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.

APPLICANT
(Moving Party)

- and -

DR. GÁBOR LUKÁCS

RESPONDENT
(Responding Party)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(DELTA AIR LINES INC., APPLICANT)
(Pursuant to Rule 28 of the Rules of the Supreme Court of Canada)

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

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

Counsel for the Applicant, Delta Air Lines Inc.

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

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

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

Dr. Gábor Lukács

Self-Represented Respondent

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

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

TABLE OF CONTENTS

PAGE

1. Delta files these Reply submissions in response to Lukács's contention that the proposed appeal does not raise an issue of national or public importance and that it is "premature". The Appeal Decision constitutes a "disguised correctness" review: the Federal Court of Appeal claimed it was applying the standard of reasonableness, but actually applied a correctness review. As reasonableness review continues to become the dominant standard of judicial review in Canada, it is important that courts understand how to conduct reviews that appropriately recognize the deference that the standard demands. In that context, the lack of deference showed by the Federal Court of Appeal in this case, especially given the wide discretion granted to the Agency by Parliament, cries out for intervention at this stage by this Court.

A. Guarding against "disguised correctness" reviews

2. The law of judicial review in Canada continues to require clarification from this Court. Much judicial ink has been spilled attempting to articulate how many standards of review there should be, what they should be called, when they should be applied and how they should be conducted. Perhaps the most important, pressing and vexing issue for review courts is how to properly conduct a reasonableness review of an administrative body's decision.

3. The proposed appeal would allow this Court to provide much-needed guidance on this issue and, in particular, to help courts ensure that they do not fall into the trap of engaging in a "disguised correctness" review when applying the reasonableness standard.[1] From a practical perspective, establishing how courts should – and should not – approach a reasonableness review is an issue of significant importance to Canadian administrative law.

4. Earlier this year, in *Wilson v Atomic Energy of Canada Ltd*, Abella J. expressed an interest in attempting to clarify or simplify the standard of review framework that has developed since *Dunsmuir*. She noted that "[t]he most obvious and frequently proposed reform of the current system is a single reviewing standard of reasonableness" and suggested that adoption of a single standard may be one way of moving toward a more coherent and consistent framework.[2]

---

[1] David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013), 42 *Adv. Q.* 1 at pp 76-81 cited by *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 27 ["*Wilson*"].

[2] *Wilson*, *supra* at para 28ff.

5. While a single standard has not yet been adopted,[3] recent jurisprudence makes clear that there is a presumption of reasonableness.[4] "Reasonableness has become the dominant standard of review of administrative action in Canada" and it is this standard that courts are bound to apply in most cases.[5] Even if it remains the case that courts must determine whether reasonableness or correctness applies in a given application or appeal, the jurisprudential trend is such that far more often than not reasonableness will be the standard that must be applied.[6]

6. In this case, in overturning the decision of the Canadian Transportation Agency, the Federal Court of Appeal determined that the appropriate standard of review was reasonableness. Which standard applies is not in doubt here, especially in light of this Court's decision in *Edmonton (City)* last month. However, how the reasonableness review should be conducted is very much in issue in this case, as it has been in many others across the country.

7. The Court of Appeal paid lip service to its obligation to conduct a reasonableness review, but the way it approached its task smacks of a correctness review. While it is important to the Agency and to those under its regulatory authority that the Court of Appeal's flawed reasoning is overturned, the proposed appeal would not merely be a case of error correction as the respondent contends. Rather, it would provide this Court with the opportunity to set a framework or guidelines for the conduct of a reasonableness review that properly strikes the balance at the heart of the law of judicial review: that between legislative supremacy and the rule of law.

8. The presumption of deference respects the legislative choice to delegate decision making to a tribunal. This presumption holds if the issue under review "involves the interpretation by an administrative body of its own statute."[7] As this Court has held on several occasions,

---

[3] See *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 20 ["*Edmonton (City)*"].

[4] The majority in *Edmonton (City)* overturned the Alberta Court of Appeal in holding that reasonableness applies to a court's review of an administrative decision where the review is conducted as a result of a statutory right of appeal on a question of law.

[5] Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *Supreme Court Law Review* (2d) 233. See also John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *Canadian Journal of Administrative Law & Practice* 101.

[6] Paul Daly has argued that reasonableness review of decisions taken under the administrative body's home statutes constitutes a "black hole" that "threatens to swallow whole" the categories of correctness review currently recognized in the case law. See Daly, *supra.*

[7] *Edmonton (City)*, *supra* at para 22.

> those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime.[8]

Courts must ensure that the rule of law is respected, but they must also show appropriate deference to the decisions and decision-making processes of administrative bodies, including administrative tribunals like the Agency.

9. In this case, on its own motion, the Agency initiated a screening proceeding to determine whether it should hear Lukács's complaint on its merits. After hearing full submissions from the parties, it decided that it should not. This decision was made by two of the Agency's five members, including its then-Chair and CEO, who analyzed the Agency's own jurisprudence and the applicable provisions of the governing legislation and regulations. The Agency is a specialized body that has been entrusted with numerous complex responsibilities and broad discretion by Parliament. Its decisions and procedures must be accorded meaningful respect by the reviewing court.

10. 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."[9] 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."[10]

11. 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.[11]

12. In his Response, Lukács points out that the Federal Court of Appeal acknowledged that the Agency retains a "gatekeeping function" and has been granted "the discretion to screen

---

[8] *Doré v Barreau du Québec*, 2012 SCC 12 at para 46, quoting *Dunsmuir*, *supra* at para 58.
[9] *Dunsmuir*, *supra* at para 47.
[10] *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 17-18 & 23 ["*Catalyst Paper*"].
[11] *Catalyst Paper*, *supra* at paras 18-25.

complaints" at the outset and this is true: these words were certainly included in the Appeal Decision below. But in its actual approach to judicially reviewing the Agency Decision screening out Lukács's complaint, the Court of Appeal showed no respect for or deference to the Agency's exercise of that discretion or performance of that gatekeeping function. It ignored the principle of legislative supremacy.

13. The many obvious analytical and interpretative errors in the Court of Appeal's decision – and its basic misunderstanding of several aspects of the Agency's home statute – should cause this Court concern in this context. They make plain why deference is owed to administrative tribunals' navigation within and interpretation of their own legislative and regulatory regimes. It cannot be enough for a court to recognize that the standard to be applied is reasonableness; that type of review must actually be carried out.

14. The question then becomes how reviewing courts should conduct judicial reviews so as to ensure that they approach the task with the requisite deference. The proposed appeal would allow this Court to begin to set out an analytical framework that reviewing courts should follow that will guard against the proliferation of "disguised correctness" reviews in Canadian administrative law.

15. Some members of the Federal Court of Appeal have made suggestions of this sort. In *Delios v Canada (Attorney General)*, the court 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 rather than simply making findings of its own and then comparing the administrative body's decision to those and "finding any inconsistency to be unreasonable."[12] In *Delios*, the Federal Court of Appeal 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

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

> 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.[13]

16. The Appeal Decision is an example of what the Federal Court of Appeal warned against a year earlier in *Delios*. The current lack of consistency in the conduct of reasonableness reviews by courts is an issue of national and public importance. It matters that the Court of Appeal erred in its approach and in its reasoning in this particular case for all of the reasons articulated in Delta's Memorandum, but it matters much more that errors of this kind are certain to continue in the absence of a coherent analytical framework that is applicable to reasonableness reviews.

B. The proposed appeal is not premature

17. Parliament did not intend to limit the scope of this Court's jurisdiction to hear appeals such that it could only hear appeals from final orders. As this Court has held, the power given to it under the *Supreme Court Act* to grant leave to appeal is "unlimited with respect to both interlocutory and final judgments."[14]

18. The Federal Court of Appeal's lack of deference and respect for the wide grant of discretion accorded to the Agency by Parliament in combination with the clear errors in interpretation and analysis it made in deciding to overturn the Agency Decision cry out for intervention by this Court at this stage.

19. The effect of the Appeal Decision goes well beyond this case in severely circumscribing the Agency's ability to control its own process even in the face of an overtly permissive statutory regime. Leaving it to stand will only add to the confusion present in the law of judicial review in Canada. Granting leave to appeal at this stage provides an opportunity both to drive home the importance of deference to administrative bodies' decisions and processes and to provide guidance for courts as to how to properly conduct a reasonableness review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2016.

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

---

[13] *Delios*, *supra* at para 26.
[14] *Bar of the Province of Québec v Ste-Marie*, [1977] 2 SCR 414 at 420-421.

PART VI – TABLE OF AUTHORITIES

AT PARA.

Case

Article

PART VII – STATUTES, REGULATIONS, RULES, ETC.

Supreme Court Act, RSC 1985, c S-26	*Loi sur la cour suprême*, LRC 1985, c S-26
Appeals with leave of Supreme Court **40 (1)** Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.	**Appel avec l'autorisation de la Cour** **40 (1)** Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.