Court File No.: A-135-15

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

APPEAL BOOK

Dated: April 2, 2015

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NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard in **Halifax, Nova Scotia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the judgment appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the court and other necessary information may be obtained on request to the Administrator of this court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: March 12, 2015 Issued by: _____

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from a decision made by the Canadian Transportation Agency (the "Agency") dated November 25, 2014 and bearing decision no. 425-C-A-2014 ("Decision Under Appeal"), in which the Agency dismissed the Appellant's complaint on the basis of lack of standing.

THE APPELLANT ASKS that:

1. the Decision Under Appeal be set aside, and the matter be returned to the Agency for hearing and determination of the complaint on its merits (that is, determination of whether Delta Air Lines' practices are "unduly discriminatory," contrary to section 111 of the *Air Transportation Regulations*, S.O.R./88-58), by a differently constituted panel;

2. the Appellant be awarded a moderate allowance for the time and effort he devoted to preparing and presenting his case, and reasonable out-of-pocket expenses incurred in relation to the appeal; and

3. this Honourable Court grant such further and other relief as is just.

THE GROUNDS OF APPEAL are as follows:

1. The Agency erred in law and rendered an unreasonable decision by:

   (a) failing to give effect to the intent of Parliament that “any person” may invoke the Agency’s jurisdiction to eliminate unreasonable or unduly discriminatory terms or conditions of airlines;

   (b) failing to recognize that the right to be subject to terms and conditions that are not unreasonable or unduly discriminatory is a collective right of the public at large; and

   (c) failing to recognize that the Agency is a quasi-judicial regulator whose mandate is different than the mandate of the courts.

2. The Agency erred in law, applied the wrong legal principles, and fettered its discretion with respect to public interest standing by:

   (a) misquoting the Supreme Court of Canada and holding that public interest standing can be granted only in “cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested” (para. 74); and

   (b) failing to assess all three factors of the tripartite test for public interest standing.

Statutes and regulations relied on

3. *Air Transportation Regulations*, S.O.R./88-58, and in particular, ss. 110, 111, 113, and 113.1.

4. *Canada Transportation Act*, S.C. 1996, c. 10, and in particular, ss. 5, 37, 41, 67, 67.1, 67.2, and 86.

5. Such further and other grounds as the Appellant may advise and the Honourable Court permits.

March 12, 2015

DR. GÁBOR LUKÁCS

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Appellant

DECISION NO. 425-C-A-2014

November 25, 2014

COMPLAINT by Gábor Lukács against Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle.

File No. M4120-3/14-04165

COMPLAINT

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain practices of Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle (Delta) relating to the transportation of large (obese) persons are "discriminatory", contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58, as amended, and inconsistent with the Agency's findings in Decision No. 6-AT-A-2008.

BACKGROUND

[2] On September 5, 2014, the Agency issued Decision No. LET-C-A-63-2014, in which the Agency noted that it was not clear whether Mr. Lukács has an interest in Delta's practices governing the carriage of obese persons. The Agency provided Mr. Lukács with the opportunity to file submissions regarding his standing, and opened pleadings.

[3] In his submission dated September 19, 2014, Mr. Lukács requested that the Agency amend Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large" throughout the Decision to adequately identify the nature of the complaint.

PRELIMINARY MATTER

Should the Agency vary Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large"?

[4] Mr. Lukács submits that the complaint concerns discriminatory practices relating to the transportation of large passengers stated in an e-mail dated August 20, 2014, and that Decision No. LET-C-A-63-2014 incorrectly labels the complaint as one that concerns the transportation of "obese persons". Delta argues that the word "large" is a euphemism and that the characterization of the complaint as one concerning "obese persons" is entirely accurate and appropriate as the practices described in the e-mail concern a passenger who cannot fit in a single seat.

[5] In his complaint, Mr. Lukács used the wording "transportation of large (obese) passengers". It is therefore not clear to the Agency why Mr. Lukács now objects to the Agency using the word "obese" in Decision No. LET-C-A-63-2014. Based on this, the Agency will not vary that Decision by replacing the word "obese" with "large". However, as Delta uses the word "large" in the policy at issue, the Agency will use the word "large" throughout this Decision.

ISSUE

[6] Does Mr. Lukács have standing in this complaint?

POSITIONS OF THE PARTIES

[7] Mr. Lukács states that section 111 of the ATR and subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) serve as a preventative function rather than merely offering remedies or compensation *post facto*. Mr. Lukács refers to Decision No. 746-C-A-2005 (*Black v. Air Canada*), in which the Agency held, at paragraph 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.

[8] Mr. Lukács states that it is important to note that in that Decision, the Agency used "persons" in the plural form, which demonstrates that the Agency was mindful of the public benefit of section 111 of the ATR, and that the purpose of such challenges goes well beyond the individual applicant's personal benefit.

[9] Mr. Lukács states that the question of "standing" to challenge the terms or conditions applied by a carrier was also addressed by the Agency in *Black v. Air Canada*, more specifically at paragraph 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 conditions" 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" [...]

[10] Mr. Lukács contends that the above findings were reaffirmed in Decision No. 215-C-A-2006 (*O'Toole v. Air Canada*), Decision No. LET-C-A-155-2009 (*Lukács v. Air Canada*) and Decision No. LET-C-A-104-2013 (*Krygier v. several carriers*), and argues that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier.

[11] Mr. Lukács contends that Delta refuses to transport passengers or forces passengers to buy multiple seats based on the personal characteristics of an individual or group and that in light of the public policy purpose of section 111 of the ATR, he is not required to be a member of the group discriminated against in order to have standing.

[12] Delta counters that in *Black v. Air Canada*, because of the basis of Air Canada's objection (that there must be "a real and precise factual background"), the reasons did not deal with the considerations normally reviewed in cases which address standing, and there was no explicit holding on the basis of standing. Delta argues that in this case, the issue of standing is squarely raised.

[13] According to Delta, the holding in *Black v. Air Canada* can be explained on the basis that Mr. Black had a direct interest in the matter and had standing as of right based on the fact that terms imposed by Air Canada affected Mr. Black's rights and would have prejudicially affected him had he travelled with Air Canada. Delta contends that in *Black v. Air Canada*, the Agency reasoned that a person who could be prejudicially affected by the terms complained of should not be required to be subjected to those terms as a precondition of bringing a complaint. Delta argues that the same analysis would explain all the cases which have followed *Black v. Air Canada.*

[14] Mr. Lukács asserts that Delta mistakenly argues that the issue of standing has not been squarely raised in *Black v. Air Canada*, and Delta's contention with respect to *Black v. Air Canada* and the subsequent cases raising the issue of standing is woefully misguided.

[15] Mr. Lukács submits that the Supreme Court of Canada (Supreme Court), in *A.G. (Que.) v. Carrières Ste-Thérèse Ltée,* [1985] 1 S.C.R. 831, at paragraph 28, noted that Parliament does not speak in vain, and that the phrase "any person" was inserted into the legislative text for a reason. Mr. Lukács claims that Delta has failed to address the argument that the right to challenge terms and conditions pursuant to subsection 67.2(1) of the CTA and section 111 of the ATR is conferred upon "any person", and has failed to propose any alternative interpretation for the phrase "any person" that Parliament chose to include in subsection 67.2(1) of the CTA. Mr. Lukács asserts that in light of this, the Agency should find that these rights are collective (similar to language rights pursuant to the *Official Languages Act*, R.S.C., 1985, c. 31 [4th supp.]) and serve the travelling public at large.

[16] Mr. Lukács also submits that it is settled law that private interest standing cannot be founded on hypothetical possibilities, and he refers to *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726 (*Downtown Eastside Sex Workers v. Attorney General*).

[17] Mr. Lukács asserts that consequently, the Agency could not have reached the conclusion it did in *Black v. Air Canada* based on speculations, such as those proposed by Delta, given that the Agency did not speculate that Mr. Black could be travelling on Air Canada the next day. Instead, Mr. Lukács states that the Agency was mindful of the public benefit of section 111 of the ATR.

[18] Mr. Lukács maintains that any doubts that *Black v. Air Canada* might have left as to the issue of standing were resolved in *Krygier v. several carriers*, 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". Mr. Lukács contends that in *Krygier v. several carriers,* the Agency reached its conclusion without any reference to the personal circumstances of the applicant and in that case, there was no trace of any consideration of the nature suggested by Delta that the applicant might be affected by the challenged terms and conditions.

Burden of proof

[19] Mr. Lukács states that when standing is raised, the burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy the legal test for public interest standing.

[20] Delta submits that Mr. Lukács provides no legal basis for this submission. Delta argues that the opposite is true as revealed by the Federal Court of Appeal in *Public Mobile Inc. v. Canada (Attorney General),* [2011] 3 F.C.R. 344, 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, Delta argues that it is Mr. Lukács who bears the onus of satisfying the Agency that he is entitled to be granted public interest standing, and not Delta to disprove such entitlement.

[21] According to Mr. Lukács, Delta confuses the question of burden of proof with respect to standing when the issue is raised as a preliminary matter with determination of standing in a hearing of an application on its merits. Mr. Lukács states that the *Globalive Wireless Management Corp. v. Public Mobile Inc.,* 2011 FCA 194 case cited by Delta concerned a judgment on the merits of an application for judicial review, which also addressed the issue of standing. Mr. Lukács argues that, in this case, standing was raised as a preliminary issue, before the parties had an opportunity to tender evidence and fully test the evidence of the opposing party and, therefore, the burden of proof is on Delta to demonstrate that the low threshold test is not satisfied.

Private interest standing

[22] Mr. Lukács states that the complaint is not about discrimination against "obese persons", but rather about discrimination against "large persons". He asserts that he is six feet tall, weighs approximately 175 pounds and, as such, he would or could be viewed as a "large person" by Delta's agents. Mr. Lukács contends that in the absence of a clear and consistent statement from Delta about the scope of its practices, it is impossible to conclude that he would not be personally subject to Delta's discriminatory practices due to his physical characteristics. Therefore,

Mr. Lukács argues that he has a private, personal interest in Delta's practices relating to the transportation of "a large person". In addition, Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[23] Delta states that according to the Federal Court of Appeal in *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] 2 F.C. 500 and *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, to be "directly affected" and thus having "direct standing" means that the practice must affect Mr. Lukács's legal rights, impose legal obligations upon him, or else prejudicially affect him in some way.

[24] With respect to Mr. Lukács's submission that he is six feet tall and weighs 175 pounds, Delta indicates that according to a national survey conducted by *Maclean's* Magazine (in 2012), the average Canadian male is five feet nine inches tall and weighs 185 pounds. Delta points out that Mr. Lukács's is only approximately four percent taller than the average Canadian male, and approximately four percent lighter.

[25] According to Mr. Lukács, Delta purports to rely on a national survey conducted by *Maclean's* Magazine as the evidentiary basis for its claim regarding the average size of a Canadian male. Mr. Lukács submits that information published in newspapers and magazines are inadmissible hearsay, and that the Agency should ignore the citation. In any event, Mr. Lukács states that Delta has correctly acknowledged that he is taller than the average Canadian male, thus making him a "large" passenger, and that Delta has provided no evidence as to the meaning of "large" found in its practices, which makes it impossible to conclude with certainty that Mr. Lukács is not "large".

[26] Delta contends that the complaint concerns persons who cannot fit in a single seat by virtue of being obese. Delta argues that given that Mr. Lukács is lighter than the average Canadian, despite being slightly taller, it is patently clear that he does not have a direct interest in the subject matter of the proposed complaint and his rights are not affected by the impugned practices nor would he suffer any prejudice if he elected to travel with Delta.

Public interest standing

[27] Mr. Lukács states that he has public interest standing, and that the legal test for public interest standing requires the consideration of three factors, which are set out in *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC) [*Fraser v. Canada*]:

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)?

1. Is there a serious issue to be tried?

[28] Mr. Lukács states that in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), 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".

[29] Mr. Lukács points out that in *Black v. Air Canada*, the Agency applied the same test for determining whether terms or conditions are "unjustly discriminatory" within the meaning of section 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.

[30] With respect to the meaning of "discriminatory," Mr. Lukács contends that the Agency adopted the interpretation of the Supreme Court in *Andrews v. Law Society of 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.

[31] Mr. Lukács asserts that Delta's practices are discriminatory in that they impose a disadvantage on a certain group of passengers based on their personal characteristics, namely, the size and/or shape of their body, and that it is arguable that the practices are "unjustly discriminatory" and contrary to subsection 111(2) of the ATR. Mr. Lukács contends that whether Delta's practices are "unjustly discriminatory" is a serious issue to be tried, meeting the first branch of the test.

2. Does the party seeking public interest standing have a genuine interest in the matter?

[32] Mr. Lukács states that he is a Canadian air passenger rights advocate who has filed more than two dozen successful complaints with the Agency, which have led to substantial improvements and landmark decisions. He adds that he has one complaint before the Agency, four proceedings before the Federal Court of Appeal, and that he is acting as a representative for a passenger in a disability-related complaint.

[33] Mr. Lukács submits that an electronic search of the Agency's decisions reveals 46 decisions mentioning him and/or decisions resulting from his complaints, and argues that based on this, he has a demonstrated long-standing, real, and continuing interest in the rights of air passengers and therefore meets the second branch of the test.

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

[34] Mr. Lukács points out that in *Fraser v. Canada*, this branch of the test was explained as follows:

> 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.

[35] Mr. Lukács states that in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 S.C.R. 524 (*Canada v. Downtown Eastside Sex Workers*), at paragraph 51, the Supreme Court 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:

> 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]

[36] Mr. Lukács asserts that there is a public interest in eliminating any discrimination, a conduct that is inconsistent with the Canadian values enshrined in the *Canadian Charter of Rights and Freedoms* (Charter) and the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, and this is particularly so with respect to "unjust discrimination", alleged in this case, which is an extreme form of discrimination. Mr. Lukács argues that these considerations militate in favour of granting him public interest standing.

[37] According to Mr. Lukács, there is no realistic alternative means for bringing Delta's outrageous practices before the Agency as such proceedings are legally complex and carriers are represented by highly skilled counsels. Mr. Lukács states that because of his expertise, he is in a unique position to meaningfully respond to the legal arguments crafted by such skilled counsels and that any other complainant would be forced to hire a lawyer and incur very substantial expenses.

[38] Delta contends that the essential issue in this case is whether, in the words of the Supreme Court in the *Canada v. Downtown Eastside Sex Workers* case, 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".

[39] Delta points out that in *Canada v. Downtown Eastside Sex Workers,* the Supreme Court cautioned, at paragraph 51, 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]

[40] With this guidance from the Supreme Court in mind, Delta submits that it is helpful to consider certain information available on the Agency's Web site, which provides any person with an easy step-by-step tool for completing a complaint in approximately 15 minutes.

[41] Delta states that there exists an expedient method for filing an application, and that the Supreme Court cautioned that the alternative should "be considered in light of the practical realities, not theoretical possibilities". According to Delta, the practical reality in this case is that, in 2013 and the first nine months of 2014, the Agency issued 36 decisions in respect of consumer complaints relating to the air mode, and of these 36 decisions, 11 relate to complaints filed by Mr. Lukács. Delta points out that the total number of persons who participated as complainants was approximately 105 (although it concedes that one single case involved 83 complainants).

[42] Delta argues that there is no discussion of standing in any of the 11 cases initiated by Mr. Lukács which led to decisions in 2013 or 2014, and argues that comments made respecting the *Black v. Air Canada* Decision are applicable in this case as each of the 11 decisions can be explained on the basis of an implicit finding that Mr. Lukács could potentially have been prejudicially affected by the practice, term or condition complained of. Delta also points out that in none of these cases were there any suggestion that Mr. Lukács should be granted public interest standing.

[43] Delta maintains that 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. Delta adds that the Agency provides experienced mediators at no cost and its rules and procedures are relatively informal by comparison to courts. Therefore, Delta submits that a complainant need not be an expert litigant nor have the assistance of an experienced counsel as it is both practical and reasonable for a complainant who is unjustly affected by a practice, procedure, term or condition of an air carrier to bring a complaint to the Agency.

[44] Mr. Lukács submits that the availability of various forms of non-binding dispute resolution is not a relevant, and certainly not a determinative, consideration in this context.

[45] According to Mr. Lukács, Delta appears to misconstrue the meaning of "alternative means" as 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. Mr. Lukács asserts that Delta has to do more than show the "mere possibility" of a challenge to the impugned practices by a directly affected private litigant, as it was noted in *Fraser v. Canada,* 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 [...] [Emphasis added]

[46] Regarding Delta's argument that a complaint can be filed "in approximately 15 minutes", Mr. Lukács submits that this is based on the misconception that an average passenger is familiar with the ATR and its section 111. Mr. Lukács asserts that while there may be particularly determined, dedicated and able passengers who might possibly be able to answer the questions found on the Agency's Web site in a meaningful way in relation to an undue or unjust discrimination complaint, this remains a "mere possibility".

[47] Mr. Lukács argues that Delta's claim regarding the number of decisions released by the Agency with respect to consumer complaints does not help Delta's argument, as a number of these complainants were represented by counsel (due to the complexity of the issues), and the fact that the Agency does not require complainants to be represented by counsel does not mean that they can effectively and successfully represent themselves. Mr. Lukács adds that the Agency's new Dispute Rules has a 90-page "companion document" which cannot be simple or accessible for an average passenger.

[48] Mr. Lukács submits that there is no obligation to be represented by counsel before the Federal Court, and most documents can be filed electronically using a simple interface; however, this does not render legal representation unnecessary, and does not demonstrate accessibility of the court and access to justice. Therefore, Mr. Lukács maintains that while there may be a theoretical possibility of this complaint being brought forward by another individual, it is no more than a "mere possibility", and this cannot be a basis for denying him public interest standing.

ANALYSIS AND FINDINGS

[49] Mr. Lukács argues that section 111 of the ATR and subsection 67.2(1) of the CTA serve as a preventive function rather than offering remedies *post facto,* and that the findings in *Black v. Air Canada*, which were reaffirmed in *O'Toole v. Air Canada, Lukács v. Air Canada* and *Krygier v. several carriers*, indicate that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier. Mr. Lukács also argues that in light of the public policy purpose of section 111 of the ATR and its preventive nature, he is not required to be a member of the group discriminated against in order to have standing.

[50] Mr. Lukács submits that in *Krygier v. several carriers*, standing was directly challenged, and the Agency held that the principles outlined in *Black v. Air Canada* applied in that case, and the Agency reached its conclusion without any reference to the personal circumstances of the applicant or how the applicant would be affected by the terms and conditions he was challenging. With respect to this submission, the Agency finds that the principles outlined in *Black v. Air Canada* do not apply in this case as the issue is not whether there is a need for a real and precise factual background but rather, as will be seen, whether Mr. Lukács has private interest standing and/or public interest standing.

Burden of proof

[51] It is important to start the analysis of the issue of standing by reminding that this case relates to a tariff issue, not an issue related to accessible transportation for persons with a disability.

[52] That being said, the Agency raised the issue of standing. Although Mr. Lukács is not required to be a member of the group "discriminated" against in order to have standing, he must have a sufficient interest in order to be granted standing. Hence, notwithstanding the use of the words "any person" in the ATR, the Agency, as any other court, will not determine rights in the absence of those with the most at stake. Determining otherwise would, as noted by the Supreme Court in *Canada v. Downtown Eastside Sex Workers*, "[...] be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized."

[53] Standing can be acquired in two ways, either as a private interest standing or as a public interest standing.

Private interest standing

[54] Private interest standing arises from the basic principle that a person who has a direct personal interest in the question to be litigated is legally entitled to invoke the jurisdiction of the court (see *Ogden v. British Columbia Registrar of Companies*, 2011 BCSC 1151, at paragraph 11).

[55] More particularly, in order to have standing, an applicant, such as Mr. Lukács, must be "aggrieved" or "affected", or have some other "sufficient interest" (Jones & de Villars, in *Principles of Administrative Law*, 2009, at pages 646-647). A person "aggrieved" or "affected" is one whose interests are affected more than those of the general public or community in issue.

[56] Further, the Supreme Court, in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (*Finlay v. Canada*), citing *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, stated that:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[57] In *Canada v. Downtown Eastside Sex Workers*, at paragraph 1, the Supreme Court stated that "[l]imitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government [...]"

[58] Considering this, the Agency must determine whether Mr. Lukács is a person who is "aggrieved" or "affected", or has some other "sufficient interest".

[59] As part of his argument concerning private interest standing, Mr. Lukács states that he would or could be considered a "large person" by Delta's agents as he is six feet tall and weighs approximately 175 pounds. Mr. Lukács also submits that in the absence of the precise meaning of a "large person", it is not possible to conclude that he could not be personally subject to the discriminatory practices due to his physical characteristics.

[60] In this regard, the Agency is of the opinion that it is not clear, as it is not supported, on what basis Mr. Lukács considers that a six-foot tall and 175-pound person is a "large person" and, for the purpose of Delta's policy, that he would not be able to sit in his seat without encroaching into the seat next to his.

[61] Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[62] Concerning the production and interrogatory mechanisms available, the Agency reminded the parties, in Decision No. LET-C-A-76-2013 (*Lukács v. United Air Lines, Inc.*) that:

> [16] [...] an applicant cannot file a complaint and then expect that any lack of information or documentation that, in the applicant's view, could be relevant in explaining or supporting the application be compensated for by inundating the respondent with questions or requests for production of documents.

[63] The Agency is of the opinion that the same rationale applies here as it is not appropriate for Mr. Lukács to submit that he is a "large person" and then to submit that to be certain of that, he should have the right to use the production and interrogatories mechanisms available pursuant to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104. As noted by the Agency in *Lukács v. United Air Lines, Inc.*, a proceeding before the Agency and the right to direct questions to the other party cannot turn into a commission of inquiry, or a "fishing expedition".

[64] The Agency finds that while Mr. Lukács describes himself as a "large person", this does not make him a "large person" for the purpose of Delta's policy and it is obvious, based on his comments regarding the need for interrogatories, that he has doubts as to whether Delta's policy even applies to him. It was for Mr. Lukács to file a complete application with the Agency, which would have included evidence that he is a "large person" for the purpose of Delta's policy at issue. How could the Agency find that Mr. Lukács has private interest standing, or more particularly, that he is a person "aggrieved" or "affected", or has some other "sufficient interest", which would give him the right to "invoke the jurisdiction of the Agency on the issue" when it is clear that Mr. Lukács is not certain himself. As pointed out by the Supreme Court of British Columbia in *Downtown Eastside Sex Workers Society v. Attorney General,* "private interest standing cannot be founded on hypothetical possibilities". In that regard, the Agency finds that Mr. Lukács's "private interest" submissions are founded on such hypothetical possibilities. On this basis, it is impossible for the Agency to find that Mr. Lukács is "aggrieved" or "affected", or has some other "sufficient interest".

[65] The Agency therefore finds that Mr. Lukács has no private interest standing in this case.

Public interest standing

[66] Mr. Lukács refers to the case of *Fraser v. Canada* for the proposition that public interest standing requires the consideration of the three following 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)?

[67] It is important to clarify that the second factor of *Fraser v. Canada* was phrased differently than what Mr. Lukács is proposing. Indeed, the Ontario Superior Court of Justice wrote: "Does the UFCW have a genuine interest in the validity of the legislation?"

[68] This clarification is important as it is consistent with the three factors established by the Supreme Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 (*Thorson v. Attorney General*), *The Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (*Nova Scotia Board of Censors v. McNeil*) and *Minister of Justice (Can.) v. Borowski,* [1981] 2 S.C.R. 575 (*Minister of Justice v. Borowski*) in which there was a challenge to the constitutionality or operative effect of legislation. Those cases led to a three-part test that a party needs to satisfy in order to be granted public interest standing:

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?

[69] In light of those cases, public interest was granted in cases where the constitutionality of legislation was contested if that three-part test was met.

[70] In *Finlay v. Canada,* the Supreme Court noted that one of the issues in that case was whether the second part of the test established in *Thorson v. Attorney General*, *Nova Scotia Board of Censors v. McNeil* and *Minister of Justice v Borowski* could also apply to a non-constitutional challenge to the statutory authority for administrative action. The Supreme Court concluded that it could.

[71] This conclusion was reiterated in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236, where the Supreme Court indicated that the *Finlay v. Canada* case made it clear that public interest standing could be granted to challenge an exercise of administrative authority as well as legislation. The Supreme Court also concluded that the principle for granting public interest standing that it had already established did not need to be expanded beyond that.

[72] Of note, in the *Canada v. Downtown Eastside Sex Workers* case referred to by both parties, which involved a Charter challenge to the prostitution provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, the Supreme Court reminded the parties that the limitations on standing were explained in *Finlay v. Canada.*

[73] Although the Supreme Court made it clear in *Canada v. Downtown Eastside Sex Workers*, at paragraph 36, "that the three factors should not be viewed as items on a checklist or as technical requirements" but "[...] should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes", the Supreme Court also made it clear, at paragraph 37, that the "[...] plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing [...]"

[74] Even looking at the three factors cumulatively and in light of their purposes, the fact remains that, in regard to the second factor, the challenge made by Mr. Lukács is not related to the constitutionality of legislation or to the non-constitutionality of administrative action. Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.

[75] The Agency finds that Mr. Lukács does not have public interest standing.

CONCLUSION

[76] The Agency finds that Mr. Lukács lacks both private interest standing and public interest standing and, accordingly, the Agency dismisses his complaint.

(signed)

Geoffrey C. Hare
Member

(signed)

Sam Barone
Member

From lukacs@AirPassengerRights.ca Sun Aug 24 15:08:21 2014
Date: Sun, 24 Aug 2014 15:08:18 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretariat <secretariat@otc-cta.gc.ca>
Subject: Discrimantory practices by Delta Airlines

Dear Madam Secretary:

I am writing to complain concerning the practices of Delta Airlines set out in the attached email concerning the transportation of large (obese) passengers:

1. in certain cases, Delta Airlines refuses to transport large (obese) passengers on the flights on which they hold a confirmed reservation, and require them to travel on later flights;

2. Delta Airlines requires large (obese) passengers to purchase additional seats to avoid the risk of being denied transportation.

It is submitted that these practices are discriminatory, contrary to subsection 111(2) of the Air Transportation Regulations, and they are also contrary to the findings of the Agency in Decision No. 6-AT-A-2008 concerning the accommodation of passengers with disabilities.

Sincerely yours,
Dr. Gabor Lukacs

[Part 2: ""]

The following attachment was sent,
but NOT saved in the Fcc copy:
A Application/PDF (Name="2014-08-24--Delta-to-Shubert--large_passengers_may_be_bumped.pdf") segment of about 135,062 bytes.

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

September 5, 2014

File No. M4120-3/14-04165

BY E-MAIL: lukacs@AirPassengerRights.ca

Gábor Lukács

Halifax, Nova Scotia

BY E-MAIL: andrea.novak@delta.com

Delta Air Lines, Inc.
1030 Delta Blvd. Dept. 982
Atlanta, Georgia
30354

Attention: Andrea Novak
International Senior Paralegal

Dear Sir/Madam:

Re: Certain practices relating to the transportation of obese persons

This refers to the attached complaint filed by Gábor Lukács with the Canadian Transportation Agency alleging that certain practices by Delta Air Lines, Inc. (Delta) relating to the transportation of obese persons are "discriminatory", contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58, as amended, and inconsistent with the Agency's findings in Decision No. 6-AT-A-2008 (Accessible transportation complaint: Additional Fares and Charges – one person, one fare; https://www.otc-cta.gc.ca/eng/ruling/6-at-a-2008).

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.

To enable the Agency to further consider this issue, Mr. Lukács is provided with the opportunity to file submissions with the Agency regarding his standing by not later than September 19, 2014. Delta will then have 5 business days from receipt of Mr. Lukács' submissions to answer. On receipt of Delta's answer, Mr. Lukács will have 3 business days to file his reply. The parties must copy each other when their respective submissions are filed with the Agency.

Should you have any questions regarding the foregoing, you may contact Mike Redmond by telephone at 819-997-1219 or facsimile at 819-953-5686.

BY THE AGENCY:

(signed)

Geoffrey C. Hare
Member

Halifax, NS

lukacs@AirPassengerRights.ca

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.

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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 2012[2] 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

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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

GAC\EPS

Halifax, NS

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AIR PASSENGER RIGHTS

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 <u>persons</u> 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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150212

Docket: 14-A-70

Ottawa, Ontario, February 12, 2015

Present: **DAWSON J.A.**
STRATAS J.A.
RYER J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

and

CANADIAN TRANSPORTATION AGENCY
and DELTA AIR LINES, INC.

Respondents

ORDER

UPON a motion in writing for an order pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 granting the Moving Party leave to appeal a decision made by the Canadian Transportation Agency dated November 25, 2014 and bearing Decision No. 425-C-A-2014;

THIS COURT ORDERS that the motion is granted.

"Eleanor R. Dawson"
J.A.

"DS"
"CMR"

Court File No.: A-135-15

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

AGREEMENT AS TO CONTENTS OF THE APPEAL BOOK (RULE 343(1))

PURSUANT to Rule 343(1) of the *Federal Courts Rules*, the parties agree that the documents, exhibits, and transcripts to be included in the appeal book are as follows:

1. Notice of Appeal;

2. Decision No. 425-C-A-2014 of the Canadian Transportation Agency, dated November 25, 2014 ("Decision Under Appeal");

3. Complaint of Dr. Lukács, dated August 24, 2014;

4. Interlocutory Decision No. LET-C-A-63-2014 of the Canadian Transportation Agency, dated September 5, 2014;

5. Submissions of Dr. Lukács, dated September 19, 2014;

6. Submissions of Delta, dated September 26, 2014;

7. Reply of Dr. Lukács, dated October 1, 2014;

8. Order of the Federal Court of Appeal granting Leave to Appeal, dated February 12, 2015;

9. Agreement as to the Contents of the Appeal Book (Rule 343(1)); and

10. Certificate of Completeness (Form 344).

March ___, 2015

DR. GÁBOR LUKÁCS
Appellant

March ___, 2015

ALLAN MATTE
Counsel for the Respondent,
Canadian Transportation Agency

March ___, 2015

GERALD CHOUEST
Counsel for the Respondent,
Delta Air Lines, Inc.

Court File No.: A-135-15

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

CERTIFICATE OF COMPLETENESS OF APPEAL BOOK

I, Dr. Gábor Lukács, the appellant, certify that the contents of the appeal book in this appeal are complete and legible.

April 2, 2015

DR. GÁBOR LUKÁCS

Halifax, NS

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Appellant