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AIR PASSENGER RIGHTS

September 19, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Delta Air Lines
Complaint concerning discriminatory practices of Delta Air Lines relating to the transportation of large passengers
File No.: M4120-3/14-04164
Submissions concerning standing as per Decision No. LET-C-A-63-2014

Please accept the following submissions concerning the issue of standing pursuant to the Agency's directions contained in Decision No. LET-C-A-63-2014.

I. Overview

The present proceeding is a complaint concerning the practices of Delta Air Lines set out in the August 20, 2014 email of Delta Air Lines' Customer Care department, which is attached and marked as Exhibit "A". (Since it appears that the Agency may not yet have received the document in question, it is attached here.) According to Exhibit "A":

1. in certain cases, Delta Air Lines refuses to transport large passengers on the flights on which they hold a confirmed reservation, and requires them to travel on later flights; and

2. Delta Air Lines requires large passengers to purchase additional seats to avoid the risk of being denied transportation.

The thrust of the complaint is that this practice is unjustly discriminatory, contrary to s. 111(2) of the *Air Transportation Regulations*, S.O.R./88-58 (the "*ATR*"). In Decision No. LET-C-A-63-2014, the Agency directed the parties to make submissions concerning the Applicant's standing.

II. Preliminary matters

In order to meaningfully address the issue of standing, it is necessary to rectify the record with respect to the nature of the complaint.

(a) Request to correct a material error in Decision No. LET-C-A-63-2014

Decision No. LET-C-A-63-2014 incorrectly labels the present complaint as one that concerns the transportation of "obese persons." This is not the case.

The present complaint concerns discriminatory practice of Delta Air Lines relating to the transportation of large passengers, as stated in Exhibit "A". The description of the practice makes no reference to "obese" persons, but speaks about "a large passenger," and thus the complaint also refers to "large passengers."

"Obese" is a subset of "large", but the two are not equivalent: every obese person is large, but not every large person is obese; there are many ways, other than obesity, to be large. Consequently, discriminatory policies against "large" passengers also affect "obese" passengers (including passengers with obesity-related disabilities), but not vice versa.

Therefore, as a preliminary matter, the Applicant requests that the Agency correct Decision No. LET-C-A-63-2014 by replacing "obese" with "large" throughout the decision to adequately identify the nature of the complaint.

(b) Limited scope of the complaint: no disability-related accommodation is being sought

The purpose of the present complaint is to stop a discriminatory practice of Delta Air Lines that singles out and subjects a category of passengers to substantially worse terms and conditions than the rest of the travelling public. The Applicant does not seek a better or special treatment for these passengers, nor any form of accommodation for any individual or group.

The present complaint does not directly raise any disability-related issues, nor does it seek any kind of accommodation to remove obstacles in transportation. The Applicant intends to rely on the Agency's findings in Decision No. 6-AT-A-2008 for the limited purpose of lending further support to his position that the impugned practice is harmful and unduly discriminatory.

However, the Applicant does not ask in the present complaint to impose on Delta Air Lines the same terms and conditions that the Agency imposed in Decision No. 6-AT-A-2008, because such a disability-related accommodation would be beyond the scope of the present complaint.

III. Section 111 of the *ATR* and standing

The present complaint alleges that Delta Air Lines' practices are unjustly discriminatory, contrary to subsection 111(2) of the *ATR*. In order to address the question of standing to bring a complaint pursuant to subsection 111(2) of the *ATR*, it is necessary to first review the legislative text, the context, and the purpose of subsection 111(2).

(a) Section 111 of the *ATR* and subsection 67.2(1) of the *CTA* are related

Section 111 of the *ATR* states that:

> **111.** (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.
>
> (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.
>
> (3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.
>
> [Emphasis added.]

Subsection 67.2(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the "*CTA*") states that:

> **67.2** (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

The Agency held in *Public Health Agency of Canada and Queen's University v. Air Canada*, Decision No. 482-A-2012, that (para. 7):

> The Agency notes that while the terminology used in subsection 67.2(1) of the CTA and section 111 of the ATR are not identical, this terminology broadly refers to the issue of unreasonable or unjust discrimination. Therefore, the Agency is of the opinion that the words "unreasonable" and "unjust discrimination" used in section 111 of the ATR encompass and capture the meaning of the terms used in subsection 67.2(1) of the CTA.

(b) The purpose of s. 111 of the *ATR* and s. 67.2(1) of the *CTA*

Section 111 of the *ATR* and subsection 67.2(1) of the *CTA* were both enacted to protect the travelling public at large against the unilateral setting of terms and conditions of carriage by air carriers. In *Anderson v. Air Canada*, 666-C-A-2001, the Agency held that:

> In the Agency's opinion, the specific wording of subsection 67.2(1) of the CTA reflects a recognition by Parliament that regulation was needed in order to attain the stated objective of the national transportation policy found in section 5 of the CTA which provides, in part, that:
>
> > ... each carrier or mode of transportation, as far as is practical, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute
> >
> > (i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,

Thus, section 111 of the *ATR* and subsection 67.2(1) of the *CTA* serve a preventative function rather than merely offering remedies or compensation *post facto*. Indeed, in *Black v. Air Canada*, 746-C-A-2005, the Agency held that:

> [7] 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.

(c) "Any person" can challenge the terms and conditions pursuant to s. 111 of the *ATR*

The question of "standing" to challenge the terms or conditions of a carrier pursuant to s. 111 of the *ATR* has been addressed by the Agency in *Black v. Air Canada*, 746-C-A-2005:

> [5] The Agency is of the opinion that it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and con-

> ditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR. In this regard, the Agency notes that subsection 67.2(1) of the CTA provides that, on the basis of a "complaint in writing to the Agency by any person", the Agency may take certain action if the Agency determines that the terms or conditions at issue are unreasonable or unduly discriminatory. The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR, the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions".
>
> [Emphasis added.]

These findings were reaffirmed by the Agency in *O'Toole v. Air Canada*, Decision No. 215-C-A-2006, *Lukács v. Air Canada*, Decision No. LET-C-A-155-2009, and most recently in Decision No. LET-C-A-104-2013.

Thus, it is submitted that "any person" has standing to challenge, pursuant to s. 111 of the *ATR*, the terms or conditions applied by a carrier.

IV. Standing in the present case

The present complaint alleges that Delta Air Lines' practice is discriminatory, contrary to 111(2) of the *ATR*, and no allegations concerning undue obstacles in the transportation network to the mobility of persons with disabilities are being made.

For the purpose of the present complaint, it is less significant whether Delta Air Lines refuses to transport passengers or forces passengers to buy multiple seats due to their large body size, their eye color, or their race; the essential aspect of the allegation is that Delta Air Lines does so based on the personal characteristics of the individual or group.

In light of the public policy purpose of s. 111 of the *ATR* and its preventative nature, it is submitted that the Applicant is not required to be a member of the group discriminated against in order to have standing to bring a complaint about practices contrary to s. 111(2) of the *ATR*. Holding otherwise would render the phrase "any person" chosen by Parliament meaningless.

Nevertheless, in order to avoid any possible doubt, the Applicant will also address his private and public interest in the complaint.

(a) Private interest

As noted earlier, the complaint is not about the discrimination against "obese persons," but rather about the discrimination against "large persons."

The Applicant is 6 ft tall, and weighs approximately 175 lbs. As such, the Applicant is certainly a "large person" and would or could be viewed as such by Delta Air Lines' agents.

In the absence of a clear and consistent statement from Delta Air Lines about the scope of the practice stated in Exhibit "A" and the precise meaning of "a large person," it is impossible to conclude that the Applicant would not be personally subject to the discriminatory practices set out in Exhibit "A" due to his physical characteristics.

Therefore, the Applicant does have a private, personal interest in the Delta Air Lines' practices relating to the transportation of "a large person." Even if the Agency may have doubts with respect to this issue, it is not possible to conclude that the Applicant has no such interest at the present stage of the proceeding.

Fully addressing the question of private interest would require directing questions to Delta Air Lines and/or requiring Delta Air Lines to produce a wealth of documents, which the Applicant understands is not permitted in the present preliminary exchange of submissions.

(b) Public interest

As noted earlier, the Applicant submits that "any person" has standing to bring a complaint pursuant to s. 111 of the *ATR* and that he has a personal interest in the present complaint.

Alternatively, the Applicant submits that he has public interest standing to bring the present complaint. The legal test for public interest standing requires the consideration of three factors (see *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC)):

(i) Is there a serious issue to be tried?

(ii) Does the party seeking public interest standing have a genuine interest in the matter?

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

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.

For the reasons set out below, the Applicant submits that all three factors favour granting him public interest standing, if necessary, to bring the present complaint.

(i) Serious issue to be tried

In *Anderson v. Air Canada*, Decision No. 666-C-2001, the Agency established a two-step test for determining whether terms or conditions are "unduly discriminatory":

> In the first place, the Agency must determine whether the term or condition of carriage applied is "discriminatory". In the absence of discrimination, the Agency need not pursue its investigation. If, however, the Agency finds that the term or condition of carriage applied by the domestic carrier is "discriminatory", the Agency must then determine whether such discrimination is "undue".

In *Black v. Air Canada*, 746-C-A-2005, the Agency applied the same test for determining whether terms or conditions are "unjustly discriminatory" within the meaning of s. 111 of the *ATR*:

> [35] The Agency is therefore of the opinion that in determining whether a term or condition of carriage applied by a carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA or "unjustly discriminatory" within the meaning of section 111 of the ATR, it must adopt a contextual approach which balances the rights of the travelling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers operating in Canada. This position is also in harmony with the national transportation policy found in section 5 of the CTA.

With respect to the meaning of "discriminatory," the Agency adopted the interpretation of the Supreme Court of Canada in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143:

> [...] discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligation, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages, available to other members of society.

In the present case, the practice set out in Exhibit "A" is certainly discriminatory in that it imposes a disadvantage on a certain group of passengers based on their personal characteristics, namely, the size and/or shape of their body. Moreover, it is arguable that it is "unjustly discriminatory," contrary to s. 111(2) of the *ATR*.

Thus, it is submitted that whether the practice set out in Exhibit "A" is "unjustly discriminatory" is a serious issue to be tried, meeting the first branch of the test.

(ii) The Applicant has a long-standing, real, and continuing interest in the rights of air passengers

The Applicant is a Canadian air passenger rights advocate. Since 2008, the Applicant has filed more than two dozen successful complaints against airlines with the Agency. The Applicant's complaints have lead to substantial improvements and landmark decisions by the Agency in the following areas:

1. baggage liability and accuracy of information on airlines' websites:

    (a) *Lukács v. Air Canada*, 208-C-A-2009;
    (b) *Lukács v. WestJet*, 477-C-A-2010 (leave to appeal refused: 10-A-41);
    (c) *Lukács v. WestJet*, 313-C-A-2010 & 483-C-A-2010 (leave to appeal refused: 10-A-42);
    (d) *Lukács v. Air Canada*, 291-C-A-2011;
    (e) *Lukács v. WestJet*, 418-C-A-2011;
    (f) *Lukács v. United*, 182-C-A-2012;
    (g) *Lukács v. United*, 200-C-A-2012;
    (h) *Lukács v. United*, 335-C-A-2012;
    (i) *Lukács v. United*, 467-C-A-2012;
    (j) *Lukács v. Sunwing*, 249-C-A-2013;
    (k) *Lukács v. British Airways*, 10-C-A-2014;

2. rebooking and/or refund for passengers in the case of flight delay, advancement, cancellation, and denied boarding:

    (a) *Lukács v. Air Transat*, 248-C-A-2012;
    (b) *Lukács v. WestJet*, 249-C-A-2012;
    (c) *Lukács v. Air Canada*, 250-C-A-2012;
    (d) *Lukács v. Air Canada*, 251-C-A-2012;
    (e) *Lukács v. WestJet*, 252-C-A-2012;
    (f) *Lukács v. Porter*, 16-C-A-2013;
    (g) *Lukács v. Sunwing*, 313-C-A-2013;
    (h) *Lukács v. Air Transat*, 327-C-A-2013;
    (i) *Lukács v. Porter*, 344-C-A-2013;
    (j) *Lukács v. Porter*, 31-C-A-2014 (involved also denied boarding compensation issues);

3. denied boarding compensation:

    (a) *Lukács v. Air Canada*, 204-C-A-2013 & 342-C-A-2013;
    (b) *Lukács v. WestJet*, 227-C-A-2013;
    (c) *Lukács v. Porter*, 31-C-A-2014;
    (d) *Lukács v. British Airways*, 201-C-A-2014;
    (e) *Lukács v. Porter*, 249-C-A-2014.

Currently, one complaint of the Applicant is pending before the Agency, four proceedings are pending before the Federal Court of Appeal, and the Applicant is also acting as a representative for a passenger in a disability-related complaint before the Agency.

The Consumers' Association of Canada awarded the Applicant its Order of Merit in recognition of his work in the area of air passenger rights.

In an article entitled "Aviation Practice Area Review" and published in September 2013 (Exhibit "B"), Mr. Carlos Martins, one of the counsels for Delta Air Lines in the present proceeding, characterized the activities of the Applicant as follows:

> 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.
>
> [Emphasis added.]

Mr. Martins' second observation is also very accurate: an electronic search among the Agency's decisions reveals a total of 46 decisions mentioning the Applicant and/or decisions by the Agency resulting from his complaints.

Based on these facts, the Applicant submits that he has a demonstrated long-standing, real, and continuing interest in the rights of air passengers, thus meeting the second branch of the test.

(iii) Reasonable and effective means of bringing the issue before the Agency

In *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC), this branch of the test was explained as follows:

> [109] Thus, in order to find that there is a reasonable and effective alternate means to litigate the issue, the A.G. must prove, on the balance of probabilities, that:
>
> (a) there is a person who is more directly affected than the applicants; and
>
> (b) that person might reasonably be expected to initiate litigation to challenge the legislation at issue.

> In order to show there is a "reasonable and effective" alternative, it is necessary to show more than a possibility that such litigation might occur. The "mere possibility" of a challenge by a directly affected private litigant will not result in the denial of public interest standing: *Canadian Bar Association v. British Columbia (Attorney General)* 1993 CanLII 310 (BC SC), (1993), 101 D.L.R. (4th) 410 (B.C.S.C.) at 417; *Grant v. Canada (Attorney General)*, 1994 CanLII 9274 (FC), [1995] 1 F.C. 158 (F.C. T.D.), aff'd [1995] F.C.J. No. 830 (C.A.), leave to appeal refused [1995] S.C.C.A. No. 394 (S.C.C.) at pp. 198-9.

Recently, in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, the Supreme Court of Canada provided several examples of the types of interrelated matters that may be useful to take into account when assessing the third branch of the test (para. 51):

> The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.
>
> The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. 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.
>
> The court should turn its mind to whether 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. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. [...]
>
> [Emphasis added.]

The Applicant submits that these considerations militate in favour of granting him public interest standing, if such standing is necessary for bringing the present complaint.

First, the Applicant has demonstrated through his past activities his experience and expertise in the area of air passenger rights in general, and in matters involving s. 111 of the *ATR* in particular.

Second, there is a public interest in eliminating any discrimination, a conduct that is inconsistent with the Canadian values enshrined in the *Charter* and the *Canadian Human Rights Act*. This is particularly so with respect to "unjust discrimination," alleged in the present case, which is an extreme form of discrimination.

Third, there is no realistic alternative means for bringing Delta Air Lines' outrageous practice before the Agency. Such proceedings are legally complex, and as the present case demonstrates, airlines are represented by highly skilled counsels. The Applicant, due to the expertise he has accumulated in the area, is in a unique position to meaningfully respond to the legal arguments crafted by such skilled counsels. Any other complainant would necessarily be forced to hire a lawyer and incur very substantial expenses.

Fourth, the Applicant is also in a unique position to bring the present complaint because he has obtained evidence of Delta Air Lines' discriminatory practice by way of Exhibit "A". Individuals who have been discriminated against by Delta Air Lines pursuant to these practices may not know that they were singled out based on their physical characteristics, and would certainly be in a difficult position to prove that.

Finally, the issue in the present case is a question of law and not a question of fact. The question is whether Delta Air Lines' practice stated in Exhibit "A" is unjustly discriminatory within the meaning of s. 111(2) of the *ATR*. The present setting is as adversarial as it can get. Since no accommodation is being sought, and the only remedy pursued is an order to extinguish the discriminatory practice, there would be no practical benefit if the present complaint were brought forward by a nominee complainant.

In light of these, it is submitted that the Applicant ought to be granted public interest standing to bring the present complaint if such a standing is necessary.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Gerald Chouest, counsel for Delta Air Lines

From: **Contact Delta** ContactUs.Delta@delta.com
Subject: Re: CC-Past Travel Compliment or Complaint-Complaint-Airport (KMM36513423V70481L0KM)
Date: August 20, 2014 at 4:57 AM
To: omer767@gmail.com

Hello Omer,

RE: Case Number 13384069

Thanks for letting us know the discomfort you were caused on your flight with us on August 12. I'm really sorry for the inconvenience you encountered while sitting next to a passenger who required additional space.

Being cramped during a long or a short flight is not a good experience. I realize how uncomfortable it must have been when you were unable to sit comfortably in your seat. Here are the guidelines we follow to help make a large passenger, and the people sitting nearby, comfortable. 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. It's obvious, this was not the case.

Delta Choice Gift
As a goodwill gesture, I'm sending a $50.00 Delta Choice gift. The Delta Choice gift code will arrive in a separate email within three business days. This will include a customer ID and instructions on how to redeem the gift. Please check your spam folder if you don't see the email in your inbox.

We appreciate the time you took to bring this experience to our attention. I hope that your next trip with us is pleasant in every way.

Regards,

Veron M. Fernandes
You Share, We Care

Original Message Follows:

Delta Air Lines Customer Care Form

WHO'SWHOLEGAL

AVIATION PRACTICE AREA REVIEW

SEPTEMBER 2013

Carlos Martins of Bersenas Jacobsen Chouest Thomson Blackburn outlines recent developments in aviation law in Canada.

There have been a number of developments in Canada in the realm of aviation law that promise to make for interesting times in the months ahead. In this review, we will consider some of these decisions, their implications and how they may play out in the coming year.

Warsaw/Montreal Liability

On the airline liability front, the Supreme Court of Canada will hear the appeal of the Federal Court of Appeal's decision in *Thibodeau v Air Canada*, 2012 FCA 246. This case involves a complaint by Michel and Lynda Thibodeau, passengers on a series of Air Canada flights between Canada and the United States in 2009. On some of the transborder legs of those journeys, Air Canada was not able to provide the Thibodeaus with French-language services at check-in, on board the aircraft or at airport baggage carousels. The substantive aspect of the case is of limited interest to air carriers because the requirement that air passengers be served in both official languages applies only to Air Canada as a result of the Official Languages Act (Canada), an idiosyncratic piece of legislation that continues to apply to Air Canada even though it was privatised in 1988.

However, from the perspective of other air carriers, the most notable facet of the Supreme Court's decision will be whether that Court will uphold the Federal Court of Appeal's "strong exclusivity" interpretation of the Warsaw/Montreal Conventions. If it does, it will incontrovertibly bring the Canadian law in line with that of the United States and the United Kingdom – meaning that passengers involved in international air travel to which either of the Conventions apply are restricted to only those remedies explicitly provided for in the Conventions. At present, the Federal Court of Appeal's decision in *Thibodeau* provides the most definitive statement to date that "strong exclusivity" is the rule in Canada.

YQ Fares Class Action

The battle over "YQ Fares" is expected to continue in a British Columbia class action. The case relates to the practice of several air carriers identifying the fuel surcharge levied on their tickets in a manner that may cause their passengers to believe that these charges are taxes collected on behalf of a third party when, in fact, fuel surcharges are collected by the air carrier for its own benefit. In the British Columbia action, the plaintiffs complain that this practice contravenes the provincial consumer protection legislation which provides that service providers shall not engage in a "deceptive act or practice".

Last year, an issue arose as to whether air carriers can be subject to the provincial legislation given that, in Canada, matters relating to aeronautics are in the domain of the federal government. Most recently, in *Unlu v Air Canada*, 2013 BCCA 112, the British Columbia Court of Appeal held that the complaint should be allowed to proceed on the basis that, among other things, there was no operational conflict between the workings of the provincial legislation and the regime imposed under the federal Air Transportation Regulations, SOR/88-58, that deal with airfare advertising. Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was denied in August 2013.

Regulatory/Passenger Complaints

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.

Since 2012, Mr Lukács has been involved in complaints arising from, among other things:

- air carriers' online and airport communications to the public as to the extent to which baggage claims involving "wear and tear" must be paid (*Lukács v United Airlines*, CTA Decision Nos. 182/200-C-A-2012);

- lack of compliance of tariff liability provisions with the Montreal liability regime (*Lukács v Porter Airlines*, CTA Decision No. 16-C-A-2013);

• the reasonableness of imposing releases of liability as a precondition for the payment of compensation provided for in a tariff (*Lukács v WestJet*, CTA Decision No. 227-C-A-2013);

• the reasonableness of air carriers engaging in overselling flights for commercial reasons (*Lukács v Air Canada*, CTA Decision No. 204-C-A-2013);

• the amount of denied boarding compensation to be paid to involuntarily bumped passengers in the event of a commercial overbooking (*Lukács v Air Canada*, CTA Decision No. 342-C-A-2013);

• the amount of compensation to be paid to passengers who miss their flight as a result of an early departure (*Lukács v Air Transat*, CTA Decision No. 327-C-A-2013); and

• the use of cameras by passengers onboard aircraft (*Lukács v United Airlines*, CTA Decision No. 311-C-A-2013)

It is expected that, in 2014, Mr Lukács will continue in his quest to ensure that air carrier tariffs are reasonable, clear and faithfully applied.

Although it may not be initiated by Mr Lukács, we expect that, in 2014, the Agency will consider the issue of whether air carriers should be able to charge a fee for booking a specific seat for a child travelling with a parent or guardian.

Regulatory/ Notices to Industry

Wet Leasing

On 30 August 2013, the Agency released its new policy on wet leasing of foreign aircraft. It applies to operators who wet lease foreign aircraft for use on international passenger services for arrangements of more than 30 days. The key changes are that, in order for the Agency to approve such an arrangement:

• the number of aircraft leased by an operator is capped at 20 per cent of the number of Canadian-registered aircraft on the lessees' Air Operator Certificate at the time the application was made;

• small aircraft are excluded from the number of Canadian-registered aircraft described above; and

• small aircraft is defined as an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of not more than 39 passengers.

In addition to the above, the lessee is required to provide a rationale as to why the wetlease arrangement (or its renewal) is necessary. The Agency has stated that it:

• will not deny an application solely on the basis of the rationale for the use of foreign aircraft with flight crew, as long as the cap is not exceeded; and

• may renew approvals of wet-lease applications of more than 30 days as long as the cap is not exceeded.

There is some flexibility for short-term arrangements and where unexpected events require an exception.

All-Inclusive Fare Advertising

In December 2012, the Agency approved new regulations with respect to all-inclusive fare advertising. Initially, the regulations were enforced through a "proactive and collaborative educational approach". The Agency has recently released a notice to the industry advising that it will now take a firmer stance in ensuring compliance. It has recently issued administrative monetary penalties (AMPs) against two online travel retailers for not advertising the total all-inclusive price on their online booking systems. In one case, the AMP amounted to $40,000 due to the lack of initial response from the retailer. In another, the AMP was $8,000 in a situation where that retailer complied in the case of booking through its main website, but not with respect to booking on its mobile website.

Baggage Rules

The Agency has recently completed a consultation process with the industry and with the public with respect to the issue of baggage rules. The issues under contemplation include à la carte pricing, regulatory change and carriers' attempts to further monetize the transportation of baggage. At present, there are two regimes being used in Canada: one of which was adopted by the International Air Transport Association (Resolution 302) and the other by way of recently promulgated

regulations to be enforced by the United States Department of Transportation (14 CFR part 399.87). The Agency has gone on the record to state that it expects to make a decision on the appropriate approach to apply for baggage being transported to/from Canada in the fall of 2013.

Defining the Boundaries of Regulation

In the arena of business aviation, the Appeal Panel of the Transportation Appeal Tribunal of Canada is expected to revisit the extent to which the Canadian Transportation Agency should regulate business-related aviation in Canada. The facts arise from the practice of a casino based in Atlantic City, New Jersey, offering voluntary air transfers to the casino to some of its most valued clients. In evidence that has already been led in these proceedings, the casino has asserted that the complimentary flights are at the sole discretion of the casino; no customer was entitled to such a service; and the provision of the flights is not based on the amount spent by the customers at the casino.

The core of the issue is whether the casino requires a licence from the Agency in order to offer this benefit to its customers. Under the applicable legislation, those who offer a "publicly available air service" in Canada require such a licence and are subject to all of the requirements imposed on licensees. *In Marina District Development Company v Attorney General of Canada*, 2013 FC 800, the Federal Court was asked by the casino, on a judicial review, to overturn the Appeal's panel's previous finding that the casino's air service did, in fact, trigger the Agency's oversight. The Federal Court found that the legal test imposed by the Appeal Panel for determining whether an air service was publicly available bordered on tautological but declined to answer the question itself. The matter was sent back to the Appeal Panel for reconsideration. A new decision is expected in 2014. In our view, it is likely that the matter will be sent back to the Federal Court, possibly before the end of 2014 as well, regardless of which party prevails.