Court File No.: 37276

IN THE SUPREME COURT OF CANADA
(On appeal from the Federal Court of Appeal)

BETWEEN:

DELTA AIRLINES INC.

APPELLANT

- AND -

DR. GABOUR LUKÀCS

RESPONDENT

MOTION RECORD FOR LEAVE TO INTERVENE OF THE ATTORNEY GENERAL FOR ONTARIO
(Pursuant to Rule 55 of the Rules of the Supreme Court)

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RESPONDENT

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF THE ATTORNEY GENERAL FOR ONTARIO
(Pursuant to Rule 55 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that the applicant, the Attorney General for Ontario, hereby applies to a Judge pursuant to Rule 55 for an order granting leave to intervene in this appeal and for leave to file a factum not exceeding 20 pages in length and to present oral argument not exceeding 15 minutes in length, and for such other order as the Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the motion will be made on the following grounds:

a) The Attorney General for Ontario has a direct and significant interest in the result of the instant appeal in that:

i. The Attorney General for Ontario has a statutory and common law mandate to superintend administrative tribunals in the Province of Ontario and has an interest in ensuring that those tribunals act within their legislative authority while maintaining sufficient flexibility to set their own priorities to accomplish their statutory mandate;

ii. Pursuant to their enabling statutes, many administrative tribunals in Ontario have the authority to receive and adjudicate complaints from members of the public on a variety of issues but their enabling statutes vary with respect to the extent that discretion is granted to determine which complaints should be adjudicated;

iii. A decision of this Honourable Court regarding the authority of a tribunal charged with adjudicating public complaints to decline to hear such complaints on the basis that the complainant lacks standing would have an impact on administrative tribunals and the administration of justice in Ontario;

b) The Attorney General for Ontario intends, if leave to intervene is granted, to restrict its submissions to the following questions:

i. Whether, and should, administrative tribunals that receive public complaints have the discretion to "screen out" complaints on the basis that the complaint lacks standing to bring the complaint?

ii. Whether the law of public interest standing as developed by this Honourable Court is applicable in the administrative law context?

c) The submissions that the Attorney General for Ontario proposes to make on these issues, if leave to intervene is granted, are summarized in the attached affidavit.

d) As outlined in the attached affidavit, the Attorney General for Ontario has a fresh and different perspective to offer this Honourable Court in the instant appeal. The Attorney General for Ontario considers that its submissions will be useful to this Honourable Court and different from the other parties to the instant appeal.

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion on or before June 28, 2017. If no response is filed within that

time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

Dated at Toronto, Ontario this 16th day of June, 2017

Applicant to the Motion

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DELTA AIRLINES INC.

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DR. GABOUR LUKÀCS

RESPONDENT

AFFIDAVIT OF SEAN KEARNEY
ON MOTION FOR LEAVE TO INTERVENE

I, SEAN KEARNEY, of the City of Toronto in the Province of Ontario, make oath and say as follows:

1. I am employed by the Ontario Ministry of the Attorney General as Director of the Crown Law Office, Civil Law. The Crown Law Office – Civil Law is the main litigation office for the Government of Ontario. The counsel in our office represent the provincial Crown in litigation at all levels of court and before administrative tribunals. In my role as Director, I have knowledge of the matters hereinafter deposed to.

A. The Interest of the Attorney General for Ontario

2. This appeal concerns the discretion of administrative tribunals to decline to consider, or to "screen out", complaints from members of the public on the basis that the complainant lacks standing to bring the complaint. This appeal also concerns whether the public interest standing test developed by this Honourable Court is, or should be, applicable in the administrative law context.

3. In Ontario, many administrative tribunals have the statutory authority to receive, review, investigate and adjudicate complaints from members of the public in a wide variety of circumstances ranging from policing to land surveying.[1] The enabling legislation of some of these tribunals sets out specific circumstances in which a tribunal may decline to deal with a complaint, including whether it is in the public interest to do so.[2] However, other enabling statutes, like the one before the court, contain no specific screening criteria, and therefore impart the tribunal with discretion to determine whether it will deal with a complaint.[3] The Court's decision in this matter will thus have an impact upon the administration of justice in Ontario.

4. The Attorney General for Ontario (the "Attorney General") has a statutory and common law mandate to superintend all matters connected with the administration of justice in Ontario.[4] Included in this mandate is the authority to advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies and the authority to conduct and regulate all litigation for and against the Crown or any ministry or agency of Government.

6. The Attorney General, as Chief Law Officer of the Province of Ontario, has a clear and strong interest in this appeal because this Court's decision will set a precedent respecting the extent of the discretion of administrative tribunals to decline to deal with complaints from members of the public and whether the public interest standing test should apply in the administrative law context. This Court's decision may have a significant impact on the administration of justice in Ontario in that it could have a direct impact on access to justice in the Province and on the ability of Ontario tribunals to perform their statutory mandates effectively.

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[1] See for example: *Police Services Act*, R.S.O. 1990, c. P.15, Part V; *Surveyors Act*, R.S.O. 1990, c. S.29; *Architects Act*, R.S.O. 1990, c. A.26; *Social Work and Social Service Work Act*, 1998, S.O. 1998, c. 31; and *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18

[2] See for example *Early Childhood Educators Act*, 2007 S.O. 2007, c.7, Schedule 8, s. 31(2); *Excellent Care for All Act*, S.O. 2010 c. 14, s. 13.2(2); *French Language Services Act*, R.S.O. 1990, c. F.32 s. 12.3(1); *Justices of the Peace Act* R.S.O. 1990, c. J.4 s. 11(19); *Ontario College of Teachers Act*, 1996 S.O. 1996, c. 12 s. 44(2); and *Coroners Act* R.S.O. 1990, c. C.37 s. 8.4(10)

[3] See for example: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 174(4); *Fire Protection and Prevention Act*, 1997, S.O. 1997, c. 4, s. 56(1); *Funeral, Burial and Cremation Services Act*, 2002, S.O. 2002, c. 33, s. 66(1); *Motor Vehicle Dealers Act*, 2002, S.O. 2002, c. 30, Sched. B s. 14(1); and *Payday Loans Act*, 2008, S.O. 2008, c. 9 46(1)

[4] *Ministry of the Attorney General Act* R.S.O. 1990, c. M-17, s. 5. 2

B. Submissions of the Attorney General for Ontario, if Leave to Intervene is Granted

7. If granted leave to intervene, the Attorney General will make submissions on the issue of whether tribunals should have the discretion to screen out complaints by members of the public on the basis of a lack of standing. The Attorney General will also make submissions regarding the policy reasons why the public interest standing test should not be applied in the administrative law context.

8. In this affidavit, I present a summary of the submissions that the Attorney General would make on these points. These submissions will be developed more fully in a factum, if leave to intervene is granted.

1. **Whether a statutory tribunal has the discretion to screen out complaints because a complainant lacks standing**

9. Because administrative tribunals are creatures of statute, the basis on which a tribunal charged with hearing complaints from members of the public may decline to deal with a complaint depends on the tribunal's enabling statute and the context in which the tribunal operates.[5]

10. The Attorney General takes no position regarding whether the Canadian Transportation Agency in particular has the authority to decline to hear complaints solely on the basis of a lack of standing, or whether s. 67.2(1) of the *Canada Transportation Act* applies to the respondent's complaint.

11. However, if granted leave to intervene, the Attorney General would argue that there are strong policy reasons why a balance must be struck between the ability of tribunals with the authority to receive, investigate and/or adjudicate complaints from members of the public to

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[5] *Nolan et al v.Kerry (Canada) Inc. et al* [2009] S.C.J. No. 39 at 33 and *Bell v. Canada (Canadian Human Rights Commission)*; [1996] S.C.J. No. 115 at 54-55

maintain a broad discretion to screen out complaints, and the ability of the public to access justice by having their complaints reviewed and investigated.

12. Although creatures of statue, tribunals are also the "masters of their own procedures", particularly where the tribunal's enabling statute leaves a decision-maker the discretion to choose those procedures. While not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.[6]

13. This factor is particularly important when applied to a regulatory tribunal whose authority extends beyond the review of public complaints to authority to make policy choices as to how to govern a particular industry. Such an agency may have particular policy reasons for declining to deal with a particular complaint which accord with the tribunal or agency's legislative mandate or policy objectives and priorities.

14. The Attorney General would, if granted leave, take the position that where the authority of a regulatory tribunal to receive and deal with public complaints is permissive, i.e. the legislation contains the word "may" rather than "shall", the tribunal has an important gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its finite resources and the discretion to set its own priorities in the pursuit of its statutory mandate.[7]

15. However, the Attorney General also recognizes that the ability of a member of the public to make a complaint raises important access to justice issues. First, tribunals that receive public complaints often deal with issues which engage the protection of the public and civil rights. For example, in Ontario, the *Police Services Act* provides the Independent Police Review Director

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[6] *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460 at para. 47; *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, at para. 27, : *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, per Gonthier J.

[7] *Delta Airlines Inc. v. Lukacs* [2016] F.C.J. No. 971, at para. 16. Such legislation is to be contrasted with legislation which actually sets out specific screening criteria to be applied by the tribunal. See for example *Early Childhood Educators Act, 2007* S.O. 2007, c.7 Schedule 8, s. 31(2); *Excellent Care for All Act*, S.O. 2010 c. 14, s. 13.2(2); *French Language Services Act*, R.S.O. 1990, c. F.32, s. 12.3(1); *Justices of the Peace Act* R.S.O. 1990, c. J.4, s. 11(19); *Ontario College of Teachers Act*, 1996 S.O. 1996, c. 12, s. 44(2); *Coroners Act* R.S.O. 1990, c. C.37, s. 8.4(10)

with the mandate to receive and investigate complaints about the policy or service of a police force or the conduct of a police officer.[8] The *Regulated Health Professionals Act* permits the College of a particular health profession to receive complaints about the competency and conduct of those health professionals.[9] The *Early Childhood Educators Act* permits complaints about the competence and conduct of early childhood educators.[10] Some statutes are silent on the right of a member of the public to file a complaint but, nonetheless, the regulator may choose to receive and investigate complaints.

16. Secondly, these tribunals provide members of the public with access to justice that they might otherwise be denied, due to a lack of financial or other resources, if their only manner of recourse was resort to the Superior Courts through a civil action.

17. Consequently, it is important to look at the particular enabling statute of the tribunal and to examine whether it restricts the tribunal's discretion to refuse to adjudicate a complaint and, to the extent the tribunal has discretion, whether it was exercised reasonably in light of the public interests the tribunal is established to serve.[11] This assessment should include a review of the substance of the complaint to determine how it may or may not accord with the legislative mandate or policy objectives of the tribunal.

18. Some statutes authorize or require a tribunal to screen out a complaint because the complainant was not "directly affected" by the conduct at issue or does not have a "sufficient personal interest" in the subject matter of the complaint.[12] However, the Attorney General would, if granted leave to intervene, argue that, if the statute is silent, the focus of the determination of whether a complaint should be dealt with should be on the substance of the complaint itself

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[8] *Police Services Act* R.S.O. 1990 c. P. 15 and see *Endicott v. Ontario (Independent Police Review Office)* 2014 ONCA 363

[9] *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18

[10] *Early Childhood Educators Act*, 2007 S.O. 2007, c. 7 Schedule 8

[11] *Endicott v. Ontario (Independent Police Review Office)* 2014 ONCA 363

[12] See for example: *Coroners Act* R.S.O. 1990, c. C.37, s. 8.4 (10)(c); *Provincial Advocate for Children and Youth Act*, 2007, S.O. 2007, c. 9, s. 16. (4.1) 2.; *Ombudsman Act* R.S.O. 1990, c. O.6, s. 17(2)(c); *Personal Health Information Protection Act,* 2004, S.O. 2004, c. 3, Sched. A, s. 56(4)(d); *Police Services Act* R.S.O. 1900 c. P. 15, s. 60(5)

rather than on the standing of the complainant because of the statutory mandate to regulate in the public interest and access to justice.[13]

2. Whether the law of public interest standing is applicable in the administrative law context

19. If granted leave, the Attorney General would argue that there are strong policy reasons why the law of public interest standing developed by this Honourable Court should not be applied in the administrative law context.

20. The Attorney General would not make submissions as to whether the respondent would meet the test for public interest standing (if public interest standing was extended to the administrative law context).

21. First, "central to the development of public interest standing in Canada" was the principle of legality, which has two aspects: 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.[14]

22. In other words, the public interest standing test was developed as means of ensuring that unconstitutional legislation or illegal government action did not go unchallenged simply because an individual who was directly affected did not bring a court challenge.[15] In this way, the public interest standing test has been used to allow individuals access to the courts where they previously would not have had access.

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[14] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 S.C.R. 524, at paras. 31 and 32

[15] *Finlay v. Canada (Minister of Finance)* [1986] S.C.J. No. 73; Canadian Council of Churches **v.** Canada (Minister of *Employment and Immigration)* [1992] 1 S.C.R. 236; *Borowski v. Canada (Attorney General),* [1981] 2 S.C.R 575; and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 S.C.R. 524

23. The Attorney General would argue that the use of the public interest standing test is antithetical to the statutory purposes of some adjudicative tribunals which are to provide members of the public with easier and faster access to justice before tribunal members with specific expertise.[16]

24. Further, complaints to administrative tribunals by members of the public rarely involve challenges to the constitutionality of legislation or the legality of state action as contemplated in this Court's public interest standing cases. Instead, the Attorney General would argue, these complaints challenge a myriad of activity and actors: i.e. commercial activity; regulated professionals (i.e. doctors, lawyers, engineers), and private parties. Consequently, the purpose for which the public interest standing test was created is not generally engaged in the administrative law context. Most regulators have authority to take action whether or not a complaint is received.

25. Secondly, the Attorney General would argue that it is not necessary to apply the public interest standing test in order to ensure that tribunals are able to use their finite resources effectively. The screening criteria already recognized in legislation and in the common law and the recognized flexibility in the procedures of administrative tribunals address the issue of the efficient use of tribunal resources. The added screening tool of the application of the public interest standing test is not required.[17]

26. Finally, the Attorney General would argue, that provided statutory bodies act within their legislative authority and are mindful of the interests that legislative mandate is designed to serve, they should be permitted sufficient flexibility to screen complaints so as to set their own priorities to accomplish their statutory mandate within their resources. The law of public interest standing was designed to moderate access to the Courts, not to administrative tribunals and where unnecessary to do so, tribunals should not resort to the application of principles developed with respect to Court processes.

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[16] *Delta Airlines Inc. v. Lukacs* [2016] F.C.J. No. 971, at paras. 19-22

[17] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 S.C.R. 524, at para. 64

27. Tribunals which have the discretion whether or not to deal with a complaint should maintain a broad discretion to screen out complaint based on their own regulatory regime and context, but the focus of that screening should be on the complaint, not the complainant. This strikes the appropriate balance between access to justice and the effective use of the limited resources of administrative tribunals.[18] The public interest standing test is a blunt tool to regulate access to a public complaint procedure.

C. Ontario's Experience in Similar Litigation

28. Ontario has extensive experience in administrative law proceedings. Counsel of my office under my supervision have given procedural advice to numerous Ontario tribunals and other statutory decision makers and have litigated cases before a wide variety of tribunals.

29. Counsel from the Crown Law Office, Civil Law have represented the Attorney General in numerous appeals relating to administrative and public law matters to this Court, both as a party and as an intervener. Further, pursuant to the *Judicial Review Procedure Act,*[19] the Attorney General may intervene as of right in every judicial review application in the Province of Ontario. As a result, counsel from the Crown Law Office – Civil Law regularly appear before the Divisional Court and the Court of Appeal for Ontario on administrative law matters.

30. The Attorney General can draw on this extensive experience to provide useful assistance to the Court in this appeal.

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[18] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 S.C.R. 524, at paras. 23 and 34

[19] *Judicial Review Procedure Act*, R.S.O. 1990, c. J-1, s. 9(4).

D. Conclusion

31. In conclusion, the Attorney General for Ontario will present submissions that will be useful and can offer a fresh perspective with respect to the issues raised in this appeal that is different from that of the parties.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario this 16th day of June 2017.

Commissioner for taking affidavits
Heather Mackay

Sean Kearney
Director, Crown Law Office – Civil Law