

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

BETWEEN:

**DELTA AIR LINES INC.**

**APPELLANT**  
(Respondent)

- and -

**DR. GÁBOR LUKÁCS**

**RESPONDENT**  
(Appellant)

- and -

**BENJAMIN ZARNETT**

**AMICUS CURIAE**

- and -

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

**INTERVENERS**

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**FACTUM OF THE INTERVENER, CANADIAN TRANSPORTATION AGENCY**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Allan Matte  
Counsel  
Legal Services Directorate  
Canadian Transportation Agency  
15 Eddy Street, 19th Floor  
Gatineau, Quebec  
K1A 0N9

Tel: 819-994-2226  
Fax: 819-953-9269

[Allan.Matte@otc-cta.gc.ca](mailto:Allan.Matte@otc-cta.gc.ca)

**Counsel for the Intervener,  
Canadian Transportation Agency**

Mante Molepo  
Counsel  
Legal Services Directorate  
Canadian Transportation Agency  
15 Eddy Street, 19th Floor  
Gatineau, Quebec  
K1A 0N9

Tel: 819-994-4283  
Fax: 819-953-9269

[Mante.Molepo@otc-cta.gc.ca](mailto:Mante.Molepo@otc-cta.gc.ca)

**Ottawa Agent for Counsel for the Intervener,  
Canadian Transportation Agency**

ORIGINAL TO: **THE REGISTRAR OF THE SUPREME COURT OF CANADA**

AND TO:

**BERENAS JACOBSEN CHOUET  
THOMSON BLACKBURN LLP**  
33 Yonge Street, Suite 201  
Toronto, ON M5E 1G4

**Carlos P. Martins**

Tel: 416-982-3800  
Fax: 416-982-3801  
Email: [cmartins@lexcanada.com](mailto:cmartins@lexcanada.com)

**Counsel for the Appellant**

AND TO:

**Dr. Gábor Lukács**

Email: [lukacs@airpassengerrights.ca](mailto:lukacs@airpassengerrights.ca)

**Self-Represented Respondent**

AND TO:

**GOODMANS LLP**  
Bay Adelaide Centre – West Tower  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

**Benjamin Zarnett**

Tel: 416-597-4204  
Fax: 416-979-1234  
Email: [bzarnett@goodmans.ca](mailto:bzarnett@goodmans.ca)

**Court appointed Amicus Curiae**

**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](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent for Counsel for the Appellant**

**GOLDBLATT PARTNERS LLP**  
30 Metcalfe Street  
Suite 500  
Ottawa, ON K1P 5L4

**Colleen Bauman**

Tel: 613-482-2463  
Fax: 613-235-3041  
Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

**Ottawa Agent for the Court appointed  
Amicus Curiae**

AND TO:

**DLA PIPER (CANADA) LLP**  
Park Place  
666 Burrard Street, Suite 2800  
Vancouver, BC V6C 2Z7

**David T. Neave**

Tel: 604-643-2961  
Fax: 604-605-3751  
Email: [david.neave@dlapiper.com](mailto:david.neave@dlapiper.com)

**Counsel for the Intervener,  
International Air Transportation  
Association**

AND TO:

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

**Heather Mackay**

Tel: 416-326-4129  
Fax: 416-326-4181  
Email: [heather.mackay@ontario.ca](mailto:heather.mackay@ontario.ca)

**Counsel for the Intervener,  
Attorney General for Ontario**

AND TO:

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

**Byron Williams**

Tel: 204-985-8540  
Fax: 204-985-8544  
Email: [bywil@pilc.mb.ca](mailto:bywil@pilc.mb.ca)

**Counsel for the Intervener,  
Council of Canadians with Disabilities**

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

**Colin S. Baxter**

Tel: 613-288-0149  
Fax: 613-688-0271  
Email: [cbaxter@conway.pro](mailto:cbaxter@conway.pro)

**Ottawa Agent for Counsel for the  
Intervener, International Air  
Transportation Association**

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

**Robert E. Houston, Q.C.**

Tel: 613-236-9665  
Fax: 613-235-4430  
Email: [rhouston@burkerobertson.com](mailto:rhouston@burkerobertson.com)

**Ottawa Agent for Counsel for the  
Intervener, Attorney General for Ontario**

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

**David Taylor**

Tel: 613-702-5563  
Fax: 613-702-5563  
Email: [dtaylor@powerlaw.ca](mailto:dtaylor@powerlaw.ca)

**Ottawa Agent for Counsel for the Intervener,  
Council of Canadians with Disabilities**

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## PART I – OVERVIEW & STATEMENT OF FACTS

### A. Overview

1. In the original decision that is the subject of this appeal, the Canadian Transportation Agency (the “Agency”) dismissed a complaint by the Respondent, Gábor Lukács, which alleged that certain practices of the Appellant, Delta Airlines Inc. (“Delta”), relating to the transportation of large (obese) persons were “unjustly discriminatory”, contrary to paragraph 111(2)(a) of the *Air Transportation Regulations* (the “ATR”).<sup>1</sup> The Agency determined that the Respondent did not have standing to bring the complaint.
2. The Respondent appealed the Agency’s decision to the Federal Court of Appeal. The Federal Court of Appeal determined that the Agency erred in law in dismissing the complaint, concluding that it does not have discretion to decline to hear a case on the basis that the complainant does not meet the standing requirements developed by the Courts.
3. Delta has been granted leave to appeal the Federal Court of Appeal’s decision. One of the issues raised in this Appeal is whether the Court was correct in finding that the Agency may not apply the law of standing in the context of the air travel complaints scheme.
4. The Agency has been granted leave to intervene in this Appeal. The Agency’s position is that it, like other quasi-judicial tribunals, does have the authority to apply the principles of the law of standing and decline to hear a complaint by persons without a sufficient interest in the matter they seek to litigate.

### B. Facts

5. The Agency is Canada’s longest-standing independent, quasi-judicial tribunal and regulator. It has a broad mandate in respect of all transportation matters under the legislative authority of Parliament, including eliminating undue obstacles to the mobility of persons with disabilities from the federal transportation network. The Agency performs two key functions. First, in its role as a quasi-judicial tribunal, it resolves

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<sup>1</sup> SOR/88-58.

commercial and consumer transportation-related disputes, including accessibility-related complaints. Second, the Agency functions as a regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament’s authority. In both roles, the Agency may be called upon to deal with matters of significant complexity.<sup>2</sup>

6. The Agency has three core mandates: (1) to help to ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians, including travelers; (2) to protect the fundamental right of persons with disabilities to an accessible transportation system; and (3) to provide consumer protection for air travelers.<sup>3</sup>
7. The Agency’s enabling statute is the *Canada Transportation Act* (the “Act”).<sup>4</sup> It is highly specialized regulatory legislation with a strong policy focus.<sup>5</sup> The Agency derives its mandate from a number of different acts and administers a number of regulations.<sup>6</sup>
8. This Court has stated that “the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate.”<sup>7</sup> The Federal Court of Appeal has also recently confirmed that the Agency legitimately draws upon its regulatory experience, its knowledge of the industry and its expertise in the transportation sector when interpreting legislation within its mandate.<sup>8</sup>
9. Section 5 of the Act declares the National Transportation Policy that includes key public policy objectives guiding the economic and socio-economic regulation of Canada’s

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<sup>2</sup> *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at paras 50-52 [*Lukács v. CTA, 2014*].

<sup>3</sup> Canada, Canadian Transportation Agency, [Annual Report 2016-2017](#) (Ottawa: Canadian Transportation Agency, 2017) at 3.

<sup>4</sup> SC 1996, c 10.

<sup>5</sup> *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para 98 [*CCD v. VIA Rail*].

<sup>6</sup> For example: *Coasting Trade Act*, SC 1992, c 31; *Railway Costing Regulations*, SOR/80-310; *Railway Interswitching Regulations*, SOR/88-41 and *Personnel Training for the Assistance of Persons with Disabilities Regulations*, SOR/94-42.

<sup>7</sup> *CCD v. VIA Rail*, *supra* note 5 at para 98.

<sup>8</sup> *Canadian National Railway Company v. Emerson Milling Inc. et al.*, 2017 FCA 79 at para 73.

transportation system. The Act states that these objectives are most likely to be achieved when, *inter alia*, the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities.<sup>9</sup>

10. Parliament has entrusted the Agency with expansive authority to control its own process. The Courts have affirmed that the Agency possesses inherent jurisdiction to stay its decisions and to otherwise control its process and functions.<sup>10</sup>
11. Section 25 of the Act confers upon the Agency all the powers, rights and privileges that are vested in a superior court with respect to all matters necessary or proper for the exercise of its jurisdiction.<sup>11</sup> The Courts have also recognized that section 25 bestows on the Agency the authority to enforce orders and regulations made under the Act.<sup>12</sup>
12. Section 37 of the Act grants the Agency the discretionary power to inquire into issues that come before it by way of complaint. Section 37 applies to a very broad range of matters.<sup>13</sup>
13. Pursuant to paragraph 17(b) of the Act, the Agency may make rules respecting the manner of and the procedures for dealing with matters and business before it, including the conduct of proceedings before it.<sup>14</sup> Pursuant to this authority, the Agency has made the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (the “Rules”).<sup>15</sup> When a complaint is filed with the Agency, the Rules are engaged and provide for various procedural steps and rights; the Respondent may file an answer,<sup>16</sup> the parties can engage in discovery by serving written

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<sup>9</sup> *Act, supra* note 4, s 5.

<sup>10</sup> *Lukács v. Canada (Transportation Agency)*, 2015 FCA 200 at para 5.

<sup>11</sup> *Act, supra* note 4, s 25.

<sup>12</sup> *Lukács v. CTA, 2014, supra* note 2 at para 37.

<sup>13</sup> *Act, supra* note 4, s 37.

<sup>14</sup> *Ibid*, s 17(b); *CCD v. VIA Rail, supra* note 5 at para 230.

<sup>15</sup> SOR/2014-104.

<sup>16</sup> *Ibid*, r 19.

questions and productions of documents,<sup>17</sup> and a person who has a substantial and direct interest in a dispute proceeding may file a request to intervene.<sup>18</sup>

14. As part of the Agency's mandate to provide consumer protection for air travelers, the Agency examines whether terms and conditions of carriage are discriminatory. Paragraph 111(2)(a) of the ATR applies to international air carriers and states that no carrier shall, in respect of tolls or the terms and conditions of carriage, make any unjust discrimination against any person or other carrier.<sup>19</sup>
15. In addition to considering whether a toll or term and condition is unduly discriminatory, the Agency's human rights mandate includes ensuring the accessibility of the federal transportation network. The Agency may, on application, determine whether there is an "undue obstacle" to the mobility of persons with disabilities. Where the Agency determines that an undue obstacle exists, the Agency also determines what corrective measures are appropriate in accordance with the Act and human rights principles.<sup>20</sup>
16. While the Agency's position is that the ability to apply the principles of the law of standing is an essential tool for the exercise of its jurisdiction, it has been rare that the Agency has declined to hear an application on the basis of a lack of standing. In *Amalgamated Transit Union Local 279*,<sup>21</sup> the union representing employees of OC Transpo, the City of Ottawa's public transit system, alleged that the failure of the City of Ottawa to purchase and install an automated announcement system for stops for its bus fleet created an undue obstacle for members of the community with disabilities. The second instance where the Agency declined to hear a case due to lack of standing is the decision that is the subject matter of this appeal. The third is another application brought by the Respondent against Porter Airlines.<sup>22</sup>

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<sup>17</sup> *Ibid*, r 24.

<sup>18</sup> *Ibid*, r 29.

<sup>19</sup> ATR, *supra*, note 1, s 111(2)(a).

<sup>20</sup> CCD v. VIA Rail, *supra* note 5 at para 2; Act, *supra* note 4, s 172(1).

<sup>21</sup> *Amalgamated Transit Union Local 279*, Decision No. 431-AT-MV-2008, dated August 20, 2008.

<sup>22</sup> *Lukacs v. Porter Airlines Inc.*, Decision No. 121-C-A-2016, dated April 22, 2016; see also the

## **PART II – INTERVERNER’S POSITION**

17. The Appellant has raised the issue of whether the Federal Court of Appeal was correct in finding that the Agency may not apply the law of standing in context of its air travel complaints scheme. On this issue, the Agency takes the position that it can apply the law of standing.

## **PART III – STATEMENT OF ARGUMENT**

### **A. Purpose of the law of standing**

18. This Court has identified various factors which are seen as justifying limitations on standing.<sup>23</sup> These principles associated with the law of standing are equally relevant for an adjudicative tribunal such as the Agency. It is the Agency’s submission that these considerations favour recognizing a tribunal’s authority to apply the principles of the law of standing.

#### (i) Scarce Judicial Resources

19. This Court has recognized that a complainant “with a personal stake in the outcome of a case should get priority in the allocation of judicial resources.”<sup>24</sup>
20. This is a valid concern for an administrative tribunal such as the Agency. The Agency operates with limited resources. Those passengers who are affected or could potentially be affected by the policies of airlines, including those alleging discriminatory practices, should get priority in the allocation of the Agency’s resources.
21. In the absence of an ability to screen out cases brought by persons without a sufficient interest in the matter they seek to litigate, in other words, opening the floodgates in a manner not intended by Parliament, it is submitted that cases involving the interests of persons that could be affected by the policies of air carriers will inevitably be delayed.

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Appellant’s factum at paras 45-46.

<sup>23</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 25 [*Downtown Eastside Sex Workers*].

<sup>24</sup> *Ibid* at para 27.

## (ii) Ensuring Contending Points of View

22. Another purpose of limiting standing relates to the need to have the benefit of contending points of view of the persons most directly affected by the issue. “Concrete adverseness’ sharpens the debate of the issues and the parties’ personal stake in the outcome helps ensure that the arguments are presented thoroughly and diligently.”<sup>25</sup>
23. Having before it contending points of view is especially important in the context of paragraph 111(2)(a) of the ATR which prohibits unjust discrimination against any person or other carrier. The Agency should have the discretion to decline to hear a complaint by taking into consideration the fact that it does not have before it the views of those individuals who are affected by the policy in question.
24. The same consideration applies when the Agency is asked to determine whether there is an undue obstacle to the mobility of persons with disabilities. In the absence any persons potentially affected by a particular policy, or a group representing persons potentially affected by such a policy, the Agency could be asked to determine whether such an obstacle exists, and could be asked to craft corrective measures to accommodate persons with disabilities, without having input from those people whose interests are most at stake, and who the Agency seeks to ensure are properly accommodated.
25. Should a person with an insufficient interest in the matter submit a complaint, the Agency’s Rules allow for an interested party to intervene.<sup>26</sup> An intervention could assist the Agency in resolving the issue at hand. However, the complaint engages the Agency’s process, and the Agency cannot rely on an interested person, or an advocacy group representing these interested persons, filing an intervention. In the absence of such an intervention, the Rules require that the responding party file an answer to the application if it intends to do so,<sup>27</sup> after which the Agency would be called upon to rule on the complaint.

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<sup>25</sup> *Ibid* at para 29.

<sup>26</sup> *Rules, supra* note 15, r 29.

<sup>27</sup> *Rules, supra* note 15, r 19.

26. This Court has recognized the dangers of hearing a case in the absence of those persons with a personal stake in the matter, namely, that a negative decision may prejudice other challenges by parties with specific and factually established complaints.<sup>28</sup>
27. Agency decisions necessarily affect the federal transportation system. It is submitted that these decisions should not be made without a proper evidentiary record, nor should they be made in the absence of those parties with a sufficient interest in the issue being argued. The Agency should have the discretion to decline to inquire into a complaint on the basis of the principles applicable to the law of standing.

### **B. Law of standing not a procedural fairness obligation**

28. As an administrative tribunal, the Agency provides access to justice through less formal procedures compared to a court.<sup>29</sup> This approach allows for a more accessible, expeditious and efficient approach to decision-making.<sup>30</sup>
29. The Federal Court of Appeal, in the decision which is the subject of this appeal, referenced decisions of this Court that indicate that procedures before a tribunal must be consistent with their enabling statute and need not replicate court procedure. It also referenced the fact that there has been criticism of “a tendency to impose court-like procedures on administrative bodies in the context of judicial review for breach of procedural fairness obligations.”<sup>31</sup>
30. It is accepted that tribunals such as the Agency should be able to operate in a manner which is more flexible and accessible than a court. Access to justice requires that tribunals should not be burdened with overly complicated procedures. The law should not go “too far in the nature and the extent of procedural fairness obligations that are imposed on or adopted by some decision-makers.”<sup>32</sup>

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<sup>28</sup> *Downtown Eastside Sex Workers*, *supra* note 23 at para 27.

<sup>29</sup> *Lukács v. Canada (Transportation Agency) et al.*, 2016 FCA 220 at para 20 [*Lukács v. Delta*].

<sup>30</sup> David Mullan, “Tribunals Imitating Courts – Foolish Flattery or Sound Policy?” (2005) 28 Dal. L. J. 1.

<sup>31</sup> *Lukács v. Delta*, *supra* note 29 at para 21.

<sup>32</sup> Mullan, *supra* note 30 at 2.

31. However, this is not what is at stake here. The *discretion* to decline to hear a case where the tribunal does not have the right parties before it, and where the factual record may be lacking, is not an overly legalistic procedural burden on a tribunal. It embodies a tribunal's ability to focus its resources on those cases involving parties affected by the issue being litigated, or those with a sufficient interest in the matter so as to have standing.

### **C. No need for a real and precise factual background**

32. The Federal Court of Appeal in the decision below confirmed that “it is not necessary for a complainant to have been personally affected by a term or condition” [emphasis added] of an airline's tariff for the Agency to assert jurisdiction.<sup>33</sup> This is consistent with the Agency's approach.
33. The Agency has held that it is not necessary for a complainant to present a “real and precise factual background” in order to advance a complaint regarding an airline's tariff. The Agency has expressed that view that it would be inappropriate to require a person to “experience an incident” before being able to file a complaint. To do so could very well dissuade persons from using the transportation network.<sup>34</sup> This would especially be the case where the matter being complained of is the safety of equipment used by the transportation provider.
34. A member of the travelling public should be entitled to bring a complaint as someone who may be affected by the terms and conditions of an airline's tariff. In *Black v. Air Canada*,<sup>35</sup> the complainant challenged Air Canada's policy with respect to its free baggage allowance. He argued that as a business traveler who carries equipment he would incur additional costs to travel. He submitted that the policy may cause hardship for some business travelers. It is clear on these facts that Mr. Black was someone who could be affected by the airline's policy and it was unnecessary that he actually travel, incur the fees, and then return to the Agency to complain.

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<sup>33</sup> *Lukács v. Delta*, *supra* note 29 at para 29.

<sup>34</sup> *Black v. Air Canada*, Decision No. 746-C-A-2005, dated December 23, 2005.

<sup>35</sup> *Ibid.*

35. This rationale is particularly apposite in the context of the Agency's human rights mandate. A person with a disability should not have to demonstrate a precise factual background to pursue an application before the Agency. It should be sufficient to argue that an applicant would encounter an undue obstacle to their mobility, without being required to demonstrate a specific incident of discrimination or injury. Such an applicant would still be able to provide a full factual record for the Agency to consider, such as a description of how the alleged obstacle could affect their ability to access the federal transportation network, and what corrective measures should be taken by the transportation provider to accommodate the applicant and persons similarly situated.
36. Any member of the public could argue that they may be affected by an airline's terms and conditions that apply to all of its passengers and complain about terms such as denied boarding compensation, flight cancellations, schedule changes and delay.<sup>36</sup> One of the factors which justifies limitations on standing is to ensure contending points of view. Where the terms and conditions affect all travelers, any member of the travelling public could present the point of view of the affected passengers. However, where it is alleged that corrective measures are required to ensure an accessible transportation system, a person without a sufficient interest in the matter may not be in a position to present the interests of those affected sufficiently to allow the Agency to make an informed decision. In such cases, the Agency should have the discretion to determine that the complaint should not proceed.

**D. Application of the law of standing is consistent with human rights principles**

37. The authority to decline to hear a complaint, even where the complaint is not frivolous, is consistent with human rights principles. Pursuant to subsection 40(1) of the *Canadian Human Rights Act*<sup>37</sup> (the "CHRA") 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 a complaint. However, pursuant to subsection 40(2) of the CHRA, the Commission retains discretion to refuse to deal with a complaint where it

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<sup>36</sup> See referenced cases in Respondent's factum at para 30.

<sup>37</sup> RSC 1985, c H-6.

is made by someone other than the victim of the discriminatory practice unless the victim consents thereto.

**E. Conclusion**

38. It is submitted that administrative tribunals such as the Agency should have the authority to decline to hear a complaint by applying the principles of the law of standing.

**PART IV – SUBMISSIONS CONCERNING COSTS**

39. The Agency does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 25<sup>th</sup> day of August, 2017.



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Allan Matte  
Counsel for the Canadian Transportation Agency

## PART V – TABLE OF AUTHORITIES

AT PARA.

### A. Jurisprudence

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6. *Lukács v. Canada (Transportation Agency)*, [2014 FCA 76](#).....5, 11
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12. *Air Transportation Regulations, SOR/88-58 / Règlement sur les transports aériens, DORS/88-58*

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## iii. Rules

13. *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104 / Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances), DORS/2014-104*

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**C. Texts/Commentary**

14. Canada, Canadian Transportation Agency, *Annual Report 2016-2017* (Ottawa: Canadian Transportation Agency, 2017) .....6
15. David Mullan, "Tribunal Imitating Courts – Foolish Flattery or Sound Policy?" (2005) 28 Dal. L. J. 1.....28, 30