SCC File No. 37276

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 –

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

INTERVENERS

REPLY FACTUM OF DR. GÁBOR LUKÁCS, RESPONDENT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. The Respondent, Dr. Gábor Lukács ("Dr. Lukács"), files these submissions to reply to the factums of the interveners, and in particular, to the arguments filed by the Canadian Transportation Agency ("Agency") and the International Air Transport Association ("IATA").

2. The Agency and IATA mistakenly conflate the prohibition on discriminatory practices—under which Dr. Lukács brought his complaint—with the more narrow provisions concerning the elimination of undue obstacles to the mobility of persons with disabilities. This is a significant distinction with important implications. Indeed, in the Agency's reasons for its decision, the Agency itself recognized and underscored the significance of the distinction between these provisions.[1] Before this Court, however, the Agency appears to be taking a position contradicting its own reasons.

3. The prohibition on discriminatory practices[2] is imperative and broad ("no air carrier shall"), while the provisions about undue obstacles to persons with disabilities[3] are permissive ("may"). More importantly, the provisions prohibiting discriminatory practices do not call for individual remedies, but for preventive measures to be taken before members of the public suffer harm.

4. The Agency's arguments are based on the flawed premise that "right parties"[4] exist with respect to every matter within the Agency's mandate. This premise does not hold true, however, outside the realm of individual remedies. The regulatory scheme administered by the Agency is largely of a precautionary nature—it seeks to prevent harm to the public *before* anyone would suffer damages. Indeed, this is recognized in the *Canada Transportation Act* (the "*Act*"), which provides the Agency with the tools necessary for gathering evidence on its own volition, even without receiving a complaint.[5]

5. There are no "right parties" for preventive complaints. A person who "could potentially be affected" by a discriminatory practice, but has not yet been affected, is in no better position to provide a factual record than anyone else who has not yet been affected.

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1 CTA Decision No. 425-C-A-2014 (the "Agency Decision") at para. 51 [Appellant's Record, Tab 2, p. 11].
2 *Air Transportation Regulations*, SOR/88-58 (the "*ATR*"), s. 111(2).
3 *Canada Transportation Act*, SC 1996, c. 10 (the "*Act*"), s. 172.
4 Agency's Factum at para. 31.
5 The *Act*, ss. 37-39.

6. The Agency's concession that passengers who "could potentially be affected" or "may be affected" by airlines' discriminatory practices are "entitled to bring a complaint" to the Agency[6] is inconsistent with the Agency's Decision, which held that complainants must have "direct personal interest."[7] Since every passenger *could potentially* be affected by Delta's discriminatory practices, this concession provides an alternative ground for dismissing the appeal at bar.

B. Dr. Lukács's complaint was brought on the grounds of the imperative and broad prohibition against discriminatory practices

7. Dr. Lukács's complaint[8] was brought under subsection 111(2) of the *ATR*, which imposes an imperative and broad prohibition against all forms of discriminatory practices:

> 111(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,
>
> (a) make any unjust discrimination against any person or other air carrier;
>
> (b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or
>
> (c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.
>
> [Emphasis added.]

8. The arguments of IATA and the Agency erroneously suggest that Dr. Lukács's complaint was brought under the narrow legislative provisions protecting passengers with disabilities.[9,10] This is not the case. As the Agency Decision correctly recognized:

> [51] It is important to start the analysis of the issue of standing by reminding that this case relates to a tariff issue, not an issue related to accessible transportation for persons with a disability.[11]

9. Being "large" is not always a disability. Delta's practices of discriminating against large passengers affect or could potentially affect all passengers, who may not properly fit into the excessively small and ever-shrinking seats on aircraft. As the United States Court of Appeal for the District of Columbia Circuit noted in a recent judgment:

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6 Agency's Factum at paras. 20 and 34 (emphasis added).
7 Agency Decision at para. 54 (emphasis added) [Appellant's Record, Tab 2, p. 12].
8 Complaint of Dr. Lukács to the Agency (Aug. 24, 2014) [Appellant's Record, Tab 7, pp. 37-38].
9 Agency's Factum at para. 36, starting at "However, where it is alleged..."
10 IATA's Factum at paras. 17(b), 21, 22, and 33.
11 Agency Decision at para. 51 (emphasis added) [Appellant's Record, Tab 2, p. 11].

> This is the Case of the Incredible Shrinking Airline Seat. As many have no doubt noticed, aircraft seats and the spacing between them have been getting smaller and smaller, while American passengers have been growing in size.[12]

Passengers whose size constitutes a "significant variation from established statistical norms"[13] or amounts to a disability are only a small subset of those who are or could potentially be affected.

10. Dr. Lukács's complaint seeks to bring Delta into compliance with subsection 111(2) of the *ATR* by putting an end to Delta's discriminatory practices. As the Agency Decision correctly found,[14] the complaint does not seek accommodation for passengers with disabilities, which would require tailoring individual remedies for the special needs of such passengers.

C. The Agency's regulatory and adjudicative functions are intertwined

11. The Agency fulfills *dual* and substantially overlapping regulatory and adjudicative roles. There is no dichotomy or delineation between the two roles as the Agency appears to suggest.[15]

12. Operating an air service to and from Canada requires a licence issued by the Agency.[16] A licence to operate an international air service is not a right but a privilege that may be revoked by the Agency if the licence holder fails to comply with any provision of the *ATR*,[17] including the consumer protection and human rights ones. Consequently, adjudicative-like proceedings before the Agency relating to consumer protection and human rights are concurrently regulatory in that they examine whether the licence holder has complied with the regulatory conditions of its licence.

13. The Agency's inquiry into the long tarmac delays of Air Transat flights in July 2017 exemplifies the substantial overlap in the Agency's two intertwined functions. The Agency launched the inquiry on its own motion, based on mere media reports;[18] the Agency appointed an inquiry officer to gather evidence needed for its decision-making, and directed that an oral hearing be held, followed by "final written submissions by the parties."[19] The Agency's proceeding with respect to Air Transat has both regulatory and adjudicative elements, but is not purely one or the other.

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[12] *Flyers Rights Education Fund v. FAA*, No. 16-1101 (D.C. Cir. 2017).
[13] *Johnson v. Air Canada*, CTA Decision No. 2-AT-A-2012.
[14] Agency Decision at para. 51 [Appellant's Record, Tab 2, p. 11].
[15] Agency's Factum at para. 5.
[16] The *Act*. s. 59.
[17] The *Act*, s. 72(2)(a).
[18] CTA Decision No. LET-A-47-2017.
[19] CTA Decision No. LET-A-49-2017 and Notice of Oral Hearing, Case No.: 17-03788.

PART II – STATEMENT OF ARGUMENT

A. Reply to IATA's arguments

i. Distinction between international and domestic licence holders: international service is subject to more stringent regulatory oversight

14. The wordings of subsection 67.2(1) of the *Act* and sections 111 and 113 of the *ATR* differ because international licence holders, such as Delta, are subject to a more stringent regulatory oversight under the *Act* and the *ATR* than domestic licence holders. In the case of international licence holders, the Agency does not have to wait until it receives a "complaint in writing"—the Agency may also act on its own motion to eliminate unreasonable and unjustly discriminatory terms and conditions, as it has done in the recent Air Transat case and other cases.[20]

15. To achieve the legislative intent of subjecting international licence holders to a more stringent regulatory oversight than domestic ones, the complaint mechanism for international service must be interpreted at least as broadly as the one available for domestic licence holders. IATA's argument, suggesting that passengers may not have a "right to complain" against international licence holders,[21] is inconsistent with the purpose of the legislative scheme, the Agency's considered and consistent view, and the Agency's position before this Court.[22]

ii. International air transportation treaties and conventions support the FCA's judgment

16. Permitting Dr. Lukács to proceed with the complaint against Delta is not only consistent with international law, as IATA acknowledged;[23] it is also the logical conclusion in light of the international treaties cited by IATA, which explain the reason for restricting the right to make monetary claims under the *Act* and the *ATR* to a "person adversely affected."

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[20] *Re: Air Transat*, CTA Decision No. LET-A-47-2017; *Re: Air Transat*, CTA Decision No. LET-A-49-2017; *Re: Delta Air Lines*, CTA Decision No. 161-A-2010, paras. 3-5 & 19(2); *Re: Northwest Airlines, Inc. and KLM Royal Dutch Airlines*, CTA Decision No. 232-A-2003, aff'd 2004 FCA 238.

[21] IATA's Factum at paras. 1 and 10.

[22] Agency's Factum at para. 34.

[23] IATA's Factum at para. 26.

17. International treaties with respect to the rights of passengers and the liability of airlines, such as the *Montreal Convention*[24] and its predecessors (collectively: the "*Conventions*"), govern certain claims for *monetary compensation* for damages that have already been suffered,[25] and as IATA correctly noted, confer the right for making such financial claims only on persons affected.[26] The *Conventions* do not govern non-monetary claims, nor do they preclude states from establishing and enforcing consumer protection and human rights standards for international air carriers.

18. The *Act* and the *ATR* mirror the principle of the *Conventions* that only a "person adversely affected" may seek monetary compensation.[27] The *Act* and the *ATR* need not and do not impose the same requirement with respect to non-monetary complaints, because the *Conventions* do not govern the enforcement of consumer protection and human rights standards.

iii. Foreign law: not properly before the Court

19. Foreign law is a question of fact to be determined by the trier of the facts, and not a question of law.[28] IATA's reference to the law of the European Union with respect to disabilities runs afoul of the July 18, 2017 Order of Abella J., which imposed restrictions on the interveners in this appeal:

> The interveners are not entitled to raise new issues or to adduce further evidence or otherwise supplement the record of the parties.[29]

20. Even if IATA were allowed to advance these arguments, they are not helpful to the appeal at bar. First, the remedial powers of the Agency to eliminate unreasonable and unjustly discriminatory terms and conditions before anyone would suffer damages are a Canadian specialty and have no European parallel. Second, Dr. Lukács brought his complaint under the imperative and broad prohibition against discrimination, and not on the basis of the duty to accommodate disabilities.[30] Third, *Regulation (EC) 261/2004* provides *ex post* remedies for those who are affected by a flight delay, flight cancellation, or denial of boarding, and has no preventive elements, and as such it is not comparable to the preventive mandate of the Agency.

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[24] *Carriage by Air Act*, RSC 1985, c. C-26, Schedule VI (the "*Montreal Convention*").
[25] *Thibodeau v. Air Canada*, 2014 SCC 67 at para. 64.
[26] IATA's Factum at para. 29.
[27] The *Act*, ss. 67.1(b) and 86(1)(h)(iii), and the *ATR*, s. 113.1(b).
[28] *Hunt v. T&N plc*, [1993] 4 SCR 289 at 308e.
[29] Order of Abella J., July 18, 2017.
[30] See section I.B. on 2 above.

B. The law of standing developed by and for the courts is not relevant in the context of preventive regulatory complaints

i. The duty to exercise discretion based on relevant factors

21. According to Justice Evans, cited with approval by Justice Abella in *Wilson*:

> Reasonableness review permits the court to determine whether the factors considered by the tribunal are rationally related to the generally multiple statutory objectives.[31]

22. The central issue on this appeal is whether the requirements of the law of standing made by and for the courts are relevant and rationally related to the objective of the *Act* and the *ATR*, which includes eliminating unreasonable and unjustly discriminatory terms and conditions before anyone would suffer damages. This is not a question of authority, as the Agency suggests,[32] but rather of the duty of all decision-makers to exercise their discretion based on relevant considerations.[33]

ii. There are no "right parties" in preventive regulatory proceedings

23. Preventive regulatory proceedings are aimed at intervening before anyone would suffer damages. As such, there are no "victims" or "right parties" nor is there a real and precise "factual record" of an incident. The evidence may consist of as little as a single document outlining the practice complained of. Consequently, anyone in possession of the document outlining the practice is on the same footing to make a complaint; having a "direct personal interest" does not add to or detract from the complaint, which relates to a policy or practice, and not to a specific past event.

24. A person with a "direct personal interest" is not necessary from an evidentiary point of view either. The Agency, unlike courts, does not depend on the evidence presented by the parties in an adversarial setting. Parliament was acutely aware of the nature of preventive regulatory proceedings, and conferred on the Agency the power to appoint an inquiry officer to gather evidence and assist in creating the "factual record" if it is needed for the Agency's decision-making.[34]

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[31] *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 33, citing John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter" (2014), 27 CJALP 101 at 110 (emphasis added).

[32] Agency's Factum at paras 17-18.

[33] *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at paras. 31 and 36.

[34] The *Act*, ss. 37-39.

25. The Agency's argument with respect to the need to have the "right parties" and a complete "factual record" before itself[35] overlooks the unique features of preventive regulatory proceedings, and is contradicted by the Agency's concession that it is not necessary for a complainant to present a "real and precise factual background" in order to advance such a complaint.[36]

26. In summary, there is no rational connection between whether a preventive regulatory complaint should be heard and the identity of the complainant. Requiring the complainant to have a personal stake in a complaint of such a nature would undermine the precautionary objective of the *Act* to offer protection to the public at large before anyone would suffer damages.

iii. Scarcity of resources does not make the identity of the complainant a relevant consideration

27. The Agency's argument that it should be able to dismiss complaints on the sole basis of the law of standing created by and for the courts because its scarce adjudicative resources are strained[37] should not be accepted by this Court.

28. First, there is no evidence on the record to suggest that the Agency's adjudicative resources are strained, or would be strained if it could not dismiss preventive regulatory complaints on the basis of the law of standing. Even if this were true, however, the Agency's argument is flawed.

29. No organization or public body has unlimited resources. The Police, the Fire Department, and the Canadian Food Inspection Agency *all* have scarce resources, but they do not use the law of standing developed by and for the courts to prioritize their responsibilities. A 9-1-1 operator would not, of course, decline to consider or investigate a reported crime, fire, or medical emergency on the sole basis that the individual reporting it lacked a personal stake in the matter.

30. The Agency's resources must be allocated in a manner that is rationally connected to its mandate, and not according to irrelevant factors. There is no rational link between scarcity of resources and the use of the law of standing outside the context in and for which it was developed: civil courts. Scarcity of resources does not turn an irrelevant factor into a relevant one, and does not elevate the law of standing to a universally applicable principle for allocating resources.

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[35] Agency's Factum at para. 31.
[36] Agency's Factum at para. 33.
[37] Agency's Factum, paras. 19-21.

31. There is also no rational link between the statutory objectives of the *Act* and the prioritization of complaints received by the Agency on the basis of the identity of the complainant.[38] The objective of the *Act* is not merely protecting individual complainants, but rather it includes the elimination of unreasonable and unjustly discriminatory practices before anyone is harmed, regardless of who reports or complains about the practice to the Agency.

iv. Comparison of the *Act* with the *Canadian Human Rights Act*

32. In enacting the *Canadian Human Rights Act* (the "*CHRA*"), Parliament chose to establish a victim-focused regime that offers primarily *ex post* remedies to victims, including compensation not only for expenses incurred, but also for pain and suffering that the victim experienced as a result of the discriminatory practice.[39] The discretion of the Commission to dismiss complaints that are not brought by or on behalf of a victim reflects the victim-focusedness of the legislative scheme.[40]

33. In sharp contrast, while Parliament could have, it chose not to include in the *Act* a provision similar to section 40(2) of the *CHRA*. The reason is that the *Act* and the *ATR* establish a primarily prevention-focused regime for international licence holders, who are required to file their terms and conditions with the Agency 45 days before the tariff would come into force,[41] and the regime offers *ex ante* remedies to prevent harm to the public at large before anyone would be victimized.

34. This contrast lends further support to the conclusion of the Federal Court of Appeal that the identity of the complainant is not a relevant consideration for the exercise of the Agency's discretion about whether to hear a preventive regulatory complaint.

C. The Agency's concession: an alternative ground for dismissing the appeal

35. Before this Court, the Agency correctly conceded that passengers who "could potentially be affected" or "may be affected" by airlines' discriminatory practices are also "entitled to bring a complaint" to the Agency.[42] In its reply factum, Delta has conceded the same point.[43]

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38 Agency's Factum at para. 20.
39 The *CHRA*, ss. 53(2)(e) and 53(3).
40 The *CHRA*, s. 40(2).
41 The *ATR*, s. 115.
42 Agency's Factum at paras. 20 and 34 (emphasis added).
43 Delta's Reply Factum at paras. 27, 28, and 29.

36. The Agency's concession directly contradicts the reasons of the Agency Decision, which were based on the premises that: (i) standing before the Agency can only be acquired in two ways, either as a private interest standing or a public interest standing; (ii) private interest standing requires a "direct personal interest";[44] and (iii) "private interest standing cannot be founded on hypothetical possibilities."[45]

37. The Agency's concession provides an alternative ground for dismissing the present appeal. First, it confirms that the Agency dismissed Dr. Lukács's complaint based on the wrong legal test, using the strict law of standing applied by civil courts instead of the broader "could potentially be affected" test. Second, in light of the shrinking of airplane seats and the tendency of many people to grow in girth, any person, including Dr. Lukács, "could potentially be affected" by Delta's discriminatory practices complained of—if not in the present, then in the future.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2017.

DR. GÁBOR LUKÁCS
Respondent

[44] Agency Decision at paras. 53-54 (emphasis added) [Appellant's Record, Tab 2, p. 12].
[45] Agency Decision at para. 64 [Appellant's Record, Tab 2, p. 13].

PART III – TABLE OF AUTHORITIES