



November 4, 2015

Case No. 15-03657

**BY E-MAIL:**

lukacs@AirPassengerRights.ca

**BY E-MAIL:**

orestes.pasparakis@nortonrosefulbright.ca  
rahoor.agarwal@nortonrosefulbright.ca

Dr. Gábor Lukács

Porter Airlines Inc.  
c/o Orestes Pasparakis  
Rahool Agarwal  
Norton Rose Fulbright Canada LLP

Dear Sirs:

**Re: Application by Dr. Gábor Lukács against Porter Airlines Inc.**

**INTRODUCTION**

On August 10, 2015, Dr. Gábor Lukács filed an application with the Canadian Transportation Agency (Agency) against Porter Airlines Inc. (Porter). On September 3, 2015, Porter filed its answer.

**ISSUES**

Before proceeding with the substantive case, the Agency will address the following issues:

- 1) Whether Dr. Lukács has standing with respect to some or all of the allegations made in his application; or,
- 2) If the Agency determines that Dr. Lukács does have standing, whether some or all of the issues raised in the application are now moot, given Porter's actions.

**ISSUE 1: WHETHER DR. LUKÁCS HAS STANDING WITH RESPECT TO SOME OR ALL OF THE ALLEGATIONS MADE IN HIS APPLICATION**

**Standing**

Standing refers to the right of a person to bring a legal claim or seek judicial enforcement of a right.

The law governing standing is intended to limit the ability of those with no real stake in a matter from over-burdening the judicial system with frivolous or duplicative cases, and to ensure that cases are determined based upon the competing arguments of those directly affected by matters in dispute.

Aside from situations in which statutory provisions specify who may bring an action, which is not applicable in this case, there are two types of standing:

1. Public interest standing
2. Private interest standing

### **Public interest standing**

Public interest standing is designed to ensure citizens can verify whether the government is acting legally.

To have public interest standing, a person must satisfy three criteria:

1. the case raises a serious justiciable issue;
2. the party bringing the action has a real stake or a genuine interest in its outcome; and
3. the action is a reasonable and effective means to bring the case to court.

Importantly, a serious justiciable issue is one that either raises a substantial constitutional issue or an important issue about the legality of administrative (i.e., government) action.

### **Private interest standing**

Private interest standing arises when a person is personally and directly affected by a matter. For standing purposes, it is not sufficient for a person to simply be “righting a wrong, upholding a principle, or winning a contest” (*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at para. 21).

### **Consequences if a person does not have standing**

If a determination is made that a person does not have standing, their application must be dismissed.

### **Practice of the Agency with respect to standing**

#### Unjust, unreasonable, and/or unclear tariffs

The Agency has recognized that any person may complain that a tariff is unjust and unreasonable, or unclear, pursuant to:

- subsection 67.2(1) of the CTA; and,
- section 111 and paragraphs 107(1)(n) and 122(c) of the ATR.

Any person could potentially be affected by a tariff provision and if that carrier's tariff is unjust and unreasonable, or unclear, that person should have recourse to the CTA or ATR provisions listed above.

Failure to properly apply tariffs, or application of terms and conditions not in tariffs

If, in the past, a carrier either failed to apply its tariff or applied terms and conditions not in its tariff, the only persons affected by such breaches are passengers of the carrier at the time of the breaches. Future passengers would not be affected by past breaches, unless it is alleged that the breaches are ongoing.

Therefore, in situations of a carrier failing to properly apply its tariff, or applying terms and conditions not in its tariff, in the past (i.e., not ongoing), the only persons with standing are passengers of the carrier at the time of and who are affected by the alleged breaches.

**Agency jurisprudence**

Lukács v. United (Decision No. 200-C-A-2012)

In Decision No. 200-C-A-2012, Dr. Lukács complained under paragraph 18(b) of the ATR that information relating to delayed and damaged baggage compensation appearing on United's Web site misrepresented its obligations under the Montreal Convention.

The Agency determined that Dr. Lukács' complaint was moot, because

- United had revised its Web site;
- the information that was the subject of Dr. Lukács' complaint no longer appeared on United's Web site; and,
- deciding the subject matter of the complaint would have no practical effect on the rights of the parties.

Standing was not dealt with by the Agency in that case.

Lukács v. United (Decision No. 335-C-A-2012)

In Decision No. 335-C-A-2012, Dr. Lukács complained under paragraph 18(b) of the ATR that information relating to delayed, lost and damaged baggage compensation appearing on United's Web site misrepresented its obligations under the Montreal Convention. Specifically, he argued that United could not require prior approval from its Baggage Resolution Service Centre in order for customer expenses to be reimbursed.

The Agency upheld the complaint.

Standing was not dealt with by the Agency in that case, and mootness was not an issue, as United's Web site was currently displaying the statement at issue.

Lukács v. Delta (Decision No. 425-C-A-2014)

In Decision No. 425-C-A-2014, the Agency denied Dr. Lukács private interest standing and public interest standing to complain that tariff provisions targeting “large” passengers were unjustly discriminatory.

The Agency denied Dr. Lukács private interest standing because he was unable to prove that he qualified as a “large” person. As such, there was no evidence that, were he ever to travel with Delta, he would be subject to their allegedly discriminatory tariff.

The Agency denied Dr. Lukács public interest standing because he was not challenging the constitutionality of legislation or the non-constitutionality of administrative action.

**The current matter**

Dr. Lukács makes the following allegations:

1. between February 19, 2013 and August 4, 2015, Porter published false and/or misleading information on the carrier’s Web site concerning the compensation tendered to passengers for expenses incurred as a result of baggage delay, contrary to paragraph 18(b) of the ATR;
2. between February 19, 2013 and August 6, 2015, Porter shortchanged passengers travelling on international or transborder itineraries by applying terms and conditions respecting baggage delay not set out in the respective tariffs governing such itineraries, and/or failing to apply its International Tariff Rule 18.2 and/or Transborder Tariff Rule 80(F), contrary to subsection 110(4) of the ATR; and
3. between October 10, 2013 and August 6, 2015, Porter shortchanged passengers travelling on domestic itineraries by applying terms and conditions with respect to baggage delay not set out in the carrier’s Domestic Tariff and/or failing to apply Domestic Tariff Rule 16.2, contrary to subsection 67(3) of the CTA.

The Agency notes that all of the allegations concern past breaches by Porter. There is no allegation of ongoing breaches by Porter. Furthermore, the Agency notes that Dr. Lukács never claims to have been a passenger of Porter during the periods identified in his allegations, nor does he claim to have been affected by the past breaches in some other manner.

False or misleading information

Paragraph 18(b) of the ATR provides that:

18. Every scheduled international licence and non-scheduled international licence is subject to the following conditions:

[...]

(b) the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto; and

Based on the following, the Agency is of the opinion that there is a serious question of whether Dr. Lukács has the proper standing to file his application under paragraph 18(b) of the ATR.

First, with respect to public interest standing, Dr. Lukács is not challenging either the constitutionality of any legislation, nor the legality of an administrative action taken by a government body.

Second, with respect to private interest standing, Dr. Lukács is alleging a breach that occurred during a specific past period of time, and he does not claim that he was affected, or would ever be affected, by that alleged breach.

Shortchanging passengers

Subsection 110(4) of the ATR provides that:

Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

Subsection 67(3) of the CTA provides that:

The holder of a domestic licence shall not apply any fare, rate, charge or term or condition of carriage applicable to the domestic service it offers unless the fare, rate, charge, term or condition is set out in a tariff that has been published or displayed under subsection (1) and is in effect.

Based on the following, the Agency is of the opinion that there is a serious question of whether Dr. Lukács has the proper standing to file his application under subsection 110(4) of the ATR and subsection 67(3) of the CTA.

First, with respect to public interest standing, Dr. Lukács is not challenging either the constitutionality of any legislation, nor the legality of an administrative action taken by a government body.

Second, with respect to private interest standing, Dr. Lukács is alleging breaches that occurred during specific past periods of time, and he does not claim that he was affected, or would ever be affected, by those alleged past breaches.

#### Agency finding

For all these reasons, the Agency is of the preliminary opinion that Dr. Lukács' application has not been properly brought, given his apparent lack of standing.

### **ISSUE 2: IN THE EVENT THE AGENCY DETERMINES THAT DR. LUKÁCS DOES HAVE STANDING, WHETHER THE ISSUES RAISED IN THE APPLICATION ARE NOW MOOT GIVEN PORTER'S ACTIONS**

#### **Mootness**

Mootness refers to the discretionary power of a tribunal, like the Agency, to refuse to hear an application when the issue has already been resolved:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice [...]

*(Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, at para. 15)*

The discretion to depart from the general policy not to hear moot matters includes, for example, situations where there is an opportunity to resolve issues of public importance, particularly where the law would otherwise remain in a state of uncertainty.

**Dr. Lukács**

Dr. Lukács requests that the Agency grant the following relief:

- 1) make an explicit finding that Porter published false/and or misleading information on its Web site, contrary to paragraph 18(b) of the ATR;
- 2) make an explicit finding that Porter applied terms and conditions not set out in its tariffs and/or failed to apply the terms and conditions set out in its tariffs;
- 3) order Porter to publish on its Web site and in the mainstream media an invitation for passengers whose baggage was delayed since February 19, 2013 to submit their claims for compensation in accordance with Porter's tariffs;
- 4) order Porter to process, in accordance with Porter's tariffs, belated claims of passengers whose baggage was delayed since February 19, 2013, provided that the claim is submitted within six months of the making of the order;
- 5) order Porter to compensate passengers for expenses incurred in relation to delayed baggage in accordance with Porter's applicable tariffs; and
- 6) order Porter to reimburse him for the out-of-pocket expenses he incurs in relation to the present proceeding.

**Porter**

Porter maintains that the relief sought by Dr. Lukács is unnecessary.

Porter submits, among other things, that the issues raised in Dr. Lukács' application are moot, given that Porter has:

- amended its Web site page;
- refreshed its training of employees regarding compensation for delayed baggage; and
- sent a corrective e-mail to 2, 485 potentially affected passengers advising them that, due to confusion regarding Porter's policy, they are entitled to submit a request for compensation for any reasonable expenses incurred due to their delayed baggage by February 29, 2016.

**Agency finding**

Given these actions taken by Porter, the Agency is of the preliminary opinion that that there is no practical merit to the Agency proceeding with a determination of this application.

**ORDER**

As set out above, the Agency is of the preliminary opinion that the application contains the following fundamental defects:

- 1) Dr. Lukács does not have standing to bring his application
- 2) Porter has already rectified its Web site and undertaken the necessary corrective measures to compensate any affected passengers, rendering the issues raised in the application moot.

The Agency, pursuant to section 42 of the Dispute Adjudication Rules, requires Dr. Lukács to justify, by not later than November 26, 2015, why the Agency should not dismiss his application.

Dr. Lukács is also required to provide Porter with a copy of any submission he makes, following which Porter will have ten business days to respond to Dr. Lukács' submission.

**BY THE AGENCY:**

(signed)

\_\_\_\_\_  
Sam Barone  
Member

(signed)

\_\_\_\_\_  
Stephen Campbell  
Member

(signed)

\_\_\_\_\_  
William G. McMurray  
Member