S.C.C. File No.: 37276

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

B E T W E E N :

DELTA AIR LINES INC.

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Pursuant to the Order of the Chief Justice of Canada dated June 22, 2017, Benjamin Zarnett was appointed as *amicus curiae* (the "Amicus") to assist the Court in connection with this appeal of Delta Air Lines Inc. ("Delta") since the Respondent, Dr. Gábor Lukács ("Dr. Lukács"), is not represented by counsel.[1]

2. The issues in this appeal revolve around a central question: who has standing to make a complaint about allegedly discriminatory practices of air carriers to the Canadian Transportation Agency (the "Agency"), invoking its authority under the *Canada Transportation Act* (the "Act")[2] and its regulations (the "Regulations")[3] to stop those practices?

3. The Act governs air and rail transportation and is the expression of Parliament's intention to achieve a national transportation system that serves and advances the well-being of Canadians, including one that is accessible without undue obstacle to persons with disabilities.[4] The Act contemplates regulation and strategic public initiatives to achieve such outcomes when they cannot be achieved satisfactorily by market forces alone.[5]

4. The Agency is given an important role to fulfill the purposes of the Act. Complaints, and who may make them, are important to that role. Section 37 of the Act provides that the Agency may inquire into, hear and determine complaints concerning a wide range of matters. Section 67.2(1) of the Act provides that on a complaint in writing by any person, the Agency, if it finds a domestic air carrier has applied terms or conditions of carriage that are unreasonable or unduly discriminatory, may suspend or disallow those

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[1] Order of C.J.C. McLachlin dated June 22, 2017 in S.C.C. Court File No. 37276.
[2] *Canada Transportation Act*, S.C. 1996, c. 10 (the "Act").
[3] *Air Transportation Regulations*, S.O.R./88-58 (the "Regulations").
[4] Act, ss. 5 and 5(d).
[5] Act, s. 5(b).

terms or conditions and order others substituted in their place.[6] Sections 111(2) and 113 of the Regulations give the Agency a similar authority for international air carriers (those licensed to operate between Canada and other countries).[7] Although ss. 111(2) and 113 of the Regulations do not condition such authority on a complaint, neither do they exclude a complaint as an initiator of that authority.

5. In the case at bar the Agency held that its powers to inquire into, hear and determine a complaint about terms and conditions of carriage applied by Delta, an international carrier, alleged to be discriminatory to large (obese) people, were powers that were circumscribed in a significant way. The Agency held that it would not consider a complaint from someone unless they met one of two particular concepts of standing, private interest standing or public interest standing, concepts used to determine who may invoke the jurisdiction of a court in some circumstances, for example, to challenge the constitutional or other validity of legislation. According to the Agency, a complainant like the Respondent, who was not an obese person and who did not raise constitutional issues, lacked private and public interest standing and therefore his complaint about Delta's practices would not be inquired into, heard or determined.

6. The Federal Court of Appeal reversed the Agency's decision on the basis that it involved an unreasonable interpretation of the Act.[8] In light of Delta's argument that the Federal Court of Appeal did not appropriately defer to the Agency, this case involves a consideration of whether the Federal Court of Appeal properly used and applied the reasonableness standard of review, which the Amicus respectfully submits it did. But perhaps more fundamentally, it involves consideration of three basic matters.

7. First, it requires consideration of the difference between the concept of standing as it applies to a statutory administrative tribunal, and the concepts of standing that the Agency applied. In the recent jurisprudence of this Court, standing in the sense of who is entitled to initiate or participate in a proceeding before a particular statutory tribunal has

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[6] Act, s. 67.2(1).
[7] Regulations, ss. 111(2) and 113.
[8] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 220 at paras. 30 and 32 ("FCA Decision").

been addressed by examining the statutory grant of power to and regulatory scheme governing the tribunal, and interpreting them according to the modern principle of statutory interpretation.[9] The concepts of private interest and public interest standing, applied in the case at bar by the Agency, have not been used. Treating the concepts used by the Agency as though they were universally applicable to all questions of standing, and apply to affect or alter a statute which addresses who has standing before an administrative tribunal, is not consistent with this Court's jurisprudence.

8. Second, this case requires consideration of how the question of standing is answered under the Act and Regulations. Specifically, the questions to be determined are whether the words of the Act: "complaint… by any person" grants standing to anyone in respect of allegedly discriminatory practices of domestic air carriers, and whether the same standing also applies where allegedly discriminatory practices of an international carrier are involved. In the Amicus' submission, the application of the modern principle of statutory interpretation to the Act and Regulations yields an answer of yes to both questions.

9. Finally, this case requires consideration of the relationship between the answer to the standing question and the Agency's discretion, under s. 37 of the Act, whether to inquire into a complaint. Both Delta and Dr. Lukács consider the standing determination as within the Agency's discretion but differ on whether the discretion was exercised on a proper consideration of relevant factors. The Amicus suggests a different analytical framework is appropriate. The first question is whether a complaint has been made by a person with standing. If the answer to a standing question is that a complaint comes from a person with standing, the Agency's discretion, or gatekeeper role, whether to inquire into, hear and determine such complaint is then engaged. That discretion is exercisable on factors other than standing. This remains a meaningful gatekeeper role, consistent with the language and scheme of the Act.

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[9] *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 at para. 15 ("*Northrop*"); *Québec (Attorney General) v. Guérin*, 2017 SCC 42 at para. 55 ("*Guérin*").

10. The *Amicus* respectfully submits that a consideration of these questions in light of this Court's jurisprudence leads to the conclusion that the Federal Court of Appeal reached the right result.

B. Statement of Facts

(i) Legislative Framework

(a) The Act

11. The Act regulates air and rail transportation in Canada. Section 5 of the Act sets out what the Act is intended to achieve:

> It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when
>
> (a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;
>
> (b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;
>
> (c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;
>
> (d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and
>
> (e) governments and the private sector work together for an integrated transportation system.[10]

12. Consistent with the Act's policy of encouraging an accessible transportation system without undue obstacle to mobility of persons including persons with disabilities, Part V of the Act, entitled "Transportation of Persons with Disabilities" contains specific provisions contemplating both regulations to remove undue obstacles to the mobility of

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[10] Act, s. 5.

persons with disabilities, and the co-ordination of the activities of the Agency with activities of the Canadian Human Rights Commission in relation to the transportation of persons with disabilities.[11]

(b) The Agency

13. The Agency is continued under and administers the Act.[12] The Act gives a variety of specific powers to the Agency; in connection with air transportation these include the power to grant licences to operate a domestic air service,[13] a scheduled international air service,[14] or a non-scheduled international air service;[15] the power to grant permits for an international charter service;[16] the power to impose terms and conditions on licences and permits;[17] the power to make regulations;[18] and the power to make rules regarding how the Agency carries out its work, [19] among others.

14. The Act contemplates a critical role for the Agency in ensuring compliance with the Act, its policy and the Regulations. The Act gives the Agency the power to inquire into obstacles to mobility[20] and matters for which licences or permits are required,[21] and the power to suspend or cancel licences.[22] And of critical relevance to this case, the Act gives the Agency various powers exercisable as a result of complaints.[23]

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[11] Act, ss. 170(1) and 171.

[12] Act, s. 7; Part I of the Act, dealing with the Agency, its composition, organization and certain of its powers, is entitled "Administration".

[13] Act, s. 61.
[14] Act, s. 69(1).
[15] Act, s. 73(1).
[16] Act, s. 75.1.
[17] Act, ss. 71 and 74.
[18] Act, ss. 86 and 170.
[19] Act, s. 17.
[20] Act, s. 172(1).
[21] Act, s. 81.
[22] Act, ss. 63(1), 72 and 75.
[23] See for example, Act, ss. 37, 65, 66, 67.1, 67.2 and 85.1 and Regulations, ss. 113 and 135.4.

(c) Complaints

15. The Act stipulates complaints as a way to invoke certain important powers of the Agency. Section 37 of the Act, which is applicable to all activities the Agency regulates, provides:

> The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.[24]

(d) Complaints Regarding Domestic Air Carriers

16. In relation to domestic air carriers, specific provisions are made in the Act about who may make complaints.

17. Section 65 of the Act provides that "on complaint in writing to the Agency by any person," the Agency may order that a domestic licensee, who proposes to discontinue or reduce a particular service in a way that will have specific effects but who has not complied with s. 64 of the Act (which regulates how that is to occur), must reinstate the service.[25] [emphasis added]

18. Section 66(2) of the Act provides that "on complaint in writing to the Agency by any person," the Agency may order that a licencee who is the only person providing a domestic service between two points and its offering an inadequate range of fares or cargo rates for that service, must offer additional fares or rates.[26] [emphasis added]

19. Section 67 of the Act requires domestic licensees to publish their fares, rates and terms or conditions of carriage in a tariff and apply only those published in the tariff. Section 67.1 of the Act provides powers to the Agency if that does not occur, exercisable as a result of a complaint by any person:

> [67.1] If, on complaint in writing to the Agency by any person, the agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a

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[24] Act, s. 37.
[25] Act, s. 65(1).
[26] Act, s. 66(2).

> fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to
>
> (a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;
>
> (b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's failure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and
>
> (c) take any other appropriate corrective measures.[27] [emphasis added]

20. Of particular importance to this case, s. 67.2 of the Act provides the Agency with a power to suspend or disallow terms and conditions of carriage of domestic air carriers which are unreasonable or unduly discriminatory and to substitute others in their place. This power is exercisable on a complaint in writing by any person:

> [62.2] If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.[28] [emphasis added]

21. Section 85.1 of the Act, dealing with air travel complaints, provides that the Agency must review a complaint, and may attempt to resolve it or have it mediated, before more formal processes are undertaken:

> (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint. …
>
> (3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.[29]

22. The Act does not make or equate the Agency with a court. The Act respects the very different jurisdictions of the Agency and courts. It is with respect to matters within the

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[27] Act, s. 67.1.
[28] Act, s. 67.2.
[29] Act, s. 85.1.

Agency's jurisdiction that certain court-like powers are given to the Agency. Section 25 of the Act grants the Agency "with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents … all the powers, rights and privileges that are vested in a superior court."[30] [emphasis added]

(a) The Regulations

23. The Regulations are promulgated under the Act. The Agency has the specific power under the Act to make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities, including prescribing the content of terms and conditions of transportation of such persons.[31]

24. The Regulations govern, among other things, the contents of tariffs and tolls. A "tariff" is "a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services."[32] A "toll" is "any fare, rate or charge established by an air carrier in respect of the shipment, transportation, care, handling or delivery of passengers or goods or of any service that is incidental to those services."[33]

25. Under the Regulations, international air carriers are required to file their tariffs with the Agency before commencing a service.[34] Section 111(2) of the Regulations, dealing with the contents of tariffs and tolls, forbids unjust discrimination:

> 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

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[30] Act, s. 25.
[31] Act, s. 170.
[32] Act, s. 55(1).
[33] Regulations, s. 2.1.
[34] Regulations, s. 110(1).

> (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.[35] [emphasis added]

26. The Agency is authorized under s. 111(3) of the Regulations to determine compliance with the requirements of the Regulations:

> The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.[36]

27. Section 113 provides that the Agency may suspend or disallow tariffs that are not compliance with the Regulations, and substitute others.[37]

28. As Delta states, "the combination of ss. 111(2) and 113 of the [Regulations] provide a similar, though not identical, authority to the Agency in the international sphere to that granted by s. 67.2(1), in the domestic sphere,"[38] that is, a power to suspend or disallow unjustly discriminatory terms and conditions of carriage and to substitute others. Although the Regulations do not specify that a complaint is necessary to invoke the Agency's authority to do so in relation to an international carrier, they do not preclude a complaint as a way of invoking it. Moreover, if a complaint invokes that power in relation to an international carrier, nothing suggests that the complaint is not governed by s. 37 of the Act.

(ii) Dr. Lukács' Complaint

29. On August 24, 2014, Dr. Lukács filed a complaint with the Agency alleging that Delta as an international carrier employs practices regarding the transportation of "large (obese)"

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[35] Regulations, s. 111(2).
[36] Regulations, s. 111(3).
[37] Regulations, s. 113.
[38] Factum of the Appellant, Delta Airlines Inc., dated May 23, 2017 at para. 31 ("Appellant's Factum").

passengers that are discriminatory, contrary to s. 111(2) of the Regulations and a previous decision of the Agency regarding accommodation of passengers with disabilities.[39]

(iii) The Agency's Decision

30. On September 5, 2014 the Agency invited submissions on Dr. Lukács' standing.[40]

31. After receiving submissions, on November 25, 2014, the Agency issued a decision[41] dismissing the complaint on the sole ground that Dr. Lukács lacked private and public interest standing to make it. In it, it articulated its interpretation of the Act and Regulations as they pertained to the requirement of standing as well as how they led to its decision.

> [52] That being said, the Agency raised the issue of standing. Although Dr. 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 [Regulations], the Agency, as any other court, will not determine rights in the absence of those with the most at stake. Determining otherwise would, as noted by the *Supreme Court* in *Canada v. Downtown Eastside Sex Workers*, "[…] be equated with a licence to grant standing to whomever decides to set themselves up as the representative of the poor or marginalized."
>
> [53] Standing can be acquired in two ways, either as private interest standing or as a public interest standing.
>
> …
>
> [76] The Agency finds that Dr. Lukács lacks both private interest standing and public interest standing and accordingly the Agency dismisses his complaint. [42]

32. For its understanding of private interest standing the Agency cited two cases which involved claims to courts to challenge the validity of legislation, and a text excerpt on standing to judicially review an administrative decision.[43] For its understanding of public

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[39] The previous decision of the Agency Dr. Lukács cited was: Canadian Transportation Agency Decision No. 6-AT-A-2008 dated January 10, 2008.

[40] Canada Transportation Agency Decision No. LET-C-A-63-2014 dated September 5, 2014, Record of the Appellant Delta Air Lines Inc., Tab 1.

[41] Canadian Transportation Agency Decision No. 425-C-A-2014 dated November 25, 2014 ("CTA Decision").

[42] CTA Decision, *supra* note 41 at paras. 52-53, 76.

[43] CTA Decision, *supra* note 41 at paras. 54-57; citing *Ogden v. British Columbia Registrar of Companies*, 2011 BCSC 1151 at para. 11 ("*Ogden*"), *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 ("*Finlay*"), David

interest standing, the Agency cited cases dealing with challenges in court to the validity of legislation or administrative action.[44]

33. The Agency found that Dr. Lukács did not have private interest standing to bring the complaint as he did not have a direct personal interest in the question to be litigated. As he was not a large (obese) person, he was not aggrieved or affected by nor did he have some sufficient interest in the matter complained about, in the sense of being affected more than a member of the general public or community in issue.[45] The Agency found that Dr. Lukács did not have public interest standing, in that Dr. Lukács submissions suffered from a "fatal flaw" – in the Agency's view public interest standing does not apply to cases beyond those in which constitutionality of legislation or non-constitutionality of administrative action is contested, and Dr. Lukács raised no such issue.[46]

(iv) The FCA's Decision

34. Dr. Lukács appealed the Agency's decision to the Federal Court of Appeal, as contemplated by s. 41 of the Act.[47]

35. The Federal Court of Appeal held that the appropriate standard of review of the Agency's decision was one of reasonableness, and in particular that the Agency's decision of

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P. Jones and Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at pp. 646-647 ("*Jones and de Villars*"), Book of Authorities of the Amicus ("Amicus' BA") Tab 2. Note that the new edition of this text, published before the CTA Decision, contains the same passage: David P. Jones and Anne S. de Villars, *Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014), at pp. 676-677, Amicus' BA Tab 2.

[44] CTA Decision, *supra* note 41 at paras. 66-73, citing *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (Ont. Sup. Ct.), *Thorson v. Canada (Attorney General)* (1974), [1975] 1 S.C.R. 138 ("*Thorson*"), *The Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236, *Downtown Eastside Sex Workers United Against Violence Society v. Canada (AG)*, 2012 SCC 45 ("*Downtown Eastside*").

[45] CTA Decision, *supra* note 41 at paras. 64-65.
[46] CTA Decision, *supra* note 41 at para. 74.
[47] Act, s. 41.

whether to grant standing, which required an analysis of the statutory regime and case law, was owed deference.[48]

36. The Federal Court of Appeal reviewed the Act and Regulations, finding that the language regarding complaints was permissive, not mandatory, and that the Agency had a "gatekeeping" function to screen complaints in order to ration resources. The Federal Court of Appeal cited this Court's decision in *Downtown Eastside* for the rationale underlying the concepts of standing to which the case law cited by the Agency referred.[49] The Federal Court of Appeal found that rationale was "warranted in a judicial setting, where the objective is to determine the individual rights of private litigants", but that "it is far from clear that [the] strict rules developed in the judicial context should be applied with the same rigour by an administrative agency mandated to act in the public interest."[50]

37. The Federal Court of Appeal concluded that the Agency "erred in superimposing the jurisprudence with respect to standing on the regulatory scheme put in place by Parliament, thereby ignoring not only the wording of the Act but also its purpose and intent."[51] It found that failure to meet the tests for standing the Agency had referred to cannot be determinative of whether a complaint that appears to be serious on its face is dismissed.[52] The Federal Court of Appeal found that the Agency unreasonably fettered its discretion by automatically denying Dr. Lukács standing on the basis that he did not meet the judicial tests for private or public interest standing.[53]

38. Having answered the question as it did the Federal Court of Appeal did not find it necessary to address whether public interest standing can arise even in the absence of a constitutional question.

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[48] FCA Decision, *supra* note 8 at para. 14.
[49] FCA Decision, *supra* note 8 at para. 18, citing *Downtown Eastside*, *supra* note 44 at para. 22.
[50] FCA Decision, *supra* note 8 at para. 18.
[51] FCA Decision, *supra* note 8 at para. 19.
[52] FCA Decision, *supra* note 8 at para. 27.
[53] FCA Decision, *supra* note 8 at para. 30.

PART II – THE AMICUS' POSITION ON APPELLANT'S QUESTIONS IN ISSUE

39. The positions of the *Amicus* with respect to the Appellant's two issues are as follows:

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?

40. The *Amicus* submits that the Federal Court of Appeal reached the correct result, but would not characterize the Federal Court of Appeal's finding as Delta has. In accordance with this Court's jurisprudence, standing is a proper consideration for an administrative tribunal; a person seeking to invoke powers of an administrative tribunal must have standing to do so. The Federal Court of Appeal did not find that the law of standing, understood in this sense, was inapplicable. What it held was that the particular concepts of standing the Agency had used were inapplicable. This Court's jurisprudence reveals that who has standing before an administrative tribunal is determined by the meaning of the statute and regulatory scheme under which the tribunal operates. What the Federal Court of Appeal held was that the Agency had unreasonably interpreted its own statute, by imposing on it standing rules applicable to certain types of cases in courts, rather than what the statute itself required. That is consistent with this Court's jurisprudence.

Issue 2: Was the Agency's decision not to hear Lukács' complaint on the basis that he lacked standing reasonable?

41. The answer is no. The proper analysis (sometimes referred to as the "correct legal test") was not used by the Agency in interpreting the Act with the result that it based its decision on (and solely on) the absence of private interest and public interest standing to bring a claim in Court rather than the standing required under the Act and Regulations. Such a decision does not meet this Court's tests for reasonableness.

PART III – STATEMENT OF ARGUMENT OF THE AMICUS

A. The appropriate standard of review as to the Agency's decision and its application

42. The Federal Court of Appeal determined that the appropriate standard of review of the Agency's decision is reasonableness. It specifically noted that the Agency's interpretation of the Act, as its enabling legislation, was reviewable on a standard of reasonableness and entitled to a high degree of deference.[54] It defined its task as "restricted to determining whether the decision of the Agency falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law."[55]

43. The Federal Court of Appeal's articulation of the standard of review comports with this Court's jurisprudence. As noted by this Court in *Dunsmuir*, reasonableness is "…concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law,"[56] which is the test the Federal Court of Appeal applied.[57] And as this Court held in *Dunsmuir*, where an administrative tribunal is interpreting its own statute, deference, in the form of a reasonableness standard of review, is generally required.[58]

44. This Court has very recently held, in *Guérin*, that a tribunal's interpretation of its own statute to determine standing is reviewable on a reasonableness standard:

> "[31]… The courts below were right to apply the reasonableness standard. Reasonableness necessarily applies because the council of arbitration was called upon to interpret and apply its enabling statute, the Framework Agreement and the Protocol, which are at the core of its mandate and expertise…"
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> …
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> "[36]…In the instant case, too, the question of Dr. Guérin's standing relates to the council of arbitration's interpretation of its enabling legislation and of the Framework Agreement. This question does not cast doubt on "the [council of arbitration's] authority to make the inquiry" submitted to it (*Dunsmuir*, at para.

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[54] FCA Decision, *supra* note 8 at para. 14.
[55] FCA Decision, *supra* note 8 at paras. 14-15.
[56] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47 ("*Dunsmuir*"); see also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 36 ("*Edmonton (City)*").
[57] FCA Decision, *supra* note 8 at para. 15.
[58] *Dunsmuir*, *supra* note 56 at para. 54.

> 59; see also *Nolan*, at para 34), but is, rather, intended to determine who – Dr. Guérin or the Fédération – can submit it. That is far from the narrow and limited scope this Court has attributed to true questions of jurisdiction."
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> …
>
> "[50]…we are of the opinion that it was, in any event, reasonable for the arbitrator to conclude that Dr. Guérin did not have standing because, under the Framework Agreement and the Act, only the Fédération can submit such a dispute to a council of arbitration."[59]

45. Delta contends that the Federal Court of Appeal, despite correctly identifying the appropriate standard of review as one of reasonableness, erroneously employed a correctness standard by interpreting the statutory regime and the Agency's authority and mandate *de novo* and finding that the Agency's decision was unreasonable because it was inconsistent with that analysis.[60]

46. It is respectfully submitted that Delta's contention that the reasonableness standard of review was not actually used is unjustified, given how that standard of review is applied to the type of question at issue here. The Federal Court of Appeal conducted a two-step analysis. First, it considered whether there were errors in the Agency's interpretation of the Act, judged against the accepted principles of statutory interpretation. It summarized the errors as consisting of "superimposing the jurisprudence with respect to standing on the regulatory scheme put in place by Parliament, thereby ignoring not only the wording of the Act, but also its purpose and intent".[61] It provided an analysis as to why it considered that to have occurred by looking at the words of the Act, the Act as a whole and its policy, as well as the non-applicability of what the Agency used as concepts of standing.[62] Second, it concluded that the result of those errors was that the Agency had "erred in law and rendered an unreasonable decision" and that the Agency had "unreasonably fettered its discretion" by "refus[ing] to look into a complaint on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdiction."[63] In other words, fairly construed, it considered whether the effect

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[59] *Guérin*, *supra* note 9 per the majority at paras. 30-37, 50.
[60] Appellant's Factum at paras. 65-66.
[61] FCA Decision, *supra* note 8 at para. 19.
[62] FCA Decision, *supra* note 8 at paras. 19-29.
[63] FCA Decision, *supra* note 8 at para. 30.

of the errors put the result outside the range of possible acceptable outcomes viewed in light of the law.

47. This two-step analysis is necessary since the question of standing revolves around the meaning and scope of the legislation, and the law provides a proper approach to the interpretation. Therefore, whether the proper legal approach was used must be considered, as must the effect of the use of an erroneous legal approach on the result. Doing so does not change a reasonableness review into a correctness one. Part of the reasonableness test in *Dunsmuir* requires consideration of whether the decision is a possible and acceptable outcome in light of the facts and the law.[64] [emphasis added]

48. This point is made clear in this Court's decision in *Németh*:

> "The Minister's decision to surrender for extradition should be treated with deference; it will generally be reviewed for reasonableness. However, in order for a decision to be reasonable, it must relate to a matter within the Minister's statutory authority and he must apply the correct legal tests to the issues before him."[65] [emphasis added]

49. In so concluding this Court in *Németh* relied on its decision in *Lake*:

> "[T]he Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable."[66] [emphasis added]

50. And although *Németh* was not cited in *Kanthasamy*,[67] a recent consideration by this Court of the standard of review for administrative decisions, the majority reasons in *Kanthasamy* are consistent with *Németh*. After finding that reasonableness was the appropriate standard of review for the immigration officer's decision in question, the majority went on to decide that the immigration officer employed an incorrect legal test,

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[64] *Dunsmuir*, *supra* note 56 at para. 74.
[65] *Németh v. Canada*, 2010 SCC 56 at para. 10 ("*Németh*").
[66] *United States v. Lake*, 2008 SCC 23 at para. 41 ("*Lake*").
[67] *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*").

in light of the statutory directives in the governing statute, making the immigration officer's decision unreasonable.[68]

51. The proper analysis, or correct legal test for interpreting a statute, is the modern principle of statutory interpretation, under which the words of the legislation are given their ordinary and grammatical meaning, read in the context of the legislation as a whole, and harmoniously with its purpose and intent.[69] Accordingly, although the Agency's interpretation of the Act is entitled to deference, an interpretation of legislation which did not follow the modern principle because it ignored the wording of the Act and its purpose and intent, and which superimposed a non-applicable concept on Parliament's legislative scheme, as the Federal Court of Appeal found, would be an interpretation arrived at without using the proper analysis or correct legal test. Where the result of an interpretation which used an erroneous legal test directly impacts the resulting decision (for example, where it is the sole reason for the decision, as it was here), the decision would not be justified as an acceptable outcome given the facts and law, and would be unreasonable according to the deferential standard of review.

52. Indeed this Court's review of decisions of administrative tribunals on the interpretation of their statutes have followed the same paradigm as the Federal Court of Appeal used in the case at bar. For example, in *Edmonton (City)* the majority concluded that the Board reached a reasonable interpretation of its legislation by looking at whether the Board had considered the legislation in light of this Court's well-established approach to statutory interpretation, and concluded it had in light of the grammatical and ordinary meaning of the language in the statutory provision in issue, the scheme of the legislation as a whole, and its purpose.[70] And in *Guérin*, the majority considered the tribunal's interpretation on

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[68] *Kanthasamy*, *supra* note 67 at paras. 33-34, 39-40, 45.
[69] *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at para. 26; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014), at p.7, ("*Sullivan*") Amicus' BA Tab 3; *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para 27.
[70] *Edmonton (City)*, *supra* note 56 at paras. 44-61.

the question of standing to be reasonable, in part because a contrary interpretation would be inconsistent with the modern principles of statutory interpretation.[71]

53. Delta also criticizes the Federal Court of Appeal for not considering, in addition to the reasons the Agency gave for its decision, reasons that could be offered in support of its decision.[72]

54. When this Court said that reasons that could be (but were not) offered to support a tribunal's decision should nonetheless be considered, the reference was to a situation where a tribunal had given no reasons. This Court noted that there can be legitimate reasons why a tribunal may have given no reasons, and it would be wrong for a decision to fail the reasonableness test's requirements of justification and intelligibility when a tribunal may have been misled into believing it did not have to give reasons.[73]

55. The situation is different where a tribunal has given reasons and an analysis. In the very case Delta cites, this Court explicitly clarified that its direction that courts are to give respectful attention to the reasons which could be offered in support of a decision "should not be taken … as suggesting that courts should not give due regard to the reasons provided by a tribunal where such reasons are available" and "is not a 'carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result.'"[74] It is the tribunal's decision, reached for the reasons it gave, that is entitled to deference – if a decision is said to be a possible acceptable outcome for other reasons, rather than the ones the tribunal actually expressed, a reviewing court would not be deferring to the tribunal but to something else. This does not mean arguments beyond what the tribunal expressed cannot be considered as support for the tribunal's reasoning – but they must support what the tribunal actually did for the reasons it expressed.

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[71] *Guérin*, *supra* note 9 at para. 55.
[72] Appellant's Factum at para. 63, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at paras. 54-56 ("*Alberta*").
[73] *Edmonton (City)*, *supra* note 56 at paras. 36-40; *Alberta*, *supra* note 72 at paras. 51-53.
[74] *Alberta*, *supra* note 72 at para. 54, citing *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, at paras. 53, 56.

56. It is therefore submitted that the Federal Court of Appeal used the proper standard of review. The question which remains is whether the Agency approached the interpretation of its enabling legislation in the erroneous manner attributed to it by the Federal Court of Appeal leading directly to the decision it reached.

B. The Standing Question and How it is Determined

57. The Agency itself raised the issue of standing, and framed the sole issue as: "Does [D]r. Lukács have standing in this complaint?"[75] That question was correct as far as it goes. The question of who may invoke a statutory tribunal's powers, which is the accurate characterization of the broad question of standing in this context, is one that each administrative tribunal can properly raise. Contrary to some of the submissions of the Respondent to the effect that standing is not a relevant consideration at all,[76] this Court's jurisprudence suggests that it is a proper and indeed a central consideration. But what standing means, and how it is determined and applied must be the product of the use of proper analysis or the correct legal test.

58. At its most general the law of standing answers the question of who is entitled to initiate or participate in a legal process.[77] Where the issue concerns a statutory administrative tribunal, the standing question is who may initiate a process to invoke a power of that tribunal.[78] That question is answered by the terms of the statutory grant, as is apparent from this Court's jurisprudence described below.

59. In *Northrop,* this Court considered a standing issue in an administrative context – whether the Canadian International Trade Tribunal could hear a complaint initiated by a non-Canadian supplier. Rothstein J described the issue as "a matter of statutory interpretation" of the enabling legislation and interpretation of the relevant trade

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[75] CTA Decision, *supra* note 41 at para. 6.
[76] Factum of the Respondent, Dr. Gábor Lukács, dated July 18, 2017 at para. 84.
[77] *Downtown Eastside*, *supra* note 44 at para. 1; Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at p. 7 ("*Cromwell*"), Amicus' BA Tab 4.
[78] *Guérin*, *supra* note 9 at para. 70.

agreement.[79] As Brown and Rowe JJ noted in their concurring judgment in *Guérin*, "the statutory grant in *Northrop Gruman*, taken together with its regulations and the Agreement on Internal Trade which those regulations referentially incorporated, explicitly restricted the class of suppliers which could bring a complaint." Since the non-Canadian supplier fell outside of the statutory grant, it was without standing.[80] The proper interpretation of the regulatory scheme was completely determinative of the standing question.

60. Similarly, in *Guérin*, this Court also reviewed whether there was standing to submit a matter to a tribunal in light of what the enabling legislation and relevant agreement provided, viewed through the proper interpretative approach.[81] The majority decision that the tribunal had reasonably decided there was no standing was solely a function of what the regulatory scheme said.

61. Accordingly, the proper analysis or correct legal test that the Agency should have applied to the standing question it raised was to consider what the Act and Regulations said about who could bring or initiate a complaint, interpreted according to the modern principle of interpretation.

62. The Agency approached the matter differently. It erroneously equated itself with a court,[82] and then asked whether the Respondent had private interest standing or public interest standing, which it described as the only two ways in which standing can be acquired.[83] It then, in the language of the Federal Court of Appeal, "superimpos[ed]" [84]

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[79] *Northrop*, *supra* note 9 at para. 15.

[80] *Guérin*, *supra* note 9 at para. 79. The concurring judges and the majority in *Guérin* differed on whether *Northrop's* jurisdictional approach to the standing issue and corresponding review for correctness was appropriate, as compared with the reasonableness approach to standing in *Guérin.* See the majority opinion at para. 35 and the concurring judgment at paras. 73-79. However, that difference does not affect the underlying principle that the determination of standing in the administrative context is a function of interpreting the statutory language.

[81] *Guérin*, *supra* note 9 at para. 50.

[82] CTA Decision, *supra* note 41 at para. 52: "The Agency, as any other court …" The Agency is not a court. It is an administrative body, part of the executive branch, not the judiciary: see FCA Decision at para. 20. This Court has recognized that procedure before administrative bodies need not replicate court procedure if their functions are different from that of a traditional court: *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145 at p. 168.

[83] CTA Decision, *supra* note 41 at para. 53.

those concepts on the Act and Regulations, rather than considering the actual text, scheme and purpose thereof.

63. Private interest standing and public interest standing are not universally applicable concepts which can be taken to implicitly exist in a statutory regime regardless of its words or purpose. This Court cautioned in *Thorson* against taking comments in prior decisions about standing "as if they were disembodied terms of a statute" rather than considering the comments in the context of the case law principle out of which they arose.[85] Public interest standing expressly refers to who may bring a public law case (one that deals with the validity and applicability of a law) to a court.[86] Private interest standing may have wider application, but it still pertains to who may sue in a court, and the cases the Agency cited refer to who may sue in court to invalidate legislation.[87] And neither applies, even to a claim in a court, where a statute itself addresses who may sue, as statutes frequently do.

64. For example, the *Canada Business Corporations Act* creates an oppression remedy, and expressly defines who may be a complainant suing under it.[88] It also creates standing for a shareholder to bring a derivative action advancing a corporation's claim, overriding what had been considered an impediment to such a claim based on standing.[89] Provincial *Securities Acts* provide remedies for prospectus misrepresentation, and expressly stipulate

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[84] FCA Decision, *supra* note 8 at para. 19.
[85] *Cromwell* at pp. 122-123, citing *Thorson*, *supra* note 44 at p. 150, Amicus' BA Tab 4.
[86] *Downtown Eastside*, *supra* note 44 at para. 1.

[87] *Ogden*, *supra* note 43 dealt with a claim challenging the constitutionality of provisions of the criminal code; *Finlay*, *supra* note 43 dealt with the validity of the exercise of statutory authority for an administrative action. *Jones and de Villars* at pp. 646-647, also cited by the Agency for a description of private interest standing, was discussing standing in court to challenge the decision of a public delegate, not standing to bring a complaint to a public delegate in the first place.

[88] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 238 and 241 ("CBCA"). Similar provisions exist in the provincial corporate statutes – see for example, *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 245 and 248 ("OBCA"). Notably, a complainant under the oppression remedy may seek relief on behalf of others: see *Themadel Foundation v. Third Canadian Investment Trust Ltd.*, [1995] O.J. No. 888 at p. 16 (Ont. Gen. Dev. Comm. List), varied on other grounds 1998 CanLII 973 (Ont. C.A.), Amicus' BA Tab 1. See also *Cromwell* at p. 40, Amicus' BA Tab 4.

[89] *Cromwell* at pp. 27, 37-39, Amicus' BA Tab 4; CBCA, s. 239. Similar provisions exist in the provincial corporate statutes – see for example, OBCA, s. 246.

who may sue for them.[90] Provincial municipal statutes create rights to sue to set aside a municipal by-law, and expressly define who may bring a proceeding under it, solving other standing issues.[91] These examples clearly may be multiplied. The point is, where a statute addresses the standing question, it – not other concepts – answer the question, even where it is a claim in court that is involved.

65. When dealing with a statutory administrative tribunal, that the answer to the standing question lies in the interpretation of the regulatory scheme and not in concepts of private and public interest standing, is made plain by this Court's decisions in *Northrop* and *Guérin*. In *Northrop*, the non-Canadian supplier was adversely affected by the matter in issue.[92] In *Guérin*, so was Dr. Guérin.[93] If private interest standing was the test, both would meet it. Neither had standing because the regulatory scheme, properly construed, did not grant it. Indeed, in *Guérin*, the majority expressly rejected the idea that being directly affected gave standing, without mentioning the concept of private interest standing.[94] It is clear from the approach in those cases that the concept of private interest and public interest standing simply have no application – the question is what the regulatory scheme provides. Where it does not grant standing, neither private interest or public interest standing creates it. By the same reasoning, where the regulatory scheme, properly interpreted, grants standing, it is wrong to use private and public interest standing concepts to take away the standing the regulatory scheme provides.

66. Accordingly, the Agency, when it considered private interest and public interest standing, rather than the Act and Regulations, as the only way standing can be acquired, made exactly the error the Federal Court of Appeal attributed to it.

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[90] See for example: *Securities Act*, R.S.O. 1990, c. S.5, s. 130(1); *Securities Act*, R.S.B.C. 1996, c. 418, s. 131(1); *Securities Act*, R.S.A. 2000, c. S-4, s. 203.

[91] See for example: *Municipal Act, 2001*, S.O. 2001, c. 25, s. 273; *Vancouver Charter*, S.B.C. 1953, c. 55, s. 524; *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 536. See also *Cromwell* at p. 48, Amicus' BA Tab 4.

[92] *Northrop*, *supra* note 9 at para. 3.
[93] *Guérin*, *supra* note 9 at paras. 58-59.
[94] *Guérin*, *supra* note 9 at para. 59.

C. How the Act and the Regulations Answer the Standing Question

(i) The General Language

67. Section 37 of the Act provides that the "Agency may inquire into, hear and determine a complaint…" Nothing in s. 37 defines or limits who may make a complaint. However, the breadth of the complaints contemplated by s. 37, which may concern "any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament administered in whole or in part, by the Agency" is more consistent with a broad reading of who has standing to make a complaint than a narrow one.

(ii) Standing in Respect of Domestic Carriers

68. Where the Act, in relation to air travel, specifically deals with complaints, as it does in the area of domestic carriers, it consistently uses the language "complaint in writing to the Agency by any person" before describing the power given to the Agency in relation to such a complaint. Such language is found in s. 65 (complaints about non-compliance with provisions regarding discontinuance of certain domestic air services), s. 66(1) (complaints regarding unreasonable fares or rates by a domestic air carrier), s. 66(2) (complaints regarding inadequate ranges of fares or rates), s. 67.1(1) (complaints regarding fares or rates of a domestic carrier not set out in a tariff), and s. 67.2 (complaints regarding unreasonable or unduly discriminatory terms and conditions applied by a domestic carrier).

69. The ordinary and grammatical meaning of the phrase "any person" is not consistent with a restricted meaning – such as only those persons who are or will be adversely affected. Synonyms for "any person" include "anyone", "everybody", "all", and "anyone at all".[95]

70. The ordinary and grammatical meaning of "any person", unmodified, is reinforced by the context of the Act as a whole. Parliament, in the Act, also used the phrase "any person adversely affected" (in s. 67.1(b)) to describe who may receive compensation if a

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[95] *Roget's 21st Century Thesaurus*, 3d ed., *sub verdo* "any person", online: Thesaurus.com <http://www.thesaurus.com/browse/any%20person>.

domestic carrier applies fares or rates not in its tariff. Accordingly, Parliament must be taken to have modified "any person" where it intended to, and to have used the phrase "any person" without modification to convey the broad meaning the phrase has. A modifier cannot be read in where Parliament did not supply it, since different phrases in the same statute are intended to have different meanings.[96] Superimposing the notions of private interest and public interest standing on the language of the Act would have exactly that effect.

71. The scheme of the Act and its purpose support the broad interpretation of "any person". The powers of the Agency in each of the sections above is, except in one case, directed at ensuring compliance with the Act and fulfilment of its policy by directing the domestic carrier to do certain things in the future about its service, fares, rates, and terms and conditions of carriage – importantly in the latter respect, making them non-discriminatory. The one exception is in respect of compensation where a carrier had charged fares or rates other than in its public tariff; such compensation is available only to persons adversely affected (s. 67.1(b)). This demonstrates that the other powers are not so restricted.

72. Under s. 67.2, the powers of the Agency consequent upon such a complaint about discriminatory terms and conditions of carriage of a domestic carrier are to disallow such terms and conditions, and substitute others. This is dissimilar to what a court is normally asked to do – enforce an existing rule and grant a remedy for its breach – as it contemplates the Agency ordering the carrier to follow new and better (non-discriminatory) rules. This is something the policy of the Act furthers as being in the interest of Canadians – a transportation system accessible without undue obstacle to mobility of persons including persons with disabilities.[97] The achievement of that through "regulation and strategic public intervention" where not satisfactorily achieved by "competition or market forces"[98] is contemplated by s. 5. None of this supports a

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[96] *Sullivan* at pp. 217-220, Amicus' BA Tab 3.
[97] Act, s. 5(d) and Part V.
[98] Act, s. 5(b).

narrow reading of who has standing but supports reading "any person" as broadly as the ordinary meaning of those words suggest.

73. Delta relies on *Porter Airlines Inc.*,[99] a decision issued shortly before the Federal Court of Appeal decision in this matter, as providing other or additional reasons supporting the Agency's interpretation in the case at bar. The Agency expressly found that "any person" in the domestic carrier parts of the Act should be read down to mean "any person who has standing under the common law relating to standing."[100]

74. But *Porter Airlines Inc.* provides a no more justifiable analysis than the case at bar. The notions of private interest and public interest standing are not equated to the law of standing generally, and they are not the law of standing for administrative tribunals. They cannot be used to read words into the Act which are not there without violating proper approach to statutory interpretation.

(iii) Standing if the Complaint is Made about an International Carrier

75. As Delta correctly contends, Dr. Lukács' complaint was not under s. 67.2 of the Act but under s. 111(2) of the Regulations; it did not deal with allegedly discriminatory practices of a domestic carrier but an international carrier. The Federal Court of Appeal did not articulate how the conclusion which would be reached under s. 67.2 of the Act is transposed to a complaint under the Regulations. So the question arises: even if one were to conclude that "any person" has standing with respect to a complaint under s. 67.2 in respect of discriminatory practices of a domestic airline, does the same conclusion follow with respect to a complaint seeking to invoke the power under ss. 111(2) and 113 of the Regulations about an international carrier? Those provisions neither refer to complaints, let alone complaints by any person. The term any person in s. 111(2) of the Regulations does not answer the question as it is used in a different context, "no air carrier shall…subject any person…to undue or unreasonable prejudice or disadvantage…" and not as a description of who may complain.

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[99] Canadian Transportation Agency Decision No. 121-C-A-2016 dated April 22, 2016 ("*Porter Airlines Inc.*").
[100] *Porter Airlines Inc.*, *supra* note 99 at para. 38.

76. It is respectfully submitted, however, that the same conclusion regarding standing for a complaint about an international carrier as applies to a domestic carrier should follow. As a matter of text, nothing in the Regulations limits who may make a complaint. The Regulations' silence on complaints does not, in the context of the scheme of the Act and the Regulations as a whole, mean that a complaint, if made, would not fall within s. 37 of the Act giving the Agency the power to deal with it. The Act does not indicate an intention to treat discriminatory practices of international carriers less seriously than those of domestic carriers, which would militate against concluding that standing to complain about international carriers is more circumscribed. Reading the Act as whole and in light of its policy, the lack of any limitation on who can complain about a discriminatory practice of an international carrier, together with the express broad grant of standing to any person in connection with complaints about domestic carriers, support the conclusion that the same standing conclusion should be reached for each.

(iv) Floodgate Considerations

77. Before concluding that the Act and Regulations give standing to any person to initiate a complaint on the subject of discriminatory practices of domestic or international air carriers, there is a further consideration: might opening the doors of standing so widely have been outside of Parliament's intention? As the majority of this Court noted in *Guérin*, a finding of standing there would have opened the doors to recourse to that tribunal to many persons, resulting in an untenable increase in the number of cases. The majority in *Guérin* considered that that could not have been the legislature's intention for that tribunal.[101]

78. However, as the concurring judges in *Guérin* noted, a consideration of the number of cases or complaints that might be submitted to a tribunal may cut the other way in a standing analysis:

> [82] One final point. While we agree with our colleagues that the arbitrator's decision regarding Dr. Guérin's standing was reasonable, we do not share their

[101] *Guérin*, *supra* note 9 at paras. 58-59.

> "floodgates" concern (paras. 58-59) arising from the potential proliferation of matters coming before councils of arbitration should Dr. Guérin be granted standing. While they see this as militating against granting standing, we respectfully see this concern as tending to cut the other way. The more persons who are placed in the difficult position in which Dr. Guérin finds himself, the more compelling the basis for allowing him and others to have their disputes heard by an impartial decision-maker.

79. Here, the wording of the Act and its purpose indicate that Parliament, through a broad grant of standing, intended the gates to be open. If a significant number of persons wish to complain about discriminatory practices of domestic or international carriers, then that may better ensure such practices are corrected. Parliament would be taken to know that passenger rights activists might make complaints to bring discriminatory practices to the attention of the Agency and to consider the benefits of that broad availability to outweigh any theoretical downside of "busy body" complaints. And unlike in *Guérin*, where there was no other discretion in the tribunal to control what cases it would hear where a case was brought by someone with standing, here the Agency has a discretion to control access to it, as discussed in the next section.

D. Interpreting standing as conferred on any person is not inconsistent with the Agency having a gatekeeper role

80. It is clear from the permissive language used in the Act that there is no general obligation for the Agency to conduct a full process of inquiry, hearing and determination of every complaint made to it even if from a person with standing. Section 37 provides that the Agency "may" inquire into, hear, and determine a complaint. Section 85.1 of the Act only requires the Agency to review a complaint – the balance of that section confirms the Agency's discretion. The Federal Court of Appeal found, there is "no question … that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives[.]"[102]

81. Although Delta and Dr. Lukács deal with standing as through it is part of the Agency's discretion as a gatekeeper, the Amicus suggests a different analytical approach. The

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[102] FCA Decision, *supra* note 8 at para. 16.

Agency did not purport to exercise a discretion in the case at bar but, having determined a lack of standing, simply proceeded to dismiss the complaint as though there was no other option. Standing is a binary matter – existing or not existing – and it is more appropriate, once it is determined to exist, to then consider the discretion the Agency is intended to have, and consider whether it is still is meaningful.

82. Delta contends that, if the concept of private and public interest standing is not superimposed on the Agency's mandate, it will have to hear and determine all complaints and be plagued by universal standing. Delta suggests this is a reason why standing for any person may not have been intended. But as this Court has stated with respect to universal standing and 'floodgates' arguments, "these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered."[103] It is not the case that, even with broad standing, there are no other gatekeeping factors for the Agency to apply in its discretion to guard against such concerns. Accordingly, interpreting the Act as conferring standing for complaints on any person is not inconsistent with the Agency having a meaningful gatekeeping role.

83. A non-exhaustive list of factors that the Agency might consider applying in deciding whether a complaint from a person with standing should proceed might include:

- Whether a complaint is bona fide or made in bad faith;
- Whether a complaint is trivial;
- Whether a complaint is or is not frivolous or vexatious;
- Whether the subject matter is duplicative of a complaint that has already been dealt with, or is currently being dealt with, by the Agency or the Canadian Human Rights Commission;[104]

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[103] *Downtown Eastside*, *supra* note 44 at para. 41.
[104] Section 171 of the Act contemplates such coordination.

- Whether the complaint engages the Agency's jurisdiction and identifies an alleged violation of the Act or Regulations;[105]
- Whether the complaint is timely; and
- The Agency's workload and prioritization of cases.[106]

84. The determination that there is broad standing to make a complaint does not exhaust, but instead begins to engage, the Agency's gatekeeping role. Once it is determined that the complaint is from a person with standing, the Agency's discretion may be directed, as a gatekeeper, to considerations such as the above. In that way, the Agency exercises a meaningful gatekeeper role while respecting Parliament's intention that there is a broad grant of standing.

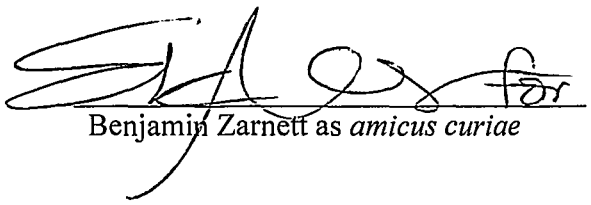
PART IV – SUBMISSIONS CONCERNING COSTS

85. The Amicus neither requests, nor should be liable, for costs.

PART V – ORDER REQUESTED

86. The Amicus respectfully submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of August, 2017.



Benjamin Zarnett as *amicus curiae*

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[105] Canadian Transportation Agency Decision No. 373-C-A-2016 dated December 20, 2016. In that case, a preliminary matter was that the applicant had not established a case under s. 172(1), under which she was attempting to complain.

[106] The Canadian Human Rights Commission takes into account some similar matters in deciding whether a complaint warrants a hearing – see *What can we expect?*, online: Canadian Human Rights Commission <https://chrc-ccdp.gc.ca/eng/content/what-can-we-expect>.

PART VI – TABLE OF AUTHORITIES

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1.	*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61	53, 54, 55
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3.	*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236	32
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23.	*The Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265	32
24.	*Themadel Foundation v. Third Canadian Investment Trust Ltd.*, [1995] O.J. No. 888 at p. 16 (Ont. Gen. Dev. Comm. List), varied on other grounds 1998 CanLII 973 (Ont. C.A.)	64
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26.	*United States v. Lake*, 2008 SCC 23	49

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1. David P. Jones and Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at pp. 646-647	32
2. David P. Jones and Anne S. de Villars, *Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014), at pp. 676-677	32
3. *Roget's 21st Century Thesaurus*, 3d ed., *sub verdo* "any person", online: Thesaurus.com <http://www.thesaurus.com/browse/any%20person>	69
4. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014), at pp. 7, 217-220	51, 70
5. Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at pp. 7, 27, 37-41, 48, 122-123	58, 63, 64
6. *What can we expect?*, online: Canadian Human Rights Commission <https://www.chrc-ccdp.gc.ca/eng/content/what-can-we-expect>	83