SCC File No. 37276

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

BETWEEN:

DELTA AIR LINES INC.

APPELLANT

- and -

DR. GÁBOR LUKÁCS

RESPONDENT

REPLY OF THE PROPOSED INTERVENER,
CANADIAN TRANSPORTATION AGENCY
(MOTION TO INTERVENE)
Pursuant to Rule 50 of the *Rules of the Supreme Court of Canada*

Allan Matte
Counsel
Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9

Tel: 819-994-2226
Fax: 819-953-9269

Allan.Matte@otc-cta.gc.ca

Counsel for the Proposed Intervener,
Canadian Transportation Agency

Mante Molepo
Counsel
Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9

Tel: 819-994-4283
Fax: 819-953-9269

Mante.Molepo@otc-cta.gc.ca

Ottawa Agent for the Proposed Intervener

ORIGINAL TO: **THE REGISTRAR**

COPIES TO:

BERENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
33 Yonge Street, Suite 201
Toronto, ON M5E 1G4

Carols P Martins
Andrew W. MacDonald

Tel: (416) 982-3800
Fax: (410) 982-3801
Email: cmartins@lexcanada.com

Counsel for the Appellant

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855
Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant

AND TO: **Dr. Gábor Lukács**

Halifax, NS

Tel:
Email: lukacs@airpassengerrights.ca

Respondent

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PART I – OVERVIEW & STATEMENT OF FACTS

1. The Canadian Transportation Agency (the "Agency") seeks an Order granting it leave to intervene in this appeal on the issue of whether an administrative tribunal can decline to consider a complaint on the basis of standing.

2. The Respondent does not oppose the Agency's request to intervene. He has, however, argued that the Agency's intervention should be limited to the issue of standard of review. He also opposes the Agency's request to adduce additional evidence, and argues that if the Agency is permitted to submit this evidence, this opens the door for him to turn the appeal into a judicial inquiry into the Agency's integrity. In doing so, he has raised numerous irrelevant allegations.

3. The Agency submits that none of the Respondent's arguments address the applicable test for whether the Agency should be granted leave to intervene, and that the motion should be granted.

PART II – QUESTION IN ISSUE

4. The issue is whether the Agency should be granted leave to intervene in this appeal.

PART III – STATEMENT OF ARGUMENT

A. Overview

5. In its original motion, the Agency sets out the applicable test applied by this Court when determining whether or not to grant leave to intervene.[1]

6. The Respondent makes no reference to this test in his response to the Agency's motion to intervene. In fact, he does not appear to oppose the Agency's request to intervene.

7. The Respondent does object to the Agency addressing the issue which is the object of the proposed intervention, and he objects to the filing of additional evidence. However, these objections are ill-founded.

B. The Agency's proposed intervention is proper

8. The Respondent relies on this Court's decision in *Ontario (Energy Board) v. Ontario Power Generation Inc.*[2] for his argument that the Agency's role on appeal should be limited, given that it is the Tribunal that issued the decision which is the subject matter of this appeal. However, the Court's decision in *Ontario (Energy Board)* did not deal with a motion for leave to intervene. In that case, the tribunal was the appellant before this Court and was arguing the merits of the case. This Court determined the factors that should be considered when determining the extent of a tribunal's participation in such a case.

9. Here, the Agency is seeking to intervene in this appeal and argue that the Agency, specifically, and administrative tribunals, generally, should have the discretion not to deal with particular complaints. The Agency does not propose to address the merits of the case as between the parties. As such, the factors identified by this Court in *Ontario* (*Energy Board*) are not applicable.

10. Specifically, and unlike the tribunal in *Ontario (Energy Board), t*he Agency does not

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[1] Agency's Memorandum of Fact and Law dated June 19, 2017 at para 23.
[2] [2015] 3 SCR 147 [*Ontario* (*Energy Board*)].

intend to address the outcome of the appeal. This Court has made it clear that it is inappropriate for an intervener to do so.[3]

11. The Agency seeks intervener status in the normal course and the Rules contemplate that an intervener's status will be limited, and different from the role of the other parties. As such, if it has been established that the Agency will offer useful and different submissions than those of the parties, the motion to intervene should be granted.

C. Evidence regarding the Agency's caseload is relevant

12. The Agency proposes to intervene on the issue of whether a tribunal should have the discretion not to deal with particular complaints. One of the factors raised in the proposed intervention is the impact of having to deal with each and every complaint on the limited resources of a tribunal. The evidence of the Agency's caseload will be relevant to this consideration.

13. The Respondent has not yet served and filed his response to the appeal. However, when opposing the Appellant's Application for Leave to Appeal, the Respondent specifically refers to the "exceptionally low number of air complaints *adjudicated* by the Agency" [emphasis added]. He then argues that this refutes the "floodgate" argument attributed to the Appellant.[4] Therefore, the evidence the Agency proposes to submit may assist in clarifying the record in this regard. Moreover, the Agency is best placed to provide this information to the Court.

14. The Respondent challenges the credibility of this evidence which describes the Agency's caseload but in doing so he conflates the issue of how many complaints are received by the Agency, compared to how many are decided by formal adjudication. While a comparatively small number of cases proceed to a formal decision, as most are resolved through facilitation and mediation, the evidence demonstrates that the number of complaints submitted to the Agency is considerable. As this caseload increases, as it has, dramatically, so too will the number of cases that proceed to formal adjudication.

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[3] Supreme Court of Canada, *March 2017 - Allotting Time for Oral Argument*, Notice to the Profession dated March 2, 2017 <http://www.scc-csc.ca/ar-lr/notices-avis/17-03-eng.aspx> accessed 5 July 2017.

[4] Response to the Application for Leave to Appeal, Memorandum of Argument dated December 5, 2016 at paras 45-47.

15. The Respondent seeks to argue that the Agency improperly closes case files following facilitation. He has also submitted evidence he suggests establishes a conspiracy on the part of Agency staff to fabricate and backdate Agency records.[5] This assertion is entirely without merit. Even if believed, these allegations have no relevance to the issues at hand. The fact remains that the Agency resolved a record number of complaints last year, and is on par to break that record this fiscal year.[6]

D. The Respondent threatens to open "Pandora's Box"

16. The affidavit of Patrice Bellerose provides background information and refers to the Agency as "Canada's longest-standing independent, quasi-judicial tribunal and regulator".[7] The Respondent has seized on this statement to suggest that he may now open "Pandora's Box"[8] and challenge the Agency's impartiality and integrity by;

    (a) Attacking the personal integrity of one of the Agency's Members[9];

    (b) Challenging the impartiality of the Agency's Manager of Monitoring and Compliance[10]; and

    (c) Most disturbingly, making a personal attack on the Agency's Chief Dispute Resolution Officer.[11]

17. Contrary to what is asserted by the Respondent, the background information contained in the affidavit of Patrice Bellerose does not allow him to open "Pandora's Box" and make these irrelevant and improper allegations against the Agency in this Court. These allegations are irrelevant and raising them in this context is an abuse of the Court's process.

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[5] Response of the Respondent to the Motion for Intervention and Adducing Further Evidence of the Canadian Transportation Agency dated June 29, 2017 at para 15 [Respondent's Response to the Motion for Intervention].
[6] Affidavit of Patrice Bellerose sworn June 16, 2017 at para 7.
[7] *Ibid* at para 2.
[8] Respondent's Response to the Motion for Intervention at para 40.
[9] *Ibid* at para 21.
[10] *Ibid* at para 22.
[11] *Ibid* at para 23.

PART IV – SUBMISSIONS CONCERNING COSTS

18. The Agency initially did not seek costs in relation to its motion to intervene. However, in light of the allegations contained in the Respondent's response to the Agency's motion, it is submitted that such an Order would be just and reasonable in the circumstances.

19. It has been held that an increased award of costs is justified when the conduct of a party is found to be "reprehensible, scandalous or outrageous".[12]

20. It is submitted that it would be just and reasonable to sanction the Respondent's conduct with an award of costs. The Respondent's personal attacks on Agency staff are scandalous and outrageous and completely irrelevant to the issues before this Court.

PART V – ORDERS SOUGHT

21. The Agency seeks an order granting it leave to intervene in this appeal as per its original motion, together with an Order for costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 5th day of July, 2017.

Allan Matte
Legal Services Directorate
15 Eddy Street, 19th Floor
Gatineau, QC K1A 0N9
Telephone: (819) 994-2226
Facsimile: (819) 953-9269
Email: Allan.Matte@otc-cta.gc.ca
Counsel for the Proposed Intervener, Canadian Transportation Agency

Mante Molepo
Legal Services Directorate
15 Eddy Street, 19th Floor
Gatineau, QC K1A 0N9
Telephone: (819) 994-4283
Facsimile: (819) 953-9269
Email: Mante.Molepo@otc-cta.gc.ca
Ottawa Agent for the Proposed Intervener

[12] *Quebec (Attorney General) v. Lacombe*, [2010] 2 SCR 453 at para 67; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 77; *Young v. Young*, [1993] 4 SCR 3 at 134.

PART VI – TABLE OF AUTHORITIES

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