appellant, para. 18.

48. According to the Appellant, as a result of this "erroneous premise" the Agency "erred in law, misquoted the Supreme Court of Canada, and fettered its discretion to grant public interest standing".

Submissions of the Appellant, paras. 43-44.

49. It is conceded that the phrase, found in paragraph 74, "constitutionality of legislation or to the non-constitutionality of administrative action" is not the most felicitous way of summarizing the scope of public interest standing. However, it is also submitted that a review of the decision as a whole reveals that the Agency applied the correct legal principles and reached the correct result.

50. An appeal is from a decision, not the reasons for it.

> *Canada (Minister of Employment & Immigration) v. Burgon*, [1991] 3 F.C. 44 (F.C.A.), at para. 45.

51. In arguing that the Agency erred in reaching its Decision on public interest standing, and in an effort to demonstrate that public interest standing is "also available in certain proceedings against private parties", the Appellant relies on two authorities; the Federal Courts' 2005 decision in *Thibodeau* and the Agency's own decision in *ATU Local 279*.

> Submissions of the Appellant, paras. 47-56.

52. It is respectfully submitted that neither is of assistance to the Appellant in this appeal.

53. The Appellant submits that the Federal Court's decision in *Thibodeau* stands for the proposition that the discretion to afford public interest standing is engaged in challenges to the "actions and omissions of an 'ordinary company'".

> Submissions of the Appellant, para. 49.

54. In *Thibodeau,* the central issue before the Federal Court was whether Air Canada had breached the unique public interest obligations specifically placed upon it by Part IV of the *Official Languages Act* (OLA), as well as sub-sections 10(2), 10(7) and 10(9) of the *Air Canada Public Participation Act*, (the "ACPPA"). The fact that Air Canada is a former crown corporation and has, according to the Federal Court, "duties

incumbent on federal institutions" pursuant to the OLA"[1] is relevant to this inquiry.

> *Thibodeau v. Air Canada*, [2005] F.C.J. No.1395 (Fed. Ct.), at paras. 40, 43, 46. ["*Thibodeau*"].
>
> *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.). ["OLA"].
>
> *Air Canada Public Participation Act*, R.S.C., 1985, c. 35 (4th Supp.), ss. 10(2), (7), (9). ["ACPPA"].

55. Although the Federal Court in *Thibodeau* referred to Air Canada as an "ordinary company" whose activities are subject to the *Canada Business Corporations Act*, R.S.C., 1985, c-44, the court also expressly recognized the special nature of, and duties incumbent upon, Air Canada by virtue of the ACPPA and the OLA, stating that:

> [43] Subsection 10(9) of the ACPPA, as amended, specifies that Air Canada's duties under subsections 10(2) and (7) are deemed to be the same as the duties of federal institutions under Part IV of the OLA (Communications with and services to the public). By explicitly subjecting Air Canada to the OLA through section 10 of the ACPPA, Parliament has compared Air Canada, for the purpose of this Part of this Act, to a federal institution. That being said, Air Canada has the same duties as those incumbent on federal institutions, namely, to ensure that the services it provides itself or through its subsidiaries are consistent with the OLA.
>
> *Thibodeau*, *supra*, at paras. 27, 43.

56. It is submitted that, with respect to the Federal Court's finding on the availability public interest standing in *Thibodeau*, there are two possibilities:

(a) the case is wrongly decided, or

1 Only Air Canada, originally a Crown Corporation and its subsidiaries, are subject to these quasi-constitutional language obligations, which do not apply to other Canadian carriers or foreign carriers operating in Canada.

(b) Air Canada, an ordinary corporation in other respects, is subject to the same quasi-constitutional "duties as those incumbent on a federal institution" pursuant to the OLA and the ACPPA. By reason of these imposed duties it is an instrument of government policy and a party wishing to challenge its actions in so far as the actions are affected by those duties may be entitled to public interest standing.

57. The Federal Court of Appeal dismissed an appeal from the Federal Court's decision in *Thibodeau*, but did not address the issue of public interest standing.

Air Canada v. Thibodeau, 2007 FCA 115 (CanLII).

58. The Appellant does not argue that Delta has the duties incumbent on a federal institution, nor that it is an instrument of government policy. Therefore, even if *Thibodeau* was correctly decided it is not authority for the proposition that litigation challenging the acts of Delta can rise to the status of public interest litigation.

59. In *ATU Local 279*, the central issue before the Agency was the failure of the Corporation of the City of Ottawa[2] to purchase and install an automated announcement system for bus stops, and the allegation that this failure created an "undue obstacle to the mobility of persons with disabilities" contrary to s. 172 the Act.

2 The Corporation of the City of Ottawa is incorporated pursuant to, and exists as a result of, the provincial City of Ottawa Act, 1999, S.O. 1999, Chapter 14, Sch. E.

ATU Local 279, *supra*.

60. The question before the Agency in *ATU* was whether the municipal government of Ottawa had failed to carry out its legal obligation to provide accessible transportation to residents of Ottawa in breach of a federal statute.

61. Thus, *ATU* is properly understood as a "public law case" engaging "the principle of legality". It involved a challenge to the legality of acts and omissions of a governmental organization.

62. Furthermore, it should be noted that in *ATU Local 279* the Agency refused to exercise its discretion to hear the matter based on the application of ATU Local 279 because it was not satisfied that the complainant had legal standing to bring the application.

ATU Local 279, *supra*, paras. 12-14.

iii. *The Principle of Legality Permeates all of the Appellant's Jurisprudence*

63. The "the principle of legality" is engaged in each of the cases referred to by the Appellant in this appeal as well as his submissions on public interest standing before the Agency, for example:

(a) The *Finlay* decision concerned the legality of payments made by the federal government to a provincial government pursuant to the *Canada Assistance Plan*, R.S.C. 1970, c. C-1;

Finlay, *supra*.

(b) In *Canadian Council of Churches*, the Supreme Court addressed whether amendments made to the *Immigration Act, 1976,* S.C. 1976-77 violated the Charter;

Canadian Council, *supra*.

(c) In *Fraser v. Canada* the Ontario Superior Court considered whether the combined effect of the *Immigration and Refugee Protection Act* and the *Employment Standards Act* on seasonal employees admitted into Canada under the federal government's Seasonal Agricultural Workers Program constituted differential treatment in violation of s. 15 of the Charter; and

Fraser v. Canada (Attorney General), 2005 CanLII 47783 (Ont. S.C.J.).

(d) Finally, in *Downtown Eastside* the Supreme Court of Canada considered "a broad constitutional challenge" to the prostitution provisions of the *Criminal Code,* R.S.C. 1985, c. C-46.

Downtown Eastside, supra, para. 3.

64. None of these cases are of any assistance to the Appellant since his proposed complaint against Delta involves the alleged practices of a private corporation with none of the duties of a "federal institution". The complaint does not involve questions concerning the conformity of government action to the Constitution or statute, and does not engage the "principle of legality".

Downtown Eastside, supra.

Complaint of the Appellant, Appeal Book, Tab 3.

65. The present case is not a "public law case" and the scope of the discretion to award public interest standing does not extend to it.

66. Since the three part test, most recently canvassed in *Downtown Eastside*, pre-supposes that the court is addressing a "public law case", the Agency was reasonable and indeed correct in not applying the three prongs of the test in the present case.

67. It is irrelevant whether or not the Appellant could satisfy the Agency that he raised a serious and justiciable issue; had a genuine interest in the issue; and presented a reasonable and effective means of bringing the issue to court. Application of the test could not, and would not, have granted the Agency discretion to award public interest standing, which simply does not extend to this case.

68. It is submitted that the Agency's Decision is reasonable, and indeed correct. Accordingly this ground of appeal ought to be dismissed.

CONCLUSION

69. It is submitted that the Agency's Decision occupied the range of reasonable outcomes in light of the facts and the law, and was indeed correct, and accordingly the Appellant's appeal ought to be denied on all grounds.

COSTS

70. It is submitted that the Appellant's appeal engages principles of law that are neither new, nor novel, having been recently and thoroughly canvassed by the Supreme Court of Canada, or else previously addressed by the Agency.

71. This appeal engages the Agency's exercise of discretion and its interpretation of its own enabling and closely related statutes, and accordingly Delta should be entitled to its costs of responding to this appeal.

PART IV - ORDER SOUGHT

72. The Responding Party, Delta Air Lines Inc., seeks an Order:

(a) dismissing the appeal;

(b) granting it costs of responding to the appeal, and

(c) granting such further relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of June, 2015

Gerard A. Chouest
Elliot P. Saccucci
Bersenas Jacobsen Chouest
Thomson Blackburn LLP

Lawyers for the Respondent

PART V - LIST OF AUTHORITIES

Legislation

1. *Canada Transportation Act*, S.C. 1996, c. 10, ss. 25, 37, 41, 67, 67.1, 67.2, 116, 116.1

2. *Air Transportation Regulations*, SOR/88-58, ss. 111

3. *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.).

4. *Air Canada Public Participation Act*, R.S.C., 1985, c. 35 (4th Supp.), ss. 10(2), (7), (9). ["ACPPA"].

Jurisprudence

1. *Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141 (F.C.A.).

2. *New Brunswick Board of Management v. Dunsmuir,* [2008] 1 S.C.R. 190 (S.C.C.)

3. *Dr. Q v. College of Physicians and Surgeons British Columbia*, [2003] 1 S.C.R. 226 (S.C.C.).

4. *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 (S.C.C.).

5. *Manitoba Métis Federation Inc. v. Canada (Attorney General),* [2010] 3 C.N.L.R. 233 (MBCA), at paras. 249-250, 261 reversed on other grounds in [2013] 1 S.C.R. 623.

6. *Water Matters Society of Alberta v. Director, Southern Region Operations Division, Alberta Environment and Water* (2012), 53 Admin L.R (5th) (ABQB)

7. *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers v. CEP*, [2013] 2 W.W.R. 602 (SKQB).

8. *Canadian National Railway Company v. Canadian Transportation Agency*, [2011] 3 F.C.R. 264 (F.C.A.)

9. *Black v. Air Canada*, Decision No. 746-C-A-2005

10. *ATU Local 279 v. OC Transpo*, Decision No. 431-AT-MV-2008

11. *Winters v. Legal Services Society,* [1999] S.C.J. No. 49 (S.C.C.).

12. *Lukacs v. Canada (Transportation Agency)*, 2014 FCA 76

13. *Attorney General of Canada v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524 (S.C.C.).

14. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 (S.C.C)

15. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.).

16. *Thorson v. Attorney General of Canada* [1975] 1 S.C.R. 138 (S.C.C.).

17. *Nova Scotia (Board of Censors) v McNeil*, [1976] 2 S.C.R. 265 (S.C.C.).

18. Ministry of Justice of Canada. v. Borowski, [1981] 2 S.C.R. 575 (S.C.C.).

19. Canada (Minister of Employment & Immigration) v. Burgon, [1991] 3 F.C. 44 (F.C.A.)

20. *Thibodeau v. Air Canada*, [2005] F.C.J. No.1395 (Fed. Ct.)

21. *Air Canada v. Thibodeau*, 2007 FCA 115 (CanLII).

Legislative History of the Canada Transportation Act

1. Bill C-101, *An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a Consequence*, 1st Sess, 35th Parl, 1995, cl 27, 38.

Court File No. **A-135-15**

FEDERAL COURT OF APPEAL

B E T W E E N :

DR.GÁBOR LUKÁCS
Moving Party

- and -

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, DELTA AIR LINES, INC.

(Filed this day of June, 2015)

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
33 Yonge Street
Suite 201
Toronto ON M5E 1G4

GERARD A. CHOUEST LSUC#: 21598E
Tel: 416-982-3804
Fax: 416-982-3801

ELLIOT P. SACCUCCI LSUC#: 63850L
Tel: 416-982-3812
Fax: 416-982-3801

Solicitors for the Respondent, Delta Air Lines, Inc