Office des transports du Canada

Canadian Transportation Agency

DECISION NO. 425-C-A-2014

November 25, 2014

COMPLAINT by Gábor Lukács against Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle.

File No. M4120-3/14-04165

COMPLAINT

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain practices of Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle (Delta) relating to the transportation of large (obese) persons are "discriminatory", contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58, as amended, and inconsistent with the Agency's findings in Decision No. 6-AT-A-2008.

BACKGROUND

[2] On September 5, 2014, the Agency issued Decision No. LET-C-A-63-2014, in which the Agency noted that it was not clear whether Mr. Lukács has an interest in Delta's practices governing the carriage of obese persons. The Agency provided Mr. Lukács with the opportunity to file submissions regarding his standing, and opened pleadings.

[3] In his submission dated September 19, 2014, Mr. Lukács requested that the Agency amend Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large" throughout the Decision to adequately identify the nature of the complaint.

PRELIMINARY MATTER

Should the Agency vary Decision No. LET-C-A-63-2014 by replacing the word "obese" with "large"?

[4] Mr. Lukács submits that the complaint concerns discriminatory practices relating to the transportation of large passengers stated in an e-mail dated August 20, 2014, and that Decision No. LET-C-A-63-2014 incorrectly labels the complaint as one that concerns the transportation of "obese persons". Delta argues that the word "large" is a euphemism and that the characterization of the complaint as one concerning "obese persons" is entirely accurate and appropriate as the practices described in the e-mail concern a passenger who cannot fit in a single seat.

[5] In his complaint, Mr. Lukács used the wording "transportation of large (obese) passengers". It is therefore not clear to the Agency why Mr. Lukács now objects to the Agency using the word "obese" in Decision No. LET-C-A-63-2014. Based on this, the Agency will not vary that Decision by replacing the word "obese" with "large". However, as Delta uses the word "large" in the policy at issue, the Agency will use the word "large" throughout this Decision.

ISSUE

[6] Does Mr. Lukács have standing in this complaint?

POSITIONS OF THE PARTIES

[7] Mr. Lukács states that section 111 of the ATR and subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) serve as a preventative function rather than merely offering remedies or compensation *post facto*. Mr. Lukács refers to Decision No. 746-C-A-2005 (*Black v. Air Canada*), in which the Agency held, at paragraph 7:

> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.

[8] Mr. Lukács states that it is important to note that in that Decision, the Agency used "persons" in the plural form, which demonstrates that the Agency was mindful of the public benefit of section 111 of the ATR, and that the purpose of such challenges goes well beyond the individual applicant's personal benefit.

[9] Mr. Lukács states that the question of "standing" to challenge the terms or conditions applied by a carrier was also addressed by the Agency in *Black v. Air Canada*, more specifically at paragraph 5:

> The Agency is of the opinion that it is not necessary for a complainant to present "a real and precise factual background involving the application of terms and conditions" for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR. In this regard, the Agency notes that subsection 67.2(1) of the CTA provides that, on the basis of a "complaint in writing to the Agency by any person", the Agency may take certain action if the Agency determines that the terms or conditions at issue are unreasonable or unduly discriminatory. The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR, the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions" [...]

[10] Mr. Lukács contends that the above findings were reaffirmed in Decision No. 215-C-A-2006 (*O'Toole v. Air Canada*), Decision No. LET-C-A-155-2009 (*Lukács v. Air Canada*) and Decision No. LET-C-A-104-2013 (*Krygier v. several carriers*), and argues that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier.

[11] Mr. Lukács contends that Delta refuses to transport passengers or forces passengers to buy multiple seats based on the personal characteristics of an individual or group and that in light of the public policy purpose of section 111 of the ATR, he is not required to be a member of the group discriminated against in order to have standing.

[12] Delta counters that in *Black v. Air Canada*, because of the basis of Air Canada's objection (that there must be "a real and precise factual background"), the reasons did not deal with the considerations normally reviewed in cases which address standing, and there was no explicit holding on the basis of standing. Delta argues that in this case, the issue of standing is squarely raised.

[13] According to Delta, the holding in *Black v. Air Canada* can be explained on the basis that Mr. Black had a direct interest in the matter and had standing as of right based on the fact that terms imposed by Air Canada affected Mr. Black's rights and would have prejudicially affected him had he travelled with Air Canada. Delta contends that in *Black v. Air Canada*, the Agency reasoned that a person who could be prejudicially affected by the terms complained of should not be required to be subjected to those terms as a precondition of bringing a complaint. Delta argues that the same analysis would explain all the cases which have followed *Black v. Air Canada.*

[14] Mr. Lukács asserts that Delta mistakenly argues that the issue of standing has not been squarely raised in *Black v. Air Canada*, and Delta's contention with respect to *Black v. Air Canada* and the subsequent cases raising the issue of standing is woefully misguided.

[15] Mr. Lukács submits that the Supreme Court of Canada (Supreme Court), in *A.G. (Que.) v. Carrières Ste-Thérèse Ltée,* [1985] 1 S.C.R. 831, at paragraph 28, noted that Parliament does not speak in vain, and that the phrase "any person" was inserted into the legislative text for a reason. Mr. Lukács claims that Delta has failed to address the argument that the right to challenge terms and conditions pursuant to subsection 67.2(1) of the CTA and section 111 of the ATR is conferred upon "any person", and has failed to propose any alternative interpretation for the phrase "any person" that Parliament chose to include in subsection 67.2(1) of the CTA. Mr. Lukács asserts that in light of this, the Agency should find that these rights are collective (similar to language rights pursuant to the *Official Languages Act*, R.S.C., 1985, c. 31 [4th supp.]) and serve the travelling public at large.

[16] Mr. Lukács also submits that it is settled law that private interest standing cannot be founded on hypothetical possibilities, and he refers to *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726 (*Downtown Eastside Sex Workers v. Attorney General*).

[17] Mr. Lukács asserts that consequently, the Agency could not have reached the conclusion it did in *Black v. Air Canada* based on speculations, such as those proposed by Delta, given that the Agency did not speculate that Mr. Black could be travelling on Air Canada the next day. Instead, Mr. Lukács states that the Agency was mindful of the public benefit of section 111 of the ATR.

[18] Mr. Lukács maintains that any doubts that *Black v. Air Canada* might have left as to the issue of standing were resolved in *Krygier v. several carriers*, where the applicant's standing was directly challenged, and the Agency held that: "the principles outlined in Decision No. 746-C-A-2005 apply in this case as it is similar type of complaint". Mr. Lukács contends that in *Krygier v. several carriers,* the Agency reached its conclusion without any reference to the personal circumstances of the applicant and in that case, there was no trace of any consideration of the nature suggested by Delta that the applicant might be affected by the challenged terms and conditions.

Burden of proof

[19] Mr. Lukács states that when standing is raised, the burden is on the party opposing the granting of standing to demonstrate that the applicant cannot satisfy the legal test for public interest standing.

[20] Delta submits that Mr. Lukács provides no legal basis for this submission. Delta argues that the opposite is true as revealed by the Federal Court of Appeal in *Public Mobile Inc. v. Canada (Attorney General),* [2011] 3 F.C.R. 344, where J.A. Sexton writing for a unanimous court at paragraph 54 clearly states that "an applicant for public interest standing must satisfy the court" that the test for public interest standing is met. Thus, Delta argues that it is Mr. Lukács who bears the onus of satisfying the Agency that he is entitled to be granted public interest standing, and not Delta to disprove such entitlement.

[21] According to Mr. Lukács, Delta confuses the question of burden of proof with respect to standing when the issue is raised as a preliminary matter with determination of standing in a hearing of an application on its merits. Mr. Lukács states that the *Globalive Wireless Management Corp. v. Public Mobile Inc.,* 2011 FCA 194 case cited by Delta concerned a judgment on the merits of an application for judicial review, which also addressed the issue of standing. Mr. Lukács argues that, in this case, standing was raised as a preliminary issue, before the parties had an opportunity to tender evidence and fully test the evidence of the opposing party and, therefore, the burden of proof is on Delta to demonstrate that the low threshold test is not satisfied.

Private interest standing

[22] Mr. Lukács states that the complaint is not about discrimination against "obese persons", but rather about discrimination against "large persons". He asserts that he is six feet tall, weighs approximately 175 pounds and, as such, he would or could be viewed as a "large person" by Delta's agents. Mr. Lukács contends that in the absence of a clear and consistent statement from Delta about the scope of its practices, it is impossible to conclude that he would not be personally subject to Delta's discriminatory practices due to his physical characteristics. Therefore,

Mr. Lukács argues that he has a private, personal interest in Delta's practices relating to the transportation of "a large person". In addition, Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[23] Delta states that according to the Federal Court of Appeal in *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] 2 F.C. 500 and *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, to be "directly affected" and thus having "direct standing" means that the practice must affect Mr. Lukács's legal rights, impose legal obligations upon him, or else prejudicially affect him in some way.

[24] With respect to Mr. Lukács's submission that he is six feet tall and weighs 175 pounds, Delta indicates that according to a national survey conducted by *Maclean's* Magazine (in 2012), the average Canadian male is five feet nine inches tall and weighs 185 pounds. Delta points out that Mr. Lukács's is only approximately four percent taller than the average Canadian male, and approximately four percent lighter.

[25] According to Mr. Lukács, Delta purports to rely on a national survey conducted by *Maclean's* Magazine as the evidentiary basis for its claim regarding the average size of a Canadian male. Mr. Lukács submits that information published in newspapers and magazines are inadmissible hearsay, and that the Agency should ignore the citation. In any event, Mr. Lukács states that Delta has correctly acknowledged that he is taller than the average Canadian male, thus making him a "large" passenger, and that Delta has provided no evidence as to the meaning of "large" found in its practices, which makes it impossible to conclude with certainty that Mr. Lukács is not "large".

[26] Delta contends that the complaint concerns persons who cannot fit in a single seat by virtue of being obese. Delta argues that given that Mr. Lukács is lighter than the average Canadian, despite being slightly taller, it is patently clear that he does not have a direct interest in the subject matter of the proposed complaint and his rights are not affected by the impugned practices nor would he suffer any prejudice if he elected to travel with Delta.

Public interest standing

[27] Mr. Lukács states that he has public interest standing, and that the legal test for public interest standing requires the consideration of three factors, which are set out in *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC) [*Fraser v. Canada*]:

1. Is there a serious issue to be tried?
2. Does the party seeking public interest standing have a genuine interest in the matter?
3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

1. Is there a serious issue to be tried?

[28] Mr. Lukács states that in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), the Agency established a two-step test for determining whether terms or conditions are "unduly discriminatory":

> [...] In the first place, the Agency must determine whether the term or condition of carriage applied is "discriminatory". In the absence of discrimination, the Agency need not pursue its investigation. If, however, the Agency finds that the term or condition of carriage applied by the domestic carrier is "discriminatory", the Agency must then determine whether such discrimination is "undue".

[29] Mr. Lukács points out that in *Black v. Air Canada*, the Agency applied the same test for determining whether terms or conditions are "unjustly discriminatory" within the meaning of section 111 of the ATR:

> [35] The Agency is therefore of the opinion that in determining whether a term or condition of carriage applied by a carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA or "unjustly discriminatory" within the meaning of section 111 of the ATR, it must adopt a contextual approach which balances the rights of the travelling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers operating in Canada. This position is also in harmony with the national transportation policy found in section 5 of the CTA.

[30] With respect to the meaning of "discriminatory," Mr. Lukács contends that the Agency adopted the interpretation of the Supreme Court in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143:

> [...] discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligation, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages, available to other members of society.

[31] Mr. Lukács asserts that Delta's practices are discriminatory in that they impose a disadvantage on a certain group of passengers based on their personal characteristics, namely, the size and/or shape of their body, and that it is arguable that the practices are "unjustly discriminatory" and contrary to subsection 111(2) of the ATR. Mr. Lukács contends that whether Delta's practices are "unjustly discriminatory" is a serious issue to be tried, meeting the first branch of the test.

2. Does the party seeking public interest standing have a genuine interest in the matter?

[32] Mr. Lukács states that he is a Canadian air passenger rights advocate who has filed more than two dozen successful complaints with the Agency, which have led to substantial improvements and landmark decisions. He adds that he has one complaint before the Agency, four proceedings before the Federal Court of Appeal, and that he is acting as a representative for a passenger in a disability-related complaint.

[33] Mr. Lukács submits that an electronic search of the Agency's decisions reveals 46 decisions mentioning him and/or decisions resulting from his complaints, and argues that based on this, he has a demonstrated long-standing, real, and continuing interest in the rights of air passengers and therefore meets the second branch of the test.

3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

[34] Mr. Lukács points out that in *Fraser v. Canada*, this branch of the test was explained as follows:

> Thus, in order to find that there is a reasonable and effective alternate means to litigate the issue, the A.G. must prove, on the balance of probabilities, that:
>
> a) there is a person who is more directly affected than the applicants; and
> b) that person might reasonably be expected to initiate litigation to challenge the legislation at issue.

[35] Mr. Lukács states that in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 S.C.R. 524 (*Canada v. Downtown Eastside Sex Workers*), at paragraph 51, the Supreme Court provided several examples of the types of interrelated matters that may be useful to take into account when assessing the third branch of the test:

> The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.
>
> The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

> The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities [...] [Emphasis added]

[36] Mr. Lukács asserts that there is a public interest in eliminating any discrimination, a conduct that is inconsistent with the Canadian values enshrined in the *Canadian Charter of Rights and Freedoms* (Charter) and the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, and this is particularly so with respect to "unjust discrimination", alleged in this case, which is an extreme form of discrimination. Mr. Lukács argues that these considerations militate in favour of granting him public interest standing.

[37] According to Mr. Lukács, there is no realistic alternative means for bringing Delta's outrageous practices before the Agency as such proceedings are legally complex and carriers are represented by highly skilled counsels. Mr. Lukács states that because of his expertise, he is in a unique position to meaningfully respond to the legal arguments crafted by such skilled counsels and that any other complainant would be forced to hire a lawyer and incur very substantial expenses.

[38] Delta contends that the essential issue in this case is whether, in the words of the Supreme Court in the *Canada v. Downtown Eastside Sex Workers* case, there are "realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination".

[39] Delta points out that in *Canada v. Downtown Eastside Sex Workers,* the Supreme Court cautioned, at paragraph 51, that:

> Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized. [Emphasis added]

[40] With this guidance from the Supreme Court in mind, Delta submits that it is helpful to consider certain information available on the Agency's Web site, which provides any person with an easy step-by-step tool for completing a complaint in approximately 15 minutes.

[41] Delta states that there exists an expedient method for filing an application, and that the Supreme Court cautioned that the alternative should "be considered in light of the practical realities, not theoretical possibilities". According to Delta, the practical reality in this case is that, in 2013 and the first nine months of 2014, the Agency issued 36 decisions in respect of consumer complaints relating to the air mode, and of these 36 decisions, 11 relate to complaints filed by Mr. Lukács. Delta points out that the total number of persons who participated as complainants was approximately 105 (although it concedes that one single case involved 83 complainants).

[42] Delta argues that there is no discussion of standing in any of the 11 cases initiated by Mr. Lukács which led to decisions in 2013 or 2014, and argues that comments made respecting the *Black v. Air Canada* Decision are applicable in this case as each of the 11 decisions can be explained on the basis of an implicit finding that Mr. Lukács could potentially have been prejudicially affected by the practice, term or condition complained of. Delta also points out that in none of these cases were there any suggestion that Mr. Lukács should be granted public interest standing.

[43] Delta maintains that the Agency provides an accessible medium for lodging consumer complaints, and encourages the participation of self-represented complainants through its informal and non-binding dispute resolution services. Delta adds that the Agency provides experienced mediators at no cost and its rules and procedures are relatively informal by comparison to courts. Therefore, Delta submits that a complainant need not be an expert litigant nor have the assistance of an experienced counsel as it is both practical and reasonable for a complainant who is unjustly affected by a practice, procedure, term or condition of an air carrier to bring a complaint to the Agency.

[44] Mr. Lukács submits that the availability of various forms of non-binding dispute resolution is not a relevant, and certainly not a determinative, consideration in this context.

[45] According to Mr. Lukács, Delta appears to misconstrue the meaning of "alternative means" as the correct interpretation of "alternative means" is the presence of another person who has private interest standing, and who is likely to challenge the impugned action, policy or law before the court or tribunal. Mr. Lukács asserts that Delta has to do more than show the "mere possibility" of a challenge to the impugned practices by a directly affected private litigant, as it was noted in *Fraser v. Canada,* at paragraph 109:

> In order to show there is a "reasonable and effective" alternative, it is necessary to show more than a possibility that such litigation might occur. <u>The "mere possibility" of a challenge by a directly affected private litigant will not result in the denial of public interest standing</u> [...] [Emphasis added]

[46] Regarding Delta's argument that a complaint can be filed "in approximately 15 minutes", Mr. Lukács submits that this is based on the misconception that an average passenger is familiar with the ATR and its section 111. Mr. Lukács asserts that while there may be particularly determined, dedicated and able passengers who might possibly be able to answer the questions found on the Agency's Web site in a meaningful way in relation to an undue or unjust discrimination complaint, this remains a "mere possibility".

[47] Mr. Lukács argues that Delta's claim regarding the number of decisions released by the Agency with respect to consumer complaints does not help Delta's argument, as a number of these complainants were represented by counsel (due to the complexity of the issues), and the fact that the Agency does not require complainants to be represented by counsel does not mean that they can effectively and successfully represent themselves. Mr. Lukács adds that the Agency's new Dispute Rules has a 90-page "companion document" which cannot be simple or accessible for an average passenger.

[48] Mr. Lukács submits that there is no obligation to be represented by counsel before the Federal Court, and most documents can be filed electronically using a simple interface; however, this does not render legal representation unnecessary, and does not demonstrate accessibility of the court and access to justice. Therefore, Mr. Lukács maintains that while there may be a theoretical possibility of this complaint being brought forward by another individual, it is no more than a "mere possibility", and this cannot be a basis for denying him public interest standing.

ANALYSIS AND FINDINGS

[49] Mr. Lukács argues that section 111 of the ATR and subsection 67.2(1) of the CTA serve as a preventive function rather than offering remedies *post facto,* and that the findings in *Black v. Air Canada*, which were reaffirmed in *O'Toole v. Air Canada, Lukács v. Air Canada* and *Krygier v. several carriers*, indicate that "any person" has standing to challenge, pursuant to section 111 of the ATR, the terms or conditions applied by a carrier. Mr. Lukács also argues that in light of the public policy purpose of section 111 of the ATR and its preventive nature, he is not required to be a member of the group discriminated against in order to have standing.

[50] Mr. Lukács submits that in *Krygier v. several carriers*, standing was directly challenged, and the Agency held that the principles outlined in *Black v. Air Canada* applied in that case, and the Agency reached its conclusion without any reference to the personal circumstances of the applicant or how the applicant would be affected by the terms and conditions he was challenging. With respect to this submission, the Agency finds that the principles outlined in *Black v. Air Canada* do not apply in this case as the issue is not whether there is a need for a real and precise factual background but rather, as will be seen, whether Mr. Lukács has private interest standing and/or public interest standing.

<u>Burden of proof</u>

[51] It is important to start the analysis of the issue of standing by reminding that this case relates to a tariff issue, not an issue related to accessible transportation for persons with a disability.

[52] That being said, the Agency raised the issue of standing. Although Mr. Lukács is not required to be a member of the group "discriminated" against in order to have standing, he must have a sufficient interest in order to be granted standing. Hence, notwithstanding the use of the words "any person" in the ATR, the Agency, as any other court, will not determine rights in the absence of those with the most at stake. Determining otherwise would, as noted by the Supreme Court in *Canada v. Downtown Eastside Sex Workers*, "[...] be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized."

[53] Standing can be acquired in two ways, either as a private interest standing or as a public interest standing.

Private interest standing

[54] Private interest standing arises from the basic principle that a person who has a direct personal interest in the question to be litigated is legally entitled to invoke the jurisdiction of the court (see *Ogden v. British Columbia Registrar of Companies*, 2011 BCSC 1151, at paragraph 11).

[55] More particularly, in order to have standing, an applicant, such as Mr. Lukács, must be "aggrieved" or "affected", or have some other "sufficient interest" (Jones & de Villars, in *Principles of Administrative Law*, 2009, at pages 646-647). A person "aggrieved" or "affected" is one whose interests are affected more than those of the general public or community in issue.

[56] Further, the Supreme Court, in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (*Finlay v. Canada*), citing *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, stated that:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[57] In *Canada v. Downtown Eastside Sex Workers*, at paragraph 1, the Supreme Court stated that "[l]imitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government [...]"

[58] Considering this, the Agency must determine whether Mr. Lukács is a person who is "aggrieved" or "affected", or has some other "sufficient interest".

[59] As part of his argument concerning private interest standing, Mr. Lukács states that he would or could be considered a "large person" by Delta's agents as he is six feet tall and weighs approximately 175 pounds. Mr. Lukács also submits that in the absence of the precise meaning of a "large person", it is not possible to conclude that he could not be personally subject to the discriminatory practices due to his physical characteristics.

[60] In this regard, the Agency is of the opinion that it is not clear, as it is not supported, on what basis Mr. Lukács considers that a six-foot tall and 175-pound person is a "large person" and, for the purpose of Delta's policy, that he would not be able to sit in his seat without encroaching into the seat next to his.

[61] Mr. Lukács maintains that it would be unfair to make any conclusions as to the meaning of "large", where he is deprived from using the production and interrogatory mechanisms available.

[62] Concerning the production and interrogatory mechanisms available, the Agency reminded the parties, in Decision No. LET-C-A-76-2013 (*Lukács v. United Air Lines, Inc.*) that:

> [16] [...] an applicant cannot file a complaint and then expect that any lack of information or documentation that, in the applicant's view, could be relevant in explaining or supporting the application be compensated for by inundating the respondent with questions or requests for production of documents.

[63] The Agency is of the opinion that the same rationale applies here as it is not appropriate for Mr. Lukács to submit that he is a "large person" and then to submit that to be certain of that, he should have the right to use the production and interrogatories mechanisms available pursuant to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104. As noted by the Agency in *Lukács v. United Air Lines, Inc.*, a proceeding before the Agency and the right to direct questions to the other party cannot turn into a commission of inquiry, or a "fishing expedition".

[64] The Agency finds that while Mr. Lukács describes himself as a "large person", this does not make him a "large person" for the purpose of Delta's policy and it is obvious, based on his comments regarding the need for interrogatories, that he has doubts as to whether Delta's policy even applies to him. It was for Mr. Lukács to file a complete application with the Agency, which would have included evidence that he is a "large person" for the purpose of Delta's policy at issue. How could the Agency find that Mr. Lukács has private interest standing, or more particularly, that he is a person "aggrieved" or "affected", or has some other "sufficient interest", which would give him the right to "invoke the jurisdiction of the Agency on the issue" when it is clear that Mr. Lukács is not certain himself. As pointed out by the Supreme Court of British Columbia in *Downtown Eastside Sex Workers Society v. Attorney General,* "private interest standing cannot be founded on hypothetical possibilities". In that regard, the Agency finds that Mr. Lukács's "private interest" submissions are founded on such hypothetical possibilities. On this basis, it is impossible for the Agency to find that Mr. Lukács is "aggrieved" or "affected", or has some other "sufficient interest".

[65] The Agency therefore finds that Mr. Lukács has no private interest standing in this case.

Public interest standing

[66] Mr. Lukács refers to the case of *Fraser v. Canada* for the proposition that public interest standing requires the consideration of the three following factors:

1. Is there a serious issue to be tried?
2. Does the party seeking public interest standing have a genuine interest in the matter?
3. Is the proceeding a reasonable and effective means to bring the issue before the court (or tribunal)?

[67] It is important to clarify that the second factor of *Fraser v. Canada* was phrased differently than what Mr. Lukács is proposing. Indeed, the Ontario Superior Court of Justice wrote: "Does the UFCW have a genuine interest in the validity of the legislation?"

[68] This clarification is important as it is consistent with the three factors established by the Supreme Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 (*Thorson v. Attorney General*), *The Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (*Nova Scotia Board of Censors v. McNeil*) and *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575 (*Minister of Justice v. Borowski*) in which there was a challenge to the constitutionality or operative effect of legislation. Those cases led to a three-part test that a party needs to satisfy in order to be granted public interest standing:

1. Is there a serious issue as to the validity of the legislation?
2. Is the party seeking public interest affected by the legislation or does the party have a genuine interest as a citizen in the validity of the legislation?
3. Is there another reasonable and effective manner in which the issue may be brought to the court?

[69] In light of those cases, public interest was granted in cases where the constitutionality of legislation was contested if that three-part test was met.

[70] In *Finlay v. Canada,* the Supreme Court noted that one of the issues in that case was whether the second part of the test established in *Thorson v. Attorney General*, *Nova Scotia Board of Censors v. McNeil* and *Minister of Justice v Borowski* could also apply to a non-constitutional challenge to the statutory authority for administrative action. The Supreme Court concluded that it could.

[71] This conclusion was reiterated in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236, where the Supreme Court indicated that the *Finlay v. Canada* case made it clear that public interest standing could be granted to challenge an exercise of administrative authority as well as legislation. The Supreme Court also concluded that the principle for granting public interest standing that it had already established did not need to be expanded beyond that.

[72] Of note, in the *Canada v. Downtown Eastside Sex Workers* case referred to by both parties, which involved a Charter challenge to the prostitution provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, the Supreme Court reminded the parties that the limitations on standing were explained in *Finlay v. Canada*.

[73] Although the Supreme Court made it clear in *Canada v. Downtown Eastside Sex Workers*, at paragraph 36, "that the three factors should not be viewed as items on a checklist or as technical requirements" but "[...] should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes", the Supreme Court also made it clear, at paragraph 37, that the "[...] plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing [...]"

[74] Even looking at the three factors cumulatively and in light of their purposes, the fact remains that, in regard to the second factor, the challenge made by Mr. Lukács is not related to the constitutionality of legislation or to the non-constitutionality of administrative action. Considering that the Supreme Court already established that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the non-constitutionality of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions.

[75] The Agency finds that Mr. Lukács does not have public interest standing.

CONCLUSION

[76] The Agency finds that Mr. Lukács lacks both private interest standing and public interest standing and, accordingly, the Agency dismisses his complaint.

(signed)

Geoffrey C. Hare
Member

(signed)

Sam Barone
Member