SCC File No.: 37276

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

BETWEEN:

DELTA AIR LINES INC.

APPELLANT

and

DR. GÁBOR LUKÁCS

RESPONDENT

and

BENJAMIN ZARNETT

AMICUS CURIAE

and

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

INTERVENERS

FACTUM OF THE INTERVENER COUNCIL OF CANADIANS WITH DISABILITIES

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

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A. OVERVIEW

1. The ability of individuals and groups to participate before administrative bodies such as the Canadian Transportation Agency (the "Agency") ought to be driven by the seriousness of the issue they raise, not their particular identity or interest. The central question raised by this hearing is the appropriate criteria for deciding whether to hear complaints before administrative bodies charged with remedial public interest purposes as compared to courts, which are characterized by their adjudicative mandates and adversarial processes.

2. The Agency and other administrative bodies tasked with broad public interest mandates are needed to ensure fairness, justice and efficiency in complex regulatory regimes. It is unreasonable for these bodies to deny the public their expertise in resolving complaints based on the identity or interest of the complainant. Reliance on technical legal standing tests developed by the courts to screen out complaints brought before the Agency effectively denies individuals and groups the ability to make complaints that would further the public interest objectives of the enabling legislation. The refusal to hear potentially meritorious complaints perpetuates barriers to access to justice, particularly for vulnerable individuals and groups.

3. A viable and effective transportation system that is accessible in a non-discriminatory manner is a matter of public interest to the entire community. Under the *Canada Transportation Act* (the "*Act*"), the Agency plays a key role in ensuring air travel rates and conditions do not constitute an undue obstacle to the mobility of persons with disabilities and that the transportation system is accessible for all. A central component of this statutory regime is a robust investigatory scheme including an accessible complaint system.

4. The Agency is intended to enhance efficient access to justice through its expertise and less formal procedures. In carrying out its duties to eliminate undue obstacles in the transportation network for the mobility of persons with disabilities, it is obliged to coordinate its activities with the Canadian Human Rights Commission (the "CHRC").

5. In this case, the Agency relied upon principles of standing developed in the context of the judicial system to decline to hear an air travel complaint alleging discriminatory practices filed by Dr. Gábor Lukács ("Dr. Lukács"). This was the sole basis for its decision.

6. In refusing to consider Dr. Lukács' complaint, the Agency rendered an unreasonable decision by:

- neglecting to take into account its own statutory scheme which is remedial in nature and investigative in process. The *Act* requires the Agency to remove undue barriers in transportation for person with disabilities.[1] The complaint filed by Dr. Lukács raises precisely the type of issue the Agency is statutorily mandated to investigate;
- relying solely upon tests of standing developed in the context of the adversarial judicial system. These technical tests are inappropriate for investigative administrative bodies such as the Agency, which have broad public interest mandates and are meant to be accessible. The use of the "public interest" and "private interest" standing tests may unnecessarily screen out meritorious complaints and perpetuate access to justice barriers;
- failing to address the implications of its decision on persons with disabilities, a historically disadvantaged group who are disproportionately negatively impacted by the broader access to justice challenges in Canada; and
- imposing a test for standing which appears to be significantly more restrictive than a test based on the reasonableness of the complaint under the *Canadian Human Rights Act* (the "*CHRA*").[2] Imposing such a high standard for the determination of whether to hear a complaint is contrary to the Agency's statutory duty to foster complementary policies and practices with the CHRC.[3]

7. The primary criterion to be employed in determining whether to hear a complaint should be whether the complaint raises a serious issue to be tried. Such an approach is consistent with the remedial purpose of the *Act*, including the objective of enhancing access to justice. When administrative bodies such as the Agency consider complaints which engage individual or

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[1] *Canada Transportation Act*, SC 1996, c 10, s 5(d) [*Act*].
[2] *Canadian Human Rights Act*, RSC 1985, c H-6, ss 40(1), s 40(3) [*CHRA*].
[3] *Act*, *supra* note 1, s 171.

collective human rights, the protection offered should be no less than the protection offered by the *CHRA*.

B. STATEMENT OF FACTS

8. On August 24, 2014, Dr. Lukács filed an air travel complaint with the Agency. He alleged that certain practices of Delta Air Lines Inc., relating to the transportation of "large (obese) persons", are discriminatory contrary to subsection 111(2) of the *Air Transportation Regulations*[4] (the "*ATR*").[5] On November 25, 2014, the Agency dismissed Dr. Lukács' complaint, finding that he lacked both private interest and public interest standing.[6] The Agency held that:

> Although Mr Lukács is not required to be a member of the group "discriminated" against in order to have standing, he must have a sufficient interest in order to be granted standing. Hence, notwithstanding the use of the words "any person" in the ATR, the Agency, as *any other court*, will not determine rights in the absence of those with the most at stake.[7] [emphasis added]

9. Dr. Lukács appealed the Agency's decision. In granting the appeal, the Federal Court of Appeal (the "FCA") concluded that complaints appearing to be serious on their face cannot be dismissed for the sole reason that they do not meet the standing requirements developed for the courts of civil jurisdiction.[8] The FCA determined that the Agency rendered an unreasonable decision. In rejecting a test based solely on private interest or public interest standing, the FCA highlighted the investigatory process of bodies such as the Agency as well as the underlying objectives to promote access to justice and to remedy discriminatory barriers:

> Often, such bodies are created to provide greater and more efficient access to justice through less formal procedures and specialized decision-makers that may not have legal training. […] If an administrative body has *important inquisitorial powers*, ensuring that the particular parties before them are in a position to present *extensive evidence of their particular factual situations may be less important than in a court of law*, where judges are expected to take on a passive role and decide on the basis of the record and arguments presented to them by the parties. […] [emphasis added]

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[4] *Air Transportation Regulations*, SOR/88-58 [*ATR*].
[5] A person is disabled, for the purposes of Part V of the *Act*, due to obesity when they cannot fit within the dimensions of an aircraft seat. See *Norman Estate et al v Air Canada et al* (10 January 2008), Canadian Transportation Agency Decision No 6-AT-A-2008 at paras 122, 128.
[6] *Lukács v Delta Air Lines Inc* (25 November 2014), Canadian Transportation Agency Decision No 425-C-A-2014 at para 76.
[7] *Ibid* at para 52.
[8] *Lukács v Canada (Transportation Agency)*, 2016 FCA 220 at paras 27, 30 [FCA Decision].

> 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.[9] [emphasis added]

PART II. ISSUES

10. The position of the Council of Canadians with Disabilities (the "CCD") on the questions in issue is:

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?

11. The FCA correctly found that the Agency may not dismiss a complaint on the sole basis that the complainant does not meet the standing requirements developed for courts of civil jurisdiction. The appropriate criterion is whether the complaint raises a serious issue to be tried.

Issue 2: Was the Agency's decision not to hear Dr. Lukács' complaint reasonable?

12. The Agency's decision was unreasonable.

PART III. ARGUMENT

A. The law of standing established in courts of civil jurisdiction should not apply to administrative bodies tasked with remedial public interest mandates

(i) Extensive investigative powers for a broad remedial purpose

13. The Agency is a highly specialized administrative body empowered by Parliament to administer a complex regulatory regime for the federal transportation system. In the context of air transportation and the transportation of persons with disabilities, Parts I, II and V of the *Act* grant the Agency a wide range of investigative and remedial powers to achieve the public interest objectives of the National Transportation Policy[10]:

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[9] *Ibid* at paras 20, 27 [emphasis added].
[10] *Act*, *supra* note 1, Part I, II, V, s 5. See in particular, *Act*, *supra* note 1, ss 170, 171, 172.

Investigative Powers

Section 37 grants the power to "inquire into, hear and determine" complaints;

Section 85.1(1) provides the authority to review and try to resolve complaints under Part II of the *Act*; and

Section 172(1) grants the authority to inquire into applications (complaints) to determine whether there is an "undue obstacle to the mobility of persons with disabilities."[11]

Remedial Powers

Section 67.1(a)-(c) allows for compensation and appropriate corrective measures in circumstances where a domestic carrier has applied a rate or condition not in its tariffs;

Section 67.2(1) grants the power to suspend or disallow the terms and conditions of domestic license holders' services that are unduly discriminatory;

Section 170(1) enables the Agency to make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities and implicitly incorporates an investigatory power; and

Section 172(3) enables the Agency to require the taking of appropriate corrective actions on finding that there is "an undue obstacle to the mobility of persons with disabilities."

14. To similar effect, albeit without an express complaint process, section 113 of the *ATR*[12] empowers the Agency to suspend and substitute any tariff of an international carrier that is unjustly discriminatory or unduly preferential within the meaning of section 111(2) of the *ATR*.

15. Section 5 of the *Act* recognizes that the advancement of the "well-being of Canadians" is achieved when the "transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities."[13] Part V of the *Act* (sections 170 – 172) mandates

[11] *Act*, *supra* note 1, s 172(1).
[12] *ATR*, *supra* note 4, s 113. See also, *ATR*, *supra* note 4, s 113.1 (corrective measures and compensation).
[13] *Act*, *supra* note 1, s 5(d).

the Agency to address undue barriers to mobility for persons with disabilities. It offers investigative and remedial tools that can be used both proactively and reactively. For example, the mere existence of a potentially discriminatory barrier is sufficient to trigger the Agency's jurisdiction to inquire into matters.[14] The statutory investigative and remedial powers of the Agency are to be interpreted and applied in a manner that is "consistent with the purposes and provisions of human rights legislation."[15]

(ii) A criterion of a serious issue to be tried is consistent with the public interest objectives of the *Act*

16. Section 37 of the *Act* provides the Agency with the general authority to hear complaints. The Agency has discretion in determining which complaints to hear. However, the Agency's discretion is not unbounded; it is constrained by the purposes and policies under the *Act*.[16] Bearing in mind these considerations, the appropriate criterion to be applied is whether the complaint raises a serious issue to be tried. A serious issue is an "important" issue that is "far from frivolous".[17]

17. In exercising its discretion, the Agency must have regard to its public interest mandate, including its statutory obligation to remediate undue barriers to persons with disabilities, its role in promoting efficient access to justice and its duty to coordinate policies and practices with those of the CHRC. In accordance with these objectives, the exercise of the Agency's discretion should: i) be consistent with the remedial purpose of the *Act*; ii) reduce rather than perpetuate barriers to access to justice; and iii) facilitate useful questions.

18. A focus upon the seriousness of the issue raised by the complaint, rather than the interest of the complainant, accords with the statutory objective of the Agency to address undue barriers to transportation. It is consistent with the majority decision in *VIA Rail*, which held that a person

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[14] *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650 at para 118 [*VIA Rail*]. See also, *VIA Rail*, *supra* note 14 at para 15.
[15] *Ibid* at para 117. See also *ibid*, at para 139. See also *Act*, *supra* note 1, s 171.
[16] Guy Régimbald, *Canadian Administrative Law*, 2nd ed (Markham, ON: LexisNexis Canada Inc, 2015) at 222-223.
[17] *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 54.

does not have to personally encounter an undue obstacle to the mobility of a person with a disability before the Agency's jurisdiction under Part V of the *Act* is engaged.[18]

19. Such an approach is also consistent with the treatment of complaints under the *CHRA*.[19] Under subsections 40(1) and (3) of the *CHRA*, a critical consideration for triggering complaints is whether the CHRC or any individual or group of individuals has reasonable grounds for believing that a person has engaged in a discriminatory practice.[20] Section 40(2) allows the CHRC to proceed with a complaint where the consent of the victim has not been obtained.[21] More importantly, if there are broad public interest issues at play, the complaint can be taken without reference to a particular victim[22] or the CHRC can initiate its own complaint.[23] Consistent with the broad direction of a serious issue to be tried, the *CHRA* also recognizes that timely complaints with reasonable grounds should be dealt with unless they are trivial, frivolous, vexatious, or made in bad faith.[24]

(iii) Concerns regarding "busybodies" are adequately addressed by the serious issue to be tried criterion

20. The criterion of a "serious issue" meets the statutory public interest objectives of the *Act* while preserving the Agency's right to control its own processes. Potential "busybodies" will have to establish a serious issue to be tried. To the extent the Agency has practical concerns regarding the need to add other perspectives, it has authority under the *Canadian Transportation Agency Rules* to add intervenors[25] and to amend processes[26] in order to facilitate "the optimal use of Agency and party resources and the promotion of justice."[27]

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[18] *VIA Rail*, *supra* note 14 at para 118.
[19] *CHRA*, *supra* note 2, ss 40(1), 40(3), 41(1)(d)-(e), 49(1).
[20] *Ibid*, ss 40(1), 40(3).
[21] *Ibid*, s 40(2). See also *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FCR 113 at para 49, 167 DLR (4th) 432 (FCA).
[22] *Ibid*, s 40(5)(b). See also *Lemire v Canada (Human Rights Commission)*, 2014 FCA 18, [2015] 2 FCR 117 at para 95.
[23] *Ibid*, s 40(3).
[24] *Ibid*, ss 41(1)(d)-(e).
[25] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104, s 29(1).
[26] *Ibid*, ss 5(2), 6.
[27] *Ibid*, s 5(1).

21. A criterion based upon the interests of the complainant does not satisfactorily address the issue of the busybody. As stated by Thomas A. Cromwell in *Locus Standi*, "while assessing the interest of a party in the proceedings is one way of deciding whether the adjudication is of practical worth, it is an *indirect and imprecise way* of doing so."[28] [emphasis added]

22. In applying the criterion of a serious question to be tried, it is only where the Agency identifies a demonstrable, fact-based abuse of process that its discretion should be exercised to decline to hear the complaint. In these circumstances, the Agency should be required to produce a record of its inquiries into the issue including the facts considered in making its determination and produce this record to the parties for their comments. In doing so, the Agency ensures that any decisions regarding abuse of process are based upon facts, as opposed to mere speculation, thereby ensuring procedural fairness to complainants.

(iv) Applying restrictive criteria perpetuates access to justice barriers

23. This Honourable Court has held that human rights legislation must be "interpreted liberally and purposively" so that the rights enunciated are given their full recognition and effect.[29] A broad and remedial approach to the determination of whether to hear a complaint is required to meet the policy objectives set out in the *Act*. By applying the public interest and private interest standing tests, the Agency failed to consider the broader implications of its decision on access to justice particularly for persons with disabilities.

24. As discussed by the FCA in granting Dr. Lukács' appeal, the very rationale underlying the notion of public interest and private interest standing is not applicable in the administrative context given the fundamental differences between their purposes, compositions, mandates, processes and procedures.[30] The Agency is designed to offer individuals the ability to enforce their legal rights through a more accessible process as compared to the traditional court system.

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[28] Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto, The Carswell Co Ltd, 1986) at 168 [emphasis added].
[29] *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53, [2011] 3 SCR 471 at para 33. See also *University of British Columbia v Berg*, [1993] 2 SCR 353 at 370–371, 1102 DLR (4th) 665.
[30] For additional details, see FCA Decision, *supra* note 8 at paras 20, 30-31.

25. It is the most vulnerable individuals and groups in society who have a greater likelihood of experiencing access to justice challenges in Canada. Persons with disabilities are one such group whose ability to participate in the judicial system is impacted by the history of disadvantage and discrimination they have faced.[31] Social inclusion for persons with disabilities requires meaningful opportunities to participate in judicial processes which impact their access to essential services and promote their full participation in Canadian society.[32]

26. Applying the restrictive rules of standing is likely to have a disproportionately negative impact on persons with disabilities, who may rely upon third party interveners to advance legal issues on their behalf. As evidenced by the circumstances of this case, overly restrictive standing criteria can prevent third party interveners from bringing legitimate public interest concerns forward. Such an approach will necessarily result in a reduction of the number of individuals who are able to exercise their rights. The inability to enforce legal rights represents a failure of access to justice and a threat to the rule of law.[33]

27. Given access to justice challenges in Canada, administrative bodies are increasingly the gatekeepers for human rights complaints. When administrative bodies like the Agency consider complaints which engage individual or collective human rights, the protection offered should be no less than the protection offered under the *CHRA*.[34] In delegating to the Agency the power to investigate and remedy concerns relating to undue barriers to persons with disabilities, Parliament intended to enable a more accessible process with enhanced protection for human rights. As held by the majority in *VIA Rail*:

> Parliament's decision to use this particular legislation as the source of human rights protection for persons with disabilities ensures specialized protection, applying practical expertise in transportation issues to human rights principles. This both strengthens the protection and enables its realistic implementation.[35]

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[31] *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 56, 151 DLR (4th) 577.
[32] Law Commission of Ontario, A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice (Toronto: September 2012) at 58, online: <www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf>.
[33] *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 1.
[34] *CHRA*, *supra* note 2.
[35] *VIA Rail*, *supra* note 14 at para 113.

28. Read in a liberal and purposive manner, the access to justice objectives underlying the *Act* require administrative bodies like the Agency to employ a low threshold when deciding to hear complaints.[36] A serious issue to be tried is a satisfactorily low threshold.

B. The Agency's decision not to hear Dr. Lukács' complaint was unreasonable.

29. The Agency's decision was unreasonable as it failed to consider its public interest mandate and its wide-reaching investigative and remedial powers. This is particularly egregious given the nature of the complaint and the statutory mandate to redress undue barriers to persons with disabilities. By relying on the private interest and public interest standing criteria developed by courts of civil jurisdiction, the Agency was able to refuse to hear Dr. Lukács' complaint without considering the merit of the issues he raised. Refusing to hear a complaint because of the interest of a complainant defeats the statutory objective of enhancing access to justice and is inconsistent with the public interest mandate of the *Act*.

PART IV. COSTS

30. The CCD does not seek costs and should not be subject to pay costs to any party.

PART V. ORDER SOUGHT

31. In accordance with Rule 42(3) of the *Rules of the Supreme Court of Canada*, the CCD takes no position regarding the disposition of this appeal.[37]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2017.

Joëlle Pastora Sala
Counsel for the Intervener, Council of Canadians with Disabilities

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[36] This Honourable Court articulated the low threshold of a "serious question to be tried" in the context of injunctions in *RJR–MacDonald v Canada (AG)*, [1994] 1 SCR 311 at 337, 111 DLR (4th) 385: **"**What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one."

[37] *Rules of the Supreme Court of Canada*, SOR/2002-156, s 42(3).

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