Office des transports du Canada

Canadian Transportation Agency

DECISION NO. 121-C-A-2016

April 22, 2016

APPLICATION by Gábor Lukács against Porter Airlines Inc. (Porter).

Case No. 15-03657

INTRODUCTION

[1] On August 10, 2015, Gábor Lukács filed an application with the Canadian Transportation Agency (Agency) alleging that:

- between February 19, 2013 and August 4, 2015, Porter published false and/or misleading information on the carrier's website concerning the compensation tendered to passengers for expenses incurred as a result of baggage delay, contrary to paragraph 18(b) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR);

- 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 that are not set out in the respective tariffs governing such itineraries, and/or failing to apply Rule 18.2 of its Tariff containing rules applicable to scheduled services for the transportation of passengers and baggage or goods between points in Canada on the one hand and points outside Canada (except the United States) on the other hand, CTA (A) No. 1 and/or Rule 80(F) of its Canadian general rules tariff No. CGR-1, NTA(A) No. 241, Airline Tariff Publishing Company, Agent, contrary to subsection 110(4) of the ATR; and,

- between October 10, 2013 and August 6, 2015, Porter shortchanged passengers travelling on domestic itineraries by applying terms and conditions respecting baggage delay that are not set out in the carrier's Tariff containing rules applicable to services for the transportation of passengers and baggage or goods between points in Canada, CTA(A) No. 1 (Tariff) and/or failing to apply Rule 16.2 of its Tariff, contrary to subsection 67(3) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA).

[2] On September 3, 2015, Porter submitted that the application should be dismissed because the issues are moot as a result of corrective action taken by Porter.

[3] In Decision No. LET-C-A-68-2015, dated November 4, 2015 (Show Cause Decision), the Agency provided Mr. Lukács with the opportunity to show cause why the Agency should not dismiss his application on the grounds of standing and/or mootness.

[4] On November 26, 2015, Mr. Lukács responded to the Show Cause Decision, and on December 10, 2015, Porter submitted its response.

SHOW CAUSE: PRELIMINARY FINDINGS

Standing

[5] The Agency expressed the preliminary opinion that there is a serious question as to whether Mr. Lukács has standing to file his application for the following reasons:

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

- with respect to private interest standing, Mr. 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.

Mootness

[6] The Agency expressed the preliminary opinion that there may be no practical merit to the Agency proceeding with a determination of the application because the issues raised may be moot:

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

ISSUES

1. Has Mr. Lukács shown cause why the Agency should not dismiss his application on the basis that he does not have standing?

2. Has Mr. Lukács shown cause why the Agency should not dismiss his application on the basis that it is moot because of the corrective measures taken by Porter?

3. Has Mr. Lukács been denied procedural fairness by being required to show cause why his application should not be dismissed? and,

4. Should costs be awarded to either Mr. Lukács or to Porter?

ISSUE 1: HAS MR. LUKÁCS SHOWN CAUSE WHY THE AGENCY SHOULD NOT DISMISS HIS APPLICATION ON THE BASIS THAT HE DOES NOT HAVE STANDING?

Standing

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

[8] As noted by the Agency in the Show Cause Decision, 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.

[9] If a person does not have standing, their application must be dismissed.

[10] There are three types of standing.

1. Private interest standing

[11] 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, (*Finlay*) at para. 21).

2. Statutory standing

[12] A statutory provision may specify who may bring an application pursuant to that provision.

3. Public interest standing

[13] In exercising their discretion to grant public interest standing, the courts weigh three factors:

a) Whether the case raises a serious justiciable issue;
b) Whether the party bringing the action has a real stake or a genuine interest in its outcome; and,
c) Whether the action is a reasonable and effective means to bring the case to court.

Private Interest Standing

Positions of the parties

[14] Mr. Lukács submits that the Agency erred in law in its Show Cause Decision by applying standing to a public law proceeding. Mr. Lukács states that paragraph 18(b) and section 113.1 of the ATR and section 67.1 of the CTA are public law, and as such, they are intended to protect the public interest. Mr. Lukács claims that because proceedings pursuant to such public law have broad societal benefits, the requirement for private standing should not apply. With respect to paragraph 18(b) in particular, Mr. Lukács insists that it is intended to serve a preventative function, and that those who would have private standing (i.e., those directly affected by the false or misleading statement) are rarely aware of their situation and therefore, they are unable to make a complaint.

[15] Porter submits that Mr. Lukács does not contest, and effectively concedes, that he does not have private interest standing. Furthermore, Porter states that the record demonstrates that Mr. Lukács has not been directly affected by, nor has a direct interest in, any of the issues raised in the application.

Analysis and findings

[16] As noted by Porter, Mr. Lukács does not argue that he has private standing. Rather, he argues that private standing is unnecessary for him to file a complaint. He suggests that standing does not or should not apply to public law, such as regulatory statutes, because such law offers wide societal benefits.

[17] However, jurisprudence establishes that standing does apply to public law. For example, the Supreme Court of Canada has applied the doctrine of standing in public law cases, such as a constitutional challenge to the *Criminal Code*, R.S.C. 1985, c. C-46 (Code): *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 S.C.R. 524, at para. 2 (*Downtown*). Notably, the Court said at paragraph 23 that it "... has taken a purposive approach to the development of the law of standing in public [...] law cases" [Emphasis added].

[18] Similarly, as noted by Porter, the Ontario Court of Appeal applied a standing analysis to public law, the *Municipal Act, 2001*, S.O. 2001, c. 25, in *Galganov v. Russell (Township)*, 2012 ONCA 409 (leave to appeal ref'd: [2012] S.C.C.A. No. 369) (Galganov).

[19] As noted by the Agency in the Show Cause Decision, applying standing to public law accomplishes three key objectives. First, it ensures that scarce judicial resources are economized. Second, it ensures that the most urgent cases (those that actually affect people, as opposed to theoretical cases) are heard as quickly and efficiently as possible. Finally, it ensures that the best evidence is before the decision maker: the evidence of someone actually affected.

[20] These objectives reflect the principles underlying administrative decision making, which is intended to operate as an expeditious, efficient, and effective recourse.

[21] Therefore, the Agency finds that standing applies to public law such as the CTA and the ATR.

[22] The Agency notes that all of the allegations made by Mr. Lukács (as set out at paragraph 1 above) concern past breaches by Porter. There is no allegation of ongoing breaches by Porter. Furthermore, Mr. Lukács has submitted no evidence that he was personally or directly affected by the allegations in his application, i.e., during the specific periods of time identified in his application. Mr. Lukács never claims to have been a passenger of Porter during these periods of time, nor does he claim to have been affected by the past breaches in some other manner. Therefore, there can be no suggestion that Mr. Lukács was personally or directly affected in the past, nor that he could be personally or directly affected in the future.

[23] This situation may be contrasted to past Agency decisions where Mr. Lukács was implicitly granted standing to complain about carriers' tariff provisions, policies, and practices, irrespective of whether he had been directly and personally affected: see Decision No. 420-C-A-2014 (Lukács v. WestJet); Decision No. 344-C-A-2013 (Lukács v. Porter); Decision No. 327-C-A-2013 (Lukács v. Air Transat). However, in those cases, the allegations related, in part, to ongoing breaches and the impugned tariffs, policies, and practices would have applied to him, if he had travelled with the carrier at some point in the future. In other words, he would have been directly and personally affected if he travelled with the carrier, because the tariffs, policies, and practices of the carrier were ongoing or were proposed to be implemented. However, as explained above, this reasoning does not apply in this situation, which involves a past breach that has since been rectified by the carrier. There is no potential for Mr. Lukács to ever be affected by the contravention identified in his application, even if he were to travel with Porter at some point in the future, because Porter has already corrected its website page. Therefore, the same logic justifying his standing in past Agency cases does not apply to his current application.

[24] Accordingly, the Agency finds that Mr. Lukács has no private standing to bring his application.

Statutory Standing

Positions of the parties

[25] Mr. Lukács submits that section 37 of the CTA enables the Agency to inquire into a complaint concerning any Act administered by the Agency. Furthermore, Mr. Lukács submits that the Agency erred in law in its Show Cause Decision by failing to respect the unambiguous language ("any person") of section 67.1 of the CTA regarding who may file an application. Mr. Lukács submits that, unlike other provisions in the CTA, the term "any person" is not qualified. Mr. Lukács argues the same applies to section 113.1 of the ATR, because of what he perceives to be similarities between the two provisions. Finally, Mr. Lukács argues that standing does not apply to paragraph 18(b) of the ATR because it is intended to be preventative (it does not require that there be actual harm to any individuals).

[26] Porter maintains that Mr. Lukács's interpretation of "any person," as used in section 67.1 of the CTA, was rejected by the Ontario Court of Appeal in *Galganov, supra*, in which the Court held that "any person" in the Ontario *Municipal Act, 2001* did not create open standing, but was rather properly interpreted to mean "any person who has standing under the common law relating to standing".

Analysis and findings

Section 37 of the CTA

[27] Mr. Lukács did not bring his application under section 37 of the CTA, but under sections 26, 27, 67, and 67.1 of the CTA, and sections 18, 110, and 113.1 of the ATR. Nevertheless, Mr. Lukács did make submissions on section 37 in his response to the Show Cause Decision.

[28] Section 37 of the CTA provides as follows:

> 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.

[29] In effect, Mr. Lukács's argument appears to be that section 37 grants universal standing for any provision of the CTA. This would mean that, pursuant to section 37, any person could bring a complaint to the Agency about any provision of the CTA, irrespective of standing, and compel the Agency to determine it.

[30] However, section 37 must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] SCC 57, at para. 48, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, approved and adopted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[31] If section 37 were interpreted as creating universal standing for the entire CTA, independent of any other provision, it would supplant the standing requirements that are specifically set out in provisions such as subsection 53.2(8), subsection 98(2), subsection 103(1), section 120.1, subsection 121(2), subsection 127(1) and subsection 127(4), subsection 131(5), subsection 132(1), paragraph 137(2)(a), subsection 138(1), subsections 144(3.1), 144(6) and 144(7), subsection 145(5), and subsection 146.2(7). This would not be a harmonious interpretation of the CTA, as these sections specifically state who can bring an application. In other words, interpreting section 37 as an independent means of granting universal standing for all of the CTA would render the more specific wording on standing in those provisions meaningless, contrary to the rule of statutory interpretation that the legislator does not speak in vain (*Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, at para. 87, citing with approval *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831). Having inserted specific standing requirements in some provisions, Parliament could not have intended for section 37 to independently create universal standing.

[32] Such an interpretation would also be inconsistent with the object of the CTA, which is intended by Parliament to achieve the public policy goals outlined in section 5 of the CTA while simultaneously achieving the practical goals underlying the creation of all administrative tribunals: expeditiousness, efficiency, and effectiveness. Universal standing risks unduly burdening the Agency with frivolous or duplicative cases brought by those without sufficient interest to bring them. This would undermine the Agency achieving both its public policy and practical goals. That cannot have been the intention of Parliament.

[33] Therefore, the Agency finds that section 37 does not give Mr. Lukács standing to bring his application. Rather, each provision of the CTA and ATR must be interpreted individually to determine the intention of Parliament with respect to standing for that provision. This is the interpretation of section 37 that best achieves the object of the CTA and the intention of Parliament.

[34] As a final note, the Agency observes that section 37 is discretionary: the Agency "may" inquire into, hear and determine a complaint. Accordingly, this permits the Agency to decide not to hear a complaint. A valid reason for not hearing such a complaint includes that the person bringing the complaint has no standing.

Section 67.1 of the CTA

[35] Section 67.1 of the CTA provides as follows:

> 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.

[36] Though Mr. Lukács asserts that the plain meaning of section 67.1 creates universal standing for that provision, the grammatical and ordinary sense of a provision is not necessarily determinative of its meaning; a tribunal must consider the total context of the provision to be interpreted, no matter how plain it may seem upon initial reading: *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76.

[37] In *Galganov, supra*, at paragraph 15, the Ontario Court of Appeal rejected the argument that the words "any person" created universal standing in the context of the *Municipal Act, 2001*:

> [...] in using the words "any person", the legislature did not eliminate the principled exercise of judicial discretion respecting standing[...] 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 "any person who has standing under the common law relating to standing."

[38] In view of the foregoing, the Agency adopts the reasoning of the Ontario Court of Appeal and finds that the term "any person" in section 67.1 of the CTA does not grant universal standing. Rather, it means "any person who has standing under the common law relating to standing."

[39] This best accomplishes the purpose of section 67.1, i.e., ensuring that carriers apply the terms and conditions of their tariffs, while also achieving the vital goals advanced by applying the requirement of standing:

- economizing scarce judicial resources (by limiting the ability of those with no real stake in a matter from over-burdening the judicial system with frivolous or duplicative cases);
- ensuring that the most urgent cases are heard as quickly and efficiently as possible; and,
- determining cases based upon the best evidence and the competing arguments of those directly affected by matters in dispute.

Section 113.1 of the ATR

[40] Section 113.1 of the ATR provides as follows:

> 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.

[41] Contrary to the assertions of Mr. Lukács, section 113.1 does not mirror section 67.1 of the CTA. First, there is no reference in section 113.1 to "any person." Second, there is no reference in section 113.1 to the filing of a complaint at all. In fact, section 113.1 does not even directly impose an obligation on air carriers. The obligation to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff derives from subsection 110(4) of the ATR, not section 113.1. Section 113.1 sets out the possible effect of failing to comply with the obligation imposed by subsection 110(4). In other words, section 113.1 defines the scope of the Agency's remedial power in the event that an air carrier offering an international service contravenes its tariff, contrary to subsection 110(4) of the ATR.

[42] Accordingly, the Agency finds that Mr. Lukács cannot rely on section 113.1 of the ATR for statutory standing: it is a remedial provision that empowers the Agency; it is not a mechanism for parties to bring an application to the Agency or otherwise acquire statutory standing as complainants.

[43] However, even if section 113.1 were interpreted as giving statutory standing to complainants, the same reasoning applicable to section 37 of the CTA is equally applicable to section 113.1 of the ATR. Interpreting section 113.1 to provide universal standing would unreasonably risk overburdening the Agency with cases brought by those who were never and could never be affected by a tariff contravention by the carrier. This would detract from the Agency's capacity to act as an expeditious, efficient, and effective recourse for those persons who actually were, or would be, directly and personally affected by an air carrier's failure to apply the fares, rates, charges or terms and conditions set out in its tariff. In the Agency's opinion, Parliament could not have intended such a result. In order to function efficaciously and properly discharge its statutory mandate, the Agency finds that, in the face of legislative silence, the common law doctrine of standing applies to provisions of the CTA and the ATR, including section 113.1.

Paragraph 18(b) of the ATR

[44] Paragraph 18(b) of the ATR provides as follows:

> 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 ...

[45] As with section 113.1 of the ATR, the same considerations of statutory interpretation for section 37 of the CTA may be applied to paragraph 18(b): silence in the provision with respect to standing does not necessarily mean that Parliament intended to grant universal standing. Rather, the Agency finds that the interpretation that best accomplishes the purpose of paragraph 18(b), i.e., prohibiting carriers from making false or misleading public statements about their service, is one that also applies the requirements of standing. In this way, the Agency discharges its mandate with maximal efficiency and effectiveness.

[46] Furthermore, the Agency notes that paragraph 18(b) of the ATR is listed in the Schedule of the *Canadian Transportation Agency Designated Provisions Regulations,* SOR/99-244 under section 30. Accordingly, in the event of contravention, the Agency may refer the issue to a designated enforcement officer with the potential for an administrative monetary penalty of up to $25,000 for a corporation. Therefore, contrary to the assertions of Mr. Lukács, it is not necessary for an unaffected individual such as himself to be granted standing under paragraph 18(b) in order for the public interest enshrined by that provision to be protected. A dispute proceeding is not the only, or even the optimal, means to achieve the goals of paragraph 18(b). Another avenue exists: the administrative monetary penalties regime, pursuant to section 176.1 to section 181 of the CTA.

[47] In view of the foregoing, the Agency finds that paragraph 18(b) of the ATR does not grant universal standing for the purposes of dispute proceedings before the Agency. Rather, the interpretation of paragraph 18(b) that best reflects the intent of Parliament is that a complaint can only be brought by a person who has standing under the common law relating to standing. Therefore, the Agency finds that paragraph 18(b) does not give Mr. Lukács standing to bring his application.

Public Interest Standing

Positions of the parties

[48] Mr. Lukács submits that the Agency erred in law in its Show Cause Decision by limiting what constitutes a "serious justiciable issue" for the purpose of public interest standing to the constitutionality of legislation or the legality of an administrative action taken by a government body. Mr. Lukács points out that in *Thibodeau v. Air Canada*, 2005 FC 1156, the Federal Court granted public interest standing in a situation that did not involve a challenge to the constitutionality of legislation or the legality of an administrative action. Mr. Lukács requests that the Agency exercise its discretion to grant him public interest standing, applying the three-part test from *Downtown, supra*:

a) the case must raise a serious and justiciable issue;
b) the party seeking public interest standing must have a genuine interest; and,
c) the proceeding is a reasonable and effective means to bring the case to court.

Serious and Justiciable Issue

[49] With respect to "a serious and justiciable issue," Mr. Lukács states that the issue raised in the application involves a systemic contravention of regulatory legislation, which is also an offence punishable on summary conviction, pursuant to section 174 of the CTA. He submits that 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 that the prohibited conduct is of such seriousness that it warrants committing significant judicial resources to its prosecution.

[50] However, Porter submits that in *Downtown, supra,* the Supreme Court of Canada confirmed that a serious justiciable issue "must be a 'substantial constitutional issue' or an 'important one'". Porter states that the issues raised in the application are not of such importance, because there is no evidence that: (i) Porter's 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.

Analysis and findings

[51] As noted by Mr. Lukács, public standing has been granted in at least one situation that did not directly involve constitutional issues or challenges to an administrative action taken by a government body: *Thibodeau v. Air Canada*, [2005] F.C.J. No. 1395, and again in *Thibodeau v. Air Canada*, [2013] 2 F.C.R. 83. Those cases involved challenges against a single airline (Air Canada) for its failure to abide by the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.). However, that Act has been deemed to be quasi-constitutional: *Thibodeau v. Air Canada*, [2014] 3 S.C.R. 340, at para. 12.

[52] Regardless, in this case, Mr. Lukács has not submitted any evidence that any of Porter's passengers have actually been affected by the issues raised in his application. Instead, he relies on his own estimate. At paragraphs 3-4 of his application, he purports to estimate the number of delayed baggage per year on flights offered by Porter. This estimate is based on the number of passengers transported by Porter, according to a 2013 Porter press release, and the ratio of delayed or lost baggage for North American airlines, according to a 2013 WestJet Annual Report. However, in the absence of any actual evidence of any passenger having delayed baggage and being improperly compensated as a result of Porter's erroneous website page, Mr. Lukács's application is theoretical. In essence, his application rests on his claim that an unsubstantiated number of Porter passengers probably had delayed baggage; they were probably improperly compensated for that delay; and this improper compensation was probably the result of Porter's erroneous website page.

[53] As observed by the Federal Court in *Havana House Cigar & Tobacco Merchants Ltd. v. Naeini (c.o.b. Pacific Tobacco, Pacific Region)*, [1998] F.C.J. No. 309, at para. 16:

> ... an action is not a speculative exercise, to be launched, in whole or in part, where it is clear that the onus of proof rests upon the plaintiff and yet the plaintiff has no evidence or foundations of fact on which to support its claims.

[54] Furthermore, it is not sufficient for a party to argue that it hopes to use discovery to substantiate its speculation: *Caterpillar Tractor Co. v. Babcock Allatt Ltd.*, [1982] F.C.J. No. 159, at para. 12; *Kastner v. Painblanc (F.C.A.)*, [1994] F.C.J. No. 1671, at para. 4.

[55] In other words, an action is not a fishing expedition: *Eli Lilly Canada Inc. v. Nu-Pharm Inc.*, 2011 FC 255, at para. 9. In fact, an allegation made without an evidentiary foundation constitutes an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Ltd.*, 2010 FCA 112, at para. 5; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, [2014] 2 F.C.R. 557, at para. 45.

[56] The Agency finds this jurisprudence compelling and equally applicable to applications brought before the Agency under the CTA and the ATR.

[57] However, for the purposes of the present matter, it suffices to note that purely speculative issues such as the ones raised by Mr. Lukács in his application do not, in the Agency's opinion, reach the threshold of sufficiently serious and justiciable for the purposes of public interest standing.

[58] Accordingly, the Agency finds that Mr. Lukács has not established that there is a serious and justiciable issue raised by his application.

Genuine interest

Positions of the parties

[59] Mr. Lukács states that he is a recognized Canadian air passenger rights advocate with more than two dozen successful complaints against airlines with the Agency. He submits that he has a genuine interest in the application, which stems from the failure of Porter to implement, in practice, two decisions of the Agency to which Mr. Lukács was a party.

[60] Porter submits that Mr. Lukács does not have a real stake or a genuine interest in the outcome of the application because he was not directly affected and because he is not affected as a passenger rights advocate, given that there is no evidence of any passengers being affected either.

Analysis and findings

[61] Given that Mr. Lukács has not submitted any evidence to suggest that an actual passenger has been affected by the issues raised in his application, the Agency finds that he cannot be affected as a passenger rights advocate. Rather, his interest is purely academic and falls into the category of "righting a wrong, upholding a principle, or winning a contest" (*Finlay, supra*, at para. 21).

[62] Accordingly, the Agency finds that Mr. Lukács has not established that he has a genuine issue in the issues raised by his application.

Reasonable and Effective Means to Bring the Case

Positions of the parties

[63] Mr. Lukács argues that his application is a realistic and effective means of bringing this case before the Agency, because passengers affected by a misleading or false statement by an air carrier are unlikely to know that they have grounds to complain; and proceedings before the Agency are complex and expensive.

[64] Porter argues that the appropriate means to raise these issues would be for an actual passenger who has been directly affected to file an application with the Agency. Porter submits that this would allow for an adjudication of a claim based on a concrete dispute, as opposed to adjudicating the speculative claims advanced by Mr. Lukács.

Analysis and findings

[65] Mr. Lukács has not presented any compelling reason why a passenger of Porter who was directly affected by the website page could not have brought an application, and thereby provided the Agency with direct and concrete evidence upon which to adjudicate.

[66] The Agency does not accept that such passengers would be categorically unable to bring such applications themselves. If Mr. Lukács is capable of uncovering the alleged contravention by Porter, which he estimates could have potentially affected many passengers, then one among them could also have made that same discovery. Indeed, those actually affected (if any) would have had the greatest motivation to investigate the rules concerning compensation for delayed baggage.

[67] Furthermore, such passengers could also have sought representation from Mr. Lukács. Section 16 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (Dispute Adjudication Rules) specifically provides a mechanism for someone in the position of Mr. Lukács to represent a person directly and personally affected by a matter. The Agency is of the opinion that, such representation would, in the context of this application, have constituted a reasonable and effective means of bringing this matter to the Agency, whereas a purely speculative application brought by someone who is not directly and personally affected cannot constitute a reasonable and effective means.

[68] Accordingly, the Agency finds that the speculative application brought by Mr. Lukács does not constitute a reasonable and effective means of bringing the case before the Agency.

Conclusion

[69] In light of the foregoing, the Agency declines to exercise its discretion to grant public interest standing to Mr. Lukács.

Standing and Summary Convictions under Section 174 of the CTA

[70] Section 174 of the CTA provides as follows:

> Every person who contravenes a provision of this Act or a regulation or order made under this Act, other than an order made under section 47, is guilty of an offence punishable on summary conviction and liable
>
> (a) in the case of an individual, to a fine not exceeding $5,000; and
> (b) in the case of a corporation, to a fine not exceeding $25,000.

[71] Section 504 of the Code provides a mechanism for private prosecution of offences, as follows:

> Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice ...

[72] Section 795 of the Code operates such that this provision, among others, also applies to summary convictions.

[73] As a result, Mr. Lukács argues that, because any contravention of the CTA or the ATR may proceed as a summary conviction offence, and because any one may privately prosecute such an offence, it would defeat common sense to hold that Parliament intended to bar a person from bringing a complaint to the Agency under the CTA or the ATR, while the same person can privately prosecute the contravention as a summary offence. Thus, Mr. Lukács submits that there must be universal standing to allege contraventions of the CTA and the ATR.

[74] The Agency does not accept this reasoning. First, dispute proceedings under the CTA and the ATR, and criminal proceedings under the Code, are very different. The standards of proof are different: balance of probabilities versus beyond a reasonable doubt. The goals are different: achieving compliance with the regulatory framework and compensating private losses versus expressing societal condemnation and imposing punishment. In the context of such different legal regimes, it simply does not follow that, because a single contravention can be pursued two different ways, the same standing should be applied to both.

[75] Furthermore, applying universal standing to all provisions of the CTA does not conform to the express language of many provisions of the CTA, which expressly limit standing, such as subsection 53.2(8), subsection 98(2), subsection 103(1), section 120.1, subsection 121(2), subsections 127(1) and (4), subsection 131(5), subsection 132(1), paragraph 137(2)(a), subsection 138(1), subsections 144(3.1), (6) and (7), subsection 145(5), and subsection 146.2(7). Clearly Parliament did not intend for universal standing to apply to every single provision of the CTA, even though all contraventions of the CTA may be pursued by any one as a summary conviction offence.

[76] Finally, despite their universal standing, private prosecutions under the Code are subject to limitations. For example, the Attorney General may intervene and assume conduct of (or direct the stay of) private prosecutions, pursuant to paragraph 3(3)(f) of *An Act respecting the office of the Director of Public Prosecutions*, S.C. 2006, c. 9, s. 121. Additionally, section 507.1 of the Code provides judicial oversight of private prosecutions to ensure that there is a *prima facie* case and to prevent abuse.

[77] Such limitations are not provided for in the CTA or the ATR, such that the implications of allowing universal standing in the CTA or the ATR would be much more drastic than in the Code, so drastic that it can reasonably be inferred that Parliament did not intend for such universal standing to apply to the CTA or the ATR. Otherwise, Parliament would have included similar limitations as exist in the Code.

[78] Rather, the appropriate limitations in the CTA and the ATR are provided two ways: by express statutory language and by the common law of standing. These are the mechanisms by which the Agency ensures that the purposes of the CTA and the ATR are achieved, as Parliament intended, with the greatest efficiency and effectiveness.

Conclusion

[79] Because Mr. Lukács lacks private standing, statutory standing, and public interest standing to bring the application, the Agency finds that Mr. Lukács has failed to show cause that he has standing in the present matter, and as a result, the Agency dismisses his application.

ISSUE 2: HAS MR. LUKÁCS SHOWN CAUSE WHY THE AGENCY SHOULD NOT DISMISS HIS APPLICATION ON THE BASIS THAT IT IS MOOT BECAUSE OF THE CORRECTIVE MEASURES TAKEN BY PORTER?

[80] 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)

[81] 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.

Positions of the parties

[82] Mr. Lukács submits that the remedies he seeks are not moot and that requiring him to address mootness at this stage of the proceeding precludes him from testing the allegations of Porter, thereby denying him procedural fairness. Specifically, Mr. Lukács argues that the Agency should not have accepted Porter's submission that it sent a corrective e-mail to potentially affected passengers. However, even if the e-mail was sent, Mr. Lukács argues that it is necessary that Porter publish a corrective notice on its website or in the media, as he estimates that Porter has approximately 5,000 passengers with delayed bags per year and Porter claims to have sent the email to only 2,485 passengers. Finally, with respect to paragraph 18(b) of the ATR, Mr. Lukács argues that mootness does not apply to public law legislation, and in the case of paragraph 18(b), a finding of a violation by the Agency could later be used to determine future administrative monetary penalties against Porter, should a contravention of paragraph 18(b) occur. Mr. Lukács submits that it would defeat the purpose of paragraph 18(b), a prohibition against making false or misleading statements, if a licencee could escape the consequences by rectifying its website and thereby rendering a remedy moot.

[83] Porter submits that the Agency has found as a fact that Porter took the remedial steps outlined in its submissions and Mr. Lukács cannot re-litigate this point. Furthermore, Porter contends that Mr. Lukács has not been denied procedural fairness. He has been given a full opportunity to make his case and be heard, including filing a complaint, receiving an answer, submitting 31 questions and requests for production of documents, receiving responses, making additional submissions to compel further responses, and being given a Show Cause Decision.

Analysis and findings

[84] In its answer to the application, Porter indicated the following:

- Mr. Lukács advised Porter of his concerns regarding the outdated statement on its website on August 4, 2015;
- Mr. Lukács received a personal response from Porter's President and Chief Executive Officer indicating that steps were being taken by Porter to address those concerns; and,
- the website was amended to properly reflect Porter's policy on August 6, 2015.

[85] Nevertheless, Mr. Lukács filed an application with the Agency on August 10, 2015, only four business days after notifying Porter of his concerns.

Corrective E-Mail

[86] In its Response to the Applicant's Notice of Written Questions dated September 18, 2015, Porter indicates that, on September 3, 2015, it sent a corrective e-mail to 2,485 passengers identified from baggage irregularity reports. Porter included a copy of the e-mail message, though it omitted the e-mail addresses of the recipients. Porter indicates that it will continue to identify additional potentially-affected passengers.

[87] Contrary to the argument of Mr. Lukács, the Agency accepts the submissions of Porter as sufficient evidence that it has undertaken the remedial measures it claims. As an administrative tribunal, the Agency is not bound by the strict rules of evidence (*Canadian Recording Industry Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 322, at paras. 20-21). Though section 15 of the Dispute Adjudication Rules provides a process for the Agency to require verification of the contents of a document by affidavit or witnessed statement, the Agency regularly accepts the submissions of parties without such verification, where such submissions relate to the direct actions or experiences of the party making the submission. This reflects the Agency's mandate as an administrative tribunal to deliver expert, expeditious, and cost-effective adjudications.

[88] Porter chose to submit an affidavit from Luis Gonzalez as a supporting document to its answer. Mr. Gonzalez is the Director, YTZ Airport Operations and Customer Service for Porter. Though, as Mr. Lukács points out, the affidavit of Mr. Gonzalez contained errors, the Agency notes that the sending of the corrective e-mail is fully consistent with Porter's past behaviour in this matter, which has consisted of attentive and timely efforts to rectify its outdated website.

[89] Accordingly, the Agency finds that Porter has demonstrated to the Agency's satisfaction that it sent a corrective e-mail to 2,485 potentially-affected passengers.

Public Notice

[90] Mr. Lukács claims that the corrective e-mail sent to 2,485 potentially-affected passengers is an insufficient remedial measure, as he estimates that Porter has approximately 5,000 passengers with delayed bags per year.

[91] As noted at length above, Mr. Lukács has not submitted any evidence that any of Porter's passengers have actually been affected by the outdated website, let alone that 5,000 such passengers have been affected.

[92] The baggage irregularity reports utilized by Porter to identify potentially-affected passengers are a far more accurate and reliable means than a 2013 Porter press release and a 2013 WestJet Annual Report from which Mr. Lukács purports to extrapolate the number of potentially-affected passengers.

[93] In the absence of any actual evidence of any passenger having a delayed baggage and being improperly compensated as a result of Porter's erroneous website page, the Agency will not exercise its remedial discretion to require Porter to publish a public notice as Mr. Lukács requests.

Paragraph 18(b) of the ATR

[94] In *Lukács v. United Air Lines, Inc.* (Decision No. 182-C-A-2012), the Agency dealt with a complaint that United had contravened paragraph 18(b) of the ATR. However, as United had removed the erroneous signage, the Agency ultimately did not contemplate further action in the matter.

[95] Similarly, in *Lukács v. United Air Lines, Inc.* (Decision No. 200-C-A-2012), the Agency held as follows:

> The Agency finds that the information that was the subject of Mr. Lukács' complaint, which relates to travel to and from Canada, no longer appears on United's global Web site. The Agency therefore finds that the complaint is moot as a decision relating to the subject matter of the complaint will have no practical effect on the rights of the parties.

[96] Indeed, in cases where a contravention of paragraph 18(b) has been found, the only remedy ordered by the Agency has been to rectify the false or misleading statement: see *for example Lukács v. United Air Lines, Inc.* (Decision No. 335-C-A-2012); *Lukács v. United Air Lines, Inc.* (Decision No. 182-C-A-2012); *Lukács v. United Air Lines, Inc.* (Decision No. 467-C-A-2012).

[97] The Agency finds that Mr. Lukács has not provided any persuasive argument to depart from this practice. Mr. Lukács does not dispute that Porter has rectified its website, such that the statement to which his complaint relates no longer appears. In fact, Porter rectified any non-compliance before Mr. Lukács even filed his application with the Agency.

[98] In the absence of any evidence that Mr. Lukács or any other person has actually been adversely impacted by the statement, the Agency declines to exercise its discretion to impose any further remedy pursuant to paragraph 18(b).

[99] Lastly, Mr. Lukács claims that an explicit finding by the Agency that Porter violated paragraph 18(b) of the ATR could be used to build a record of violations, which could augment the administrative monetary penalty issued against Porter for any future contraventions. With respect, Mr. Lukács misinterprets the administrative monetary penalty regime. It is not findings by the Agency in the context of dispute proceedings that are used to determine the level of penalty imposed for future contraventions. Rather, it is previous notices of violation issued by designated enforcement officers that are used to determine the level of penalty.

[100] Accordingly, the Agency finds that Mr. Lukács has failed to justify why, given that Porter is now in compliance with paragraph 18(b) of the ATR, the Agency should nevertheless impose a remedy.

Conclusion

[101] In light of the foregoing, the Agency finds that Mr. Lukács has failed to show cause why the Agency should not dismiss his application on the grounds that, as a result of the corrective measures undertaken by Porter, there is no practical merit to the Agency proceeding with a determination of his application. The issues raised and remedies sought in his application are now moot.

ISSUE 3: HAS MR. LUKÁCS BEEN DENIED PROCEDURAL FAIRNESS BY BEING REQUIRED TO SHOW CAUSE WHY HIS APPLICATION SHOULD NOT BE DISMISSED?

[102] Mr. Lukács asserts that, in issuing the Show Cause Decision, the Agency has denied him procedural fairness, because he has been prevented from contesting the allegations of Porter, specifically compelling Porter to answer certain questions.

[103] However, mootness is a preliminary objection: *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139, (*Budlakoti*) at para. 28. The Federal Court of Appeal explained it this way in *Budlakoti, supra*, at para. 29:

> Preliminary objections are "show stoppers": *JP Morgan*, above at paragraph 47. Where they are well-founded and the reviewing court cannot hear some or all of the issues placed before it, those issues are finished. The reviewing court need not proceed further with them.

[104] This is recognized by the Dispute Adjudication Rules, which permit the Agency to require the applicant to justify why the Agency should not dismiss their application before considering the issues raised in the application.

[105] Put simply, the Agency is entitled to determine mootness as a preliminary matter, and the procedural fairness afforded to an applicant like Mr. Lukács is the opportunity to demonstrate that his application is not moot. Mr. Lukács has been given that opportunity. Procedural fairness has been satisfied.

[106] To the extent that Mr. Lukács complains of a lack of evidence to support his position, as explained above, he is the one who chose to bring an application to the Agency a mere four business days after first notifying Porter of his concerns and despite having received a response from Porter indicating that it was undertaking measures to resolve those concerns. It should have been foreseeable for Mr. Lukács that his application might well be rendered moot once Porter's remedial measures were fully implemented.

[107] Furthermore, Mr. Lukács chose to bring a speculative application regarding issues that did not affect him directly or personally and for which he had no evidence of any actual passenger being directly or personally affected. He therefore placed himself in a position where his only chance of success was to extract evidence from Porter through the discovery procedure. As explained earlier, jurisprudence has established that this is an improper use of the production process. Applicants cannot bring theoretical applications in the hopes of substantiating them by evidence learned through discovery.

Conclusion

[108] Accordingly, the Agency finds that Mr. Lukács has failed to demonstrate that he has been denied procedural fairness in this matter.

ISSUE 4: SHOULD COSTS BE AWARDED TO MR. LUKÁCS OR TO PORTER?

Positions of the parties

[109] Mr. Lukács submits that Porter only took action after he had filed his application. Therefore, he argues that the application served the interest of the travelling public, and that accordingly, he should be awarded costs.

[110] Porter submits that Mr. Lukács should not be awarded costs. It argues that the Agency only awards costs in special or exceptional circumstances, and that there are no such circumstances in this application. Porter states that the expenses incurred by Mr. Lukács to engage a court reporter to transcribe telephone recordings were unnecessary because the recordings were submitted to the Agency with his application.

[111] To the contrary, Porter argues that it should be awarded costs because Mr. Lukács abused the Agency's process by initiating a dispute that was moot and for which he had no standing, and because his approach to the application, which included multiple lengthy submissions, multiple interlocutory requests, and "specious challenges" to Porter's evidence and affiants, was disproportionate.

Analysis and findings

[112] Section 25.1 of the CTA provides that:

> (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.
> (2) Costs may be fixed in any case at a sum certain or may be taxed.
> (3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.
> (4) The Agency may make rules specifying a scale under which costs are to be taxed.

[113] In exercising its discretion to award costs, the Agency has, in the past, relied on a set of general principles, including whether the applicant for an award of costs has a substantial interest in the proceeding, has participated in the proceeding in a responsible manner, has made a significant contribution that is relevant to the proceeding, and has contributed to a better understanding of the issues by all the parties before the Agency. In addition, the Agency may consider other factors, such as the importance and complexity of the issues, the amount of work, and the result of the proceeding in justifying an award of costs.

[114] The Agency has not typically awarded costs against individual applicants who in good faith bring forward applications regarding their experiences travelling by air. Even if unsuccessful, the Agency has declined to award costs against an applicant because, in part, there would be concern that future applicants might hesitate filing an application with the Agency out of fear that, if not successful, they would be called upon to compensate a carrier for substantial legal costs. Proceedings should be accessible and, for this reason, the Agency typically determines that parties should bear their own costs.

[115] With respect to the awarding of costs to Mr. Lukács, the Agency is of the opinion that Mr. Lukács has not demonstrated that special or exceptional circumstances exist to warrant an award of costs in his favour, particularly given the result of the proceeding and the fact that Porter acted in good faith on the information provided by Mr. Lukács. The Agency notes that not all situations where an air carrier is technically non-compliant with its legal obligations under the CTA and the ATR require a formal application to the Agency. An aggrieved person should notify the air carrier first and give the carrier an opportunity to resolve the problem before resorting to Agency adjudication. Such informal resolution may be all that is required to protect the interests of the travelling public, particularly in the absence of any evidence of any passenger actually being affected. However, the viability of informal dispute resolution depends on the good faith of all participants in the federal transportation network: both transportation service providers, which must be open to rectifying their non-compliance when notified, and those representing the interests of the traveling public, who must be willing to allow transportation service providers some flexibility in rectifying their non-compliance.

[116] With regard to the awarding of costs to Porter, the Agency is of the opinion that Porter has not demonstrated that special or exceptional circumstances exist to warrant an award of costs in its favour, particularly given the Agency's concern that its proceedings remain accessible to individual applicants acting in good faith.

Conclusion

[117] The Agency denies the parties' respective requests to be awarded costs.

(signed)

Sam Barone
Member

(signed)

Stephen Campbell
Member

(signed)

William G. McMurray
Member