Case No. 15-03657

CANADIAN TRANSPORTATION AGENCY

B E T W E E N :

GÁBOR LUKÁCS

Applicant

- and -

PORTER AIRLINES INC.

Respondent

RESPONSE OF PORTER AIRLINES INC.
TO APPLICANT'S SUBMISSIONS ON PRELIMINARY DECISION

December 10, 2015

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A. Introduction

1. This Response is made by Porter Airlines Inc. (**Porter**) to the Applicant's submissions regarding the Canadian Transportation Agency's (the **Agency**) Preliminary Decision dated November 4, 2015 (the **Preliminary Decision**).

2. The Applicant's submissions fail to establish that (i) he has standing to bring the Application, or (ii) the Application is not moot. The Preliminary Decision is correct and the Application should be dismissed with costs awarded to Porter.

B. The Applicant does not have standing

3. The Preliminary Decision correctly stated the law of standing. A litigant may have standing to commence a proceeding on three grounds: (i) private interest standing, (ii) standing pursuant to an express statutory right of action, or (iii) public interest standing.

4. The Applicant has failed to discharge his onus of establishing that he has standing on any ground and accordingly, the Application should be dismissed.

i. Private interest standing

5. The Applicant does not contest, and effectively concedes, the Agency's preliminary determination that he does not have private interest standing. Indeed, nothing in the

record demonstrates that the Applicant has been directly affected by, or has a direct interest in, any of the issues raised in the Application.

ii. Standing pursuant to a statutory right of action

6. The Applicant argues the phrase "any person" in section 67.1 of the *Canada Transportation Act* (**CTA**) expresses "legislative intent to create open standing"[1] and as a result, literally "any person", regardless of their degree of interest in the issues before the Agency, may bring a complaint under section 67.1.

7. The Applicant's proposed interpretation of "any person" was considered and flatly rejected by the Ontario Court of Appeal in *Galganov v Russell (Township)*.[2] The court held that "any person" in the Ontario *Municipal Act* did not create open standing, but was rather properly interpreted to mean "any person who has standing under the common law relating to standing":

> ...in using the words "any person", the legislature did not eliminate the principled exercise of judicial discretion respecting standing. As noted by the application judge, at para. 101 of her reasons:
>
> > Standing is sometimes denied for a variety of reasons which may impact the exercise of discretion by the court. Some are listed in the text by P.W. Hogg, *Constitutional Law of Canada*, 5th ed, v. 2 looseleaf (Toronto: Carswell, 2007) at pp. 59-3; and in *Finlay v. Canada (Minister of Finance),* [1986] 2 S.C.R. 607 at paragraphs 32-35:
> >
> > (a) to avoid opening the flood gates to unnecessary litigation;
> > (b) to screen out the mere busy body;
> > (c) to ration scarce judicial resources by applying them to real rather than hypothetical disputes; and
> > (d) to avoid the risk that cases will be inadequately presented by parties who have no real interest in the outcome. [Citations in original.]
>
> Thus, the court maintains the discretion to refuse to grant standing in accordance with the common law rules respecting standing. The words "any person" in s. 273(1) of the Act mean

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[1] Applicant's Response to Preliminary Decision (26 November 2015) at para 13 [***Applicant's Response to Preliminary Decision***].

[2] 2012 ONCA 409 [***Galganov***].

"any person who has standing under the common law relating to standing."[3]

8. Following *Galganov,* the Applicant must establish that he has common law standing, *i.e.*, private interest or public interest standing, notwithstanding the use of the phrase "any person" in section 67.1 of the CTA.

9. The Applicant also relies on section 37 of the CTA, but that section has no relevance to the question of standing. Section 37 addresses the scope of the Agency's jurisdiction and inquiry powers; it does not address, in any way, shape or form, who may commence a proceeding before the Agency.

10. Moreover, section 37 confirms that the Agency's inquiry powers are ultimately discretionary: "[t]he Agency may inquire into, hear and determine a complaint".[4] Accordingly, even if the phrase "any person" had been intended to grant standing beyond common law standing, the language of the CTA recognizes that the Agency has discretion to deny standing and not hear a complaint. The Applicant has no absolute entitlement to compel the Agency to inquire into his complaint.

iii. The Applicant does not have public interest standing

1. The Agency should not exercise its discretion to grant standing

11. The Applicant bears the onus of persuading the Agency to exercise its discretion to grant him public interest standing.[5] The exercise of the Agency's discretion involves the consideration of three factors:

(a) whether there is a serious justiciable issue raised;

(b) whether the plaintiff has a real stake or a genuine interest in it; and

(c) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.[6]

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[3] *Galganov* at para 15.

[4] *Canada Transportation Act*, S.C. 1996, c. 10, section 37 [emphasis added].

[5] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General),* 2012 SCC 45 at para 37 [***SWUAV***].

[6] *SWUAV* at para 37.

12. In this case, the Applicant has failed to discharge his onus: none of the factors favour granting the Applicant public interest standing in this proceeding.

13. First, the issues before the Agency are not serious justiciable issues. In *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, the Supreme Court of Canada confirmed that to qualify as a serious justiciable issue, "the question raised must be a 'substantial constitutional issue' or an 'important one'".[7] The issues raised in the Application are clearly not constitutional in nature. Furthermore, the issues are not of such importance that resolution by the Agency is necessary or desirable: there is no evidence that (i) Porter passengers or other members of the public are actually impacted by the issues, or (ii) the resolution of the issues is important for the airline industry or the transportation regulatory regime.

14. Second, the Applicant does not have a real stake or a genuine interest in the outcome of the Application:

    (a) the Applicant was not directly affected by the now-corrected misstatement on Porter's website or the potential miscommunication of Porter's Baggage Delay Policy and, given the remedial steps taken by Porter, the Applicant will not be affected by either issue in the future; and

    (b) the Applicant's purported "genuine interest" as a passenger rights advocate is questionable. The outcome will not affect his rights in any way, and there is no evidence that actual passengers of Porter were affected at all, much less to a degree significant enough to make a complaint or join this proceeding. The Applicant appears more concerned with pursuing his own advocacy agenda rather than issues of material significance to passengers.

15. Lastly, the Application is not a reasonable and effective means to bring the matters at hand before the Agency. The appropriate means would be for an actual passenger who had been directly affected by the misstatement on the website or potential miscommunication about Porter's Baggage Delay Policy to make a complaint before the Agency. This would allow for an adjudication of a claim based on a concrete dispute, as opposed to adjudicating speculative claims advanced by the Applicant.

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[7] *SWUAV* at para 42.

16. There is no merit to the Applicant's contention that passengers are unable to bring complaints on their own behalf because proceedings before the Agency are too complex. Self-represented complainants regularly appear before the Agency and the Agency's procedures are designed to be accessible to lay persons – for example, complainants can file a complaint at no cost by filling out an application form,[8] which the Agency indicates should take 10 minutes to complete.[9] Indeed, given that Porter has acknowledged the misstatement on its webpage and its liability for expenses arising from baggage delay,[10] it is unlikely that any actual passenger complaints would require adjudication at all.

2. No basis for relaxed rules of standing for "public law legislation"

17. The Applicant appears to argue that litigation relating to "public law legislation" or "regulatory legislation" should be subject to different, more relaxed rules of standing.[11]

18. The Applicant's position has no basis in any legal authority. The jurisprudence is clear that standing is to be based on the grounds identified above, and there has never been a distinct test for public law legislation.

19. In fact, the Applicant's position is directly contradicted by the case law, specifically the Ontario Court of Appeal's decision in *Galganov*. *Galganov* involved the interpretation of public law legislation, the Ontario *Municipal Act*, and the court determined standing on the basis of established common law principles, not less restrictive rules specifically designed for regulatory disputes.[12]

20. The Applicant is effectively advocating for the extension of public interest standing to non-constitutional and non-public law disputes. Extending public interest standing in this manner would run contrary to the courts' restrictive approach to standing, adopted "to ensure that courts do not become hopelessly overburdened with marginal or redundant cases" and "to screen out the mere 'busybody' litigant".[13]

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[8] Air Complaints, Canadian Transportation Agency <https://services.otc-cta.gc.ca/eng/air-complaints>.

[9] Complaint Wizard (Completion Page), Canadian Transportation Agency <https://services.otc-cta.gc.ca/node/7>.

[10] Answer of Porter Airlines (3 September 2015) at paras 23-25.

[11] Applicant's Response to Preliminary Decision at paras 2-9.

[12] *Galganov* at paras 9-20.

[13] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 1.

21. The Applicant seeks to extend public interest standing to the present case by relying on *Thibodeau v. Air Canada*, a case which dealt with standing under the *Official Languages Act.*[14] However, *Thibodeau* is not an example of a case where public interest standing was granted in a non-constitutional case. Rather, *Thibodeau* directly engaged the application of the *Charter* and constitutional protections for language rights, and also confirmed that the *Official Languages Act* has quasi-constitutional status.

22. As a consequence, the Applicant's reliance on sections 113.1 and 18(b) of the *Air Transportation Regulations* are flawed. Those provisions may be aimed at protecting the public interest, but that is not a sufficient reason to establish more relaxed rules of standing for their enforcement.

C. In any event, the issues raised by the Application are moot

23. In any event, should the Agency reverse its opinion on the Applicant's lack of standing as expressed in the Preliminary Decision, the Agency's statement and application of the doctrine of mootness in the Preliminary Decision was correct and as a result, the Application should be dismissed.

24. The doctrine of mootness provides that adjudicative resources should not be utilized where no live controversy exists which affects the rights of the parties, and where a decision will have no practical effect on those rights.[15]

25. The Applicant's assertion that there remains a "live factual dispute" between the parties is specious. The Agency has found as a fact that Porter took the remedial steps as outlined in its materials and thus addressed the substance of the Application.[16] The Applicant is effectively seeking to re-litigate the Application before the Agency, but has no right to do so.

26. There is similarly no basis to the Applicant's complaint of a denial of procedural fairness. The Applicant has been given a full opportunity to make his case and be heard by the Agency. The Applicant has:

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[14] 2005 FC 1156.

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

[16] Preliminary Decision at p. 7.

(a) filed a complaint[17] and received a reply;[18]

(b) submitted 31 questions and requests for production of documents,[19] and received responses to each request;[20]

(c) made additional submissions to compel Porter to respond to the questions where he was dissatisfied with Porter's response;[21]

(d) been provided with written reasons for the Preliminary Decision and the opportunity to provide further submissions in response to the Preliminary Decision.[22]

27. Finally, the Applicant's claim for disbursements is irrelevant to the mootness of the Application. The Agency is not precluded from rendering a decision on costs even if the Application is dismissed.[23]

28. In any event, costs are not awarded by the Agency on the basis of the outcome of a decision but rather only in special or exceptional circumstances.[24] There are no such special or exceptional circumstances in this case. Indeed, the Applicant should not be reimbursed because the only disbursement claimed was unnecessary. The Applicant has claimed the cost of using a court reporter to transcribe telephone recordings, but the recordings were also submitted as part of the Application and there was no indication that the recordings needed to be transcribed for the purposes of the Application.

29. If anything, Porter should be awarded costs. The Applicant abused the Agency's process to draw Porter into a fight for which he did not have standing and that was moot, forcing both Porter and the Agency to expend significant resources

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[17] Application of Dr. Gábor Lukács against Porter Airlines before the Canada Transportation Agency (10 August 2015).

[18] Answer of Porter Airlines (3 September 2015).

[19] Notice of Written Questions and Production of Documents (10 September 2015).

[20] Response to Applicant's Notice of Written questions (18 September 2015).

[21] Request for Agency to Require Party to Respond (21 September 2015).

[22] Preliminary Decision (4 November 2015).

[23] Pursuant to s. 25.1 of the CTA, the Agency has extensive authority in awarding costs.

[24] *Gábor Lukács v Air Canada* (27 May 2013), Decision No 204-C-A-2013, online: <https://www.otc-cta.gc.ca/eng/ruling/204-c-a-2013> at para 77.

unnecessarily. His approach to the complaint was clearly disproportionate to the issues at stake: he converted a summary complaints procedure into full-scale litigation, with multiple submissions totaling over 100 pages, multiple interlocutory requests that were ultimately irrelevant, and specious challenges to Porter's evidence and the truthfulness of Porter's affiants. In the circumstances, a costs award against the Applicant is warranted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of December 2015.

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