

September 26, 2014

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VIA E-MAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario K1A 0N9

Dear Madam Secretary:

**Re: Re: Dr. Gabor Lukács v. Delta Air Lines
Complaint Concerning discriminatory practices of Delta Air Lines
relating to the transportation of obese passengers**

**File No.: M4120-3/14-04164
Submissions concerning Dr. Lukács' standing
File No: 301351**

Please accept the following submissions concerning Dr. Lukács' standing pursuant to the Canadian Transportation Agency's (the "Agency") directions contained in Decision No. LET-C-A-63-2014.

I. Overview

As highlighted in his September 19th submissions, Dr. Lukács' complaint pertains to an August 20th, 2014 e-mail responding to one passenger ("Omer")'s concern regarding a fellow passenger who "required additional space", and who therefore made Omer feel "cramped". Dr. Lukács attaches the e-mail as Exhibit "A" to his submissions.

Dr. Lukács alleges that the e-mail evidences a practice of the Respondent that is unjustly discriminatory contrary to s. 111(2) of the *Air Transportation Regulations*, S.O.R./88-58 (the "ATR") and has requested that the Agency grant him standing to lodge a complaint under that section.

It is submitted that Dr. Lukács does not have a direct interest in the policy he wishes to challenge and that the Agency should not accord him public interest standing.

II. The “large passenger” issue

According to Dr. Lukács, the Agency’s Decision No. LET-C-A-63-2014 incorrectly labels his proposed complaint as one concerning the transportation of “obese persons”. It is Dr. Lukács’ submission that the complaint properly concerns “large persons”, which includes but is not limited to “obese persons”.

In fact, as is clear from Dr. Lukács’ own Exhibit “A”, the Agency’s characterization of the complaint as one concerning “obese persons” is entirely accurate and appropriate. The passenger complaint and the Respondent’s practice alluded to in the e-mail and excerpted below, which Dr. Lukács alleges are “unjustly discriminatory” contrary to section 111(2) of the *ATR*, clearly concern a passenger who cannot fit in a single seat.

For the Agency’s benefit and ease of reference, the Respondent’s public statement on its practice concerning passengers who cannot fit in a single seat states that:¹

If you are unable to sit in your seat without encroaching into the seat next to you while the armrest is down, please ask the agent if they can reseat you next to an empty seat. You might also consider purchasing an upgrade to First/Business Class.

We will do all possible to ensure your comfort but you might consider booking an additional seat in order to ensure your best comfort during your travel. Please call Delta Reservations at 1-800-221-1212 and they will be glad to assist.

Clearly these practices address “obese persons” who cannot fit in a single seat, and in fact encroach onto a second seat by virtue of their condition.

It appears that the Agency has recognized the word “large” in Delta’s response to “Omer” for what it is—a euphemism. We submit that Dr. Lukács’ request for an amendment should be denied.

III. Section 111(2) of the *ATR* and direct interest standing

It is Dr. Lukács’ submission that section 111(2) of the *ATR* ought to be read so as to grant “any person” standing to challenge the terms or conditions applied by a carrier pursuant to that provision. According to Dr. Lukács, the issue of “standing” to challenge the terms or conditions of a carrier pursuant to section 111(2) of the *ATR* was addressed in *Black v. Air Canada*, 746-C-A-2005.

¹See <http://www.delta.com/content/www/en_US/traveling-with-us/special-travel-needs/require-extra-seat-space.html>

It is clear from the result that the Agency found that Mr. Black had standing. However, because of the basis of Air Canada's objection (i.e. the submission that there must be "a real and precise factual background") the reasons do not deal with the considerations normally reviewed in cases which address standing and there is no explicit holding respecting the basis of Mr. Black's standing. In the present case the issue is squarely raised and we will discuss the two bases upon which a person may have standing; direct interest standing and public interest standing.

In order to have direct standing to bring a complaint, Dr. Lukács must be directly affected by the Respondent's allegedly "unjustly discriminatory" practice. According to the Federal Court of Appeal in *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] 2 F.C. 500 (Fed. C.A.) and *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 (F.C.A.) to be "directly affected" – and thus have direct standing - means that the practice must affect Dr. Lukács' legal rights, impose legal obligations upon him, or else prejudicially affect him in some way.

We submit that the holding in *Black v. Air Canada* can be fully explained on the basis that Mr. Black had a direct interest in the matter of the complaint and had standing as of right. He had not been affected by the terms complained of, but he could have been the next day had he chosen to fly with Air Canada. The terms imposed by Air Canada affected his rights and would have prejudicially affected him had he elected to fly with Air Canada. The same analysis will explain all the cases which have followed *Black*. The Agency reasoned, and we take no exception to this reasoning, that a person who could be prejudicially affected by terms complained of should not be required to subject himself to those terms as a precondition of bringing a complaint.

By his own submission, Dr. Lukács is 6'0 tall and 175lbs in weight. According to Dr. Lukács this makes him "certainly a 'large person'".

However, a national survey conducted by Maclean's Magazine in 2012² reveals that the average Canadian male is 5'9 and 185lbs. Despite Dr. Lukács' submissions to the contrary, he is only approximately 4% taller than the average Canadian male, and is in fact approximately 4% lighter than the average Canadian male.

As the Agency properly characterized in Decision No. LET-C-A-63-2014, and as is clear from Dr. Lukács' own Exhibit "A", the proposed complaint is one that concerns persons who cannot fit in a single seat by virtue of being

² See <<http://www.macleans.ca/news/canada/how-canadian-are-you/>>.

obese. As someone who is lighter than the average Canadian, despite being slightly taller, it is patently clear that Dr. Lukács does not have a direct interest in the subject matter of the proposed complaint; his rights are not affected by the impugned practice nor would he suffer any prejudice if he elected to fly with Delta.

V. Public interest standing

In his submissions Dr. Lukács states that “when standing is raised as a preliminary matter, the burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy the test”. Dr. Lukács provides no legal basis for this submission.

In fact, the opposite is true as revealed by the Federal Court of Appeal in *Public Mobile Inc. v. Canada (Attorney General)*, [2012] 3 F.C.R. 344 (F.C.A.), where J.A. Sexton writing for a unanimous court at paragraph 54 clearly states that “an applicant for public interest standing must satisfy the court” that the test for public interest standing is met.

Thus, it is Dr. Lukács who bears the onus of satisfying the Agency that he is entitled to be granted public interest standing, and not the Respondent who bears the onus of disproving such entitlement.

Quite apart from the question of who has the onus of proving what, the Respondent submits that the essential issue in this case is whether, in the words of the Supreme Court of Canada in the case of *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, [2012] 2 S.C.R. 524 (S.C.C.), in a passage cited by the Applicant at page 15 of his Submissions, there are “realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination.”

Also at paragraph 51 of *Downtown Eastside*, the Court cautioned that:

Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

[Emphasis added].

With this guidance from the Supreme Court in mind we submit it is helpful to consider certain information available on the Agency’s website. On the homepage (<https://www.otc-cta.gc.ca/eng>) and directly under the Maple Leaf we find a banner with the central entry “Complaints and disputes”. Any person who elects to click this item will be taken to a page at which she is

asked whether she wishes to submit a complaint. If the visitor clicks the button she is taken to a three step "Complaint Wizard" which provides an easy step by step tool for completing a complaint in approximately 15 minutes.

Thus there is an expedient method for filing a complaint. The Supreme Court of Canada also cautions that the alternative should "be considered in light of the practical realities, not the theoretical possibilities". The practical reality in this case is that, leaving aside complaints related to accessibility issues which Dr. Lukács does not wish to raise, in calendar year 2013 and the first nine months of 2014 the Agency has issued 36 Decisions in respect of Consumer Complaints, related to the air mode. Of these 11 relate to cases filed by Dr. Lukács and the balance of 25 relate to complaints filed by other individuals. The total number of persons who participated as complainants in these matters is approximately 105 (although it is conceded that one single case involved 83 complainants).

There is no discussion of standing in any of the 11 cases initiated by Dr. Lukács which led to Decisions in 2013 or 2014. It is submitted that the comments made above respecting the *Black* decision are applicable here. Each of the 11 decisions can be explained on the basis of an implicit finding that Dr. Lukács could potentially have been prejudicially affected by the practice, term or condition complained of. As in *Black* this justified direct interest standing.

We would like to underline the fact that in none of these cases was there any suggestion that Dr. Lukács should be granted public interest standing.

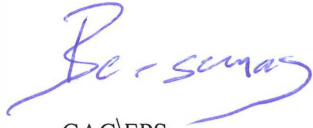
The Agency provides an accessible medium for lodging consumer complaints, and encourages the participation of self-represented complainants. Through its informal and non-binding dispute resolution services, the Agency provides experienced mediators at no cost to the complainant, while its rules and procedures are relatively informal by comparison to courts. A complainant need not be herself an expert litigant nor have the assistance of experienced counsel.

It is both practical and reasonable for a passenger who is unjustly affected by the practice, procedure, term or condition of an air carrier to bring her complaint to the Agency.

Furthermore, Dr. Lukács submits that he is in a privileged position because he has unique evidence of the allegedly "unjustly discriminatory" practice. However, as is noted above, the impugned practice is described on Delta's publicly available website.

We accordingly submit that his request for public interest standing should be denied.

Yours truly,
Bersenas Jacobsen Chouest Thomson Blackburn LLP

A handwritten signature in blue ink, appearing to read "Bersenas", with a stylized flourish extending from the end.

GAC\EPS