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

MEMORANDUM OF FACT AND LAW OF THE APPELLANT, DR. GÁBOR LUKÁCS

Dated: May 19, 2015

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Appellant

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Allan Matte

Tel: (819) 994 2226
Fax: (819) 953 9269
Allan.Matte@otc-cta.gc.ca

Solicitor for the Respondent,
Canadian Transportation Agency

AND TO: **BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP**
33 Yonge Street, Suite 201
Toronto, ON M5E 1G4

Gerard Chouest

Tel: (416) 982 3804
Fax: (416) 982 3801
chouest@lexcanada.com

Counsel for the Respondent,
Delta Air Lines, Inc.

TABLE OF CONTENTS

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

MEMORANDUM OF FACT AND LAW OF THE APPELLANT, DR. GÁBOR LUKÁCS

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. At stake in the present appeal is whether the practice of Delta Air Lines to discriminate against passengers based on their physical characteristics will go unchallenged. Dr. Gábor Lukács appeals, with leave of this Honourable Court under s. 41 of the *Canada Transportation Act*, from Decision No. 425-C-A-2014 (the "Decision") of the Canadian Transportation Agency (the "Agency"), denying him both private and public interest standing to bring a complaint concerning practices of Delta Air Lines that discriminate against "large" passengers by singling them out for denial of or delay in transportation.

2. Lukács is in a unique position to challenge the airline's practice, because he has the key piece of evidence: a damning email from Delta Air Lines' customer service, describing the discriminatory practices. Other passengers who experience discrimination are unlikely to succeed in establishing that they were denied transportation or delayed because of their physical characteristics, and are even less likely to be able to prove that the discrimination is systemic.

3. The Agency erred in law and rendered an unreasonable decision by failing to respect Parliament's intent in creating the Agency, and failing to recognize that the right to not be subjected to unreasonable or unduly discriminatory terms and conditions is a collective right of the travelling public, and that "any person" may bring a complaint about the breach of this right.

4. Furthermore, the Agency erred in law, applied the wrong legal principles, and fettered its discretion by:

(a) holding that public interest standing can only be granted in "cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested" (para. 74 of the Decision); and

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

This ground of appeal raises a question of law that is of central importance to the legal system as a whole, and is outside the Agency's specialized expertise.

B. THE STATUTORY SCHEME

5. Airlines operating flights within, to, or from Canada are required to create a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and the terms and conditions set out in the tariff are enforceable in Canada.

***Air Transportation Regulations*, s. 110(1)**
***Canada Transportation Act*, s. 67**

6. All terms and conditions of carriage established by an airline must be reasonable, and cannot be unduly discriminatory.

***Air Transportation Regulations*, s. 111(2)**
***Canada Transportation Act*, s. 67.2(1)**

7. The Agency is a quasi-judicial federal regulator created by the *Canada Transportation Act*. Parliament conferred upon the Agency broad regulatory powers with respect to the contractual terms and conditions that are imposed by airlines. The Agency may disallow any tariff or tariff rule that is found to be unreasonable or unduly discriminatory, and then it may substitute the disallowed tariff or tariff rule with another one established by the Agency itself.

***Air Transportation Regulations*, s. 113**
***Canada Transportation Act*, ss. 67.2(1) & 86(1)(h)**

8. In addition, if an airline fails to apply the terms and conditions set out in its tariff, the Agency may direct the airline to take corrective measures (collective remedies), or to compensate individuals who were adversely affected by the airline's conduct (individual remedies).

***Air Transportation Regulations*, s. 113.1**
***Canada Transportation Act*, ss. 67.1 & 86(1)(h)**

9. The Agency may inquire into, hear, and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

***Canada Transportation Act*, s. 37**

C. PROCEEDINGS BEFORE THE AGENCY

10. According to an email sent by a customer care agent of Delta Air Lines ("Delta") on or around August 20, 2014, the airline applies the following practices with respect to large passengers:

> Sometimes, we ask the passenger to move to a location in the place 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.
>
> [Emphasis added.]

Complaint of Dr. Lukács, attachment **Appeal Book, Tab 3, p. 21**

(i) The complaint

11. On August 24, 2014, Lukács filed a written complaint with the Agency alleging that the aforementioned practice of Delta is (unduly) discriminatory, contrary to subsection 111(2) of the *Air Transportation Regulations* (the "*ATR*").

Complaint of Dr. Lukács **Appeal Book, Tab 3, p. 20**

(ii) The preliminary issue of standing

12. On September 5, 2014, the Agency invited the parties to make submissions with respect to the standing of Lukács to bring the complaint.

Decision No. LET-C-A-63-2014 **Appeal Book, Tab 4, p. 22**

13. On September 19, 2014, Lukács submitted to the Agency that:

(a) the complaint did not seek any disability-related accommodation, but only sought to stop discrimination against passengers based on their size;

(b) "any person" has standing to bring a complaint pursuant to s. 111 of the *ATR*; and

(c) alternatively, Lukács should be granted public interest based on the well-established three-part test.

Submissions of Dr. Lukács (Sep. 19, 2014) **Appeal Book, Tab 5, p. 23**

14. On September 26, 2014, Delta submitted to the Agency that Lukács did not have private interest standing, and should not be granted public interest standing. Delta's arguments were focused on the third part of the test for public interest standing, and Delta submitted that there might be others who are directly affected by Delta's discriminatory practices, and who might complain about the same issue. Delta did not address the first or second part of the test,

and it did not dispute that the complaint raises a serious issue to be tried, nor did it dispute that Lukács had a genuine interest in the matter.

Submissions of Delta (Sep. 26, 2014) **Appeal Book, Tab 6, p. 38**

15. On October 1, 2014, Lukács filed his reply on the issue of standing.

Reply of Dr. Lukács (Oct. 1, 2014) **Appeal Book, Tab 7, p. 44**

(iii) The Decision under appeal

16. On November 25, 2014, the Agency issued Decision No. 425-C-A-2014 (the "Decision") dismissing the complaint on the basis that Lukács is lacking both private and public interest standing to bring the complaint.

Decision No. 425-C-A-2014, para. 76 **Appeal Book, Tab 2, p. 19**

17. Although Agency correctly found that Lukács is not required to be a member of the group discriminated against in order to have standing to complain about the impugned practices, in the same sentence, the Agency contradicted itself by stating that "he must have a sufficient interest in order to be granted standing."

Decision No. 425-C-A-2014, para. 52 **Appeal Book, Tab 2, p. 15**

18. Furthermore, the Agency misquoted the Supreme Court of Canada on the issue of public interest standing, and erroneously held that:

> 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.

On this erroneous basis, the Agency failed to assess all three branches of the tripartite test for granting public interest standing.

Decision No. 425-C-A-2014, para. 74 **Appeal Book, Tab 2, p. 19**

PART II – STATEMENT OF THE POINTS IN ISSUE

19. The issues to be determined on this appeal are:

(a) Who has standing to invoke the Agency's jurisdiction to eliminate unreasonable and unduly discriminatory terms and conditions of airlines?

(b) Did the Agency err in law, apply the wrong legal principles, and fetter its discretion by:

(1) holding that public interest standing can only be granted in "cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested"?

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

PART III – STATEMENT OF SUBMISSIONS

A. WHO CAN COMPLAIN TO THE AGENCY ABOUT UNREASONABLE OR UNDULY DISCRIMINATORY TERMS AND CONDITIONS?

20. A fundamental flaw in the Decision is that the Agency views its powers and mandate to eliminate unreasonable or unduly discriminatory terms and conditions as if these were ordinary functions of "any other court," subject to the law of standing.

Decision No. 425-C-A-2014, para. 52 **Appeal Book, Tab 2, p. 15**

21. The Agency, however, is not a court but a quasi-judicial regulator, whose mandate and consideration of whether terms and conditions are unreasonable or unduly discriminatory is quite different from that of a court.

***Lukács v. Air Canada*, 250-C-A-2012, para. 30**

22. The role of the Agency with respect to unreasonable or unduly discriminatory terms and conditions is similar to the role of the Canadian Food Inspection Agency with respect to unsafe food products: to protect the entire public, and to take action *before* anyone is harmed. Regulators with such a preventive role are mandated to consider the public interest, rather than the private interest of the complainant, in the subject matter of the complaint. For example, anyone can complain about meat infected with *E. coli*, and it would be absurd to reject such a complaint on the basis that the complainant is vegetarian.

23. As explained below, both the Agency's own past interpretation and a textual, contextual, and purposive analysis of the *Canada Transportation Act* lead to the conclusion that Parliament intended to establish a regulatory scheme that entails the Agency accepting complaints from any person, and not only from those who are affected by the terms and conditions of an airline; being affected is only a prerequisite for individual remedies (monetary compensation).

(i) The Agency's own analysis in *Krygier v. several carriers*

24. The question of standing to bring a complaint to the Agency arose recently in *Krygier v. several carriers*:

> [...] The respondents submit that Mr. Krygier has not established that he is sufficiently affected by the policies challenged and that he has the requisite "direct personal interest standing" or "interest for public interest standing."

The Agency began its analysis on standing by distinguishing the case from disability-related complaints:

> The respondents refer to Decision No. 431-AT-MV-2008 to support their position. The Agency notes that the application at issue in that Decision concerned the Agency's mandate to inquire into matters concerning undue obstacles in the transportation network to the mobility of persons with disabilities. [...] Therefore, the conclusions reached in that Decision have no bearing on the present case.

The Agency then went on to cite from its own Decision No. 746-C-A-2005:

> 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. [...]
>
> ⋮
>
> 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.
>
> [Emphasis added.]

The Agency finally concluded:

> The Agency is of the opinion that the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint, and that it has jurisdiction to consider Mr. Krygier's complaint as filed. As such, the Agency denies the respondents' motion to dismiss Mr. Krygier's complaint against Air Canada, Air Transat, Sunwing, Jazz and Porter and will consider the complaint filed against all respondents.
>
> ***Krygier v. several carriers*, LET-C-A-104-2014, pp. 5-6**

25. In *Krygier v. several carriers*, the Agency correctly recognized its mandate and the purpose of s. 67.2 of the *Canada Transportation Act* and s. 111 of the *ATR* as being of a preventive nature, and thus correctly dismissed the challenge to Mr. Krygier's standing. The Agency's Decision at bar contains no intelligible explanation as to why the same principles should not apply to the standing of Lukács in the present case.

(ii) Textual and contextual analysis: "any person" v. "person adversely affected"

26. As the Agency noted in *Krygier*, s. 67.2(1) of the *Canada Transportation Act* provides that the Agency may eliminate unreasonable or unduly discriminatory terms and conditions if the Agency receives a "complaint in writing to the Agency by any person" (emphasis added). The Agency's broad interpretation of "any person" in *Krygier* is harmonious with the Act for the following reasons.

> ***Canada Transportation Act*, s. 67.2(1)**

27. The *Canada Transportation Act* uses two different phrases: "any person" and "person adversely affected." The phrase "any person" appearing in ss. 67.1 and 67.2(1) refers to a complainant who brings a complaint in writing to the Agency. On the other hand, "person adversely affected" appearing in ss. 67.1(b) and 86(1)(h)(iii) refers to a person who can seek monetary compensation.

> ***Canada Transportation Act*, ss. 67.1, 67.2(1), 86(1)(h)(iii)**

28. Parliament is presumed to not be speaking in vain, and to speak consistently. When a statute uses different words in relation to the same subject, such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.

***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, paras. 38 and 41**

29. Thus, the phrases "any person" and "person adversely affected" have different meanings in the *Canada Transportation Act*, and "any person" does not have to be (adversely) affected. Therefore, the phrase "any person" in s. 67.2(1) indicates that a complaint may be brought by "any person" even if they are not "adversely affected"; however, only those "adversely affected" can obtain monetary compensation.

30. Sections 111 and 113 of the *ATR*, which govern the terms and conditions applicable to international carriage of passengers, serve the same purpose of eliminating unreasonable and unduly discriminatory tariff provisions as s. 67.2(1) of the *Canada Transportation Act*. The only difference is that ss. 111 and 113 of the *ATR* allow the Agency to act even in the absence of a complaint from a member of the public, on its own motion.

***Air Transportation Regulations*, ss. 111 and 113**
***Canada Transportation Act*, s. 67.2(1)**

(iii) Purposive analysis

31. The Agency is not merely a quasi-judicial tribunal for adjudicating private disputes between private parties, but also a regulator that is required to act in the public interest to maintain a functional transportation network. Indeed, in enacting the *Canada Transportation Act*, Parliament chose to create a regulatory scheme to regulate the national transportation system in order to achieve certain policy objectives, which are identified in section 5.

***Canada Transportation Act*, s. 5**

32. Eliminating unreasonable or unduly discriminatory terms and conditions applied by airlines is not only a consumer protection measure, but also an economic necessity for maintaining a functional transportation network, which is vital for the economic growth of a country as large as Canada.

33. Consequently, having a transportation network that is free of unreasonable or unduly discriminatory terms and conditions is, unlike the right to monetary compensation, a collective right of the public at large, in the same fashion as the rights conferred by the *Official Languages Act* are collective rights.

34. Thus, the purpose of the Agency's powers to eliminate unreasonable or unduly discriminatory terms and conditions applied by airlines is to prevent harm and damage to the public *before* anyone is harmed or suffers damages, and to serve the public interest. These preventive powers must be distinguished from the restitutional powers of the Agency to award monetary compensation to a "person adversely affected," which serve the complainant's private interest.

35. In sharp contrast to the powers of courts to grant restitution to parties before it, the purpose of preventive powers of regulatory bodies is to protect the general public *before* anyone is harmed or suffers damages. Preventive regulatory powers can be invoked by any member of the public, regardless of whether they are personally at risk of being harmed or suffering damages, because such powers protect the public interest, and not a private interest. Holding otherwise would undermine the very purpose for which preventive powers were conferred.

36. Legislative history, parliamentary debates, and similar material may be properly considered to establish the background and purpose of legislation as long as they are relevant, reliable, and are not assigned undue weight.

***Castillo v. Castillo*, 2005 SCC 83, para. 23**

37. Further support to the proposition that the Agency cannot avoid considering and deciding complaints falling within its jurisdiction is found in the statement of Ms. Moya Green, the Assistant Deputy Minister of Transport, during the study of Bill C-101 (which became the *Canada Transportation Act*) by the Standing Committee on Transport:

> Under part I the agency can subpoena witnesses, can inquire into any complaint that is laid before it. The agency "must" decide the matter. The agency does not have a discretion to say "well, that one I'm not going to look at". The agency must decide the matter, and must decide the matter with dispatch.
>
> ⋮
>
> Most importantly, under clause 38, the agency has to hear any complaint, on any matter or act that is the subject of this or other pieces of legislation under its jurisdiction, and the agency shall make a decision. Under clause 29 it is obliged to hear it, obliged to decide.
>
> ⋮
>
> There is a misconception that I think it is very important the committee get on its table early. Subclause 27(2) does not entitle the agency not to deal with the complaint. The agency is required by law to take complaints and required to make decisions.
>
> [Emphasis added.]
>
> ***Hansard*, Volume 133, Number 235, 1st Session, 35th Parliament (October 2, 1995), p. 15078**
>
> **Study of Bill C-101 (October 5, 1995):**
> **Standing Committee on Transport, Meeting No. 63,**
> **35th Parliament, 1st Session, pp. 3, 6**
>
> ***Hansard*, Volume 133, Number 009, 2nd Session, 35th Parliament (March 8, 1996), p. 490**

38. Therefore, whether the complainant is personally affected by the terms and conditions complained of is irrelevant to the Agency's mandate and preventive powers to eliminate unreasonable or unduly discriminatory terms and conditions. The law of standing cannot be applied to such preventive regulatory powers.

(iv) Application to the case at bar

39. In the Decision at bar, the Agency correctly noted that the complaint of Lukács relates to a tariff issue, and is unrelated to accessible transportation for persons with a disability. This observation is important, because accommodation of a disability is an individual remedy that requires assessing the individual needs of the person seeking it, while tariff complaints invoke the Agency's preventive powers, and as such, they can and have regularly been dealt with by the Agency "on principle," without the presence of an "affected" person.

Decision No. 425-C-A-2014, para. 51

40. The Agency also correctly concluded that Lukács is not required to be a member of the group discriminated against in order to have standing.

Decision No. 425-C-A-2014, para. 52

41. However, the Agency's finding that Lukács lacks "a sufficient interest in order to be granted standing" necessary to bring a complaint about the discriminative practices of Delta is unreasonable, because:

(a) it contradicts the finding that Lukács does not have to be a member of the group discriminated against in order to have standing;

(b) it is absurd to apply the law of standing to preventive regulatory powers that, by their nature, serve the public interest rather than the private interest of the complainant, and which can be exercised by the regulator even in the absence of a complaint; and

(c) it defeats the preventive purpose for which Parliament conferred upon the Agency powers to eliminate unreasonable and unduly discriminatory terms and conditions.

42. Hence, the Agency erred in law and rendered an unreasonable decision in dismissing the complaint of Lukács for lack of standing.

B. PUBLIC INTEREST STANDING

43. The Agency denied Lukács public interest standing without assessing all three factors of the well-established tripartite test, and based the denial on the erroneous and unsubstantiated premise that public interest standing *cannot be granted* in the present case:

> 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.

Decision No. 425-C-A-2014, para. 74 **Appeal Book, Tab 2, p. 19**

44. It is submitted that the Agency erred in law, misquoted the Supreme Court of Canada, applied the wrong legal principles, and fettered its discretion to grant public interest standing.

(i) Standard of Review

45. Whether public interest standing is available only in cases "in which constitutionality of legislation or the non-constitutionality of administrative action is contested" and the legal principles governing the granting of public interest standing are questions of law that are of central importance to the legal system as a whole, and are outside the Agency's specialized expertise. Thus, it is submitted that these questions should be reviewed on the correctness standard.

46. However, in the present appeal, nothing turns on standard of review, because a decision founded on wrong legal principles is unreasonable. Discretion does not immunize a decision from judicial review of the legal principles used.

***Gavrila v. Canada (Justice)*, 2010 SCC 57, para. 11**

(ii) The current state of the law

47. Public interest standing is not confined to constitutional cases nor to cases challenging the legality of administrative actions, but is also available in certain proceedings against private parties. Both cases in support of this proposition are related to transportation, the first being the 2005 case of *Thibodeau v. Air Canada*, while the second is a case decided by the Agency.

Thibodeau v. Air Canada

48. The 2005 case of *Thibodeau v. Air Canada* concerned the failure of Air Canada to comply with the *Official Languages Act*. By 2005, Air Canada had long been privatized, and the sole reason that it was nonetheless subject to the *Official Languages Act* was s. 10 of the *Air Canada Public Participation Act*:

> 27 The Canadian government decided to privatize the airline. This project materialized through the enactment of the ACPPA. The airline, previously a Crown corporation, now became an ordinary company whose activities were subject to the Canada Business Corporations Act, R.S.C. 1985, c. C-44.
>
> 28 Under section 10 of the ACPPA, the OLA applies to Air Canada. It is clear that this company is under a statutory duty to comply with the OLA and the Regulations thereunder.
>
> [Emphasis added.]

***Thibodeau v. Air Canada*, 2005 FC 1156, paras. 27-28**

49. In *Thibodeau*, the Federal Court granted Thibodeau standing to challenge Air Canada's non-compliance with the *Official Languages Act* on behalf of the public interest, even though the case did not involve any challenge to the constitutionality of legislation nor the legality of administrative action, but rather challenged the actions and omissions of an "ordinary company."

***Thibodeau v. Air Canada*, 2005 FC 1156, paras. 74-79**

50. The test for granting public interest standing articulated in *Thibodeau* notably makes no reference to the "validity of the legislation" at all:

> 1. The applicant must raise a serious and justiciable issue;
>
> 2. He must have a genuine interest; and
>
> 3. There must be no other reasonable and effective manner in which the issue may be brought before the Court.

***Thibodeau v. Air Canada*, 2005 FC 1156, para. 75**

51. *Thibodeau* demonstrates that public interest standing is not confined to cases challenging the validity of legislation or legality of administrative actions, but it is also available in proceedings against private parties, at least in cases that concern collective rights. (Language rights are collective rights of the public, and the *Official Languages Act* permits "any person" to make a complaint.)

52. This Honourable Court affirmed the judgment of the Federal Court in *Thibodeau*.

***Thibodeau v. Air Canada*, 2005 FCA 115**

***ATU Local 279 v. OC Transpo*, decided by the Agency**

53. In *ATU Local 279 v. OC Transpo*, the Agency was called upon to determine whether the failure to purchase automated announcement systems for bus stops created an "undue obstacle" for passengers with disabilities within the meaning of s. 172 of the *Canada Transportation Act*.

***ATU Local 279 v. OC Transpo*, 431-AT-MV-2008**

54. *ATU Local 279 v. OC Transpo* did not involve a constitutional challenge nor a challenge to the legality of administrative actions. Indeed, the refusal of the City of Ottawa, in its capacity as a corporation operating a public transportation system, to purchase automated announcement systems for bus stops was a business decision, and not an administrative action.

55. In sharp contrast to the Decision at bar, in *ATU Local 279 v. OC Transpo*, the Agency itself articulated and applied essentially the same test as in *Thibodeau*. Based on this test, the Agency found that the trade union could meet the first and second part of the test, but the third part of the test was not met, because a specific individual with private interest standing in accommodation of his disabilities was identified.

***ATU Local 279 v. OC Transpo*, 431-AT-MV-2008, paras. 11-12**

56. Therefore, in the Decision at bar, the Agency not only misstated the law and applied the wrong legal test with respect to public interest standing, but also contradicted its own jurisprudence on public interest standing.

(iii) The Agency misquoted the Supreme Court of Canada

57. It is difficult to understand what led the Agency to erroneously believe that the Supreme Court of Canada restricted the second part of the test to cases "in which constitutionality of legislation or the non-constitutionality of administrative action is contested."

Decision No. 425-C-A-2014, para. 74

58. As the Agency has referred to *Canadian Council of Churches v. Canada* in this context, it is worth reviewing this case for greater certainty. This case turned on the third part of the test, that is, the availability of another reasonable and effective way. With respect to the second part, it was held that:

> There can be no doubt that the applicant has satisfied this part of the test. The Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

***Canadian Council of Churches v. Canada*,**
[1992] 1 S.C.R. 236, para. 39

59. The question considered by the Supreme Court under the heading of "Should the Current Test for Public Interest Standing be Extended" was not the nature of cases where public interest standing is available, but rather whether the third part of the test should be relaxed:

> The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded.
>
> ***Canadian Council of Churches v. Canada*,**
> **[1992] 1 S.C.R. 236, para. 36**

60. Therefore, the Agency misquoted and/or misapprehended the Supreme Court of Canada with respect to the availability of public interest standing.

(iv) Failure to assess all three factors

61. Although the granting of public interest standing is a discretionary decision, that discretion must be exercised in accordance with the well-established principles of the law governing the question. Failing to consider all three factors of the tripartite test for granting public interest standing is an error of law.

> ***Alberta (Workers' Compensation Board) v. Appeals Commission*,**
> **2005 ABCA 276, paras. 21-22**

62. As the Agency correctly acknowledged in the Decision, the three factors of the tripartite test for public interest standing should not be viewed as items on a checklist or as technical requirements, but rather should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purpose.

> **Decision No. 425-C-A-2014, para. 73** **Appeal Book, Tab 2, p. 18**
>
> ***Canada v. Downtown Eastside Sex Workers*, 2012 SCC 45, para. 36**

63. Alas, the Agency failed to assess any of the three factors: the Decision is silent as to whether in the Agency's opinion Lukács raised a "serious and justiciable issue," whether Lukács had a "genuine interest" in the matter, or if the Agency believed that there was another reasonable and effective manner in which to bring the issue before the Agency. Thus, the Agency failed to perform the analysis that it explicitly acknowledged it was required to perform.

64. The Agency's failure to consider all three factors is particularly troubling, because they were addressed in great detail in the submissions of Lukács, and Delta did not dispute that the first two factors were met, but confined its submissions to the third factor.

Submissions of Dr. Lukács (Sep. 19, 2014) Appeal Book, Tab 5, pp. 29-33
Submissions of Delta (Sep. 26, 2014) Appeal Book, Tab 6, pp. 41-43

65. In light of the Agency's public mandate to eliminate unreasonable and unduly discriminative terms and conditions (even in the absence of a complaint), the Agency should not only have considered, but should also have given significant weight to the third factor: will Delta's discriminatory practices escape scrutiny if Lukács is not granted public interest standing?

66. This question must be answered in the affirmative, because Lukács has the key piece of evidence, the damning email from Delta's customer service, describing the discriminatory practices. Other passengers who experience discrimination are unlikely to succeed in establishing that they were denied transportation or delayed because of their physical characteristics, rather than for other reasons; they are even less likely to be able to prove that discrimination is systemic, and is part of Delta's standard procedure.

Complaint of Dr. Lukács, attachment Appeal Book, Tab 3, p. 21

67. Thus, the Agency's Decision effectively shields Delta's discriminatory practices from scrutiny, contrary to Parliament's intent in establishing the Agency.

68. Therefore, it is submitted that the Decision is unreasonable not only because the Agency failed to apply the correct legal test, but also because the Decision's outcome falls outside the acceptable range of outcomes.

(v) Conclusion on public interest standing

69. As the *Thibodeau* and *ATU Local 279* cases demonstrate, public interest standing is not confined to cases involving a constitutional challenge or a challenge to the legality of administrative action. The "principle of legality," articulated in *Downtown Eastside*, applies *mutatis mutandis* in cases involving collective rights of the public: under the first and third parts of the legal test, the decision-maker must consider whether there is a "serious issue" and whether the issue will escape scrutiny if public interest standing is refused.

70. The Agency fettered its discretion to grant public interest standing by erroneously holding that public interest standing was *not available* due to the nature of the case.

71. In the case at bar, it is apparent on the face of the Decision that the Agency applied the wrong legal principles to determine whether to grant Lukács public interest standing by failing to consider whether the complaint of discrimination based on physical characteristics raised a "serious issue," whether Lukács had a "genuine interest" in the issue, and whether the issue would escape scrutiny if public interest standing were refused.

72. The Decision also falls outside the acceptable range of outcomes in that it shields Delta's discriminatory practices from scrutiny.

73. Hence, the Agency's Decision is unreasonable, and ought to be set aside.

C. COSTS

74. In *Lukács v. Canada (Transportation Agency)*, this Honourable Court awarded the appellant disbursements even though the appeal was dismissed:

> In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.
>
> ***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 62**

75. Lukács is respectfully asking this Honourable Court that he be awarded his disbursements in any event of the cause, and if successful, also a modest allowance for his time, for the following reasons:

(a) the appeal raises novel questions of law that have not been addressed by this Honourable Court;

(b) the issues raised in the appeal are not frivolous (demonstrated by the fact that leave to appeal was granted by this Honourable Court); and

(c) the appeal, seeking to clarify the law with respect to standing to complain to the Agency, is in the nature of public interest litigation.

PART IV – ORDER SOUGHT

76. The Appellant, Dr. Gábor Lukács, is seeking an Order:

(a) setting aside Decision No. 425-C-A-2014 of the Canadian Transportation Agency;

(b) directing that a differently constituted panel of the Agency hear and determine the Appellant's complaint on its merits (that is, determine whether Delta Air Lines' practices are "unduly discriminatory," contrary to section 111 of the *Air Transportation Regulations*, S.O.R./88-58);

(c) awarding the Appellant 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

(d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 19, 2015

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Appellant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, S.O.R./88-58,
ss. 110, 111, 113, 113.1

Canada Transportation Act, S.C. 1996, c. 10,
ss. 5, 37, 41, 67, 67.1, 67.2, 86

CASE LAW

Alberta (Workers' Compensation Board) v. Appeals Commission, 2005 ABCA 276

Amalgamated Transit Union Local 279 v. OC Transpo, Canadian Transportation Agency, Decision No. 431-AT-MV-2008

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236

Castillo v. Castillo, 2005 SCC 83

Gavrila v. Canada (Justice), 2010 SCC 57

Krygier v. several carriers, Canadian Transportation Agency, Decision No. LET-C-A-104-2014

Lukács v. Air Canada, Canadian Transportation Agency, Decision No. 250-C-A-2012

Lukács v. Canada (Transportation Agency), 2014 FCA 76

Thibodeau v. Air Canada, 2005 FC 1156

Thibodeau v. Air Canada, 2007 FCA 115

LEGISLATIVE HISTORY OF THE CANADA TRANSPORTATION ACT

First reading of Bill C-101 (June 20, 1995): *Hansard*, Volume 133, Number 222, 1st Session, 35th Parliament, p. 14188

Bill C-101 is referred to the Standing Committee on Transport (October 2, 1995): *Hansard*, Volume 133, Number 235, 1st Session, 35th Parliament, p. 15078

Study of Bill C-101 (October 5, 1995): Standing Committee on Transport, Meeting No. 63, 35th Parliament, 1st Session

Presentation of the Report of the Standing Committee on Transport on Bill C-101 (November 27, 1995): *Hansard*, Volume 133, Number 265, 1st Session, 35th Parliament, p. 16838

Bill C-14 is introduced and deemed to have been studied by the Standing Committee on Transport (March 8, 1996): *Hansard*, Volume 133, Number 009, 2nd Session, 35th Parliament, p. 490