Halifax, NS

lukacs@AirPassengerRights.ca

November 26, 2015

**VIA EMAIL**

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. Porter Airlines**
**Application concerning misrepresentation, application of terms and conditions not set out in the tariff, and failure to apply the tariff with respect to compensation for baggage delay / Case No.: 15-03657**
**Response to Preliminary Decision No. LET-C-A-68-2015**

Please accept the following response of the Applicant to Preliminary Decision No. LET-C-A-68-2015 of the Agency (the **"Preliminary Decision"**).

## OVERVIEW

In *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013 and *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013, the Agency directed Porter Airlines to amend its tariffs to require the airline to reimburse passengers for expenses incurred as a result of baggage delay, up to about $1,800 (cash).

Although Porter Airlines amended its tariffs, the amendments were not implemented in practice. In most cases, the airline did not comply with the obligation set out in the tariffs, and instead it misled passengers to believe that they were only entitled to $125 in travel vouchers.

The Application is seeking an Order, pursuant to s. 67.1(c) of the *Canada Transportation Act* ("*CTA*") and/or s. 113.1(a) of the *Air Transportation Regulations* ("*ATR*"), directing Porter Airlines to take corrective measures with respect to all passengers whose baggage was delayed since 2013.

In the Preliminary Decision, the Agency expressed the preliminary opinion that the Applicant lacks standing and that the Application is moot, and sought further submissions from the parties.

**PRELIMINARY MATTER:**
**MATERIAL OMISSIONS AND MISSTATEMENTS IN THE PRELIMINARY DECISION**

- Although the Applicant is seeking remedies pursuant to s. 67.1(c) of the *CTA* and s. 113.1 of the *ATR*, the Preliminary Decision makes no reference to these provisions.

- Contrary to what is suggested by the Preliminary Decision, the *CTA* does specify who may bring a complaint: section 67.1 is unambiguous in stating that "any person" may do so.

- The Preliminary Decision refers to *Lukács v. Delta*, Decision No. 425-C-A-2014 without acknowledging that the Federal Court of Appeal granted leave to appeal from that decision, and the appeal is awaiting hearing (Federal Court of Appeal File No.: A-135-15).

## I. STANDING

1. In the Preliminary Decision, the Agency erred in law by:

   (a) superimposing the private law doctrine of standing on a proceeding under a regulatory legislation whose objective is the protection of public and societal interests and not mere private interests;

   (b) failing to give effect to the explicit and unambiguous language of its enabling legislation governing who may bring an airline-related complaint; and

   (c) misstating what constitutes a "serious justiciable issue" for the purpose of the legal test for public interest standing.

### (a) The private law doctrine of standing is not applicable to regulatory legislation

2. Regulatory legislation is public law, enacted for the protection of public and societal interests, not mere individual ones:

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests.
>
> [Emphasis added.]

***R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154, para. 129**

3. The Supreme Court of Canada cautioned that:

> The laudable objectives served by regulatory legislation should not be thwarted by the application of principles developed in another context.
>
> ***R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154, para. 187**

4. The private law doctrine of standing was developed in the specific context of private law litigation before courts. The rationale for the doctrine is the desire to limit expenditure of scarce judicial resources for the resolution of private law disputes, which benefit only those who are directly affected by the matter, but have no public or societal benefit.

5. This rationale fails in the context of public law legislation whose objective is to protect the public or broad segments of the public, and not mere individual interests, because public law proceedings have broad public or societal benefits. For example, no reasonable police officer should turn away a complaint about child abuse on the basis that the complainant is not affected by the acts complained of. Indeed, the *Criminal Code* permits private prosecution, and private prosecutors are not required to be affected in any way by the offences they prosecute (ss. 504, 507.1, and 788 of the *Criminal Code*).

6. Thus, applying the private law doctrine of standing, which was developed in and for the context of private law litigation before courts, indiscriminately to any public law legislation whose objective is to protect the public or broad segments of the public, would lead to absurd results and would defeat the purpose of the legislation.

7. Parliament may choose to restrict standing in proceedings under a regulatory legislation to those who are "directly affected" or "interested persons." For example, s. 43(1) of the *Nuclear Safety and Control Act* limits standing to those who are "directly affected," while s. 48(1) of the *Telecommunications Act* speaks of "application by any interested person or on its own motion." Such restriction, however, must be explicit.

8. In sharp contrast, in s. 37 of the *CTA* (which is similar in many ways to s. 48(1) of the *Telecommunications Act*), Parliament chose to impose no restrictions on who can bring a complaint to the Agency:

> **37.** 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.

9. The absence of language governing standing in a regulatory legislation that involves receipt of complaints is to be considered deliberate and an indication of Parliament's choice that due to the public or societal benefit of the legislation, complaints should be accepted from any member of the public, regardless of whether they are personally "directly affected" or "interested."

**(b) Parliament conferred standing on "any person" to bring an airline-related complaint**

10. The *CTA* contains clear and unambiguous wording with respect to who may bring a complaint to the Agency. In the case of certain railway-related complaints, Parliament limited standing to "a shipper who is subject to any charges" (s. 120.1(1)), an "interested person" (s. 144(6)), and a "railway company" (s. 144(7)). In sharp contrast, Parliament permitted "any person" to bring airline-related complaints (ss. 65, 66(1), 66(2), 67.1, and 67.2).

11. The Agency, being a tribunal created by statute, must abide by and is bound by its enabling legislation, the *CTA*, and cannot second-guess Parliament's choices with respect to standing. In particular, the Agency must give effect to the language of s. 67.1 of the *CTA*, under which the corrective measures are being sought in the present Application:

> **67.1** If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to
>
> (a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;
>
> (b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's failure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and
>
> (c) take any other appropriate corrective measures.
>
> [Emphasis added.]

12. The modern principle of statutory interpretation calls for textual, contextual, and purposive analysis to find a meaning that is harmonious with the Act as a whole.

***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, paras. 21-15**

**(i) Textual analysis**

13. The common and ordinary meaning of the phrase "on complaint in writing to the Agency by any person" (emphasis added) is that the complaint may be brought by any individual (or possibly legal entity) without being subject to further requirements. It expresses a legislative intent to create open standing.

**(ii) Contextual analysis**

14. Parliament is presumed to not be speaking in vain, and to speak consistently. The same expression in a statute is presumed to have the same meaning throughout. When a statute uses a different expression 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**

15. In the *CTA*, Parliament uses the expression "on complaint in writing to the Agency by any person" in ss. 65, 66(1), 66(2), 67.1, and 67.2(1) with respect to airline-related complaints. Consequently, this expression has the same meaning in each of these provisions.

16. As the Agency correctly acknowledged in the Preliminary Decision, s. 67.2(1) of the *CTA* permits any person to bring a complaint under that provision. Moreover, it is amply clear from the nature of ss. 65 and 66 that Parliament intended to permit any member of the public to bring a complaint. Since the expression "on complaint in writing to the Agency by any person" has the same meaning in s. 67.1 as in ss. 65, 66, and 67.2(1), it follows that any person may bring a complaint pursuant to s. 67.1.

17. The *CTA* distinguishes between "any person" and "any person adversely affected" and "interested person":

    (1) "any person" appears in ss. 65, 66(1), 66(2), 67.1, and 67.2(1) in reference to a complainant who brings an airline-related complaint;

    (2) "person adversely affected" appears in ss. 67.1(b) and 86(1)(h)(iii) in reference to a person who may be awarded monetary compensation; and

    (3) "interested person" appears in s. 40 in reference to a non-party who petitions the Governor in Council to vary or rescind a decision, order, rule, or regulation made by the Agency, and in s. 144(6) in reference to a complainant who brings a railway-related complaint.

18. Thus, the phrases "any person" and "any person adversely affected" and "interested person" have different meanings in the *CTA*. In particular, "any person" does not have to be (adversely) affected nor to be "interested" in the sense of having a private law interest.

19. Therefore, the phrase "any person" in s. 67.1 indicates that the complaint may be brought by "any person" even if they are not adversely affected or an "interested person." As explained below, this conclusion is consistent with the purposive analysis and is harmonious with the *CTA* as a whole.

**(iii) Purposive analysis**

20. The *CTA* is a public law, created for the benefit and protection of the public, more specifically, to achieve the policy objectives set out in s. 5 of the Act.

21. Parliament chose to impose a regulatory scheme on transportation by air, and created the Agency to oversee and enforce the regulatory scheme for the benefit of the public good.

22. Consequently, the primary objective of the regulatory scheme governing air transportation is to protect the public interest in having a functional transportation system, and protection of individual interests is a collateral objective (similar to ss. 737.1-741.2 of the *Criminal Code*, concerning restitution to victims of crime). This primary objective is reflected, for example, in s. 67.1(c), which allows the Agency to offer systemic remedies, by way of corrective measures, to systemic problems.

23. Thus, the purpose of s. 67.1 of the *CTA* is to provide a mechanism *within* the regulatory scheme to enforce a regulatory legislation, specifically s. 67(3), for the benefit of the general public, rather than merely to the benefit of those who have been "adversely affected" by the carrier's unlawful actions.

24. The significant public interest that attaches to compliance with the regulatory scheme is underscored by s. 174 of the *CTA*, which makes any contravention of the *CTA* or a regulation under the *CTA* an offence punishable on summary conviction. This feature distinguishes consumer-related disputes that arise under the *CTA* from private contractual disputes: any person may prosecute a carrier for contraventions of s. 67(3) of the *CTA* by way of private prosecution of a summary offence.

25. It would be unreasonable to hold that Parliament intended to create a higher threshold (in terms of standing) for bringing a complaint to the Agency for contraventions of s. 67(3) of the *CTA* than the threshold for private prosecution of the same contraventions as a summary offence.

26. Therefore, interpreting s. 67.1 of the *CTA* as permitting any person to bring a complaint to the Agency under s. 67.1 and not requiring the complainant to be adversely affected or be an "interested person" is harmonious with the Act as a whole, and is consistent with the purpose for which the Agency was created.

27. Hence, the Applicant is not required to establish that he has been "personally and directly affected" by the unlawful conduct of Porter Airlines in order to seek an Order pursuant to s. 67.1(c), directing Porter Airlines to take corrective measures. It is sufficient that the Applicant is a "person" and the Applicant has made a "complaint in writing to the Agency."

**(c) Standing to bring a complaint under the *ATR***

28. The *Air Transportation Regulations* ("*ATR*") is a delegated legislation that was promulgated pursuant to the *CTA*, and its predecessor, the *National Transportation Act*. Consequently, provisions of the *ATR* must be interpreted in light of and in a manner that is harmonious with the *CTA*.

**(i) Section 113.1 of the *ATR***

29. Section 113.1 of the *ATR* mirrors to a great extent s. 67.1 of the *CTA*, and provides that:

> **113.1** If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to
>
> (a) take the corrective measures that the Agency considers appropriate; and
>
> (b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

30. The similarity between s. 67.1 of the *CTA* and s. 113.1 of the *ATR* was intentional, and reflects the legislative history of the provisions: In 2000, Parliament amended the *CTA* by adding, among other provisions, ss. 67.1, 67.2, and paragraph 86(1)(h)(iii), which authorized the making of section 113.1 of the *ATR*.

31. Section 113.1 of the *ATR* and s. 67.1 of the *CTA* serve the same purpose, namely, to provide a mechanism *within* the regulatory scheme to enforce the regulatory legislation for the benefit of the general public, rather than merely to the benefit of those who have been "adversely affected." Indeed, if these provisions were viewed as protecting only individual interests, then s. 113.1(a) of the *ATR* (and s. 67.1(c) of the *CTA*) would serve no practical purpose.

32. One difference between the two provisions is that s. 113.1 of the *ATR* confers broader powers upon the Agency with respect to international transportation: The Agency may act on its own motion under s. 113.1 of the *ATR* (see, for example, Decision No. 232-A-2003; affirmed in *Northwest Airlines Inc. v. Canadian Transportation Agency*, 2004 FCA 238), while it can act under s. 67.1 of the *CTA* only upon the receipt of a "complaint in writing by any person." This difference is consistent with the overarching philosophy of the *CTA* that international services are subject to closer monitoring and tighter regulation than domestic service.

33. Consequently, the threshold (in terms of standing) for bringing a complaint to the Agency pursuant to s. 113.1 of the *ATR* is not higher than the threshold for complaints under s. 67.1 of the *CTA*.

34. Since a complainant under s. 67.1 of the *CTA* does not have to be adversely affected or an "interested person," it follows that there is no requirement to be adversely affected or to be an "interested person" for bringing a complaint pursuant to s. 113.1 of the *ATR*.

### (ii) Subsection 18(b) of the *ATR*

35. Subsection 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;
>
> [Emphasis added.]

36. The superimposition of the private law of standing on this provision in the Preliminary Decision is unreasonable for a number of reasons:

(1) Pursuant to s. 37 of the *CTA*, the Agency may hear and determine a complaint concerning any act that is prohibited under the *ATR*, including a complaint pursuant to s. 18(b). The *CTA* does not require the complainant to be affected in any way.

(2) The plain language of s. 18(b) of the *ATR* indicates that its purpose is to protect the public at large, and not only specific individuals who were affected by the false or misleading statements.

(3) Contravention of s. 18(b) of the *ATR* depends solely on the actions of the licensee, and not on the result (e.g., how many individuals, if any, were affected).

(4) Waiting until individuals are affected by a contravention would defeat the preventive function of regulatory legislation.

(5) Due to the nature of deceptive conduct, those who are affected by the conduct are rarely aware that they are being deceived, and are unlikely to make a complaint in a timely manner.

(6) Undoubtedly, any person could prosecute contraventions of s. 18(b) of the *ATR* as a summary offence pursuant to s. 174 of the *CTA*. It would defeat common sense to hold that Parliament intended to bar a person from bringing a complaint to the Agency, while the same person can privately prosecute the contravention as a summary offence.

37. Therefore, a complaint about the contravention of s. 18(b) of the *ATR* may be brought to the Agency by any person, regardless of whether the person was personally affected.

**(d) Public interest standing**

38. In the alternative to the foregoing, the Agency should exercise its discretion, pursuant to s. 25 of the *CTA*, to grant the Applicant public interest standing to bring the present Application.

39. The test for granting public interest standing requires considering three factors:

(i) the case must raise a serious and justiciable issue;

(ii) the party seeking public interest standing must have a genuine interest; and

(iii) the proceeding is a reasonable and effective means to bring the case to court.

These three factors are not a checklist or technical requirements, but rather should be viewed as interrelated considerations to be weight cumulatively, not individually.

***Thibodeau v. Air Canada*, 2005 FC 1156, para. 75**
***Canada v. Downtown Eastside Sex Workers*, 2012 SCC 45, para. 36**

40. Contrary to what is stated in the Preliminary Decision, 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 in cases that concern public law and/or collective rights:

- In *Thibodeau v. Air Canada*, the Federal Court granted the applicant 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 the 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 ("*Thibodeau 1*"), paras. 27-28 and 74-79**

- The Federal Court of Appeal affirmed the judgment in *Thibodeau 1*.

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

- In a subsequent application commenced by Thibodeau against Air Canada under the *Official Languages Act*, the Federal Court followed *Thibodeau 1*, and granted Thibodeau public interest standing again. The Court added that:

  > It is inconceivable that Parliament would grant applicants [...] the possibility to file information on similar complaints and then deprive the same applicants of the standing required to present it before the Court.

  ***Thibodeau v. Air Canada*, 2011 FC 876 ("*Thibodeau 2*"), paras. 102-106**

  The comment of the Federal Court in *Thibodeau 2* applies *mutatis mutandis* to proceedings before the Agency, where the Agency may act based on a complaint in writing by "any person."

41. The test for granting public interest standing is met in the present case for the following reasons.

**(i) Serious and justiciable issue**

42. The issue raised in the Application is systemic contravention of a regulatory legislation, which is also an offence punishable on summary conviction (s. 174 of the *CTA*).

43. Parliament's choice to make the alleged conduct an offence means that these contraventions are to be viewed as wrongs committed against the public as a whole, and not only against a few individuals, and that the prohibited conduct is of such seriousness that warrants committing significant judicial resources to its prosecution.

44. Therefore, the Application raises serious and justiciable issues, and there is a significant public interest in the resolution of the issues.

**(ii) Genuine interest**

45. The Applicant is a Canadian air passenger rights advocate. In 2013, the Consumers' Association of Canada awarded the Applicant its Order of Merit in recognition of his work in the area of air passenger rights. Recently, the Federal Court of Appeal recognized the Applicant as an air passenger rights advocate.

***Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 140, para. 1**

46. 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:

(a) baggage liability and accuracy of information on airlines' websites:

i. *Lukács v. Air Canada*, 208-C-A-2009;
ii. *Lukács v. WestJet*, 477-C-A-2010 (leave to appeal refused: 10-A-41);
iii. *Lukács v. WestJet*, 313-C-A-2010 & 483-C-A-2010 (leave to appeal refused: 10-A-42);
iv. *Lukács v. Air Canada*, 291-C-A-2011;
v. *Lukács v. WestJet*, 418-C-A-2011;
vi. *Lukács v. United*, 182-C-A-2012;
vii. *Lukács v. United*, 200-C-A-2012;
viii. *Lukács v. United*, 335-C-A-2012;
ix. *Lukács v. United*, 467-C-A-2012;
x. *Lukács v. Sunwing*, 249-C-A-2013;

xi. *Lukács v. British Airways*, 10-C-A-2014;

(b) rebooking and/or refund for passengers in the case of flight delay, advancement, cancellation, and denied boarding:

i. *Lukács v. Air Transat*, 248-C-A-2012;
ii. *Lukács v. WestJet*, 249-C-A-2012;
iii. *Lukács v. Air Canada*, 250-C-A-2012;
iv. *Lukács v. Air Canada*, 251-C-A-2012;
v. *Lukács v. WestJet*, 252-C-A-2012;
vi. *Lukács v. Porter*, 16-C-A-2013;
vii. *Lukács v. Sunwing*, 313-C-A-2013;
viii. *Lukács v. Air Transat*, 327-C-A-2013;
ix. *Lukács v. Porter*, 344-C-A-2013;
x. *Lukács v. Porter*, 31-C-A-2014 (also involved denied boarding compensation issues);

(c) denied boarding compensation:

i. *Lukács v. Air Canada*, 204-C-A-2013 & 342-C-A-2013;
ii. *Lukács v. WestJet*, 227-C-A-2013;
iii. *Lukács v. Porter*, 31-C-A-2014;
iv. *Lukács v. British Airways*, 201-C-A-2014;
v. *Lukács v. Porter*, 249-C-A-2014.

47. Thus, the Applicant has a demonstrated long-standing, real, and continuing interest in the rights of air passengers. In particular, the Applicant has a genuine interest in the Application, which stems from the failure of Porter Airlines to implement, in practice, two decisions of the Agency to which the Applicant was a party:

- *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013; and
- *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013.

### (iii) Reasonable and effective means

48. Under this branch of the test, the Agency should consider whether there is a realistic alternative means to bring the issues before the Agency, and one which is a more efficient and effective use of judicial resources. The "mere possibility" that a directly affected private litigant may bring the same issue before the Agency does not warrant denying public interest standing.

***Canada v. Downtown Eastside Sex Workers*, 2012 SCC 45, para. 51**
***Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC), para. 109**

49. In the present case, there is no realistic and effective alternative means of bringing Porter Airlines' unlawful conduct before the Agency, for the following reasons:

    (a) The essence of the issue raised in the Application is that Porter Airlines misled a significant number of passengers to believe that the airline did not owe them any monetary compensation (only travel vouchers up to $125). It follows from the nature of deceit that the victims have no knowledge of the wrong that they suffered. Consequently, those who are directly affected do not know that they have grounds to complain.

    (b) Proceedings before the Agency are legally complex, and as the present case demonstrates, airlines are represented by multiple counsels. Any complainant who does not have the experience that the Applicant has accumulated over the years in proceedings before the Agency would have no choice but to retain legal counsel and incur substantial expenses in relation to a small claim (up to $1,800), making pursuing their rights economically unfeasable.

    (c) Given the systemic nature of the issues raised in the Application, they can be cured only by way of systemic remedies (corrective measures), which are precisely the main remedies that are being sought in the Application. Consequently, the Application is a more efficient and effective use of the Agency's resources than multiple applications for individual remedies (for compensation) brought by individual victims.

50. The Applicant acknowledges that he could bring some of the issues raised in the Application to court by way of private prosecution under s. 174 of the *CTA*; however, criminal proceedings tend to require more judicial resources than regulatory proceedings before an expert tribunal, such as the Agency. Consequently, Parliament intended the Agency to deal with these issues to the extent that they can be addressed without invoking criminal proceedings.

51. Therefore, judicial economy strongly militates in favour of the Agency granting the Applicant public interest standing and addressing the issues raised in the Application within the framework of the present proceeding.

## II. MOOTNESS

52. The reliefs sought in the present Application can be divided into three categories:

    (a) corrective measures to ensure that passengers who did not assert their rights because Porter Airlines misled them are provided with a meaningful opportunity to do so in the 6 months after the making of the order;

    (b) making findings with respect to contravention of s. 18(b) of the *ATR*; and

    (c) disbursements (out of pocket expenses incurred by the Applicant).

    For the reasons stated below, these remedies are not moot.

53. Furthermore, requiring the Applicant to address the issue of mootness at the present stage of the proceeding deprives the Applicant from his right to test the allegations of Porter Airlines that are relevant to the issue of mootness.

### (a) Main relief: corrective measures

54. The main reliefs being sought in the Application are corrective measures and a finding necessary to enable the Agency to order corrective measures pursuant to s. 67.1 of the *CTA* and s. 113.1 of the *ATR* (items 3-5 and 2, respectively, in the Preliminary Decision).

55. The Agency's preliminary opinion that these reliefs are moot hinges on the alleged sending of a "corrective e-mail" to 2,485 affected passengers by Porter Airlines.

56. There is a live factual dispute between the parties as to whether such a "corrective e-mail" was sent, and whether Porter Airlines has reached all affected passengers. In this context, the Agency erred in law by:

    (i) failing to acknowledge that Porter Airlines submitted a false affidavit;

    (ii) confusing bare allegations put forward by Porter Airlines with evidence;

    (iii) conflating mootness with the substantive issue of necessity of the reliefs; and

    (iv) denying the Applicant of a fair process by preventing him from testing Porter Airlines' allegations before addressing the issue of mootness.

### (i) Porter Airlines submitted a false affidavit relating to the "corrective e-mail"

57. In order to support the allegation that a "corrective e-mail" was sent to affected passengers, Porter Airlines submitted to the Agency the affidavit of Mr. Luis Gonzalez, who falsely swore that it "was sent."

**Gonzalez Affidavit, p. 4, para. 15(c)**

58. Subsequently, Porter Airlines admitted that the "corrective e-mail" had not been sent out when Mr. Gonzales swore his affidavit. Thus, Mr. Gonzalez swore to a false statement.

**Porter Airlines' Response to the Applicant's Notice of Written Questions, p. 9, para. 35**

### (ii) No evidence, only bare and dubious allegations

59. The Agency must base its decision on the evidence on record, and cannot find that the "corrective e-mail" was sent to 2,485 affected passengers without evidence capable of supporting that finding.

60. It is trite law that a witness cannot testify about future events. Consequently, Mr. Gonzalez's affidavit is not evidence with respect to events that allegedly took place after the affidavit was sworn.

61. All the Agency has before it is the bare allegation of Porter Airlines that after Mr. Gonzalez swore his false affidavit, the "corrective e-mail" was sent to 2,485 affected passengers. There is no evidence before the Agency capable of supporting this allegation.

**Porter Airlines' Response to the Applicant's Notice of Written Questions, p. 9, para. 35**

62. Moreover, there is a good reason to doubt Porter Airlines' bare allegation with respect to the sending of the "corrective e-mail," because in response to Question Q24 of the Applicant, Porter Airlines produced an e-mail with no recipients at all.

**Porter Airlines' Response to the Applicant's Notice of Written Questions, Tab D**

### (iii) The Application is not moot even if the alleged "corrective e-mail" was sent

63. The Applicant is asking the Agency, among other reliefs, to order Porter Airlines:

> to publish on its website 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 Airlines' tariffs;

**Application, p. 15, para. 45(c)**

64. Porter Airlines does not allege that it has published such a corrective notice on its website or in the mainstream media; rather, the airline disputes the *necessity* of this specific corrective measure sought by the Applicant.

65. Thus, the substantive question of whether the specific relief being sought in the Application is warranted in the present case remains a live dispute between the parties. It is not plain and clear that the specific corrective measures sought in the Application are unnecessary:

    (1) There are serious concerns about Porter Airlines' recording-keeping practices. For example, Porter Airlines has allegedly disposed of records relating to passengers claims from 2013.

    **Gonzalez Affidavit, p. 3, para. 11**

    (2) Based on publicly available information and statistics, Porter Airlines has approximately 5000 passengers with delayed bags per year.

    **Application, paras. 2-4**

    (3) Porter Airlines neither denied this allegation nor tendered evidence to contradict it.

    (4) Consequently, the 2,485 passengers to whom Porter Airlines allegedly sent a "corrective e-mail" are less than 25% of the number of Porter Airlines passengers with delayed baggage between February 2013 and August 2015.

66. Therefore, there is a live substantive dispute between the parties. For the reasons explained below, it is procedurally unfair to require the Applicant to address this question without being afforded a reasonable opportunity to test the allegations of Porter Airlines.

### (iv) Denial of procedural fairness

67. The duty of procedural fairness, owed by the Agency to the Applicant, dictates that the Applicant is entitled to a meaningful opportunity to contest and test the allegations of Porter Airlines. The Agency's own rules of procedure ("*Dispute Rules*") incorporate this duty.

***Lukács v. Canada* (Transport, Infrastructure and Communities), 2015 FCA 200, para. 10**

68. There are live factual disputes between the parties, among other matters, with respect to:

    (1) whether Porter Airlines sent the "corrective e-mail" to 2,485 affected passengers; and
    (2) whether the "vast majority" of the affected passengers were notified by Porter Airlines.

    In order to test Porter Airlines' allegations with respect to these matters, the Applicant directed certain questions, including Q7 and Q24, to Porter Airlines, in accordance with the Agency's *Dispute Rules*.

    **Notice of Written Questions and Production of Documents (September 10, 2015), Q7 and Q24**

69. Since Porter Airlines refused to answer Question 7 and failed to answer Question 24 properly, the Applicant made a request to the Agency, pursuant to Rule 32 of the *Dispute Rules*, to require Porter Airlines to respond to these and other relevant questions that have remained unanswered.

**Request for Agency to Require Party to Respond (September 21, 2015), paras. 17 and 44-46**

70. The relevance and the significance of answers to the outstanding questions is underscored by the Preliminary Decision, which was made without the Agency first ruling on the Applicant's request to require Porter Airlines to answer the questions.

71. The Preliminary Decision denies the Applicant a fair process by requiring him to address the issue of mootness, and implicitly the substantive issue of the necessity of the remedies being sought, without allowing him to test the allegations on which the Agency's preliminary opinion is based.

**(b) Making findings relating to s. 18(b) of the *ATR***

72. As a secondary relief, the Applicant is asking the Agency to make an explicit finding that Porter published false and/or misleading information on its Web site, contrary to subsection 18(b) of the *ATR*.

73. Mootness is private law doctrine which has limited applicability in public law, whose purpose is to protect the public, and not merely to protect individual interests. A contravention of public law legislation is, generally speaking, not purged and does not become moot when the contravention stops. For example, taking hostages does not become "moot" by releasing the hostages.

74. Similarly, a contravention of s. 18(b) does not become moot once the contravention stops:

(a) Parliament chose to make contraventions of s. 18(b) of the *ATR* a summary offence, and chose to permit criminal prosecution of such contraventions for up to 12 months after the time that the contravention took place (ss. 174 and 176 of the *CTA*).

(b) Subsection 18(b) of the *ATR* is listed in the Schedule to the *Canadian Transportation Agency Designated Provisions Regulations* as a provision contravention which is punishable by an administrative monetary penalty (AMP) of up to $25,000.

(c) The penalty for a contravention depends on whether the offender has a record of previous violations.

***AMPs and you*, publication of the Canadian Transportation Agency, Document No. "14"**

75. Therefore, determining whether Porter Airlines contravened s. 18(b) of the *ATR* between 2013 and 2015 does serve a practical purpose, and will directly affect the rights of Porter Airlines should it engage in further contraventions. Furthermore, it would defeat the purpose of the prohibition of making false or misleading statements if a licensee could escape the consequences by changing its website years later.

76. *Lukács v. United*, 200-C-A-2012 was wrongly decided by the Agency, but can anyway be distinguished from the present Application in terms of the relief being sought, which was an order requiring United to amend its website. In sharp contrast, in the present Application an explicit finding of contravention of s. 18(b) of the *ATR* is sought, which is a relief that does not depend on the *current* state of Porter Airlines' website.

77. Hence, based on the foregoing, this portion of the Application is not moot either.

**(c) Disbursements of the Applicant**

78. It is undisputed that Porter Airlines has taken no action to notify affected passengers until *after* the present Application was commenced. Thus, even if the Agency finds that the Application has become moot as a result of *subsequent* developments, the Applicant should be awarded his disbursements relating to the Application, which was properly commenced and brought in the interest of the travelling public.

***Dagg v. Canada (Industry)*, 2010 FCA 316, para. 15**
***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 62**

79. The Applicant is seeking an order directing Porter Airlines to reimburse him for his out-of-pocket expenses (disbursements) incurred in relation to the present Application in any event of the cause.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Orestes Pasparakis, counsel for Porter Airlines
Mr. Rahool P. Agarwal, counsel for Porter Airlines

Government of Canada / Gouvernement du Canada

Canada



# AMPS AND YOU

## Administrative monetary penalties

### The Agency's role and regulations

The Canadian Transportation Agency monitors and enforces compliance with the *Canada Transportation Act* and the following related regulations:

- *Air Transportation Regulations* (ATR (Air Transportation Regulations))
- *Personnel Training for the Assistance of Persons with Disabilities Regulations* (PTR (Personnel Training for the Assistance of Persons with Disabilities Regulations))

The Agency may issue an administrative monetary penalty (AMP (administrative monetary penalty)) if certain provisions of the Act and the above regulations are contravened. These provisions are listed in the *Canadian Transportation Agency Designated Provisions Regulations (DPR (Designated Provisions Regulations)).*

### Could an AMP (administrative monetary penalty) happen to you?

The DPR (Designated Provisions Regulations) and AMPs affect:

- Publicly available air carriers subject to the Act and the ATR (Air Transportation Regulations); and
- Transportation service providers subject to the PTR (Personnel Training for the Assistance of Persons with Disabilities Regulations).

### Monitoring and enforcement

The Agency's monitoring and enforcement activities include:

- periodic inspections of Canadian-based air carriers licensed by the Agency;
- periodic inspections of air, rail and marine terminals falling under the PTR (Personnel Training for the Assistance of Persons with Disabilities Regulations);
- targeted investigations that focus on anyone suspected of operating illegal air services in Canada, regardless of their country of origin; and

- special field projects, which include educating the public, law enforcement organizations, and certain provincial agencies about the legislation and regulations.

## Key terms

The Agency designates **enforcement officers**, who have the power to enter and inspect any place other than a dwelling. They can require any person to produce documents or data that may contain relevant information. They can also issue notices of violation (NoV (notice of violation)).

A **notice of violation** (NoV (notice of violation)) identifies the alleged violation, names the alleged offender, sets out the penalty, and tells the person how and when to pay the penalty.

**Administrative monetary penalties** (AMP (administrative monetary penalty)), as the name suggests, are sanctions in the form of a monetary penalty imposed by the government through a regulatory scheme. An AMP (administrative monetary penalty) is a form of civil penalty in which an administrative body or regulator seeks monetary relief against an individual or corporate body as restitution for unlawful activity. The unlawful activity is typically defined through legislation and/or regulations.

The goal of AMPs is to promote voluntary compliance with legislation by imposing penalties for non-compliance. Penalties levied are proportionate to the type, severity and frequency of the infraction.

These penalties are one of several ways the Agency can enforce the law; other options include formal reprimands, cease-and-desist orders, licence suspensions or cancellations, and prosecutions.

While the Agency is responsible for administering AMPs, the **Transportation Appeal Tribunal of Canada** is a quasi-judicial body responsible for review and appeal hearings pertaining to AMPs that are imposed by the Agency under the Act.

## Process

### Warnings

If you have allegedly violated the Act or its regulations for the first time, an enforcement officer will normally send you a letter of warning. However, in serious cases, the designated enforcement officer may issue a NoV (notice of violation) without first issuing a warning.

After receiving a warning, you have 30 days from the date of the warning to ask the Agency for a review.

After concluding a review, if the Agency decides that you **did not** commit the violation, it takes no further action. However, if it decides that you **did** commit the violation, it records the violation and the warning forms part of your record for four years.

## Notices of violation

If you violate the same provision within four years, you may receive a NoV (notice of violation). You have at least 30 days from the date that the NoV (notice of violation) is issued to pay the AMP (administrative monetary penalty) or appeal the decision by requesting a review hearing with the Transportation Appeal Tribunal of Canada.

If you do not pay on time, you are deemed guilty by the Transportation Appeal Tribunal of Canada. If you **have not** requested a hearing, then the Tribunal will issue a certificate for payment.

## Review hearings

If you **have** requested a review hearing, the Tribunal will schedule one to be conducted by a Tribunal member. The Tribunal will notify both you and the designated enforcement officer (the two of you are also known as "the parties"). Hearings are held at or near the place where the contravention allegedly occurred.

Following the review hearing, the Tribunal Member will provide a written determination. Tribunal member may confirm or reject the charge set out in NoV (notice of violation) or may substitute herhis own sanction. Either party may appeal the determination by applying to the Tribunal in writing, within 10 days of receiving the determination.

## Appeal hearings

If the determination is appealed, the Tribunal will notify the parties of the date, time and place of the appeal hearing. The Tribunal will also give each party a copy of the record of the proceeding under appeal. Appeal panels usually consist of three Tribunal members and are usually chaired by the chairperson or vice-chairperson of the Tribunal. Following the hearing, all parties will get a copy of the panel's determination. This determination is final and binding on the parties, subject only to judicial review by the Federal Court.

## Penalties

*Penalties for individuals*[1]

| Level | 1st violation | 2nd violation ($) | 3rd violation ($) | 4th and subsequent violations ($) |
|---|---|---|---|---|
| **1** | warning | 100 | 100 | 100 |
| **2** | warning | 250 | 500 | 1,000 |
| **3** | warning | 500 | 1,000 | 2,000 |
| **4** | warning | 1,000 | 2,500 | 5,000 |
| **5** | Up to $1,000 | 2,500 | 5,000 | 5,000 |

*Penalties for corporations*

| Level | 1st violation | 2nd violation ($) | 3rd violation ($) | 4th and subsequent violations ($) |
|---|---|---|---|---|
| **1** | warning | 500 | 500 | 500 |
| **2** | warning | 1,250 | 2,500 | 5,000 |
| **3** | warning | 2,500 | 5,000 | 10,000 |
| **4** | warning | 5,000 | 12,500 | 25,000 |
| **5** | Up to $5,000 | 12,500 | 25,000 | 25,000 |

Visit the Agency's Web site for more on enforcement (/eng/enforcement), including the results of enforcement actions and the names of contraveners.

For more information, contact the Agency (/eng/contact).

## Notes

**Note 1**

An **individual** in this case also means a sole proprietorship or partnership. In most cases, an employee is viewed as an agent of the employer. The employer is therefore liable for the misconduct of its employees and is the subject of any enforcement action. 1

## Publication Information

**ISBN** 0-662-67109-0
**Catalogue No.** TW3-40/2003

**Date modified:**
2013-10-25