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)

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. At stake in the present appeal is whether Delta's practice of singling out passengers based on their physical characteristics will go unchallenged.

2. The central issue before this Court is whether the Canadian Transportation Agency (the "Agency") exercised its discretion unreasonably by basing its decision to refuse to hear a complaint about Delta's practice on irrelevant considerations that are inconsistent with the policy objectives of the regulatory scheme.

3. The Agency's enabling statute and regulatory scheme, which govern transportation of passengers by air within, to, and from Canada, specifically prohibit discrimination through consumer protection and human rights provisions. These provisions are complemented by a complaint mechanism, which provides not only for *ex post* remedies for those individuals who have been adversely affected, but also for *ex ante* remedies to prevent harm to the public at large. The scheme provides that, to eliminate unreasonable and unjustly discriminatory practices in international service, the Agency may act on its own motion as well as in response to a complaint.

4. The Agency administers the regulatory scheme, and has discretion to determine whether to hear a complaint. The Agency's discretion is not, however, unlimited. The Agency must exercise its discretion reasonably, on the basis of considerations that are relevant to and consistent with the policy objectives of the regulatory scheme. Notably, the Agency's exercise of discretion is not protected by a privative clause; it is subject to a statutory appeal on questions of law and jurisdiction.

5. Dr. Gábor Lukács ("Dr. Lukács"), a well-known air passenger rights advocate, complained to the Agency about Delta's discriminatory practices. The purpose of his complaint was to prevent harm to the public, and he sought no individual remedies. The Agency dismissed the complaint—without considering its merits—on the sole ground that Dr. Lukács did not have standing, based on its misapprehension that the law of standing developed by and for the courts was applicable.

6. The Federal Court of Appeal ("FCA") held that the Agency unreasonably fettered its discretion and based its decision on irrelevant considerations. Accordingly, the FCA set aside the Agency's decision, and directed the Agency to redetermine whether to hear Dr. Lukács's complaint

on the basis of *relevant* considerations.[1] Notably, contrary to the implication in Delta's factum, the FCA did *not* direct the Agency to hear Dr. Lukács's complaint, nor did it find that the Agency is required to hear all complaints submitted to it.

7. The FCA reviewed the Agency's decision based on the reasonableness standard, applying the analytic framework that has been repeatedly endorsed by this Court:[2] it construed the legislative scheme and the scope of the Agency's mandate, then it examined, in that context, whether the impugned decision fell within the range of reasonable outcomes.

8. The FCA observed that the policy objectives of the regulatory scheme include prevention of harm to the travelling public and ensuring that airlines provide their services free from unreasonable or unduly discriminatory practices, and held that to neglect to hear a complaint on its merits until after someone has been affected by such practices would be inconsistent with these objectives; the purpose of the scheme is to prevent harm before it happens, not just to offer remedies after the fact.[3] The FCA concluded that:

> [...] complaints that appear to be serious on their face cannot be dismissed for the sole reason that the person complaining has not been directly and personally affected or does not comply with other requirements of public standing. When read in its contextual and grammatical context, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.[4]

9. In so holding, the FCA committed no error, but rather adopted the Agency's consistent and considered interpretation of its mandate and home statute.[5]

10. Bill C-49, currently before Parliament, lends further support to the FCA's interpretation of the regulatory scheme. Bill C-49 proposes to amend the regulatory scheme by restricting access to the complaint mechanism, in certain circumstances, to those who have been "adversely affected."[6]

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1 Judgment of the Federal Court of Appeal [Appellant's Record, Tab 4, p. 17].

2 *Green v. Law Society of Manitoba*, 2017 SCC 20 at para. 26.

3 *Lukács v. Canada (Transportation Agency)*, 2016 FCA 220 at paras. 25 and 27 [Appellant's Record, Tab 5, pp. 30-31].

4 *Ibid* at para. 27 [Appellant's Record, Tab 5, p. 31].

5 *Black v. Air Canada*, CTA Decision No. 746-C-A-2005 at paras. 5 and 7; *O'Toole v. Air Canada*, CTA Decision No. 215-C-A-2006 at paras. 8-9; *Lukács v. Air Canada*, CTA Decision No. LET-C-A-155-2009; *Lukács v. Air Canada*, CTA Decision No. LET-C-A-47-2012; and *Krygier v. several carriers*, CTA Decision No. LET-C-A-104-2013 ("*Krygier*") at p. 5 [Appellant's Book of Authorities, Tab 2].

6 Bill C-49, 42nd Parliament, 1st Session, ss. 17-19.

Although complaints relating to discriminatory practices remain unaffected by the proposed amendments, the fact that Parliament proposes that explicit wording is needed to restrict the complaint mechanism to those who have been adversely affected strongly suggests that, without such explicit wording, access to the complaint mechanism is not so limited.

11. In the alternative, should this Court find that the Agency has discretion to dismiss complaints on the basis of standing, the determination of public interest standing in the regulatory context must be assessed purposively and flexibly, in a manner that considers the distinct nature of administrative decision-making and the objectives of the statutory scheme. Dr. Lukács's complaint raises a serious issue in which he has a genuine interest, and it was a reasonable and effective means to bring this issue before the Agency. Even if the Agency may screen complaints on the basis of standing, its decision to deny Dr. Lukács public interest standing in this case was unreasonable; by failing to consider the aforementioned three factors cumulatively and generously in light of the policy objectives of the regulatory scheme,[7] the Agency based its decision on the wrong legal test.

12. Dr. Lukács asks this Court to dismiss Delta's appeal and affirm the judgment of the FCA directing the Agency to redetermine whether to hear his complaint, on the basis of relevant considerations and in accordance with this Court's reasons.

B. The legislative framework

13. In enacting the *Canada Transportation Act* (the "*Act*"),[8] Parliament chose to create a regulatory scheme for the national transportation system in order to achieve certain policy objectives, which are identified in part in section 5 of the *Act*.

14. The Agency is an administrative body—not a court. It administers the regulatory scheme, and fulfills a dual role: (i) as a regulator, it ensures that the policies determined by Parliament are carried out; and (ii) as a quasi-judicial tribunal, it adjudicates transportation-related disputes. The two roles substantially overlap.

15. Part II of the *Act* governs commercial transportation by air within Canada (domestic service), and to and from Canada (international service); establishes licensing requirements for op-

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7 CTA Decision No. 425-C-A-2014 at para. 74 [Appellant's Record, Tab 2, p. 15].

8 *Canada Transportation Act*, SC 1996, c. 10 (the "*Act*").

erating such services; and confers broad regulation-making powers upon the Agency.[9] The *Air Transportation Regulations* (the "*ATR*")[10] were promulgated pursuant to these powers.

16. For historic reasons, domestic and international air services are treated separately in the *Act* and the *ATR*, but they are both subject to consumer protection and human rights provisions that have the same meaning[11] and they serve the same purpose of eliminating unreasonable and unduly discriminatory practices.[12]

i. Consumer protection and human rights provisions

17. Air carriers operating a domestic or international service are required to create and publish a tariff setting out the terms and conditions of carriage.[13] Sections 107 and 122 of the *ATR* govern the contents of domestic and international tariffs. Paragraph 107(1)(n) and subsection 122(c) of the *ATR* are virtually identical[14] and they both require carriers to include in their tariff terms and conditions relating to "passenger re-routing" and "refusal to transport passengers and goods." The tariff is a contract of carriage between the carrier and its passengers, and the carrier is required to apply the terms and conditions set out in the tariff.[15]

18. Unreasonable terms and conditions and undue (or unjust) discrimination are prohibited in domestic service pursuant to subsection 67.2(1) of the *Act* and in international service pursuant to section 111 of the *ATR*. While the terminology used in these provisions is not identical, the words "unreasonable" and "unjust discrimination" in section 111 of the *ATR* encompass and capture the meaning of the terms used in subsection 67.2(1) of the *Act*.[16,17]

19. The prohibition against discrimination in transportation by air includes all forms of discrimination. It is broader than and complements the Agency's general powers to eliminate undue obstacles for passengers with disabilities in the transportation network.[18]

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[9] The *Act*, s. 86.
[10] *Air Transportation Regulations*, SOR/88-58 (the "*ATR*").
[11] CTA Decision No. 390-A-2013 at paras. 21-25; CTA Decision No. 482-A-2012 at para. 7.
[12] For a comparison, see below, subsection iii.
[13] The *Act*, s. 67 for domestic service; *ATR*, ss. 110, 116, and 116.1 for international service.
[14] They differ only in the words "for travel" in s. 122(c)(ii).
[15] The *Act*, s. 67(3) for domestic service; *ATR*, s. 110(4) for international service.
[16] CTA Decision No. 482-A-2012 at para. 7.
[17] See also concession in the Appellant's Factum, para. 31, p. 6.
[18] The *Act*, s. 172.

20. The Agency has both restitutional and preventive remedial powers to give effect to the consumer protection and human rights provisions of the scheme. The Agency may offer restitution by way of compensation to those who have been "adversely affected" by the failure of a carrier to apply the terms and conditions set out in its tariff, and by ordering the carrier to take corrective measures.[19] The Agency may also prevent harm to the public before it happens by disallowing or substituting terms and conditions that are unreasonable or unduly (unjustly) discriminatory.[20]

21. The Agency's preventive powers form part of its public interest mandate and distinguish it from the courts, whose function is to resolve disputes between affected parties in a real and precise factual context. Unlike the courts, the Agency can and frequently has exercised these powers to prevent harm to the travelling public at large, even in the absence of an "adversely affected" person.[21]

ii. Complaint mechanism complementing the regulatory scheme

22. Section 37 of the *Act* confers upon the Agency general powers to inquire into, hear, and determine complaints concerning "any act, matter or thing prohibited, sanctioned or required to be done" under legislation administered by the Agency.

23. Section 85.1 of the *Act* governs complaints under Part II of the *Act*, relating to transportation by air. Pursuant to subsection 85.1(1), the Agency must ("shall") review such complaints, and may attempt to resolve them informally, through facilitation or mediation. If the complaint is not resolved informally, then the complainant may request, pursuant to subsection 85.1(3), that the Agency deal with the complaint formally, "in accordance with the provisions of this Part under which the complaint has been made."

24. Subsection 85.1(3) of the *Act* does not confer absolute or unlimited discretion upon the Agency. The Agency must exercise its discretion reasonably and "in accordance with the provisions of this Part under which the complaint has been made." Its exercise of discretion is not protected by a privative clause.

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[19] The *Act*, s. 67.1 for domestic service; *ATR*, s. 113.1 for international service.
[20] The *Act*, s. 67.2(1) for domestic service; *ATR*, s. 113 for international service.
[21] See fn. 5 on p. 2 above; and *Re: Delta Air Lines*, CTA Decision No. 161-A-2010 at paras. 3-5 and 19(2); *Re: Northwest Airlines, Inc. and KLM Royal Dutch Airlines*, CTA Decision No. 232-A-2003, aff'd 2004 FCA 238; and *Re: Lufthansa German Airlines*, CTA Order No. 2005-A-8.

iii. International service is subject to a more stringent regulation

25. Although the consumer protection and human rights provisions applicable to domestic and international service have the same meaning[22] and serve the same purpose, two noteworthy differences underscore the legislative intent to subject international service to a more stringent scrutiny.

26. First, section 110(1) of the *ATR* provides that tariffs applicable to international service must be filed with the Agency. No such obligation exists with respect to domestic service.

27. Second, pursuant to section 111 and section 113 of the *ATR*, the Agency may act not only in response to a complaint, but also on its own motion to eliminate unreasonable and unjustly discriminatory terms and conditions in international service.[23] In the case of domestic service, the Agency may act based "on complaint in writing to the Agency by any person."[24] Neither the *Act* nor the *ATR* requires the complainant in a complaint about unreasonable or unjustly discriminatory terms and conditions to be "adversely affected."

C. Background

i. The advocacy and expertise of Dr. Gábor Lukács in air passenger rights

28. Dr. Gábor Lukács is a Canadian air passenger rights advocate,[25] who volunteers his time and expertise for the benefit of the travelling public.

29. Air passengers have many rights, not only under the *Act* and the *ATR*, and but also under the *Montreal Convention*.[26] Yet, violations of these rights by air carriers often remain undetected by the Agency. The work and advocacy of Dr. Lukács help fill this gap in the regulatory scheme.

30. Since 2008, Dr. Lukács has filed more than two dozen successful complaints with the Agency, challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers.[27] Dr. Lukács

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[22] CTA Decision No. 482-A-2012 at para. 7.

[23] *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.

[24] The *Act*, s. 67.2(1).

[25] *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 140 at para. 1.

[26] Schedule VI to the *Carriage by Air Act*, RSC 1985, c. C-26.

[27] Highlights: *Lukács v. British Airways*, CTA Decision No. 49-C-A-2016 (denied boarding compensation amounts); *Lukács v. Porter Airlines*, CTA Decision No. 249-C-A-2014 (denied board-

has successfully challenged before the FCA the Agency's failure to comply with the open court principle in adjudicating air travel complaints[28] and the reasonableness of the Agency's decisions.[29]

31. Dr. Lukács's advocacy in the public interest and his expertise in the area of air passenger rights have been recognized by both the FCA[30] and the legal profession. In a 2013 review, counsel for Delta, Mr. Carlos Martins, wrote:

> In the consumer protection landscape, for the last several years, the field has largely been occupied by Gabor Lukács, a Canadian mathematician who has taken an interest in challenging various aspects of the tariffs filed by air carriers with the regulator, the Canadian Transportation Agency (the Agency). The majority of Mr Lukács' complaints centre on the clarity and reasonableness of the content of the filed tariffs, as well as the extent to which air carriers are applying their tariffs, as filed, in the ordinary course of business.
>
> Mr Lukács' efforts have created a significant body of jurisprudence from the Agency - to the extent that his more recent decisions often rely heavily upon principles enunciated in previous complaints launched by him.[31]

32. Dr. Lukács is not a "busybody," but a recognized and established consumer advocate with a genuine interest in the rights of Canadian air passengers.

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ing compensation amounts); *Lukács v. Porter Airlines*, CTA Decision No. 31-C-A-2014 (*Montreal Convention*, flight cancellation, schedule change, flight advancement and denied boarding); *Lukács v. British Airways*, CTA Decision No. 10-C-A-2014 (*Montreal Convention* and amount of denied boarding compensation); *Lukács v. Porter Airlines*, CTA Decision No. 344-C-A-2013 (liability for delays); *Lukács v. Air Canada*, CTA Decision Nos. 204-C-A-2013 and 342-C-A-2013 (denied boarding compensation amounts); *Lukács v. United Airlines*, CTA Decision No. 467-C-A-2012 (conditions inconsistent with Art. 17(2) and 19 of the *Montreal Convention*); *Lukács v. Air Canada*, CTA Decision Nos. 250-C-A-2012 and 251-C-A-2012, *Lukács v. Air Transat*, CTA Decision No. 248-C-A-2012, *Lukács v. WestJet*, CTA Decision Nos. 249-C-A-2012 and 252-C-A-2012 (*Montreal Convention* and delays caused by overbooking and flight cancellation); *Lukács v. WestJet*, CTA Decision No. 483-C-A-2010, leave to appeal to FCA ref'd, 10-A-42 (domestic baggage liability cap); *Lukács v. WestJet*, CTA Decision No. 477-C-A-2010, leave to appeal to FCA ref'd, 10-A-41 (disclaimer of liability inconsistent with Art. 17(2) and 19 of the *Montreal Convention*); *Lukács v. Air Canada*, CTA Decision No. 208-C-A-2009 (baggage liability policy inconsistent with Art. 17(2) and 19 of the *Montreal Convention*).

[28] *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 140 at para. 80.

[29] *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269 at para. 40.

[30] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 174 at para. 6; *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269 at para. 43; and *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at para. 62.

[31] Submissions of Dr. Lukács to the Agency, Exhibit "B" — Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL [Respondent's Record, Tab 1, p. 13].

ii. Delta's discriminatory practices

33. According to an email sent by a customer care agent of Delta to a passenger on or around August 20, 2014 (the "Email"), Delta applies the following practice with respect to "large" passengers booked on its flights:

> Sometimes, we ask the passenger to move to a location in the place where there's more space. If the flight is full, we may ask the passenger to take a later flight. We recommend that large passengers purchase additional seats, so they can avoid being asked to rebook and so we can guarantee comfort for all.[32]

34. In airline parlance, "ask the passenger to take a later flight" is a euphemism for denying the passenger transportation on the flight they paid for, and forcing them to take a later flight against their will. Large passengers have no option of declining to take a later flight when "asked." Purchasing "additional seats, so they can avoid being asked to rebook" is the only option available to large passengers.

35. Delta has never disputed the authenticity of the Email or the veracity of the statements made by its agent with respect to Delta's practice.

36. Dr. Lukács submits that the Email is an admission of Delta's practice of discriminating against "large" passengers by singling them out for denial of or delay in transportation based on their physical characteristics. Delta forces passengers whom it considers "large" to purchase more than one seat, or else they risk being denied transportation against their will ("being asked to rebook").

D. Proceedings before the Agency

37. Upon learning about Delta's practice as outlined in the Email, Dr. Lukács filed a short complaint with the Agency alleging that the practice is discriminatory, contrary to subsection 111(2) of the *ATR*, and contrary to the so-called "One-Person-One-Fare" decision of the Agency,[33] which addressed the accommodation of passengers requiring more than one seat due to their disabilities. Dr. Lukács's complaint read as follows:[34]

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[32] Exhibit to the complaint of Dr. Lukács to the Agency (Aug. 24, 2014) (emphasis added) [Appellant's Record, Tab 7, p. 38].

[33] CTA Decision No. 6-AT-A-2008.

[34] Complaint of Dr. Lukács to the Agency (Aug. 24, 2014) [Appellant's Record, Tab 7, pp. 37-38].

> I am writing to complain concerning the practices of Delta Airlines set out in the attached email concerning the transportation of large (obese) passengers:
>
> 1. in certain cases, Delta Airlines refuses to transport large (obese) passengers on the flights on which they hold a confirmed reservation, and require them to travel on later flights;
>
> 2. Delta Airlines requires large (obese) passengers to purchase additional seats to avoid the risk of being denied transportation.
>
> It is submitted that these practices are discriminatory, contrary to subsection 111(2) of the Air Transportation Regulations, and they are also contrary to the findings of the Agency in Decision No. 6-AT-A-2008 concerning the accommodation of passengers with disabilities.

38. Instead of dealing with the substantive issue of whether Delta's practice is discriminatory on its merits, the Agency invited the parties to make submissions with respect to Dr. Lukács's standing to bring the complaint.[35]

i. Positions of the parties before the Agency

39. In response to the Agency's invitation, Dr. Lukács submitted to the Agency that:[36] (a) any person may bring a complaint under section 111 of the *ATR*, regardless of whether they are adversely affected by the practice complained of; (b) it was unclear at the preliminary stage of the proceeding that Dr. Lukács was not "large" and that he was not personally affected by the practice complained of; and (c) alternatively, he should be granted public interest standing because he met the well-established test set out in *Finlay*.[37]

40. Before the Agency, Delta did not contest that Dr. Lukács met the first two prongs of the legal test for public interest standing (i.e., that there was a serious issue to be determined, and Dr. Lukács had a genuine interest in the issue). Nor did Delta dispute that public interest standing was available and could be granted to Dr. Lukács for the purpose of bringing the complaint. Instead, Delta argued that Dr. Lukács lacked private interest standing and should be denied public interest standing because the Agency's procedures are so simple that "a complainant need not be herself an expert litigant or have the assistance of experienced counsel."[38]

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[35] CTA Decision No. LET-C-A-63-2014 [Appellant's Record, Tab 1, p. 1].
[36] Submissions of Dr. Lukács to the Agency (Sep. 19, 2014) [Respondent's Record, Tab 1, p. 1].
[37] *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607.
[38] Submissions of Delta to the Agency (Sep. 26, 2014) [Respondent's Record, Tab 2, p. 16].

ii. Dismissal of the complaint without consideration of its merits

41. The Agency correctly held that Dr. Lukács's complaint relates to a "tariff issue," but departed from its considered and consistent view that any person may bring a complaint under section 111 of the *ATR*. In doing so, the Agency erroneously considered itself to be a court of law:

> [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.
>
> [52] That being said, the Agency raised the issue of standing. Although Mr. Lukács is not required to be a member of the group "discriminated" against in order to have standing, he must have a sufficient interest in order to be granted standing. Hence, notwithstanding the use of the words "any person" in the ATR, the Agency, as any other court, will not determine rights in the absence of those with the most at stake. [...][39]

42. The Agency then dismissed the complaint—without examining its merits—on the sole basis that Dr. Lukács was lacking private interest standing, and that public interest standing was not available for the purpose of challenging Delta's practice. In doing so, the Agency misstated the law of this Court on the test for public interest standing:

> Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.[40]

43. The effect of the Agency Decision is that Delta's practice has escaped scrutiny. The substantive issue of whether Delta's practice is unjustly discriminatory has never been considered by the Agency, and there is no record to suggest that the Agency dealt with this issue in any way.

E. Proceedings before the Federal Court of Appeal

44. Section 41 of the *Act* provides for a statutory right of appeal from decisions and orders of the Agency to the FCA on questions of law and jurisdiction, subject to leave of the FCA. The FCA granted Lukács leave to appeal the Agency Decision.[41]

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[39] CTA Decision No. 425-C-A-2014 (the "Agency Decision") at paras. 51-52 (emphasis added) [Appellant's Record, Tab 2, p. 11].

[40] Agency Decision at para. 74 [Appellant's Record, Tab 2, p. 15].

[41] Order of the Federal Court of Appeal (Feb. 12, 2015) [Appellant's Record, Tab 3, p. 16].

i. Judgment of the Federal Court of Appeal

45. The FCA articulated two issues to be decided on the appeal:[42]

A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2(1) of the *Act* and 111(2) of the *Regulations*?

B. Did the Agency err in finding that public interest standing is limited to cases in which the constitutionality of legislation or the non-constitutionality of administrative action is challenged?

46. The FCA determined the appeal based on the first issue.

47. The FCA began its analysis by acknowledging the gatekeeper function of the Agency and its discretion to screen complaints to ensure "the best use of its limited resources,"[43] and concluding that the applicable standard of review is reasonableness.[44]

48. The FCA held that the principles applicable to the exercise of the gatekeeper function of administrative bodies vary and depend on the particularities of the administrative body, its enabling statute, and its functions.[45] The FCA rejected the premise that the principles governing standing before courts of law are one-size-fits-all and should be applied to administrative bodies such as the Agency, which are not courts, but rather part of the executive branch.[46]

49. The FCA then turned to analyzing the Agency's enabling statute and functions, and concluded that the broad policy objectives of the *Act* include the prevention of harm to the public by eliminating unreasonable and unduly discriminatory practices, and not just by offering remedies to individuals who have been adversely affected after-the-fact.[47]

50. The FCA adopted the Agency's previously consistent, considered view of its enabling statute that it is not necessary for a complainant to have been personally affected by a term or condition in order to make a complaint under s. 67.2(1) of the *Act* or s. 111 of the *ATR*:[48]

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[42] *Lukács v. Canada (Transportation Agency)*, 2016 FCA 220 ("FCA Reasons") at para. 8 [Appellant's Record, Tab 5, p. 22].
[43] *Ibid* at para. 16 [Appellant's Record, Tab 5, p. 26].
[44] *Ibid* at para. 15 [Appellant's Record, Tab 5, p. 25].
[45] *Ibid* at paras. 18, 21, and 22 [Appellant's Record, Tab 5, pp. 27-29].
[46] *Ibid* at paras. 17, 18, and 20 [Appellant's Record, Tab 5, pp. 26-27].
[47] *Ibid* at para. 25 [Appellant's Record, Tab 5, p. 30].
[48] *Ibid* at paras. 27, 28, and 29 [Appellant's Record, Tab 5, pp. 31-32].

> If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint.

51. Based on these considerations, the FCA concluded that it was unreasonable for the Agency to dismiss Dr. Lukács's complaint "on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions."[49]

52. The FCA set aside the Agency Decision,[50] and directed the Agency to redetermine whether to hear the complaint on the basis of relevant considerations. Contrary to what Delta implies in its factum, the FCA did not direct the Agency to hear Dr. Lukács complaint, nor did it find that the Agency is *required* to hear or has a general duty to hear complaints submitted to it.

ii. ***Lukács v. Porter Airlines Inc.*** **was not submitted to the FCA**

53. Delta makes much of the fact that the FCA did not refer to the Agency's decision in *Lukács v. Porter Airlines Inc.* ("*Porter Decision*").[51] It is common ground that the *Porter Decision* was issued three days before the FCA hearing, and thus more than four and a half (4.5) months before the release of the FCA's judgment. However, the *Porter Decision* was not binding on the FCA, nor was it particularly relevant when the issue before the FCA was the Agency Decision in the present case. Moreover, it was impractical for Dr. Lukács to appeal the portion of the decision relating to standing in light of the Agency's findings of fact relating to mootness, which are protected by a privative clause.[52]

54. Nevertheless, neither Delta nor the Agency brought the Porter Decision to the FCA's attention—despite having ample opportunity to do so. They could have submitted it at the hearing of the appeal, but did not do so;[53] and they could have also advised the FCA about the Porter Decision during the four and a half (4.5) months between the hearing of the appeal and the release of the FCA's judgment, but did not do so either.[54] It does not lie in the mouth of Delta to complain to this Court that the FCA did not consider a decision that was not put before it.

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[49] *Ibid* at para. 30 [Appellant's Record, Tab 5, p. 33].
[50] *Ibid* at para. 32 [Appellant's Record, Tab 5, pp. 33-34].
[51] Delta's Factum at paras. 45-46
[52] The *Act*, s. 31.
[53] Minutes of Hearing (Apr. 25, 2016) [Respondent's Record, Tab 4, p. 30].
[54] List of Recorded Entries for FCA File No. A-135-15 [Respondent's Record, Tab 5, p. 37.]

F. Bill C-49

55. On May 16, 2017, the Minister of Transportation tabled Bill C-49 in Parliament.[55] The Bill proposes to amend the *Act* by adding s. 86.11, which confers additional regulation-making powers on the Agency with respect to the obligations of air carriers to passengers.[56] The Bill also proposes to restrict access to the Agency's complaint mechanism, both for domestic and international service, to those who have been "adversely affected"—but only with respect to complaints "concerning any obligation prescribed by regulations made under subsection 86.11(1)."[57]

56. Section 17 of the Bill proposes to add s. 67.3 to the *Act*:

> **67.3** Despite sections 67.1 and 67.2, a complaint against the holder of a domestic license related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1) may only be filed by a person adversely affected.

57. Section 18(2) of the Bill proposes to amend subparagraph 86(1)(h)(iii) of the *Act* to read:

> **(iii)** authorizing the Agency to direct a licensee or carrier to take the corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage that are applicable to the service it offers and that were set out in its tariffs, if the Agency receives a written complaint and, if the complaint is related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1), it is filed by the person adversely affected, (Emphasis is in the original.)

58. Notably, the Bill does not propose to restrict complaints relating to discriminatory practices to those "adversely affected." The Bill did not exist and was not passed into law at the time of the Agency Decision or when the FCA Reasons were issued.

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[55] Bill C-49, 42nd Parliament, 1st Session, ss. 17-19.
[56] Ibid, s. 19.
[57] Ibid, ss. 17 and 18(2).

PART II – POSITION WITH RESPECT TO QUESTIONS IN ISSUE

59. In respect of the questions formulated by Delta, Dr. Lukács's position is 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?

Yes. Delta misstates the FCA's findings and thereby makes a straw man argument. The FCA was correct in finding that the Agency exercised its discretion unreasonably and based its decision on irrelevant considerations when it refused to consider Dr. Lukács's complaint on its merits on the sole basis that he did not meet the standing requirements developed by and for the courts.

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

No, the Agency's decision was unreasonable. In the event that this Court finds that standing may be a relevant consideration in the exercise of the Agency's discretion to determine complaints, the question of whether a complainant should be granted public interest standing must be assessed purposively and generously, with due consideration to the regulatory framework and the objectives of the statutory scheme. The Agency serves a dual and overlapping regulatory and adjudicative function, and administers a regulatory scheme whose policy objectives include preventing harm to the travelling public and ensuring that transportation providers offer their services free from discriminatory practices. The serious issue raised in Dr. Lukács's complaint, his genuine interest in this issue, and the fact that his complaint was a reasonable and effective means to bring this issue before the Agency must be considered in this context. The Agency erred in law and applied the wrong legal test by failing to consider these factors. When these factors are assessed cumulatively, generously, and purposively as the law requires, it is clear that it was unreasonable for the Agency to deny Dr. Lukács public interest standing.

PART III – STATEMENT OF ARGUMENT

60. The central question on this appeal is whether the Agency exercised its discretion unreasonably by basing its decision to refuse to hear Dr. Lukács's complaint on irrelevant considerations that are inconsistent with the policy objectives of the regulatory scheme. It is common ground that the Agency's decision is a discretionary one. Thus, the issue is not *whether* the Agency has such discretion, but rather *on what basis* the Agency may exercise its discretion.

61. The FCA similarly framed the issue as "the general principles the Agency should apply when determining whether a party has standing to file a complaint,"[58] and correctly noted that the issue "does not raise broad questions relating to the Agency's authority."[59] Delta argues in its factum, however, that the issue is not what considerations are relevant to the Agency's exercise of discretion to hear or refuse to hear complaints, but rather the Agency's authority to exercise its discretion. This is incorrect. The Agency's authority is undisputed, and Delta has taken no issue before this Court with either of the FCA's findings regarding the framing of the issue.

62. Before addressing the central question, it is necessary to dispose of Delta's argument that the FCA exceeded its jurisdiction in setting aside the Agency Decision, and that the Agency's discretion to refuse to hear complaints can be challenged only on the basis of procedural fairness.[60]

A. Judicial review of discretionary decisions of the Agency

i. Administrative discretion must be exercised based on relevant considerations

63. No administrative decision is immune from judicial review. The constitutional principle of the rule of law dictates that all exercise of administrative powers be subject to the supervision of the courts, whose role is to ensure that decision-makers conduct themselves in a manner that comports with the law.[61]

64. Discretionary decisions of administrative decision-makers are not immune from judicial review;[62] the Agency's discretionary decision in the present case is subject to the review of the FCA or this Court. The choice of Parliament *not* to protect the Agency's discretion with a privative cause serves to further confirm the courts' supervisory role over such decisions of the Agency, particularly as the enabling statutes of other administrative bodies do contain such clauses.[63,64]

65. Any discretion, whether or not described as absolute, is subject to the same legal limitations: the discretion must be exercised based on relevant considerations, and the decision-maker must

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58 FCA Reasons at para. 14 [Appellant's Record, Tab 5, p. 24].
59 FCA Reasons at para. 15 [Appellant's Record, Tab 5, p. 25].
60 Appellant's Factum, paras. 121-150, pp. 29-38.
61 *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 27-30.
62 *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 at p. 138, cited with approval in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.
63 See, e.g., *Telecommunications Act*, SC 1993 c. 38, ss. 9(3) and 48(2).
64 See, e.g., *National Energy Board Act*, RSC 1985 c. N-7, s. 55.2.

avoid arbitrariness and act in good faith.[65] The curial deference afforded to discretionary decisions cannot be invoked to save a decision that is based on irrelevant considerations.[66] In particular, contrary to the implication in Delta's factum,[67] the Agency did have a duty to exercise its discretion to hear or refuse to hear the complaint of Dr. Lukács on the basis of relevant considerations. The Agency's failure to do so is a ground for intervention on judicial review.

66. Thus, the FCA properly exercised its supervisory role in reviewing the Agency Decision on the ground of whether the Agency exercised its discretion on the basis of irrelevant considerations, and the FCA was correct in embarking on that inquiry, as there was no bar to such a review.

ii. The Federal Court of Appeal properly exercised its appellate jurisdiction

67. Delta's jurisdictional arguments[68] conflate the statutory appeal under s. 41 of the *Act* with a prerogative writ of *mandamus* under the *Federal Courts Act*.[69] The two are distinct in nature and scope: a *mandamus* is available only to enforce a statutory duty, such as the duty to render a decision, if such a duty exists; on the other hand, a statutory appeal is available only after a decision has been made, and can be brought on any grounds that are permitted by the statute. Statutory appeals and applications for judicial review complement each other: judicial review under the *Federal Courts Act* is precluded to the extent that a statutory appeal is available.[70]

68. Delta further exacerbates the confusion by citing in support of its position[71] a judgment of the FCA on an application for judicial review where the remedy being sought was a *mandamus*.[72] In that judgment, the same panel of the FCA whose decision is in issue on the present appeal held that the Agency has discretion to screen complaints, but the FCA did not address what considerations are relevant to the exercise of the Agency's discretion.

69. In this case, Dr. Lukács's appeal to the FCA was a statutory one[73] under s. 41 of the *Act*.

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[65] *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at paras. 31 and 36.
[66] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at p. 179.
[67] Appellant's Factum, paras. 139-140, pp. 34-35.
[68] Appellant's Factum, paras. 121-150, pp. 29-38.
[69] *Federal Courts Act*, RSC 1985, c. F-7, ss. 28(1)(k) and 18(1)(a).
[70] *Federal Courts Act*, RSC 1985, c. F-7, s. 18.5.
[71] Appellant's Factum, para. 132, p. 33.
[72] *Lukacs v. Canada (Transportation Agency)*, 2016 FCA 202 at para. 1.
[73] FCA Reasons at para. 1 [Appellant's Record, Tab 5, p. 19].

70. Contrary to the implication in Delta's factum, the FCA *did not* make a *mandamus* order to force the Agency to hear Dr. Lukács's complaint. On the contrary, the FCA acknowledged the Agency's gatekeeper function and its discretion to screen complaints.[74] The issue before the FCA was not *whether* the Agency has discretion to decline to hear complaints, but rather *what considerations are relevant* to that exercise of discretion.[75] The FCA, having found that the Agency exercised its discretion based on irrelevant considerations,[76] displayed judicial restraint in crafting a remedy:

> The matter is returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint.[77]

71. In so doing, the FCA respected the Agency's well-established duty to exercise its discretion based on relevant considerations,[78,79] and did not impose any other duties. Therefore, the FCA exercised its appellate jurisdiction properly and within the four corners of s. 41 of the *Act*.

B. The reasonableness standard of review

72. The parties agree, as did the FCA,[80] that the standard of review applicable to the Agency's discretionary decision to refuse to hear Dr. Lukács's complaint is reasonableness.[81] By focusing its argument before this Court on its erroneous assertion that the FCA reviewed the Agency Decision on a correctness standard,[82] Delta is distracting from the central question on this appeal.[83]

i. The analytic framework of the reasonableness standard

73. A court conducting a reasonableness review must determine whether the outcome falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law.[84] This Court has recognized various ways in which decisions may be unreasonable and thus

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74 *Ibid* at para. 16 [Appellant's Record, Tab 5, p. 26].
75 FCA Reasons at para. 8 [Appellant's Record, Tab 5, p. 22].
76 FCA Reasons at para. 30 [Appellant's Record, Tab 5, p. 33].
77 Judgment of the Federal Court of Appeal [Appellant's Record, Tab 4, p. 17].
78 *Comeau's Sea Foods Ltd. v. Canada (Min. of Fisheries & Oceans)*, [1997] 1 SCR 12 at para. 36.
79 *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at p. 179.
80 FCA Reasons at para. 15 [Appellant's Record, Tab 5, p. 25].
81 *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53.
82 Appellant's factum, para. 65, p. 17.
83 *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 20.
84 *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 ("*Halifax v. Canada*") at para. 44.

warrant curial intervention: Decisions that contradict or frustrate the purpose or policy underlying the statutory scheme are unreasonable,[85] and decisions that are the product of a fettered discretion or based on irrelevant considerations are unreasonable—and cannot be saved by curial deference.[86]

74. As this Court recently held in *Green v. Law Society of Manitoba*, determining whether a decision contradicts or frustrates the purpose or policy underlying the statutory scheme requires a two-step analysis. First, the reviewing court must construe the legislative scheme and the scope of the decision-maker's mandate. Second, the reviewing court must examine, in light of the findings of the first step, whether the impugned decision fell within the range of reasonable outcomes.[87]

ii. The Federal Court of Appeal applied the reasonableness standard correctly

75. The FCA correctly applied the reasonableness standard, following the two-step approach for reasonableness review outlined by this Court in *Green*. In the first step, the FCA construed the legislative scheme and the scope of the Agency's mandate, and found that the broad policy objectives of the *Act* include the prevention of harm to the public by eliminating unreasonable and unduly discriminatory practices—not just by offering after-the-fact remedies to individuals who have been adversely affected.[88] The FCA adopted the Agency's considered and, prior to the Agency Decision below, consistent view of its enabling statute:[89]

> If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint.

76. In the second step of the reasonableness review, the FCA examined the outcome of the Agency Decision in light of its findings in the first step. The FCA concluded that the Agency exercised its discretion based on irrelevant considerations and that it was unreasonable for the Agency to dismiss Dr. Lukács's complaint "on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions."[90]

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[85] *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 at paras. 42 and 47; *Halifax v. Canada*, 2012 SCC 29 at para. 56; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 35.

[86] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at p. 179; see also *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at para. 24.

[87] *Green v. Law Society of Manitoba*, 2017 SCC 20 at para. 26.

[88] FCA Reasons at para. 25 [Appellant's Record, Tab 5, p. 30].

[89] *Ibid* at paras. 27, 28, and 29 [Appellant's Record, Tab 5, pp. 31-32].

[90] *Ibid* at para. 30 [Appellant's Record, Tab 5, p. 33].

77. In so doing, the FCA correctly recognized that the practical effect of the Agency Decision was that Delta's discriminatory practice would evade scrutiny on its merits, and that this outcome was not defensible in light of the law, because it would contradict and frustrate the purpose and policy underlying the statutory scheme.[91,92]

78. Before this Court, Delta does not dispute any of the FCA's findings in the first step of the analysis. Instead, Delta argues, incorrectly, that the FCA owed curial deference to the Agency's "implicit decision" to exercise its discretion to refuse to hear a complaint on the basis that the complainant lacks standing, because the FCA was required to consider the reasons that could be offered in support of the decision to dismiss Dr. Lukács's complaint.[93] This argument confuses reasons with grounds. It is well within the scope of reasonableness review for a court to find a discretionary decision to be unreasonable when it is made on the *sole basis* of a ground that is not relevant to the exercise of that discretion. Delta's position is belied by this Court's holding that curial deference cannot be invoked to save a decision that is based on irrelevant considerations.[94]

79. Finally, it does not lie in the mouth of Delta to complain to this Court that the FCA did not consider the *Porter Decision*.[95] First, as noted above, neither Delta nor the Agency chose to bring this decision to the FCA's attention, despite having ample opportunity to do so.[96] The implication in Delta's factum that a reviewing court must search for decisions of an administrative tribunal under its supervision in the hopes of finding justifications that are not set out in the reasons provided for a decision under review is preposterous. In an adversarial setting, such as an appeal before the FCA, bringing such non-binding authorities to the decision-maker's attention is the responsibility of the parties. This particularly holds for Delta, which was represented by counsel before the FCA.

80. Second, and perhaps more importantly, a decision-maker is not and should not be entitled to bolster or improve upon its reasons in a decision under review by supplementing them with further and better reasons after the fact. If this were permitted, an appellant would be asked to hit a moving target.[97]

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91 *Halifax v. Canada*, 2012 SCC 29 at para. 56.
92 *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 35.
93 Appellant's Factum, para. 63, p. 16.
94 *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at p. 179.
95 Appellant's Factum, para. 64, p. 16.
96 See para. 53 on p. 12 above.
97 *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255

Issue 1: The FCA was correct in finding that the Agency exercised its discretion unreasonably and based its decision on irrelevant considerations

81. The Agency purported to dismiss Dr. Lukács's complaint on the basis that he lacked standing, but in fact merely used the law of standing as a pretext to dispose of his complaint without assessment of its merits. In the result, the Agency has taken no steps whatsoever to fulfill its recognized duty to enforce the *Act* and the *ATR*[98] in respect of Delta's discriminatory practices. This outcome is unreasonable not only because it was reached on the basis of irrelevant considerations, but also because it is inconsistent with the purpose and the objective of the *Act*. Therefore, the FCA's judgment is correct.

C. Applicability of the law of standing outside the realm of civil courts

i. The rationale and the implicit assumptions underpinning the law of standing

82. The law of standing, developed by and for courts hearing civil matters, is not a self-serving doctrine, but is dictated by necessity. Justice, like heart transplants, is a vital but scarce resource of society that must be rationed and allocated according to a set of priorities. Standing before the courts is restricted on the basis of a few underlying purposes: (a) parties with "a personal stake in the outcome of a case should get priority in the allocation of judicial resources" of civil courts; (b) civil courts need to have "the benefit of contending points of view of the persons most directly affected by the issue"; and (c) courts must adhere to their proper role and respect the separation of powers, and must not encroach on the roles of the executive or the legislature.[99]

83. The sound propositions underpinning the law of standing are implicitly based on constraints and assumptions that are specific to the traditional core function of civil courts: First, in most civil cases before the courts, there is no societal interest in the resolution of the dispute that transcends the interests of the parties; in a contractual or tort claim, for example, only a small and well-defined group of persons with "a personal stake"are affected and benefit from the resolution of a dispute. Second, courts have a wholly adjudicative role in an adversarial system, and cannot assume an inquisitive or investigative role in cases that come before them; rather, they "depend on the parties

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at paras. 46-47.

98 Appellant's Factum, para. 125, p. 31.

99 *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("*Downtown Eastside*") at paras. 27, 29, and 30.

to present the evidence and relevant arguments fully and skillfully."[100] Third, courts are independent and separate from the executive and legislative branches of power. As discussed in greater detail below, these assumptions do not hold true outside the realm of civil courts.

ii. The law of standing is not a universal legal principle

84. While scarcity of resources is an overarching concern that may relate to both the judiciary and the executive branch, the law of standing is *not* a universal legal principle that necessarily applies outside the realm of civil courts. When the interests being protected are societal, rather than individual, the principles underpinning the law of standing developed by and for civil courts are inapplicable. Accordingly, standing is not a relevant consideration, and the allocation of resources must be governed by other considerations and principles.

85. The institution of private prosecution in criminal law is a prime example of this point. Pursuant to s. 504 of the *Criminal Code*, anyone "who, on reasonable grounds, believes that a person has committed an indictable offence" may lay an information. Pursuant to s. 507.1 of the *Criminal Code*, if the information is laid by a person other than a peace officer, a public officer, the Attorney General or the Attorney General's agent, then the information must first be referred to a provincial court judge to consider on a "process hearing" whether to issue a summons or a warrant.

86. The legal test for issuing a summons or a warrant at a process hearing is whether the "information is valid on its face" and, if so, whether the evidence presented "discloses a *prima facie* case of the offences alleged."[101] Being a victim of the alleged offence or otherwise having a personal stake in the prosecution is *not* a prerequisite for privately prosecuting an offence, because the primary purpose of criminal law is the protection of society, and not the vindication of victims.[102]

iii. The law of standing is incompatible with regulatory law

87. The law of standing is inconsistent with the objectives of regulatory law, and should not be superimposed on it. As this Court has held, "[t]he laudable objectives served by regulatory legislation should not be thwarted by the application of principles developed in another context."[103]

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[100] *Downtown Eastside*, 2012 SCC 45 at para. 29.
[101] *Canadian Broadcasting Corporation et al v. Morrison*, 2017 MBCA 36 at para. 21.
[102] *R. v. Hotomanie*, 1985 CanLII 2647 (SK CA), para. 8; *R. v. Stubel*, 1990 ABCA 286, para. 10.
[103] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at para. 187.

88. The constraints and assumptions that justify restricting access to civil courts by means of the law of standing[104] are not present in the context of regulatory statutes and the administrative bodies in charge of administering them. First, unlike courts that resolve civil disputes between parties with "a personal stake in the outcome," regulatory schemes aim to protect public and societal interests, and to prevent future harm to the public at large:

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.[105]

Second, unlike civil courts, administrative bodies in charge of regulatory legislation may and frequently do assume an inquisitive or investigative role, and address concerns on their own initiative, without necessarily having contending points of view before them. Third, administrative bodies are part of the executive branch, and not the judiciary.

89. Applying the law of standing to administrative bodies in charge of regulatory legislation would also lead to the inconsistent and absurd result whereby a person may lack standing to complain to the administrative body, but may institute private prosecution for the violation of the same legislation.[106]

iv. Analytic framework for determining whether the law of standing is relevant to a function of an administrative body

90. Administrative bodies and decision-makers wield powers in a wide range of areas that affect the daily lives of Canadians. The FCA correctly noted that "their mandates come in all shapes and sizes, and their role is different from that of a court of law."[107] Some administrative bodies[108] are tasked with adjudicating disputes between individual citizens and the government or one of its

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[104] See para. 83 on p. 20 above.
[105] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at para. 129.
[106] *Lynk v. Ratchford*, 1995 CanLII 4236 (NS CA).
[107] FCA Reasons at para. 20 [Appellant's Record, Tab 5, p. 27].
[108] See, e.g., *Department of Employment and Social Development Act*, SC 2005, c. 34, Part 5.

delegated authorities, while others[109] carry out a public interest mandate and are in charge of regulatory legislation whose objective is to prevent harm to the public. Administrative bodies may have more than one role. Determining whether the law of standing is a relevant consideration requires construing the function and mandate of the administrative body in question, and calls for examining three interrelated factors.[110]

(1) Objective of the enabling legislation

91. The law of standing is an irrelevant consideration that may lead to absurd outcomes where the administrative body in question carries out broad public interest mandates, or exercises broad regulatory powers to accomplish such a mandate. For example, if the doctrine of standing were applied to the Canadian Food Inspection Agency, then only a person who purchased, consumed, and fell ill from a contaminated item could report a food safety issue, which would defeat the objective of preventing harm to the public before anyone falls ill. On the other hand, applying the law of standing may be a sound policy for administrative bodies whose functions are confined to determining individual rights.

(2) The words and context of the enabling legislation

92. Legislative language restricting access to those "directly affected" or "any interested person,"[111] or otherwise permitting preliminary dismissal of a matter on the basis of insufficient interest,[112] indicates that the legislature intended for standing to be a relevant consideration for the given function of the administrative body. The absence of such restrictions indicates that legislature did not consider the law of standing a relevant consideration to the given function of the body.

93. Furthermore, legislation whose objective is consumer protection or human rights must be interpreted generously.[113,114] Accordingly, when the enabling statute is silent as to who may bring a matter to the administrative body, a complainant seeking to shine a spotlight on allegations of

[109] See, e.g., *Canadian Food Inspection Agency Act*, SC 1997, c. 6, s. 11.
[110] *Green v. Law Society of Manitoba*, 2017 SCC 20 at paras. 27-42.
[111] See, e.g., *Telecommunications Act*, S.C. 1993 c. 38, ss. 9(3) and 48(2); and *National Energy Board Act*, RSC 1985 c. N-7, s. 55.2.
[112] See, e.g., *Royal Canadian Mounted Police Act*, RSC 1985, c. R-10, s. 45.53(2).
[113] *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30 at paras. 11-14; *Young v. National Money Mart Co.*, 2013 ABCA 264 at para. 19, leave to appeal ref'd 2014 CanLII 3513 (SCC).
[114] *Gould v. Yukon Order of Pioneers*, [1996] 1 SCR 571 at para. 120 (per L'Heureux-Dubé J, in dissent on other grounds); *B. v. Ontario (Human Rights Comm.)*, 2002 SCC 66 at paras. 44-45.

shabby corporate conduct in the public interest should not be frustrated by the blunt tool of the law of standing.

(3) Scheme of the enabling legislation

94. The relevance of the law of standing is significantly diminished in the context of administrative bodies that do not "depend on the parties to present evidence and relevant arguments fully and skillfully" as courts do,[115] but rather are permitted to act on their own initiative and may assume an inquisitive or investigative role. Indeed, no standing should be required to invoke the jurisdiction of an administrative body if that jurisdiction exists in the absence of an affected person, because the body can act on its own motion.

D. The Federal Court of Appeal's judgment is correct

i. International *versus* domestic air service

95. Discrimination is prohibited both in international and domestic air service, but for historic reasons the respective prohibitions are found in two different legislative instruments: the *ATR* and the *Act*. While the terminology used in these provisions is not identical, the words "unreasonable" and "unjust discrimination" in section 111 of the *ATR* encompass and capture the meaning of the terms used in subsection 67.2(1) of the *Act*.[116] These are parallel provisions and, as Delta conceded, the Agency has a similar mandate in relation to both.[117] Delta also correctly conceded that the Agency may act on its own motion, without receiving a complaint, in order to eliminate discriminatory practices in international service.[118]

96. The FCA correctly stated at the beginning of its reasons[119] that Dr. Lukács's complaint to the Agency was brought under subsection 111(2) of the *ATR*, which prohibits discrimination in *international* service. At the hearing of the appeal before the FCA, Webb, J.A. stated that section 67.2 of the *Act*, which prohibits discrimination in *domestic* service, does not apply to Delta.[120]

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[115] *Downtown Eastside*, 2012 SCC 45 at para. 29.
[116] CTA Decision No. 482-A-2012 at para. 7.
[117] Appellant's Factum, paras. 31 and 75, pp. 6 and 18.
[118] Appellant's Factum, para. 115, p. 28.
[119] FCA Reasons at para. 3 [Appellant's Record, Tab 5, p. 20].
[120] Minutes of Hearing (Apr. 25, 2016), p. 6, at 11:55 [Respondent's Record, Tab 4, p. 35].

97. The FCA's reference to s. 67.2(1) of the *Act* at paragraph 26 of its reasons[121] was in error. However, in light of Delta's concession that the Agency's mandate is similar in relation to both provisions prohibiting discrimination,[122] this error is inconsequential. The FCA committed no error in relying on legislative provisions governing *domestic* air service for the purpose of contextual analysis to illuminate the Agency's public interest mandate in relation to air service generally.

ii. The law of standing is not relevant to complaints before the Agency directed to the prevention of future harm

98. An appeal to this court is from an FCA judgment, and not the reasons for the judgment.[123] The FCA's judgment should be upheld not only because of its substantially correct reasons, but also based on the above-noted framework, for determining whether standing is relevant to a function of an administrative body, as applied to the Agency's function relating to Dr. Lukács's complaint.

(1) Objective of the Act and the ATR

99. The *Act* and the *ATR* promulgated pursuant to the *Act* create a regulatory scheme for transportation by air in order to achieve certain policy objectives, which include the enhancement of consumer protection through elimination of unreasonable practices and fostering human rights through elimination of unjustly (or unduly) discriminatory practices in transportation by air.[124,125]

100. The Agency administers the regulatory scheme and has a broad public interest mandate with respect to transportation by air. The Agency has been granted broad regulatory powers to eliminate unreasonable and unjustly (unduly) discriminatory practices in transportation by air.[126] Such regulatory powers are "directed to the prevention of future harm through the enforcement of minimum standards of conduct and care."[127] The beneficiary of the exercise of powers of this nature is the public at large, not a small, identifiable group of individuals with a personal stake. It is therefore unreasonable for the Agency to ignore a discrimination complaint intended to prevent future harm on the sole basis that the complainant has no personal stake in the complaint.

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[121] FCA Reasons at para. 26 [Appellant's Record, Tab 5, p. 31].
[122] Appellant's Factum, paras. 31 and 75, pp. 6 and 18.
[123] *Janis v. Janis*, 2016 BCCA 364 at para. 79.
[124] The *Act*, ss. 67.2(1) and 86(1); *ATR*, ss. 111 and 113.
[125] CTA Decision No. 390-A-2013 at paras. 21-25.
[126] The *Act*, ss. 67.2(1) and 86(1); *ATR*, ss. 111 and 113.
[127] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at para. 129.

101. This argument does not merely represent the position of Dr. Lukács, but also represents the Agency's previously-stated view of its role relating to the prevention of future harm,[128] which may be given some weight.[129] The Agency's decision in the *Krygier* case involved a complaint against all major Canadian airlines about the practice of charging a fee for ensuring that young children are seated next to an accompanying adult. The respondent airlines raised the issue of standing on a preliminary motion, arguing that Mr. Krygier had not established that he was sufficiently affected by the policies challenged or had the requisite "direct personal interest standing or "interest for public interest standing."[130] The Agency dismissed the airlines' preliminary motion, rejecting the applicability of the law of standing to complaints relating to unreasonable or discriminatory practices. In so doing, the Agency reiterated its previously consistent view that:

> [...] it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and conditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR.
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> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.[131]

102. In *Krygier*, the Agency distinguished its earlier decision in *OC Transpo*,[132] which was brought under s. 172 of the *Act* (accommodation of persons with disabilities). This distinction demonstrates that the relevance of standing depends on the mandate or function exercised by the administrative body; whereas in *OC Transpo* the relevant provision required individually tailored remedies, *Krygier* related to the Agency's mandate to eliminate unreasonable and discriminatory practices in transportation by air, which is directed at preventing future harm.

103. The Agency's analysis and conclusion in *Krygier*[133] was correct, and supports the FCA's finding that applying the law of standing—which was developed by and for the courts—to the Agency's mandate to eliminate unreasonable and discriminatory practices contradicts and frustrates the purpose and policy underlying the regulatory scheme:

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[128] See fn. 5 on p. 2 above.
[129] *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 53.
[130] *Krygier* at p. 5 [Appellant's Book of Authorities, Tab 2].
[131] *Krygier* at p. 5 [Appellant's Book of Authorities, Tab 2].
[132] *ATU Local 279 v. OC Transpo*, CTA Decision No. 431-AT-MV-2008 ("*OC Transpo*").
[133] *Krygier* at p. 5 [Appellant's Book of Authorities, Tab 2].

> [...] the fact that a complainant has not been directly affected by the fare, rate, charge, or term or condition complained of and may not even meet the requirements of public standing, should not be determinative. If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint. [...] there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.[134]

(2) The words and context of the Act and the ATR

104. When Parliament intends to restrict access to a function of an administrative body, it does so explicitly. Indeed, in the *Act* itself, Parliament restricted access to some, but not all, of the available complaint mechanisms and remedies, including to "a shipper" (in ss. 120.1(1), 131(5), and 132(1)); "a party to a negotiation" (in s. 144(3.1)); "an interested person" (in s. 144(6)); or "any person adversely affected" (in ss. 67.1(b), 86(1)(h)(iii), and 116(4)(c.1)).

105. Notably, none of the provisions relating to the Agency's mandate to eliminate unreasonable and discriminatory practices are subject to such a restriction:

(a) Subsection 85.1(3) of the *Act* speaks about "deal[ing] with the complaint in accordance with the provisions of this Part under which the complaint has been made."

(b) The provisions relating to domestic service consistently refer to "complaint in writing to the Agency by *any person*" (ss. 65, 66(1), 66(2), 67.1, and 67.2 of the *Act*, emphasis added).

(c) The provisions relating to international service (ss. 111 and 113 of the *ATR*) are silent about who may bring a complaint and, as Delta conceded, permit the Agency to act on its own motion, without receiving a complaint, in order to eliminate discriminatory practices in international service.[135]

106. According to the presumption of consistent expression, when different terms are used in a single piece of legislation, they must be understood to have different meanings.[136] If Parliament had intended to restrict access to the Agency's functions relating to the elimination of unreasonable and discriminatory practices, it could have so indicated by using the type of language found elsewhere in

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[134] FCA Reasons at para. 27.
[135] Appellant's Factum, para. 115, p. 28.
[136] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 81.

the *Act* and in Bill C-49.[137] While complaints relating to discriminatory practices remain unaffected by the proposed amendments in Bill C-49, the fact that Parliament is proposing to add explicit wording to restrict the Agency's complaint mechanism in some circumstances to those who have been adversely affected further confirms that its intention and understanding has always been that, without such explicit wording in the *Act*, access to the complaint mechanism is not so limited.

107. In light of the consumer protection and human rights purpose of the Agency's mandate to eliminate unreasonable and discriminatory practices, the silence of the *Act* and the *ATR* reflects the legislative choice that a public interest complainant intended to shine a spotlight on allegations of shabby corporate conduct should not be frustrated by the blunt tool of the law of standing.[138]

(3) Scheme of the Act and the ATR

108. The scheme of the *Act* is inconsistent with the rationale underpinning the law of standing developed by and for the courts. First, sections 37-39 of the *Act* confer upon the Agency broad inquisitive and investigative powers. The Agency may inquire or appoint an inquiry officer to inquire into a complaint relating to a prohibited conduct, such as discriminatory practices. The inquiry officer may "exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary."[139]

109. Second, as the FCA noted[140] and Delta conceded before this Court,[141] pursuant to sections 111 and 113 of the *ATR*, the Agency may act on its own motion to eliminate unreasonable or unjustly discriminatory practices in international air service, regardless of whether it has received a complaint. Indeed, the Agency has exercised similar powers on its own initiative,[142] merely based on information that "had come to its attention,"[143] and in the absence of the affected passengers.

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[137] Bill C-49, 42nd Parliament, 1st Session, ss. 17-19; see paras. 55-57 above.
[138] See fns. 113 and 114 on p. 23 above.
[139] The *Act*, s. 39(b).
[140] FCA Reasons at para. 31 [Appellant's Record, Tab 5, p. 33].
[141] Appellant's Factum, para. 115, p. 28.
[142] *Re: Delta Air Lines*, CTA Decision No. 161-A-2010 at paras. 3-5 and 19(2).
[143] *Re: Northwest Airlines, Inc. and KLM Royal Dutch Airlines*, CTA Decision No. 232-A-2003, aff'd 2004 FCA 238; see also *Re: Lufthansa German Airlines*, CTA Order No. 2005-A-8.

110. The Agency's role in relation to complaints, as set out in the scheme of the *Act* and the *ATR*, is not wholly adjudicative; it does not necessitate an adversarial setting with contending points of view of the persons most directly affected by the issue, and the Agency does not "depend on the parties to present evidence and relevant arguments fully and skillfully" as courts do.[144]

111. As the Agency could have acted on the information set out in Dr. Lukács's complaint even without receiving a complaint, the justifications for limiting standing are inapplicable. Accordingly, the law of standing is not a relevant consideration in the exercise of the Agency's discretion, and does not reasonably justify the dismissal of Dr. Lukács's complaint without addressing its merits in any way.

Issue 2: In the alternative, the Agency's decision to deny Dr. Lukács public interest standing was unreasonable, because the Agency did not apply the appropriate legal test, misapprehended the applicable principles, and frustrated the purpose of the statutory scheme

112. If this Court finds it reasonable for an administrative body with a mandate to prevent future harm, such as the Agency, to screen complaints on the basis of standing, Dr. Lukács submits that such a body must exercise its discretion to grant public interest standing by applying the factors articulated in *Downtown Eastside* in a manner that reflects the distinct nature of administrative decision-making and considers the objectives of the relevant statutory scheme.

113. Under such a framework, the Agency's decision to deny Dr. Lukács public interest standing was unreasonable. The Agency merely paid lip service to *Downtown Eastside*, without properly considering *any* of the three factors relevant to granting public interest standing set out therein, and the Agency did not conduct its assessment generously and purposively. The Agency's misapplication of the relevant legal test frustrated the purpose and underlying policy of the statutory scheme.

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[144] *Downtown Eastside*, 2012 SCC 45 at para. 29.

E. The test for public interest standing in the distinct administrative context

i. Principles governing administrative bodies' exercise of discretion to grant public interest standing

114. Decision-makers must act in accordance with the law.[145] *Downtown Eastside* is a binding authority on public interest standing in Canada, and any administrative tribunal deciding this issue has a duty to apply this Court's interpretation of the law to the cases before it.[146]

115. Additional considerations are relevant, however, when the decision-maker is an administrative body, as opposed to a court. Both the Agency's decision below and Delta's argument before this Court fail to appreciate that administrative tribunals and courts have distinct functions and objectives. As the FCA held:

> Administrative bodies such as the Agency are not courts. They are part of the executive branch, not the judiciary. Their mandates come in all shapes and sizes, and their role is different from that of a court of law.[147]

116. The courts have a broad but well-defined role, providing a venue for both the adjudication of private disputes and challenges to the constitutionality of legislation and the legality of state action.[148] While administrative bodies may serve an adjudicative function in order to provide an efficient dispute resolution mechanism for issues relating to the policy underpinning their enabling statute, they are not, and cannot serve the core "judicial" functions of, superior courts.[149] Indeed, administrative bodies' mandates and processes vary widely,[150] and, as described above, render the underlying purposes of limiting standing largely inapplicable.[151]

117. Most importantly, administrative bodies' authority derives entirely from legislation; their powers are confined to those expressly or implicitly conferred to them by statute, and they must act in a manner consistent with the legislative intent of their enabling statute.[152]

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[145] *Roncarelli v. Duplessis*, [1959] SCR 121.
[146] *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46 at paras. 46-47 (per Wagner J), and paras. 63 and 68 (per McLachlin CJ, in dissent but concurring on this point).
[147] FCA Reasons at para. 20 [Appellant's Record, Tab 5, p. 27].
[148] *Downtown Eastside*, 2012 SCC 45 at para. 32.
[149] *The Constitution Act*, 1867, 30 & 31 Vict, c. 3, s. 96; *Re Residential Tenancies Act*, [1981] 1 SCR 714.
[150] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 21-28.
[151] See paras. 82-89 on pp. 20-22 above.
[152] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 55.

118. For these reasons, the courts' approach to public interest standing, as stated by this Court in *Downtown Eastside*, ought not be transposed wholesale to the administrative context. Rather, it should be adapted to recognize the distinct purposes and functions of administrative bodies.

119. Interestingly, Delta does not dispute that the Agency may apply "*a version of* this Court's public interest standing jurisprudence,"[153] but neglects to articulate how "a version of" the *Downtown Eastside* factors for courts ought to be applied in the distinct administrative context.

120. Even when applied in the context of a court, the three factors relevant to the determination of public interest standing "should not be treated as hard and fast requirements or free-standing, independently operating tests," but weighed cumulatively in a flexible and generous manner that considers the particular circumstances and serves the purposes underlying the relevant law.[154]

121. Accordingly, administrative bodies should not assess the three *Downtown Eastside* factors in a manner that serves the inapplicable purposes of limiting standing *in the courts*, but should generously apply "a version of" the *Downtown Eastside* test, in a manner that serves the policy objectives of the body's enabling statutory scheme.

ii. Public interest standing is not restricted to certain categories of cases

122. Public interest standing is not and ought not be limited to cases challenging the constitutionality of legislation or the legality of government actions. While cases of this type comprise the majority of situations in which public interest standing has been granted before the courts, this Court has never "established" that public interest standing can be granted *only* in such cases. The Agency's finding[155] and Delta's arguments[156] to the contrary confuse necessity and sufficiency of conditions, a logical fallacy known as "affirming the consequent."

123. Canadian courts have recognized that public interest standing is available for bringing an action against a private party under a public statute, and have granted public interest standing in such cases.[157] There is no justification for construing public interest standing more restrictively in the administrative context than in the judicial one.

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[153] Appellant's Factum, para. 154, p. 38 (emphasis added).
[154] *Downtown Eastside*, 2012 SCC 45 at paras. 2, 20, and 36.
[155] Agency Decision at para. 74 [Appellant's Record, Tab 2, p. 15].
[156] Appellant's Factum, paras. 155-157, p. 39.
[157] *Thibodeau v. Air Canada*, 2005 FC 1156 paras. 74-79, aff'd 2007 FCA 115; *Thibodeau v. Air Canada*, 2011 FC 876 paras 97-106, var'd on other grounds 2012 FCA 246, aff'd 2014 SCC 67.

124. Even if public interest standing were restricted in the judicial context in the manner the Agency found and Delta argues, such a restriction would be premised on the function and purpose *of the courts*. Courts are empowered to grant public interest standing in part because of their role as guardians of the the rule of law and the Constitution;[158] as it is necessary to ensure that legislation and government actors conform to the Constitution and the *Charter*, the Canadian public must have access to a venue in which to challenge the constitutionality of legislation and legality of state action to ensure that such action is not effectively immunized from challenge.[159] As discussed above,[160] however, administrative tribunals play an entirely different role in our constitutional and governmental framework. They are intended to provide an informal and efficient forum in which to determine issues arising in the context of their enabling statutory framework, and they have no supervisory role over the legislative or executive branch. The scope of public interest standing in the administrative context should accordingly be limited only by the jurisdiction and purpose of the administrative body at issue.

125. To restrict public interest standing before administrative bodies only to questions of the constitutionality of legislation and legality of state actions, as the Agency would have it, is putting a round peg in a square hole—it would unduly limit administrative bodies based on an incongruent misapprehension of those bodies' functions and purpose.

iii. Adapting the test for public interest standing to administrative bodies

126. Administrative bodies' role is to properly execute the will of Parliament as expressed in their enabling statutes. Accordingly, an administrative body considering the three factors articulated in *Downtown Eastside* to determine whether to grant public interest standing must do so in the broad and liberal manner that best serves the objectives of the underlying statutory scheme, and gives effect to the legislative intent. Absent an express legislative provision to the contrary, the exercise of an administrative body's discretion to grant public interest standing should accord with the following framework.

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[158] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 27-30.
[159] *Downtown Eastside*, 2012 SCC 45 at paras. 32-33.
[160] See para. 116 on p. 30.

(1) Objective of the statutory scheme

127. Before embarking on an analysis of the three *Downtown Eastside* factors, an administrative body deciding whether to exercise its discretion to grant public interest standing must first determine the scope and purpose of the regulatory scheme in which the complaint is raised, which will guide the body's application of the test.

128. Articulating the objective of the statutory scheme in this context is no different than doing so for the purpose of judicial review. In addition to the express language of the enabling statute, the decision-maker must consider whether the scheme is aimed at the protection of the public; the policy issues engaged; the powers conferred upon the body, including whether the body may act on its own initiative; the rights and interests affected; and the range of administrative responses available.[161]

(2) Serious issue

129. In the administrative context, the "serious issue" factor need not be concerned with whether the issue raised is "justiciable" or "appropriate for judicial determination," in that it fits squarely within the adversarial structure of adjudication. Rather, it must be concerned with whether the issue raised properly falls within the administrative body's jurisdiction, and whether resolution of the issue would be consistent with the body's statutory purpose. Issues engaging questions of policy, which a court may deem better left for the legislative and executive branches, are ideally suited for determination by a statutorily-enacted administrative body acting pursuant to a complaint made in the public interest.

130. While the efficient allocation of scarce resources is relevant to this factor, it applies quite differently than Delta suggests.[162] The justification for prioritizing cases brought by those with a "personal stake in the outcome" is premised on the assumption that the available remedies are of a personal nature, and that there is no public interest in addressing the issue. This is a fallacy in the context of administrative bodies whose mandate and powers are "directed to the prevention of future harm through the enforcement of minimum standards of conduct and care."[163] Parliament's choice

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[161] *Green v. Law Society of Manitoba*, 2017 SCC 20 at paras. 28-31; see also *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 64.
[162] Appellant's Factum, para. 50, p. 12.
[163] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at para. 129.

to empower a body to act on its own motion indicates its legislative intent to allocate resources to prevent societal harm, rather than merely providing *ex post facto* remedies to affected individuals. It would contravene the principle of legislative supremacy to prioritize individual, private interest cases in the face of Parliament's intent to empower the administrative body to investigate and provide remedies for systemic issues.

131. Furthermore, preventing harm before it occurs is more cost and resource efficient than ordering after-the-fact remedies. Granting standing liberally to parties raising public interest concerns is thus a more efficient way to allocate an administrative body's scarce resources, because it forestalls future harm and the numerous potential complaints arising from it.

132. What constitutes a "serious issue" in the administrative context is otherwise the same as in the judicial context. The issue must be "far from frivolous," although the administrative body should not examine the merits of the issue at the standing stage in other than a preliminary manner. The standard expressed by Justice Major in respect of this factor in *Hy and Zel's* appropriately reflects the generous approach to public interest standing this Court reaffirmed in *Downtown Eastside*: an issue raised in a public interest complaint will be considered serious unless it is so unlikely to succeed that its result would be seen as a "foregone conclusion."[164]

(3) The nature of the complainant's interest

133. This factor requires the party seeking public interest standing to have a genuine interest in the issue they seek to raise, without requiring them to be personally affected by its resolution.[165] Courts typically assess the party's "engagement" by examining their reputation, continuing interest, and link with the issue.[166] In the administrative context, the decision-maker should conduct this assessment liberally, so as to filter out complainants who are not serious in pursuing the issue or would be unable or unwilling to participate in the process.

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[164] *Downtown Eastside*, 2012 SCC 45 at para. 42 citing *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 SCR 675.
[165] *Downtown Eastside*, 2012 SCC 45 at para. 43.
[166] *Id.*

(4) Reasonable and effective means of resolving the issue

134. In the judicial context, this factor requires that, in light of all circumstances and a number of considerations, the proposed suit be "***a*** reasonable and effective means to bring the challenge to court."[167] This Court clarified in *Downtown Eastside* that public interest standing should not be denied on the basis that those directly affected by the issue in question could *theoretically* bring a suit; in order to meet this factor, the proposed suit need not be the *only* means to resolve the issue, but only *one* of possibly several reasonable and effective means.[168]

135. In the context of courts, which rely on the adversarial structure to resolve private disputes, this factor may be applied so as to ensure the court has "the benefit of the contending views of the persons most directly affected by the issue."[169] This rationale, however, is inapplicable to the administrative context, where administrative bodies assume inquisitive or investigative roles or act on their own initiative, without having contending points of view before them.

136. Whether a public interest complaint made to an administrative body is a "reasonable and effective means" of addressing the issue must be considered pragmatically, with a view to the purpose of the regulatory scheme. Where the objective includes the *prevention* of harm, a preemptive complaint, directed at preventing future harm, is a reasonable and effective means to address a concern. This is particularly so when the alternative is the body acting on its own motion, in which setting the body has only the benefit of one point of view: that of the respondent company.

(5) Residuary discretion

137. Courts have residuary discretion to grant standing even when a person does not meet the test for public interest standing, if the question involved is one of public importance.[170] The same holds for administrative bodies, especially those that may act on their own motion or that have the powers of a superior court to carry out their mandates. Such bodies should not ignore evidence, information, or arguments relevant to a matter of public importance within their mandate on the sole basis that it originates from a person who would not otherwise have standing.

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[167] *Downtown Eastside*, 2012 SCC 45 at para. 44 (emphasis added).
[168] *Downtown Eastside*, 2012 SCC 45 at paras. 47 and 51.
[169] *Downtown Eastside*, 2012 SCC 45 at para. 49.
[170] *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 at para. 33, citing *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

F. Assessment of public interest standing in the case at bar

i. The Agency's unreasonable decision

138. The Agency did not apply the appropriate legal test for public interest standing when it dismissed Dr. Lukács's complaint on that sole basis. The Agency's decision misapprehended the applicable legal principles and frustrated the purpose of the statutory scheme, and was thus unreasonable.

139. The Agency's decision was entirely inconsistent with this Court's reasons in *Downtown Eastside*, which emphasized that the factors to be considered in the exercise of discretion to grant public interest standing "should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes" and considering the particular circumstances of the case.[171]

140. While the Agency paid lip service to the principles set out in *Downtown Eastside*, the Agency's decision ran afoul of them. The Agency did not consider *any* of the three factors, and it did not conduct its assessment generously and purposively. The Agency's reasons were silent on whether a serious issue had been raised and whether the complaint was a reasonable and effective means of resolving that issue. While the Agency referenced the "second part of the test" (genuine interest of the complainant), its only comment in that regard was an incorrect assertion on an unrelated point, made without and contrary to authority, stating:

> Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.[172]

141. In other words, the Agency refused to grant public interest standing to Dr. Lukács on the sole basis that his complaint was not a constitutional challenge of some sort. This is not a prerequisite for nor a factor in the assessment of public interest standing at all, much less a determinative factor—particularly in the administrative context.[173]

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[171] *Downtown Eastside*, 2012 SCC 45 at paras. 2, 20, and 36.
[172] Agency Decision at para. 74 [Appellant's Record, Tab 2, p. 15].
[173] See para. 123 on p. 31 above.

ii. Proper application of the public interest standing analysis in this case

142. A generous and purposive analysis of whether to grant public interest standing in the present case demonstrates that, had the Agency properly applied the factors from *Downtown Eastside* in a manner consistent with the legislative intent of its enabling statute, Dr. Lukács would have been granted public interest standing.

(1) Objective of the statutory scheme

143. As noted above,[174] the *Act* and the *ATR* create a regulatory scheme for transportation by air in order to achieve certain policy objectives, which include enhancing consumer protection through the elimination of unreasonable practices and fostering human rights though the elimination of unjustly discriminatory practices in transportation by air. The Agency, which administers the regulatory scheme, has been granted broad regulatory powers to carry out this public interest mandate.[175,176] Such regulatory powers are "directed to the prevention of future harm through the enforcement of minimum standards of conduct and care,"[177] and make clear that the Agency's mandate in addressing complaints is not limited to providing remedies for harm after the fact. The beneficiary of the Agency's exercise of its powers is the public at large, not a small, identifiable group of individuals with a personal stake.

(2) Serious issue

144. The issue raised in Dr. Lukács's complaint is whether Delta's practice of singling out "large" passengers based on their size is unjustly discriminatory, contrary to subsection 111(2) of the *ATR*. This issue falls squarely within the Agency's jurisdiction and mandate to eliminate unreasonable and unjustly discriminatory practices in international service.[178] The resolution of the issue would be consistent with the *Act*'s policy objectives, which include the protection of consumers and their human rights. Indeed, by determining the so-called "One-Person-One Fare" decision,[179] the Agency has accepted the seriousness of a similar issue, albeit in the substantially narrower context of accommodation of disabilities in *domestic* transportation by air.

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[174] See para. 101 on p. 26 above.
[175] The *Act*, ss. 67.2(1) and 86(1); *ATR*, ss. 111 and 113.
[176] CTA Decision No. 390-A-2013 at paras. 21-25.
[177] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at para. 129.
[178] *ATR*, ss. 111 and 113.
[179] CTA Decision No. 6-AT-A-2008.

145. Delta did not contest before the Agency[180] or the FCA[181] that Dr. Lukács's complaint raises a serious issue, nor does Delta contest this before this Court.

(3) The nature of the complainant's interest

146. Dr. Lukács has demonstrated his seriousness and effectiveness in pursuing air passenger rights issues through more than two dozen successful complaints with the Agency, which have resulted in various orders directing carriers to amend their conditions of carriage and offer better protection to passengers.[182] Dr. Lukács's advocacy in the public interest and expertise in the area of air passenger rights have been praised even by Mr. Martins,[183] counsel for Delta before this Court. Dr. Lukács is willing and able to participate in the process. There can be no question that Dr. Lukács is engaged with the issue he raised in his complaint; indeed, Delta did not contest before the Agency[184] or the FCA[185] that Dr. Lukács has a genuine interest in the complaint.

(4) Reasonable and effective means of resolving the issue

147. The objectives of the *Act* and the functions of the Agency include the elimination of unreasonable and unjustly discriminatory practices, which is a public interest mandate. Consequently, Dr. Lukács's preemptive complaint, directed at preventing the future harm that Delta's stated practice would cause, is a reasonable and effective means to address the issue of whether Delta's practice is unjustly discriminatory, contrary to subsection 111(2) of the *ATR*.

148. As the Agency has broad investigative and inquistorial powers,[186] and is not restricted to an adjudicative role, it is not necessary for it to have directly affected individuals as parties to address the substance of a complaint. The Agency may act on its own motion, whether or not it has received a complaint, to eliminate unreasonable or unjustly discriminatory practices in international air service. The Agency has previously exercised such powers on its own initiative,[187] based merely on information that "had come to its attention,"[188] and in the absence of the affected passengers.

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[180] Submissions of Delta to the Agency (Sep. 26, 2014) [Respondent's Record, Tab 2, p. 16].
[181] Minutes of Hearing (Apr. 25, 2016) [Respondent's Record, Tab 4, p. 30].
[182] See para. 30 on p. 6 above.
[183] See para. 31 on p. 7 above.
[184] Submissions of Delta to the Agency (Sep. 26, 2014) [Respondent's Record, Tab 2, p. 16].
[185] Minutes of Hearing (Apr. 25, 2016) [Respondent's Record, Tab 4, p. 30].
[186] The *Act* ss. 37-39.
[187] *Re: Delta Air Lines*, CTA Decision No. 161-A-2010 at paras. 3-5 and 19(2).
[188] *Re: Northwest Airlines, Inc. and KLM Royal Dutch Airlines*, CTA Decision No. 232-A-2003,

149. The theoretical possibility that some people who are directly affected by Delta's impugned practice *might* or *could* bring a complaint is neither determinative nor particularly relevant. As a practical matter, it is unlikely that most affected individuals would expend the effort and expense to make a complaint about Delta's practice because there is little monetary value at stake. Dr. Lukács has made a complaint on the basis of evidence in his possession[189] that Delta is singling out passengers based on their size, which is all that is required for the Agency to exercise its powers and fulfill its mandate. Without an advocate for passenger rights taking the initiative to make a public interest complaint, these concerns about Delta's discriminatory practices may effectively be immunized from scrutiny; indeed, there has been no suggestion, and there is no basis to suggest, that the Agency has addressed or intends to address Delta's practice on its own initiative.

(5) Residuary discretion

150. Neither the *Act* nor the *ATR* limits the Agency's discretion to hear to hear discrimination complaints relating to international service to only those complaints received from affected individuals. Accordingly, even if Dr. Lukács did not meet the test for public interest standing, the Agency could exercise its residuary discretion to consider Dr. Lukács's complaint and determine whether Delta's practice is unjustly discriminatory, contrary to subsection 111(2) of the *ATR*. Dr. Lukács's complaint raises a question of public importance, and addressing the complaint would be consistent with and indeed promote the Agency's mandate. The Agency may act on its own motion to do so, and may invite or receive submissions from Dr. Lukács in such a proceeding.

PART IV – SUBMISSIONS CONCERNING COSTS

151. As this case affects the public interest and Dr. Lukács is a Respondent before this Court, Dr. Lukács respectfully requests that this Court exercise its discretion to award him costs or a "moderate allowance" for the time he has spent on this proceeding as a self-represented party,[190] in any event of the cause, in addition to his disbursements.

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aff'd 2004 FCA 238; see also *Re: Lufthansa German Airlines*, CTA Order No. 2005-A-8.

[189] Exhibit to the complaint of Dr. Lukács to the Agency (Aug. 24, 2014) [Appellant's Record, Tab 7, p. 38].

[190] Following the practice of the FCA and other Canadian courts: see *Sherman v. Canada (M.N.R.)* 2004 FCA 29 para. 16; *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 para. 82; FCA Reasons at para. 32 [Appellant's Record, Tab 5, pp. 33-34]; and *Bergen v. Sharpe*, 2013 CanLII 74188 (ON SC) which contains a comprehensive survey of such cases.

PART V – ORDER SOUGHT

152. Dr. Lukács seeks an order dismissing the appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July, 2017.

DR. GÁBOR LUKÁCS
Respondent

PART VI – TABLE OF AUTHORITIES

Legislative Enactments (continued) **Para. No.**