



**SUPREME COURT OF CANADA**

**CITATION:** Delta Air Lines Inc. v. Lukács, 2018  
SCC 2

**APPEAL HEARD:** October 4, 2017  
**JUDGMENT RENDERED:** January 19, 2018  
**DOCKET:** 37276

**BETWEEN:**

**Delta Air Lines Inc.**  
Appellant

and

**Gábor Lukács**  
Respondent

- and -

**Attorney General of Ontario, Canadian Transportation Agency, International  
Air Transport Association and Council of Canadians with Disabilities**  
Interveners

**CORAM:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,  
Brown and Rowe JJ.

**REASONS FOR JUDGMENT:** McLachlin C.J. (Wagner, Gascon, Côté, Brown and Rowe  
(paras. 1 to 32) JJ. concurring)

**DISSENTING REASONS:** Abella J. (Moldaver and Karakatsanis JJ. concurring)  
(paras. 33 to 67)

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DELTA AIR LINES INC. v. LUKÁCS

**Delta Air Lines Inc.**

*Appellant*

v.

**Gábor Lukács**

*Respondent*

and

**Attorney General of Ontario,  
Canadian Transportation Agency,  
International Air Transport Association and  
Council of Canadians with Disabilities**

*Interveners*

**Indexed as: Delta Air Lines Inc. v. Lukács**

**2018 SCC 2**

File No.: 37276.

2017: October 4; 2018: January 19.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,  
Brown and Rowe JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Administrative law — Boards and tribunals — Canadian Transportation Agency — Inquiry into complaint — Standing — Public interest standing — Complainant alleging air carrier's practices regarding transportation of obese persons are discriminatory — Agency dismissed complaint on basis that complainant lacked standing — Whether Agency reasonably exercised its discretion to dismiss complaint — Canada Transportation Act, S.C. 1996, c. 10, s. 37.*

L filed a complaint with the Canadian Transportation Agency alleging that Delta Air Lines' practices in relation to the transportation of obese passengers are discriminatory and contrary to s. 111(2) of the federal *Air Transportation Regulations*. The Agency dismissed the complaint on the basis that L failed to meet the tests for private interest standing and public interest standing as developed by and for courts of civil jurisdiction. It found L lacked private interest standing because he was not himself obese, and so could not claim to be aggrieved or affected or to have some other sufficient interest. It also determined that L lacked public interest standing because his complaint did not challenge the constitutionality of legislation or the illegal exercise of an administrative authority. The Federal Court of Appeal allowed L's appeal and held that a strict application of the law of standing as applied in courts was inconsistent with the Agency's enabling legislation. The court directed that the matter be returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide L's complaint.

*Held* (Abella, Moldaver and Karakatsanis JJ. dissenting): The appeal should be allowed in part. The matter is remitted to the Agency to reconsider the matter in whole, whether on the basis of standing or otherwise.

*Per McLachlin C.J. and Wagner, Gascon, Côté, Brown and Rowe JJ.:* The *Canada Transportation Act* bestows broad discretion on the Agency to hear and determine complaints. In this case, the Agency did not reasonably exercise its discretion to dismiss L's complaint. A decision is reasonable if it is justifiable, transparent and intelligible, and falls within a range of possible, acceptable outcomes. The Agency's decision that L lacked standing does not satisfy these requirements for two reasons. First, the Agency presumed public interest standing is available and then applied a test that can never be met. Any valid complaint against an air carrier would impugn the terms and conditions established by a private company. Such a complaint can never, by its very nature, be a challenge to the constitutionality of legislation or the illegality of administrative action. The imposition of a test that can never be met could not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints. The Agency's application of the test is also inconsistent with the rationale underlying public interest standing, which is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door. The Agency did not maintain a flexible approach to this question and in so doing unreasonably fettered its discretion.

Second, the total denial of public interest standing is inconsistent with a reasonable interpretation of the Agency's legislative scheme. Applying the tests for private and public interest standing in the way the Agency did would preclude any public interest group or representative group from ever having standing before the Agency, regardless of the content of its complaint. In effect, only a person who is herself targeted by the impugned policy could bring a complaint. This is contrary to the scheme of the Act. Parliament has seen fit to grant the Agency broad remedial authority and to allow the Agency to act to correct discriminatory terms and conditions before passengers actually experience harm. To refuse a complaint based solely on the identity of the group bringing it prevents the Agency from hearing potentially highly relevant complaints, and hinders its ability to fulfill the statutory scheme's objective.

While a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. This is not a case where merely supplementing the reasons can render the decision reasonable. The Agency clearly stated a test for public interest standing and applied that test. The Agency could have adapted the test so that the complainants under its legislative scheme could actually meet it. It could also have exercised its discretion without any reference to standing at all. But it did neither of these things and the reviewing court must not do them in the Agency's place.

The Court of Appeal should not have held that standing rules could not be considered by the Agency in its reconsideration of the matter. The better approach is to send the matter back to the Agency for reconsideration in its entirety. Deference requires that the Agency determines for itself how to use its discretion, provided it does so reasonably.

*Per Abella, Moldaver and Karakatsanis JJ. (dissenting):* There is nothing in the Agency's mandate that circumscribes its ability to determine how it will decide what cases to hear. Parliament has given the Agency wide discretion to choose, according to its own institutional constraints and demands, how it will promote its overall mandate to regulate and adjudicate national transportation issues. The Agency's power to process and resolve complaints is framed in discretionary language, giving the Agency the authority to make its own rules about how it carries on its work, as well as the manner of, and procedures for, dealing with matters before the Agency. In this case, the Agency developed its standing rules in full accordance with its legislative mandate. There is no basis for interfering with them.

Standing rules exist to enable a court or tribunal to economize and prioritize its resources, and ensure that it benefits from contending points of view that are advanced by those best placed to advance them. The Agency is entitled to apply a gatekeeping or screening mechanism which enables it to balance, in a transparent and effective manner, the Agency's various competing interests and demands, such as access and resources.

Tribunals are not required to follow the same procedures courts use, but when a tribunal like the Agency chooses to apply and exercise its broad legislative mandate by borrowing an approach to standing long sanctioned by the courts as an effective and principled way to determine which cases it will hear, reviewing courts should not interfere merely because the court might have applied the mandate differently. Where, as here, the adopted standing procedures flow from the same concerns and rationales as those relied on by courts, there is no reason for a tribunal to be immunized from access to a procedure courts have endorsed. Access to justice demands that both courts *and* tribunals be encouraged to develop screening methods to ensure that access to justice will be available to those who need it most in a timely way. The fact that a tribunal's governing legislation has a public interest dimension does not preclude it from adopting similar rules of standing to those used by the courts.

The Agency's decision to deny L's complaint on the basis that he lacked standing was reasonable in the circumstances. L brought a complaint with no underlying facts, no representative claimants and no argument. His complaint is purely theoretical, his interest in the issues is academic, and the proposed suit does not constitute an effective and reasonable means of bringing the issue before the Agency. It is therefore unnecessary to remit the matter back to the Agency.

### **Cases Cited**

By McLachlin C.J.

**Referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Lukács v. Porter Airlines Inc., Canadian Transportation Agency*, Decision No. 121-C-A-2016, April 22, 2016; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154; *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135; *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267.

By Abella J. (dissenting)

*Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and*



*Immigration*), [1992] 1 S.C.R. 236; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Lukács v. Porter Airlines Inc.*, Canadian Transportation Agency, Decision No. 121-C-A-2016, April 22, 2016; *Amalgamated Transit Union, Local 279 (Re)*, Canadian Transportation Agency, Decision No. 431-AT-MV-2008, August 20, 2008; *Lukács v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Norman Estate v. Air Canada*, Canadian Transportation Agency, Decision No. 6-AT-A-2008, January 10, 2008.

### **Statutes and Regulations Cited**

*Air Transportation Regulations*, SOR/88-58, ss. 111, 113, 113.1.

*Canada Transportation Act*, S.C. 1996, c. 10, ss. 5, 17, 25, 37, Part V.

*Canadian Transportation Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104, s. 5(1).

### **Authors Cited**

Dyzenhaus, David. “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.

Jones, David Phillip, and Anne S. de Villars. *Principles of Administrative Law*, 5th ed. Toronto: Carswell, 2009.

Sossin, Lorne. “Access to Administrative Justice and Other Worries”, in Flood, Colleen M., and Lorne Sossin, eds., *Administrative Law in Context*, 2nd ed. Toronto: Emond Montgomery, 2013, 211.

APPEAL from a judgment of the Federal Court of Appeal (Webb, Scott and de Montigny JJ.A.), 2016 FCA 220, 408 D.L.R. (4th) 760, [2016] F.C.J. No. 971 (QL), 2016 CarswellNat 4268 (WL Can.), setting aside a decision of the Canadian Transportation Agency, No. 425-C-A-2014, November 25, 2014, dismissing a complaint for discriminatory practices. Appeal allowed in part, Abella, Moldaver and Karakatsanis JJ. dissenting.

*Carlos P. Martins and Andrew W. MacDonald*, for the appellant.

Gábor Lukács, on his own behalf.

*Heather Mackay and Edmund Huang*, for the intervener the Attorney General of Ontario.

*Allan Matte and Mante Molepo*, for the intervener the Canadian Transportation Agency.

*David Neave and Derek Bell*, for the intervener the International Air Transport Association.

*Byron Williams, Joëlle Pastora Sala and Alyssa Mariani*, for the intervener the Council of Canadians with Disabilities.

*Benjamin Zarnett*, as *amicus curiae*, and *Jane Scholes*.

The judgment of McLachlin C.J. and Wagner, Gascon, Côté, Brown and Rowe JJ. was delivered by

THE CHIEF JUSTICE —

[1] The respondent, Dr. Gábor Lukács, filed a complaint with the Canadian Transportation Agency (“Agency”), alleging that the appellant, Delta Air Lines Inc. (“Delta”), applied discriminatory practices governing the carriage of obese persons. The Agency dismissed this complaint on the basis that Dr. Lukács failed to meet the tests for private interest standing and public interest standing as developed by and for courts of civil jurisdiction.

[2] The question is whether the Agency’s decision was reasonable. I conclude that it was not. I would remit the matter to the Agency to reconsider whether to hear the complaint.

I. Facts and Decisions Below

[3] On August 24, 2014, Dr. Lukács submitted a complaint to the Agency alleging that Delta's practices in relation to the transportation of obese passengers are discriminatory and contrary to s. 111(2) of the *Air Transportation Regulations*, SOR/88-58 ("Regulations"). In support of his complaint, he attached an email from Delta in response to a passenger's negative experience of sitting next to another passenger "who required additional space". In the email, Delta apologized and explained:

Sometimes, we ask the passenger to move to a location in the plane 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. [A.R., at p. 38]

[4] On September 5, 2014, the Agency issued a letter decision in response to this complaint. It stated: "It is not clear to the Agency that, on the basis of his submission, Mr. Lukács has an interest in Delta's practices governing the carriage of obese persons. As such, his standing (or *locus standi*) in this matter is in question": (Decision No. LET-C-A-63-2014, September 5, 2014, reproduced in A.R., at p. 1). The Agency called for submissions on the standing question.

[5] In its ultimate decision, which is at issue in this case, the Agency denied Dr. Lukács standing and dismissed his complaint: Decision No. 425-C-A-2014, November 25, 2014. To do so, it applied the tests for private interest standing and public interest standing as they have been developed by and for civil courts. It found Dr. Lukács lacked private interest standing because he was not himself obese, and so

could not claim to be “aggrieved” or “affected” or to have some other “sufficient interest” (para. 64). It then determined that he lacked public interest standing because his complaint did not challenge the constitutionality of legislation or the illegal exercise of an administrative authority (para. 74).

[6] The Federal Court of Appeal allowed Dr. Lukács’ appeal: 2016 FCA 220, 408 D.L.R. (4th) 760. The Court of Appeal held that a strict application of the law of standing as applied in courts was inconsistent with the Agency’s enabling legislation. Moreover, it was contrary to the Agency’s objective to refuse to examine a complaint based solely on whether a complainant had been directly affected or had public interest standing (para. 27). The Court of Appeal held that in refusing to examine Dr. Lukács’ complaint, the Agency “unreasonably fettered its discretion” (para. 30). Ultimately, the Court of Appeal directed that the matter be “returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide [Dr. Lukács’] complaint” (para. 32).

## II. Analysis

### A. *Standard of Review*

[7] The standard of review to be applied in this case is reasonableness. This was the finding of the Court of Appeal (paras. 14-15) and is not disputed by the parties.

[8] Where an administrative body interprets its own statute and is required to exercise discretion under it, it is presumptively entitled to deference: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 53-54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, at paras. 33-35. There is no contention that the presumption of reasonableness is rebutted in this case. As the Court of Appeal found, the issue “falls squarely within the Agency’s expertise” (para. 15).

B. *The Legislative Scheme and the Agency’s Discretion*

[9] The Agency is charged with implementing the *Canada Transportation Act*, S.C. 1996, c. 10 (“Act”) and the Regulations. This legislative scheme requires the Agency to balance a range of interests in order to ensure a competitive, safe, and accessible transportation network for all Canadians: s. 5.

[10] To meet these objectives, s. 37 of the Act bestows broad discretion on the Agency to hear and determine complaints:

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

[11] With respect to international carriers, including Delta, the Regulations prohibit any terms or conditions of carriage which are unjustly discriminatory (s. 111(2)) and empower the Agency to take action against any such term or condition (s. 113.1). The parties agree that s. 37 of the Act grants the Agency broad discretion to hear complaints regarding international carriers, including Dr. Lukács' complaint against Delta in this case.

C. *The Agency's Decision*

[12] A decision is reasonable if it is justifiable, transparent, and intelligible, and falls within "a range of possible, acceptable outcomes": *Dunsmuir*, at para. 47. Courts are required to pay "respectful attention to the reasons offered or which could be offered in support of a decision": *ibid.*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart ed., *The Province of Administrative Law* (1997), 279, at p. 286. A reviewing court must refer "both to the process of articulating the reasons and to outcomes": *ibid.*, at para. 47.

[13] The question in this case is whether the Agency reasonably exercised its discretion to dismiss Dr. Lukács' complaint. On a respectful reading of the Agency's reasons, I conclude that it did not. The decision does not satisfy the requirements of justification, transparency, and intelligibility for two reasons. First, the Agency presumed public interest standing is available and then applied a test that can never be met. This approach to standing unreasonably fettered the Agency's discretion. Second, the total denial of public interest standing is inconsistent with a reasonable

interpretation of the Agency's legislative scheme. I will address each of these points in turn.

[14] In this case, the Agency had discretion under s. 37 of the Act to determine whether to hear Dr. Lukács' complaint. The Agency did not advert to this discretion, however, and appeared to approach the standing question as if bound by the tests for standing as applied in civil courts. As such, it found that it would hear the complaint only if Dr. Lukács could satisfy the test for either private interest standing or public interest standing.

[15] The Agency held that to establish private interest standing, complainants must show that they are "aggrieved", "affected", or have some other "sufficient interest" (para. 64). While the Agency appears to have accepted that a complainant does not need to have suffered discrimination, it held that the complainant does need to be a person to whom the impugned policy applies. Dr. Lukács, who was not a "large person" for the purpose of Delta's policy, did not therefore have private interest standing (*ibid.*).

[16] Nor, the Agency held, could Dr. Lukács claim public interest standing. The Agency stated the relevant test as follows, at para. 68:

1. Is there a serious issue as to the validity of the legislation?
2. Is the party seeking public interest affected by the legislation or does the party have a genuine interest as a citizen in the validity of the legislation?



3. Is there another reasonable and effective manner in which the issue may be brought to the court?

The Agency recognized this Court's direction in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, at para. 36, that these factors are not technical requirements and must be weighed cumulatively. Nonetheless, the Agency proceeded to deny standing based on a rigid application of the second factor of the test. It concluded that standing must be denied because the complaint was "not related to the constitutionality of legislation or to the non-constitutionality of administrative action" (para. 74).

[17] This brings us to the first problem: the Agency applied a test for public interest standing that could arguably never be satisfied. One of the Agency's functions is the regulation of air carriers, which are private, non-governmental actors. Any valid complaint against an air carrier would impugn the terms and conditions established by a private company. A complaint regarding these terms and conditions can never, by its very nature, be a challenge to the constitutionality of legislation or the illegality of administrative action. In sum, the Agency suggests the availability of public interest standing to bring a complaint of this type and then, in the same breath, precludes any possibility of granting it. The imposition of a test that can never be met could not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints.

[18] The Agency's application of the test is also inconsistent with the rationale underlying public interest standing. In determining whether to grant public interest standing, courts must take a "flexible, discretionary approach": *Downtown Eastside*, at para. 1. This requires balancing the preservation of judicial resources with access to justice: *ibid.* at para. 23. The whole point is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door. As the Agency rightly put it, the objective is to hear from those plaintiffs or complainants "with the most at stake" (para. 52). The Agency's decision in this case, however, exhibits no balancing; it does not allow those with most at stake to be heard. Rather, it uses public interest standing simply to bar access. *Downtown Eastside* makes clear that at least *some* plaintiffs will be granted public interest standing. The Agency's decision, in contrast, allows *no* complainants to have public interest standing. The Agency did not maintain a flexible approach to this question and in so doing unreasonably fettered its discretion. While the public interest standing test was designed to protect courts' discretion, the Agency eliminated any of its own discretion under this test.

[19] The second problem with the decision is that the impact of the tests for private and public interest standing, applied as they were in this decision, cannot be supported by a reasonable interpretation of how the legislative scheme is intended to operate. Applying these tests in the way the Agency did would preclude any public interest group or representative group from ever having standing before the Agency, regardless of the content of its complaint. A complaint by the Council of Canadians with Disabilities, like the one brought in *Council of Canadians with Disabilities v.*

*VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, would not be heard. In effect, only a person who is herself targeted by the impugned policy could bring a complaint.

[20] This is contrary to the scheme of the Act. Parliament has seen fit to grant the Agency broad remedial authority. Section 5(d) of the Act requires the Agency to promote accessible transportation. And ss. 111 and 113 of the Regulations allow the Agency to act to correct discriminatory terms and conditions before passengers actually experience harm. Indeed, these provisions empower the Agency to investigate based on a complaint or of its own motion. To refuse a complaint based solely on the identity of the group bringing it prevents the Agency from hearing potentially highly relevant complaints, and hinders its ability to fulfill the statutory scheme's objective. This does not mean that every complaint from a public interest group must be heard. It is unreasonable, however, for the Agency to apply a test that would prevent it from hearing the complaint of any such group.

[21] For these reasons, I conclude that the Agency's decision fails to meet the indicia of reasonableness enumerated in *Dunsmuir*.

[22] Delta acknowledges that the Agency's reasons are deficient. It argues, however, that the reviewing court is required to examine not only the reasons given, but the reasons that *could* be given to support the Agency's decision: see *Alberta Teachers*, at para. 53; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12.

Specifically, it urges this Court to look to the justifications for denying standing enumerated in *Lukács v. Porter Airlines Inc.*, Canadian Transportation Agency, Decision No. 121-C-A-2016, April 22, 2016.

[23] Supplementing reasons may be appropriate in cases where the reasons are either non-existent or insufficient. In *Alberta Teachers*, no reasons were provided because the issue had not been raised before the decision maker (para. 51). In *Newfoundland Nurses*, the reasons were alleged to be insufficient (para. 8). These authorities are distinguishable from this case, where the Agency provided detailed reasons that enumerated and then strictly applied a test unsupported by the statutory scheme.

[24] The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in *Alberta Teachers* when he cautioned:

The direction that courts are to give respectful attention to the reasons “which could be offered in support of a decision” is not a “carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result” [para. 54, quoting *Petro-Canada v. Workers’ Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56].

In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.

[25] In my view, this is not a case where merely supplementing the reasons can render the decision reasonable. The Agency clearly stated a test for public interest standing and applied that test. The Agency could have adapted the test so that the complainants under its legislative scheme could actually meet it. Of course, it could also have exercised its discretion without any reference to standing at all. But it did neither of these things. The reviewing court must not do them in the Agency's place for three principal reasons.

[26] First, to do so would require erasing the public interest standing test and its application, as set out by the Agency, and replacing them with reasons and justifications formulated by this Court. Delta has not pointed to any administrative law authority that would justify this approach.

[27] Second, it would undermine, if not negate, the vital role of reasons in administrative law. *Dunsmuir* still stands for the proposition that reviewing courts must look at both the reasons *and* the outcome. While this does not require "two discrete analyses" (*Newfoundland Nurses*, at para. 14), it means that reasons still matter. If we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole

consideration. With that approach, as long as the reviewing court could come up with some possible justification — even if it contradicted the reasons given by the administrative body — the decision would be reasonable. This goes too far. It is important to maintain the requirement that where administrative bodies provide reasons for their decisions, they do so in an intelligible, justified, and transparent way.

[28] Finally, this would amount to the reviewing court assuming the role of the Agency by developing and applying a complaints procedure under the Act. It would be ironic to allow the appeal in the name of deference and then stipulate how the Agency should determine when to hear a complaint: see *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11.

[29] With respect, I am of the view that this is the approach taken by Abella J. in this case. Abella J. explains that the outcome is reasonable because Dr. Lukács' complaint is not "an effective and reasonable means of bringing the issue before the Agency" (para. 64) and because he provides no explanation for why an affected passenger could not have submitted his or her own complaint (para. 65). These are not justifications that were provided by the Agency, which set out that the public interest test requires a complaint that raises the constitutionality of legislation or the illegal exercise of administrative authority. The Agency then dismissed Dr. Lukács' complaint on the sole basis that his complaint did neither of these things. I do not see how my colleague's justifications can be used to supplement the Agency's reasons,

unless the Agency's own formulation and justification of the legal test is struck from the reasons and these justifications are put in their place. This goes beyond paying respectful attention to the reasons or appropriately supplementing them. It amounts instead to replacing the Agency's reasons with those of this Court and effectively leaving the Agency with a standing test not of its own making.

[30] I would agree with Abella J., however, that the Court of Appeal should not have held that standing rules could not be considered by the Agency in its reconsideration of the matter. The better approach is to send this matter back to the Agency for reconsideration in its entirety. In its order, the Court of Appeal stipulated that the Agency must reconsider the matter "otherwise than on the basis of standing" (para. 32). I would not structure the order so strictly so as to foreclose the possibility that the Agency could reasonably adapt the standing tests of civil courts in light of its statutory scheme. As my colleague observes, s. 25 of the Act confers on the Agency "all the powers, rights and privileges that are vested in a superior court" (para. 56) with respect to all matters within its jurisdiction. This language indicates the legislator's intention to give deference to the Agency's determination of its complaints process.

[31] Of course, there are numerous other ways that the Agency could exercise its discretion under s. 37 of the Act, including examining whether the complaint is in good faith, timely, vexatious, duplicative, or in line with the Agency's workload and prioritization of cases. The Agency may also wish to consider whether the claim

raises a serious issue to be tried or, as Abella J. has done, whether the complaint is based on sufficient evidence. It is not for this Court to tell the Agency which of these methods is preferable. Deference requires that we let the Agency determine for itself how to use its discretion, provided it does so reasonably.

### III. Conclusion

[32] I would allow the appeal in part to vary the order of the Court of Appeal, with costs to the respondent. The matter should be remitted to the Agency to reconsider the matter in whole, whether on the basis of standing or otherwise.

The reasons of Abella, Moldaver and Karakatsanis JJ. were delivered by

ABELLA J. —

#### Introduction

[33] Gábor Lukács, a mathematician who describes himself as an “air passenger rights advocate”, complained to the Canadian Transportation Agency asserting that Delta Air Lines Inc.’s practices regarding “large” persons were contrary to a tariff provision of the *Air Transportation Regulations*, SOR/88-58.



[34] Mr. Lukács' complaint was based on an email concerning a passenger who had told Delta that another passenger's size made him feel discomfort. Delta had apologized to that customer for the discomfort and explained that under its guidelines, "large" passengers are either moved to a part of the plane with more space or, if the plane is full, asked if they wish to take a later flight. The discomforted passenger did not file a complaint with the Agency. Mr. Lukács did.

[35] Mr. Lukács did not make a complaint about disability.<sup>1</sup> He chose instead to bring a tariff complaint under s. 111(2) of the *Regulations*, which states:

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

His complaint was not supported by any facts. Nor was there any suggestion that Mr. Lukács spoke for, or represented, any "large" persons.

[36] Mr. Lukács acknowledged that he was not raising any disability-related issues and was not seeking better or special treatment for "large" passengers, since he

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<sup>1</sup> Disability complaints are brought under Part V of the *Canada Transportation Act*, S.C. 1996, c. 10, which deals with the "Transportation of Persons with Disabilities".

acknowledged that imposing such policies on Delta “would be beyond the scope of the present complaint”. Instead, Mr. Lukács was seeking to have Delta’s practices regarding “large” passengers stopped.

[37] The Agency invited Mr. Lukács and Delta to file submissions on whether Mr. Lukács had standing. The Agency concluded that Mr. Lukács lacked both private interest and public interest standing. It held that private interest standing prioritizes those who have a direct personal interest in the issue being litigated, those whose interests are affected more than those of the general public, and those who are seeking to gain something more than simply righting a wrong. It is, as a result, only made out if a complainant is “aggrieved” or “affected” or has some other “sufficient interest” (citing D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (5th ed. 2009), at pp. 646-47). Since Mr. Lukács brought forward no evidence that he fell within Delta’s guidelines, Mr. Lukács was found not to be an “aggrieved” or “affected” or a “sufficient[ly] interest[ed]” person able to get private interest standing.

[38] Mr. Lukács argued that the applicable test for public interest standing should be the one he said was applied by the Ontario Superior Court in *Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101. He referred to the following three factors:

1. Is there a serious issue to be tried?
2. Does the party seeking public interest standing have a genuine interest in the matter?

3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

(Canadian Transportation Agency, Decision No. 425-C-A-2014, November 25, 2014, at para. 66)

[39] The Agency, noting that the Ontario Superior Court in *Fraser* actually framed the second factor differently — “Does the UFCW have a genuine interest in the validity of the legislation?” (emphasis added) — ultimately chose not to apply Mr. Lukács’ proposed test and adopted instead the three-part framework developed by this Court in *Thorson, McNeil, Borowski, Finlay, Canadian Council of Churches*, and *Downtown Eastside*<sup>2</sup>, which was in fact the test applied in *Fraser*. The framework can be summarized as follows:

1. Is there a serious justiciable issue as to the validity of the legislation (or the legality of the administrative acts)?
2. Is the party seeking public interest standing affected by the legislation directly or does the party have a genuine interest as a citizen in the validity of the legislation?
3. Is the proposed suit, in all the circumstances, a reasonable and effective means of bringing the matter before the court?

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<sup>2</sup> *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524.

Applying this jurisprudence, and based on the nature of his complaint, the Agency concluded that Mr. Lukács also lacked public interest standing.

[40] At the Federal Court of Appeal, Mr. Lukács acknowledged that he lacked a personal and direct interest in this case and therefore no longer claimed private interest standing.

[41] The Federal Court of Appeal found that the Agency's decision to dismiss the complaint based on the public interest standing test developed by the courts was unreasonable. It concluded that since tribunals are entitled to use less formal procedures, they *should* use standing rules that are less formal than the ones used by courts. The issue was returned to the Agency to determine whether it would inquire into Mr. Lukács' complaint on a basis other than the rules of standing developed by the courts.

[42] In my respectful view, based on the purposes and provisions in its governing statute, while the Agency is not *required* to apply the same standing rules used by courts, nothing in its governing statute prevents it from doing so. Nor is its conclusion that Mr. Lukács lacked standing unreasonable. I would therefore allow the appeal.

#### Analysis

[43] The issue is whether the Agency can develop and apply its own standing rules and, if so, whether they can be similar to those applied by courts. All of the parties agree that reasonableness is the applicable standard of review.

[44] The intention of Parliament was for the Agency to have the authority to interpret and apply its wide-ranging governing statute dealing with national transportation issues, address policy, and balance the multiple and competing interests before it (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at para. 107). There is nothing in the Agency's mandate that circumscribes its ability to determine how it will decide what cases to hear.

[45] Like the courts, the Agency is entitled to apply a gatekeeping or screening mechanism that is principled and for the same principled reason, namely, to avoid an arbitrary and undisciplined *ad hoc* approach to standing. And, like the courts, a principled gatekeeping function enables the Agency to balance, in a transparent and effective manner, the various competing interests and demands before it, such as access and resources.

[46] The Agency's approach to public interest standing is based on this Court's jurisprudence and reflects traditional gatekeeping rationales:

. . . applying standing to public law accomplishes three key objectives. First, it ensures that scarce judicial resources are economized. Second, it ensures that the most urgent cases (those that actually affect people, as opposed to theoretical cases) are heard as quickly and efficiently as

possible. Finally, it ensures that the best evidence is before the decision maker: the evidence of someone actually affected.

(*Lukacs v. Porter Airlines Inc.*, Canadian Transportation Agency, Decision No. 121-C-A-2016, April 22, 2016, at para. 19; see also *Amalgamated Transit Union, Local 279 (Re)*, Canadian Transportation Agency, Decision No. 431-AT-MV-2008, August 20, 2008.)

[47] Mr. Lukács argued, however, that the courts' law of standing is inappropriate in a tribunal context because, in his view, the assumptions that justify the use of standing in the civil courts context are absent. His argument, at its core, is for universal standing, namely that everyone who brings a claim before the Agency is entitled to have it heard.

[48] This claim for universal standing ignores why standing rules exist. As Cromwell J. explained in *Downtown Eastside*, "it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter" (para. 1). Standing rules allow tribunals to preserve and properly allocate scarce judicial resources, screen out "the mere busybody", and ensure that contending points of view are fully canvassed (*Downtown Eastside*, at para. 25).

[49] Standing rules also ensure that tribunals have the "benefit of contending points of view of the persons most directly affected by the issue" (*Downtown Eastside*, at para. 29).

[50] And, as in courts, standing enables a tribunal to economize and prioritize its resources, and ensure that it benefits from contending points of view that are

advanced by those best placed to advance them. And all this to ensure that the most timely and effective use can be made of a tribunal's ability to implement its mandate.

[51] Requiring a tribunal to adjudicate even marginal or inadequately substantiated complaints, on the other hand, grinds the operation of a tribunal to a halt and can be “devastating” to private litigants. As Cory J. warned in *Canadian Council of Churches*:

It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants. [p. 252]

[52] The fact that a tribunal's governing legislation has a public interest dimension does not preclude it from adopting similar rules of standing to those used by the courts. All tribunals have a public interest mandate because all legislation does. This does not mean that all litigants who want to bring a claim can automatically do so. The question is what the tribunal's enabling legislation mandates or precludes (L. Sossin, “Access to Administrative Justice and Other Worries”, in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 211, at p. 214).

[53] Parliament has given the Agency wide discretion to choose, according to its own institutional constraints and demands, how it will promote its overall mandate

to regulate and adjudicate national transportation issues. That discretion is found in ss. 17, 25 and 37 of the *Canada Transportation Act*, S.C. 1996, c. 10. Under s. 37 of the *Act*, the Agency has the authority to determine which complaints it will inquire into:

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

The Agency's power to process and resolve complaints is framed in discretionary language. The Agency *may* inquire into, hear and determine a complaint. I agree with Mr. Lukács that anyone can *bring* a complaint, but his view that there is no discretion to decide which complaints to hear reads out the word "may" from s. 37.

[54] Under s. 17 of the *Act*, the Agency may make its own rules about how it carries on its work, as well as the manner of and procedures for dealing with matters before the Agency. It states:

**17** The Agency may make rules respecting

- (a) the sittings of the Agency and the carrying on of its work;
- (b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
- (c) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.



These rules are codified in the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (“*Rules*”).

[55] Under s. 5(1) of the *Rules*,<sup>3</sup> the *Rules* are to be interpreted so as to facilitate the optimal use of Agency and party resources, and the promotion of justice. Examining the Agency’s mandate through the lens of efficiency, Dawson J.A. noted that “[e]fficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances” (*Lukács v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186, at para. 54). Formulating and applying screening or gatekeeping rules represents one way in which the Agency can legitimately realize these goals.

[56] And, under s. 25 of the *Act*, the Agency has “all the powers, rights and privileges that are vested in a superior court” to deal with “all matters necessary or proper for the exercise of its jurisdiction”, including compelling the attendance and examination of witnesses, ordering the production and inspection of documents, entering and inspecting property and enforcing its orders. Like s. 17 of the *Act*, s. 25 reflects a choice on the part of Parliament to grant the Agency expansive, discretionary authority to manage its own processes and procedures, including judicial powers.

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<sup>3</sup> **5 (1)** These Rules are to be interpreted in a manner that facilitates the most expeditious determination of every dispute proceeding, the optimal use of Agency and party resources and the promotion of justice.

[57] The Federal Court of Appeal in this case acknowledged that the Agency has the discretion not to hear every case:

As recently stated by this Court in *Lukacs v. Canada (Transport Agency)*, 2016 FCA 202 (F.C.A.) at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency “may” inquire into, hear and determine a complaint. There is no question . . . that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources.

(2016 FCA 220, 408 D.L.R. (4th) 760, at para. 16)

Yet after accepting that the Agency has discretionary gatekeeping authority, the Federal Court of Appeal went on to constrain that discretion by saying that the gatekeeping exercise could not be based on the approach used by courts.

[58] The legislature has given the Agency wide discretionary authority over how to exercise its mandate. It is not a fettering of discretion for a tribunal to exercise this discretionary authority differently from how a reviewing court would exercise it. This, with respect, results in the court unduly fettering the Agency’s discretion, not the Agency fettering its own.

[59] There is no doubt that one can envision other tests for standing, but once we accept that gatekeeping is a legitimate exercise of the Agency’s discretion in accordance with its mandate, what is the court’s authority for replacing the Agency’s test with one it prefers? As McIntyre J. cautioned in *Maple Lodge Farms Ltd. v.*

*Government of Canada*, [1982] 2 S.C.R. 2, when he wrote: “. . . courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility” (para. 7).

[60] A tribunal’s standing rules will not necessarily survive scrutiny simply because the tribunal is authorized by statute to develop its own procedures. But when a tribunal like the Agency chooses to apply and exercise its broad legislative mandate by borrowing an approach long sanctioned by the courts as an effective and principled way to determine which cases it will hear, reviewing courts should not be overly eager to substitute their own vision of how that tribunal’s procedural mandate should be applied. To do so, in effect, undermines not only the legitimacy of the standing rules developed and applied by the courts, it undermines public confidence in the tribunal by suggesting it lacks the indicia of an adjudicative body with sufficient institutional maturity to apply the same rules as a court. Put colloquially, if it’s good enough for the courts, it’s good enough for tribunals. I recognize that the application of court-like procedures to the tribunal context may not, in certain circumstances, be appropriate, but where, as here, the adopted procedures flow from the same concerns and rationales, I see no reason for a tribunal to feel immunized from access to a procedure courts have found helpful.

[61] This does not mean that tribunals are *required* to follow the same procedures courts use, but when they do, this should not be a stand-alone basis for

quashing them. Unless we are prepared to say that the courts' standing rules are inappropriate, I see no reason to conclude that their propriety is diminished when applied by a tribunal. In this case, the Agency developed its standing rules in full accordance with its legislative mandate. There is no basis for interfering with them.

[62] There is no doubt that the test for public interest standing is a high threshold and results in some individuals or groups being unable to raise issues they consider significant. Yet courts routinely apply this threshold as a transparent way to determine the most effective use of their time, resources and expertise. No less are tribunals entitled to apply high thresholds in order to preserve their ability to manage resources and expertise in accordance with their mandate. Access to justice demands that courts and tribunals be encouraged to, not restrained from, developing screening methods to ensure that access to justice will be available to those who need it most in a timely way (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87). That is why courts developed standing rules in the first place.

[63] The test applied by the Agency effectively foreclosed Mr. Lukács' ability to make out a case for public interest standing in this case. But, in my respectful view, that does not end the matter. The question to be determined is whether the outcome reached by the Agency was reasonable. Mr. Lukács has brought a complaint with no underlying facts, no representative claimants and no argument. He wants to engage the Agency in a fishing expedition that will have the effect of distracting it from its ability to exercise its mandate on behalf of those with a *prima facie* legitimate claim.

[64] Even if the Agency had applied the lower public interest standing test proposed by Mr. Lukács, I do not see how he would have been successful in having his complaint inquired into. It is therefore unnecessary to remit the matter back to the Agency. His complaint regarding Delta's practices is purely theoretical, his interest in the issues is academic and the proposed suit does not constitute an effective and reasonable means of bringing the issue before the Agency. He submitted no evidence that any of Delta's passengers, including the passenger whose email he relied on, had actually been affected by the issue he raised before the Agency. In fact, he submitted no evidence at all even though the Agency has an open complaint procedure whereby complainants are invited to make and substantiate their complaints through an accessible online application.

[65] Nor has he provided any explanation for why a passenger affected by Delta's practices could not have submitted his or her own application to the Agency, "thereby provid[ing] the Agency with direct and concrete evidence upon which to adjudicate" (*Porter*, at para. 65). Such direct and concrete evidence seems all the more necessary given the Agency's decision dealing with, and Mr. Lukács' acknowledged familiarity with the Agency's best known disability case, setting out the "one-person - one-fare" policy, which states that "the determination of whether a person is disabled by reason of obesity is dependent on the facts and circumstances in each individual case and must be assessed on a case-by-case basis" (*Norman Estate v. Air Canada*, Decision No. 6-AT-A-2008, January 10, 2008, at para. 128).

[66] The Agency's decision to deny Mr. Lukács' complaint on the basis that he lacked standing was therefore reasonable in all the circumstances.

[67] I would allow the appeal and restore the Agency's decision. Delta is not seeking costs.

*Appeal allowed in part with costs to the respondent, ABELLA, MOLDAVER and KARAKATSANIS JJ. dissenting.*

*Solicitors for the appellant: Bersenas Jacobsen Chouest Thomson Blackburn, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Canadian Transportation Agency: Canadian Transportation Agency, Gatineau.*

*Solicitors for the intervener the International Air Transport Association: DLA Piper (Canada), Vancouver.*

*Solicitor for the intervener the Council of Canadians with  
Disabilities: Public Interest Law Centre, Winnipeg.*