



Justice Centre
for Constitutional Freedoms

September 13, 2017

Via email and regular mail

Elizabeth C. Barker
General Counsel
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec J8X 4B3
liz.barker@cta-otc.gc.ca

Dear Ms. Barker:

Re: Unconstitutional Censorship of Expression on CTA Facebook Page

We write on behalf of Dr. Gabor Lukacs, the coordinator of Air Passenger Rights, an air passenger rights advocacy network. The Canadian Transportation Agency (CTA) has violated Dr. Lukacs' freedom of expression, guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*, by deleting Dr. Lukacs' posts from the public CTA Facebook page.

We request that the Canadian Transportation Agency cease its policy of censorship on social media.

Background Facts

CTA uses social media, such as Facebook, Twitter and YouTube, to "encourage communications between [the public] and the Agency."¹ Further, CTA has repeatedly stated that it "is committed to an open and transparent dialogue with Canadians and welcomes a variety of perspectives and opinions."² Additionally, CTA has stated:

We believe that only by being open to challenge, debate and a free and honest exchange of ideas can we ensure that we are serving Canadians to the best of our ability.³

On its Facebook page, CTA regularly posts public announcements about the Agency, tips on air travel and links to various webpages. Members of the public frequently comment on CTA's Facebook posts and occasionally CTA replies to those comments. These communications are all public, allowing members of the public to interact with the Agency and with each other.

¹ See CTA Use of Social Media policy, <https://www.otc-cta.gc.ca/eng/use-social-media>.

² July 5, 2017 Facebook message to Dr. Lukacs from CTA Social Media Coordinator ("July 5 Message").

³ July 26, 2017 Facebook post by CTA on CTA Facebook page.

Dr. Lukacs published an article “5 Reasons not to Trust the Canadian Transportation Agency” (the “Article”). The Article listed 5 concerns with the CTA: 1) institutional bias, 2) track record of lack of enforcement, 3) Vice-Chair: former airline lobbyist, 4) Manager of Enforcement: on first-name basis with industry, and 5) Chief Dispute Officer: lawyer suspended for misconduct. The Article is enclosed with this letter.

The issue of systemic passenger abuse by airlines is a matter of concern for all Canadians. Dr. Lukacs and the informal Air Passenger Rights network are concerned that airlines frequently act in violation of passenger rights and the laws of contract, and do so with impunity. Dr. Lukacs feels that the Agency is not fulfilling its role to hold airlines accountable for improper or unlawful practices. As he posted comments on the CTA’s Facebook page, Dr. Lukacs would occasionally post a link to the Article.

On July 5, 2017, Dr. Lukacs received a private Facebook message from an unnamed individual purporting to be the CTA Social Media Coordinator using the Facebook name of “Cta Otc”. The message told Dr. Lukacs that a number of his comments “directly targeted a number of Agency employees that draw their integrity into question.” It further informed him that these posts violated CTA’s Use of Media policy, and that if they continued, “the Agency will block your future access to comment on our Facebook and Twitter channels.”⁴

Dr. Lukacs immediately responded to confirm whether the message actually originated with the Agency. He denied making improper posts and asked for clarification as to how he had disclosed “personal information” or made “unproven or inaccurate accusations against individuals or organizations”. Dr. Lukacs asserted that attempts to censor him unlawfully interfered with his freedom of expression.

On July 19, 2017, Dr. Lukacs received another Facebook message from a person purporting to be the CTA Social Media Coordinator, telling him that his posting of “5 Reasons not to Trust the Canadian Transportation Agency” did not comply with their guidelines and was being removed. The message did not explain what “personal information” or “unproven or inaccurate accusations” were made in the Article. The message warned Dr. Lukacs to “stop posting references to the article” or his account would be blocked.

On July 28, 2017, the CTA made the following public post on its Facebook page:

Comments with links to "5 Reasons Not To Trust The Agency" will be deleted as it is deemed to be in breach of our social media policy, as well as Facebook's Community Guidelines, based on:

- It is repetitive or spam;
- Contains references to personal information;
- Puts forward serious, unproven or inaccurate accusations against individuals or organizations;
- Do not, in our opinion, add to the normal flow of the discussion.

⁴ July 5 Message.

CTA removed comments with links to or that referred to the Article, and blocked Dr. Lukacs from posting on the CTA's Facebook page.

Violation of Freedom of Expression

The CTA is a government body and is required to respect freedom of expression, guaranteed under section 2(b) of the *Charter*.

CTA has created a public Facebook page and invited the public to express their opinions and perspectives and has committed itself to being open to challenge and debate on its Facebook page. Clearly, the CTA Facebook page is a proper forum for public expression regarding the CTA, and expression there is protected under section 2(b) of the *Charter*.

The CTA's censorship of Dr. Lukacs in a public forum is unlawful. CTA's Use of Social Media policy cannot be used to justify censorship of government criticism. The Use of Social Media policy violates section 2(b) of the *Charter* by prohibiting, for example, comments that include "serious ... accusations", that are "offensive", "irrelevant" or that do not "add to the normal flow of the discussion."

In *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, the Supreme Court of Canada struck down policies that prohibited controversial and political advertisements, finding that those policies prohibited a "highly valued form of expression in a public location that serves as an important place for public discourse."

CTA itself acknowledges the importance of a free and open expression on its Facebook page, which it has set up as an important place for public discourse concerning the CTA. It is important that the CTA actually allow freedom of expression on the CTA Facebook page and other social media, not just pay lip service to the *Charter* rights of Canadians. Policies that improperly prevent lawful expression must be changed.

In this present situation, CTA has applied its policies to censor Dr. Lukacs' expression. The reasons CTA cites for removing links to the Article and blocking Dr. Lukacs are not justifiable in a free and democratic society, where freedom of expression is protected in order to (1) enable democratic discourse, (2) facilitate truth seeking, and (3) contribute to personal fulfillment.⁵ As a government agency, CTA would do well to regard the following passage from Canada's Supreme Court and govern itself accordingly:

Freedom of expression was entrenched in our Constitution and is guaranteed ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic

⁵ See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*] at p. 976.

society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

... is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".⁶

Conclusion

The CTA censorship of Dr. Lukacs, and the policy on which that censorship is based, violate the freedom of expression guaranteed by the *Charter*. This violation cannot be justified in Canada's free and democratic society.

We request that the Canadian Transportation Agency cease its censorship of Dr. Lukacs, and change its Use of Social Media policy to properly respect freedom of expression. Further, we request that CTA confirm in writing that Dr. Lukacs is no longer blocked from posting on CTA's social media pages, including links to the Article, and that Dr. Lukacs' posts will not be summarily deleted.

Should CTA choose rather to continue to violate Dr. Lukacs' constitutional freedom, we will have no alternative but to pursue further steps to defend our client's rights.

We request a response from CTA no later than 4:00 p.m. EST, Friday September 22, 2017.

Sincerely,



Marty Moore
Justice Centre for Constitutional Freedoms
Counsel for Dr. Gabor Lukacs

Enclosures

⁶ *Irwin Toy*, at pp. 968-69.