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October 1, 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**  
**Reply submissions concerning standing as per Decision No. LET-C-A-63-2014**

Please accept the following submissions concerning the issue of standing as a reply to Delta Air Lines' submissions dated September 26, 2014.

**I. The practice complained of substantially differs from Delta Air Lines' public statement**

The Applicant strenuously objects to Delta Air Lines' attempt to obfuscate and sidestep the subject of the complaint, and conflate it with the contents of the statement appearing on Delta Air Lines' website (page 2 of Delta Air Lines' September 26, 2014 submissions).

The present complaint concerns Delta Air Lines' practices, as set out in Exhibit "A" of the Applicant's September 19, 2014 submissions, and not the public statement of Delta Air Lines.

**(a) Delta Air Lines' public statement substantially differs from Exhibit "A"**

There is a fundamental difference not only in the subject matter, but also in the nature of the statements appearing on Delta Air Lines' website and the practices set out in Exhibit "A". The

difference can be best illustrated as the difference between inviting a guest over for a weekend as opposed to forcibly confining a person for a weekend.

Delta Air Lines cites on page 2 of its September 26, 2014 submissions a statement that appears on Delta Air Lines' website, concerning Delta Air Lines' commitment to offer additional assistance to obese passengers. The public statement uses the permissive language of "you might also consider" and "you might consider," and is clearly a mere suggestion to passengers. There is nothing in these statements to pressure passengers to purchase an additional seat. The airline simply advises the passenger of an option available for the passenger's "best comfort" during their travel.

In sharp contrast, however, the practice complained about is not a recommendation to passengers, but rather a discriminatory practice that singles out "large" passengers:

[...] 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 [...]

Unlike the public statement on Delta Air Lines' website, these practices do not leave it to the passenger to decide whether they wish to purchase additional seats; rather, Delta Air Lines targets "large" passengers as candidates for being denied transportation on full flights. Furthermore, according to Exhibit "A", Delta Air Lines does not recommend, but requires such passengers to purchase additional seats, lest they be denied transportation on full flights, and be forced to fly at a later time or date.

The Applicant submits that the public statement of Delta Air Lines is so substantially different on essential points from what is set out in Exhibit "A" that it is not possible to make any conclusions with respect to the intended meaning of Exhibit "A" based on the public statement of Delta Air Lines.

**(b) Lack of evidence**

It is important to note that Delta Air Lines has tendered no evidence as to its actual practices to demonstrate that its practices are not as set out in Exhibit "A" or to explain the meaning of "large" in Exhibit "A".

There would have been many ways for Delta Air Lines to provide evidence on this point, such as producing its training manuals, and providing a statement from a person with knowledge of the pertinent matters about Delta Air Lines' practices.

The Applicant submits that Delta Air Lines tendered no evidence whatsoever to support its contention that "large" in Exhibit "A" is an euphemism for "obese".

**(c) Procedural fairness concern**

The Applicant submits that it would be unfair to make any conclusions as to the meaning of “large” in Exhibit “A” in the framework of a preliminary question, where he is deprived from using the production and interrogatory mechanisms normally available pursuant to the Agency’s rules of procedures after pleadings are opened.

While Delta Air Lines may eventually tender evidence as to the meaning of “large” in Exhibit “A”, it would amount to denial of procedural fairness to accept bald allegations as facts at such a preliminary stage of the proceeding.

There is nothing in Exhibit “A” to show that the passenger was complaining about an “obese” passenger sitting next to him and not an exceptionally tall passenger or one with longer than average legs.

Therefore, the Applicant submits that for the purpose of the present preliminary matter concerning standing, and in the absence of any evidence to the contrary, the Agency should look at the words of Exhibit “A” as they stand. Exhibit “A” speaks of “large” and not “obese” passengers. Hence, the present complaint is concerning discrimination against “large” passengers, which can include a range of ways of being “large.”

**II. Section 111 of the ATR and standing**

The Applicant submits that Delta Air Lines is grossly misstating the law on standing with respect to section 67.2(1) of the *Canada Transportation Act* and section 111 of the *Air Transportation Regulations*, and the Agency’s jurisprudence on it.

**(a) Collective right of the travelling public: “any person”**

As noted by the Supreme Court of Canada in *A.G. (Que.) v. Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 (at para. 28), Parliament does not speak in vain, and the phrase “any person” was inserted into the legislative text for a reason. Delta Air Lines has failed to address the argument of the Appellant, supported by a wealth of case law from the Agency, that the right to challenge terms and conditions pursuant to s. 67.2(1) of the *CTA* and s. 111 of the *ATR* is conferred upon “any person” and not only those who have been directly affected by the impugned terms and conditions.

Delta Air Lines failed to propose any alternative interpretation for the phrase “any person” that Parliament chose to include in s. 67.2(1) of the *CTA*. In the absence of submissions by Delta Air Lines on this point, the Applicant submits that the Agency should find that these rights are collective rights of the travelling public (similar to language rights pursuant to the *Official Languages Act*), which serve the travelling public at large, and as such, “any person” has standing to challenge terms and conditions.

**(b) Delta Air Lines misstates the Agency’s jurisprudence**

Delta Air Lines mistakenly argues that the issue of standing has not been squarely raised in *Black*, and that the Agency found in favour of the passenger in *Black*, because “he could have been” subject to the terms and conditions complained of “the next day had he chosen to fly with Air Canada.” The Applicant submits that Delta Air Lines’ contention with respect to *Black* and the subsequent cases raising the issue of standing is woefully misguided, and Delta Air Lines misstates the Agency’s decision in *Black*.

It is settled law that private interest standing cannot be founded on hypothetical possibilities. In *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726, it was held that:

[47] Paragraph 10 of the statement of claim states that Ms. Kiselbach is not currently engaged in prostitution and does not at present intend to re-enter the sex trade. The fact that she cannot rule out the possibility that she may change her mind and may want to engage in sex work in the future does not distinguish her from any other member of the general public. Private interest standing cannot be founded on hypothetical possibilities: *Canadian Council for Refugees v. Canada* (2008), 74 Admin. L.R. (4th) 79, 2008 FCA 229 (CanLII) at paras. 99-102.

Consequently, the Agency could not have reached the conclusion that it did in *Black* based on speculations such as those proposed by Delta Air Lines. The Agency did not speculate that Mr. Black could be travelling on Air Canada the next day. Instead, the Agency correctly focused on the policy objective that s. 111 of the *ATR* serves, and held that:

To require a “real and precise factual background” could very well dissuade persons from using the transportation network.

[Emphasis added.]

It is important to note that the Agency used “persons” in plural, which demonstrates that the Agency was mindful of the public benefit of s. 111 of the *ATR*, and that the purpose of such challenges go well beyond the individual applicant’s personal benefit.

Any doubts that *Black* might have left as to standing to bring s. 111 challenges have been resolved in *Krygier*, where the applicant’s standing was directly challenged, and the Agency held that: “the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint.”

The Agency’s decision in *Krygier* has a number of additional features that are relevant to the question of standing in the present case. First, the Agency reached its conclusion without any reference to the personal circumstances of Mr. Krygier. There is no trace of any consideration of the nature suggested by Delta Air Lines that Mr. Krygier might be affected by the terms and conditions that he was challenging. Second, the Agency distinguished challenges pursuant to s.

111 of the *ATR* from challenges brought under subsection 172(1) of the *CTA*, which must be brought by a person with a disability or filed on behalf of such a person.

Although the Applicant provided counsel for Delta Air Lines with a copy of Decision No. LET-C-A-104-2013, the airline chose not to address this recent decision of the Agency concerning standing.

**(c) Conclusion**

In light of the Agency's jurisprudence on standing to challenge terms and conditions pursuant to s. 67.2(1) of the *CTA* and s. 111 of the *ATR*, it is submitted that "any person" may bring such challenges, and no further analysis of standing is required.

**III. Private interest standing in the present case**

Although Delta Air Lines accepts that the Applicant is 6 feet tall and 175 lbs in weight, and that his height is above the average, Delta Air Lines disputes that the Applicant is a "large person."

**(a) Inadmissible hearsay**

Delta Air Lines purports to rely on a national survey conducted by Maclean's Magazine in 2012 as the evidentiary basis for the claim that the average Canadian male is 5'9" tall and 185 lbs in weight.

The Applicant submits that information published in newspapers and magazines are archetypical examples of inadmissible hearsay, and the Agency should ignore the content of the Maclean's Magazine cited by Delta Air Lines.

**(b) Delta Air Lines has acknowledged that the Applicant is taller than average**

Regardless of the actual figures, Delta Air Lines has correctly acknowledged that the Applicant is taller than the average Canadian male. Thus, the Applicant is certainly a "large" passenger.

**(c) Lack of evidence as to the meaning of "large"**

Unfortunately, Delta Air Lines has provided no evidence as to the meaning of "large" in Exhibit "A": no statement from the author of Exhibit "A" nor from anyone else who could have provided some clarification were provided. Thus, at the present preliminary stage, it is impossible to conclude with certainty that the Applicant is not "large" and that the Applicant is not directly affected by the practices set out at Exhibit "A".

**(d) The scope of the proposed complaint**

Delta Air Lines cannot hijack and alter the present matter by stating that “the proposed complaint is one that concerns persons who cannot fit in a single seat by virtue of being obese.” As the Applicant stated on multiple occasions, the present application concerns discrimination and not accommodation for disability, and it concerns an allegation of discrimination against “large” passengers.

Whether such discrimination does exist and its extent are questions that can be answered only after pleadings are opened and evidence is tendered, including by way of productions and interrogatories.

**IV. Public interest standing**

Delta Air Lines does not dispute the Applicant’s submission that 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)?

Moreover, Delta Air Lines does not dispute that the Applicant meets the first two conditions of the test. Thus, the parties’ positions differ only on two points related to public interest standing: who has the burden of proof, and whether the third prong of the test is met.

**(a) Burden of proof on a preliminary determination of standing**

Contrary to what is stated in Delta Air Lines’ submissions, the Applicant did cite *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 as an authority with respect to burden of proof when standing is raised as a preliminary issue. Paragraph 55 of *Fraser* reads as follows:

[55] When the question of standing is raised in a preliminary motion, a court should only consider whether, on the materials before the court, the applicant has an arguable case or, putting it the other way, has no reasonable cause of action: *Sierra Club of Canada*, supra; *Energy Probe v. Canada (Attorney General)* (1989), 1989 CanLII 258 (ON CA), 68 O.R. (2d) 449 (C.A.); *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, supra. The burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy even this low threshold test. [Emphasis added.]

Delta Air Lines confuses the question of burden of proof with respect to standing when such an issue is raised as a preliminary matter with determination of standing in a hearing of an application on its merits. The *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194 case cited by Delta Air Lines concerned a judgment on the merits of an application for judicial review, which also addressed the issue of standing.

In the present case, however, standing was raised as a preliminary issue, before parties had an opportunity to tender evidence and fully test the evidence of the opposing party. Thus, the burden of proof is on Delta Air Lines to demonstrate that the Applicant cannot satisfy a low threshold test.

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

Delta Air Lines appears to misconstrue the meaning of “alternative means” in the text for public interest standing. The correct interpretation of “alternative means” is the presence of another person who has private interest standing, and who is likely to challenge the impugned action, policy or law before the court or tribunal. It is submitted that the availability of various forms of non-binding dispute resolution is not a relevant, and certainly not a determinative, consideration in this context.

As noted in *Fraser*, at paragraph 109:

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), 1993 CanLII 310 (BC SC), 101 D.L.R. (4th) 410 (B.C.S.C.) at 417; *Grant v. Canada (Attorney General)*, 1994 CanLII 3507 (FC), [1995] 1 F.C. 158 (F.C. T.D.), aff’d reflex, [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.

[Emphasis added.]

Thus, Delta Air Lines has to do more than show the “mere possibility” of a challenge to the impugned practices by a directly affected private litigant.

Delta Air Lines’ argument that a complaint can be filed “in approximately 15 minutes” is based on the misconception that an average passenger is familiar with the *Air Transportation Regulations* and its section 111. A review of the Agency’s website reveals that completion of the online forms ask for the following:

- Provide a full description of the facts.
- Clearly state the issues.
- Identify any legislative provisions on which you are relying.

- Clearly set out the arguments in support of your application.
- Clearly set out the relief you are seeking.

It is submitted that while there may be particularly determined, dedicated, and able passengers who might possibly be able to answer these in a meaningful way in relation to an undue or unjust discrimination complaint, this remains a “mere possibility.”

Delta Air Lines’ claim as to the number of decisions released by the Agency with respect to Consumer Complaints does not help Delta Air Lines’ argument, as a number of these complainants were represented by counsel, precisely because of the complexity of the issues.

The fact that the Agency does not require individuals to be represented by counsel does not mean that passengers can effectively and successfully represent themselves before the Agency; most individuals cannot.

According to a recent filing with the Federal Court of Appeal (File No.: A-357-14), the Agency’s new Dispute Rules has a 90-page “companion document” explaining the rules. The Applicant submits that any procedure that requires a 90-page explanation cannot be simple or accessible for an average passenger.

There is no obligation to be represented by counsel before the Federal Court either, and most documents can be filed electronically using a rather simple interface. This fact, however, does not render legal representation unnecessary, and does not demonstrate in and on its own accessibility of the court and access to justice.

Finally, contrary to what Delta Air Lines claims, the practices set out in Exhibit “A” substantially differ from what is described on the airline’s website. Consequently, the Applicant is in a privileged position because he has unique evidence of the unjustly discriminatory practice of Delta Air Lines.

Therefore, the Applicant submits that while there may be a theoretical possibility of the present complaint being brought forward by another individual, it is no more than a “mere possibility,” and it cannot be a basis for denying the Applicant public interest standing.

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Applicant

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