Gábor Lukács

Halifax, Nova Scotia

August 31, 2012

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Gábor Lukács v. Air Canada
Overselling practices and denied boarding compensation rules (domestic)
File No.: M 4120-3/11-06673
Comments on Air Canada's answers to interrogatories

On July 19, 2012, in Decision No. LET-C-A-105-2012, the Agency directed a total of ten questions to Air Canada: three concerning Rule 245(E)(1)(B), and seven concerning Rule 245(E)(2). The Agency directed that Air Canada provide its answers by August 8, 2012, and provided the Applicant with 12 days to file comments in response.

Pursuant to the extension granted to Air Canada in Decision No. LET-C-A-125-2012, Air Canada submitted its answers to the Agency's questions on August 15, 2012, but served only a redacted version of its answers upon the Applicant, omitting certain paragraphs and documents with respect to which Air Canada is seeking confidentiality.

Air Canada requested that the Applicant sign a "Confidentiality and Non-Disclosure Undertaking" before the full, unredacted submissions of Air Canada are disclosed to the Applicant. The Applicant signed the sought "Confidentiality and Non-Disclosure Undertaking" on August 17, 2012, and Air Canada disclosed its full, unredacted submissions to the Applicant on August 20, 2012. In Decision No. LET-C-A-133-2012, the Agency granted the Applicant an extension until September 4, 2012 to file his comments.

Please accept the following submissions in relation to the above-noted matter as comments in response to the information and submissions of Air Canada dated August 15, 2012.

ISSUES

I. Reliability of Air Canada's evidence: Questions directed to Air Canada

The submissions below challenge the reliability of Annex A (paragraph 10(i)) and Annex C to Air Canada's submissions dated August 15, 2012. The Applicant would like to underscore that nothing in this section is to be interpreted as attributing bad faith or intention to mislead to Air Canada or to Mr. Gordon Ng.

A. Paragraph 10(i) of Annex A: "average Air Canada domestic economy cabin fare"

Annex A to Air Canada's submissions dated August 15, 2012 is a signed statement by Mr. Gordon Ng, the manager of the premium revenues department of Air Canada. In paragraph 10(i) of his statement, Mr. Ng provides Air Canada's "average domestic economy cabin fare" for each of the years 2004-2012. Air Canada relies heavily on these figures in order to justify the quantum of its denied boarding compensation.

(a) Statistical analysis

While statistics can be a profoundly strong and sophisticated instrument for drawing inferences from datasets, it has a number of limitations. A statement that first-year science students may hear from professors who caution them against the erroneous use of statistical evidence is that "64.79% of the arguments based on statistics are wrong."

Apparently, Air Canada is the victim of such a typical error. Given that Air Canada, being an airline and not a research institute, has no expertise in statistics, the Applicant would like to emphasize that this is clearly a genuine error of Air Canada.

The average of a dataset (such as the fares sold by an airline) provides very little information about the distribution of the data (fares) below and above the average, as the following four examples demonstrate:

Example 1. The average of $169.00, $186.00, $190.00, and $211.00 is $189.00. The fact that these figures are "close" to the average is statistically quantified, for example, by means of the standard deviation ($14.95) and the average deviation ($11.50).

Example 2. The average of $69.00, $86.00, $290.00, and $311.00 is also $189.00. However, the standard deviation is $111.91 and the average deviation is $111.50. It is worth noting that the average deviation in this case exceeds by $100.00 the same quantity from the previous example.

Example 3. The average of $69.00, $71.00, $75.00, and $541.00 is once again $189.00, but the standard deviation is $203.24, and the average deviation is $176.00.

Example 4. The average of $9.00, $246.00, $250.00, and $251.00 is yet again $189.00. The standard deviation is $103.94 and the average deviation is $90.00.

A common feature of all four examples is that the average of the data is $189.00, just as in the case of Air Canada's domestic economy cabin fares in 2012. Nevertheless, there is a qualitative difference in the four examples in terms of how far the data entries are from the average. This difference (deviation) from the average is measured by the standard deviation and the average deviation, which are, indeed, the highest in Example 3. (The importance of standard deviation has been recognized also in finance: see, for example, the Bollinger bands.)

These examples underscore that the average domestic economy cabin fares for the years 2004-2012 provided by Air Canada give precious little information about Air Canada's domestic economy fares, and cannot be the rational basis for establishing denied boarding compensations.

Nevertheless, the Applicant commends Air Canada's initiative to rely also on statistical analysis in order to determine what amount of denied boarding compensation is reasonable. In order to enable both the Agency and the Applicant to fully understand the domestic fare structure of Air Canada, the Applicant directs the following questions to Air Canada pursuant to Rule 19 of the Agency:

Q1. What is the standard deviation of Air Canada domestic economy cabin fares in each of the years 2004-2012?

For greater clarity, given a sample $x_1, \ldots, x_N$ with average $\mu := \dfrac{x_1 + \cdots + x_N}{N}$, the *standard deviation* of the sample is

$$\sigma := \sqrt{\frac{(x_1 - \mu)^2 + \cdots + (x_N - \mu)^2}{N}}.$$

In commonly used spreadsheet programs, the standard deviation of a sample can be calculated using the `STDEVP` function. (The `STDEV` function provides a larger and incorrect figure, because it uses $N-1$ instead of N in the denominator. It is used to estimate the standard deviation of large datasets based on small sample.)

Q2. What is the average deviation of Air Canada domestic economy cabin fares in each of the years 2004-2012?

For greater clarity, given a sample $x_1, \ldots, x_N$ with average $\mu := \dfrac{x_1 + \cdots + x_N}{N}$, the *average deviation* of the sample is

$$\frac{|x_1 - \mu| + \cdots + |x_N - \mu|}{N}.$$

In commonly used spreadsheet programs, the average deviation of a sample can be calculated using the `AVEDEV` function.

Q3. Please provide complete datasets of Air Canada's domestic economy cabin fares for each of the years 2004-2012 that were used for the calculations.

(b) Total price vs. air transportation charge

Although Air Canada does not address this question directly, the figures provided by Air Canada for the years 2004-2012 leave the impression of being only "air transportation charges" and not "total prices". In other words, it seems that Air Canada's figures exclude all taxes and surcharges.

If that is the case, then the figures provided by Air Canada are substantially lower and not comparable with the American regime of denied boarding compensation (as revised by 76 FR 23100), which is based on a notion of "fare" that includes all taxes and fees and surcharges required in order to obtain the service (14 CFR 250.1 that):

> *Fare* means the price paid for air transportation including all mandatory taxes and fees. It does not include ancillary fees for optional services.

In order to resolve this uncertainty, and ensure that the figures provided by Air Canada are comparable with international standards for denied boarding compensation, the Applicant directs the following questions to Air Canada pursuant to Rule 19 of the Agency:

Q4. What surcharges, taxes, and fees were included in calculating the "average domestic economy cabin fare" mentioned in Annex A?

Q5. What is the average, standard deviation, and average deviation of the "total price" of Air Canada's domestic economy cabin fares in each of the years 2004-2012?

B. Annex C: [Confidential]

In order to respect Air Canada's request that Annex C be treated confidentially, submissions and questions concerning Annex C are provided in a separate, password-protected electronic document, which is to be considered to form an inherent part of the Applicant's submissions.

In order to respect Air Canada's request that Annex C be treated confidentially, submissions and questions concerning Annex C are provided in a separate, password-protected electronic document, which is to be considered to form an inherent part of the Applicant's submissions.

II. It is unreasonable for Air Canada to oversell its domestic itineraries

In the present proceeding, commenced on December 12, 2011, the Applicant is challenging the reasonableness of the practice of "overselling" flights by Air Canada, that is, the calculated and premeditated act of selling more seats on flights than the aircraft's capacity (see Annex E to Air Canada's August 15, 2012 submissions).

In this context, it is important to emphasize that Air Canada's main competitor in the market of domestic carriage by air within Canada does not engage in the practice of overselling flights: WestJet has a well-known policy of never, under any circumstance, overselling its flights (see Exhibit "A").

In its January 16, 2012 submissions, Air Canada claimed that it "engages in the practice of over-booking in order to absorb some of" the risk associated with "no-show" passengers and "to, in turn, benefit customers". As the Applicant noted in his January 24, 2012 reply, there was no evidence before the Agency to support this claim.

The answers and submissions of Air Canada dated August 15, 2012 do not alter this state of affairs: there is still no evidence before the Agency on this point.

The practice of overselling flights was sensible in times when, as a general rule, air tickets were changeable and refundable, and so passengers could change their minds hours before the flight, leaving airlines with a loss. In light of Air Canada's practice of selling a substantial amount of non-refundable and non-changeable tickets, a "no-show" is no longer a financial risk for Air Canada, because it does not have to refund the fare to passengers who chose not to fly at the last minute; in fact, Air Canada may even benefit from no-shows, because it can keep their fares, but it may use less fuel if the flight is not full.

For these reasons, it is submitted that there is no evidence before the Agency on the relationship between the practice of (deliberately) overselling flights and Air Canada's statutory, commercial and operational obligations, while it is plain and clear that this practice has a profound impact on passengers and their rights to be transported in a timely manner as provided for by the contract of carriage.

Therefore, it is submitted that the practice of Air Canada of (deliberately) overselling its flights is unreasonable.

III. Air Canada's Rule 245(E)(1)(b)(iv) is unreasonable

Rule 245(E)(1)(b)(iv) allows Air Canada to exonerate itself from the obligation of paying denied boarding compensation (DBC) to passengers who are denied boarding because the aircraft was substituted with one having a smaller capacity due to "operational and safety reasons".

The Applicant does not dispute that Air Canada may, in certain cases, choose to substitute one aircraft with another, but he submits that in the vast majority of such situations, Air Canada should be required to pay denied boarding compensation to affected passengers.

The Applicant is aware of the presence of the phrase "operational or safety reasons" in 14 CFR 250.6. However, there is no evidence before the Agency concerning the interpretation of this phrase by American courts or the Department of Transportation of the United States. Consequently, it is not possible to conclude that 14 CFR 250.6(b) supports Air Canada's position.

At the same time, the Applicant would like to draw attention to the decision of the European Court of Justice in *Wallentin-Hermann v. Alitalia*, Case C-549/07, which interpreted Article 5(3) of *Regulation 261/2004*, concerning "extraordinary circumstances" relieving an airline from payment of DBC, in a very narrow and strict manner, consistent with the position taken by the Applicant.

The Agency directed Air Canada to provide examples of such substitution of aircraft ("down-gauging"), and in its August 15, 2012 submissions, Air Canada provided the following examples: aircraft not equipped with a GPS unable to land in adverse weather, "unplanned mechanical issue," noise curfews, and delayed inbound flight.

(a) Aircraft not equipped with a GPS unable to land in adverse weather

As noted by the Agency in *Lukács v. WestJet*, 249-C-A-2012 (at para. 94), developments in technology may alter the assessment of what constitutes "all reasonable measures" that may relieve a carrier from liability in the context of Article 19 of the *Montreal Convention*. In light of the language of Article 5(3) of *Regulation 261/2004*, the Applicant submits these principles are equally applicable in the context of denied boarding.

The GPS (Global Positioning System) project was developed in 1973, and was originally meant for use by the US military. In 1983, Korean Air Lines Flight 007 departed from Alaska, and due to a navigational error strayed into the prohibited airspace of the Soviet Union, where it was shot down, killing 269 people on board. Following the tragedy, president Reagan issued a directive to make the GPS system available also for civil use once it was sufficiently developed, in order to prevent such tragedies in the future.

The first GPS satellite was launched in 1989, and the GPS system reached initial operational capability in December 1993. It reached full operational capability in April 1995. Until May 2000, civil use was limited to a coarser signal, whose precision was 100 metres; however, since May 1, 2000, civil users have access to the military-quality signal, whose precision is 20 metres.

In the year 2012, GPS is no longer considered to be a specialty or a particularly exceptional equipment; indeed, many people have GPS on their smartphones and/or in their cars. Portable GPS devices suitable for use in aviation (albeit for VFR), such as the Garmin aera 795 or Garmin aera 796, are readily available for purchase on the Internet:

`http://www.gpscentral.ca/products/garmin/aviation/aera795.html`
`http://www.gpscentral.ca/products/garmin/aviation/aera796.html`

Appendix A of Policy No. 551-003 of Transport Canada, entitled *Global Positioning System (GPS) Equipment and Installation Approval*, provides a complete list of GPS equipment that is approved for instrumental approach in IFR (Instrumental Flight Conditions) weather conditions. It is worth noting that the approval of some of this equipment dates back to 1996, that is, 14 years ago.

Thus, in the year 2012, a GPS that is approved for IFR approach is a completely standard equipment in aviation that can be installed on any aircraft commonly used in air transportation if the owner or operator so desires; its absence from an aircraft is the direct consequence of an informed decision and choice of the owner or operator to not install it.

The Applicant respectfully disagrees with Air Canada's submission that downgauging due to the inability of an aircraft not equipped with GPS to land in adverse weather is an event outside of Air Canada's control. While Air Canada has no control over the weather, it does have full control over its fleet and the equipment it chooses to install in its aircrafts. Operating aircrafts that are not equipped with GPS and/or failing to upgrade its aircrafts' avionic systems is a choice of Air Canada, and this choice apparently has an impact on passengers transported by Air Canada, who may consequently be denied boarding. There is no reason for Air Canada to not bear the costs of the consequences of such choices.

Therefore, it is submitted that it is unreasonable for Air Canada to relieve itself from the obligation of paying DBC in situations where the downgauging is necessitated by Air Canada's decisions and choices in relation to the navigation equipment of its fleet, and their upgrade, such as the failure of Air Canada to have a GPS installed on some of its aircrafts.

(b) "Unplanned mechanical issue"

The Applicant would like to draw attention to the leap in Air Canada's submissions from "unplanned mechanical issues" to a bird strike at landing. While the former is, in general, not viewed as being outside of a carrier's control, the latter is clearly an extraordinary event capable of exonerating an airline from the obligation of paying DBC.

The Applicant is alarmed by Air Canada's attempt to blur the line between mechanical failures commonly discovered before or after take-offs (which are considered by the caselaw to be within the airline's control), and damage to the aircraft by unrelated third parties or acts of nature, such as a bird striking an aircraft.

The submissions below focus on the extent to which a mechanical failure constitutes a circumstance beyond the airline's control. In *Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, the court held that:

> [15] [...] Certes, le transporteur aérien demeure tributaire des phénomènes atmosphériques. En revanche, il doit escompter la possibilité de bris mécaniques et prévoir pour cette raison des solutions efficaces de rechange afin d'assurer le service promis. Ce devoir s'accentue davantage lorsque ce transporteur effectue ce transport à partir de son principal établissement.

The same principal was cited with approval and applied in *Lukacs v. United Airlines*, 2009 MBQB 29 (leave to appeal denied; 2009 MBCA 111):

> [32] The court held that the airline must take into consideration the possibility of mechanical failures and provide for efficient solutions to assure the service contracted with the public. I agree.

Similarly, in *Lambert v. Minerve Canada*, 1998 CanLII 12973 (QC C.A.), the Quebec Court of Appeal held that:

> le bris mécanique de l'appareil n'est pas [...] dans les circonstances de l'espèce, constitutif de force majeure.

In the same vein, in *Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11, the court cited with approval a commentary on tourism law in Quebec (at para. 13):

> [...] les bris mécaniques ne sont généralement pas considérés comme une force majeure [...]

The same conclusion was reached by the European Court of Justice in *Wallentin-Hermann v. Alitalia*, Case C-549/07, where the court was called upon to interpret the phrase "extraordinary circumstances" Article 5(3) of *Regulation (EC) 261/2004*, which states that:

> An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

The court held that:

> 24. In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft, it must be stated that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is moreover in order to avoid such problems and to take precautions against incidents

> compromising flight safety that those aircraft are subject to regular checks which are particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity.
>
> 25. Consequently, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004.
>
> 26. However, it cannot be ruled out that technical problems are covered by those exceptional circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.

The Applicant submits that the approach of the European Court of Justice represents an adequate balance between the rights of passengers for performance of the contract of carriage in a timely manner, and the operational needs of airlines: While technical or mechanical problems, on their own, are not extraordinary circumstances that relieve the carrier from the obligation of paying DBC, if such problems arise from causes that are entirely outside of the carrier's control, such as sabotage, acts of terrorism, or a hidden manufacturing defect (which affects all aircrafts of a particular model), then obviously the airline should not be required to pay DBC.

The Applicant further notes that the approach of the European Court of Justice is consistent with the aforementioned Canadian jurisprudence. Therefore, it is submitted that it is unreasonable for Air Canada to relieve itself from the obligation of paying DBC in situations where the downgauging is necessitated by mechanical problems, unless the problems themselves were caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

(c) Noise curfews

The Applicant respectfully disagrees with Air Canada's submission that noise curfews are unexpected events that justify not paying DBC in the case of downgauging equipment. As in the case of Montreal airport referred to by Air Canada, the "airport curfew" is part of the standard airport information periodically published together with the various procedural charts related to the airport. It is also publicly available on the Internet:

http://www.admtl.com/AboutUs/Soundscape/NoiseAbatementMeasures.aspx

The Applicant is struggling to see how a restriction that is widely known and published months in advance of the flight can be considered by Air Canada as an operational reason that warrants depriving passengers of their DBC.

Therefore, the Applicant submits that it is unreasonable for Air Canada to refuse to pay DBC to stranded passengers based on downgauging in relation to airport curfews, because these are not unexpected and unforeseeable events.

(d) Delayed inbound flight

The common consequence of a delayed inbound flight is that the outbound flight is also delayed. Delay of the inbound flight, however, does not exempt a carrier from compensating passengers for the delay under the principles of Article 19 of the *Montreal Convention*.

Downgauging an aircraft in order to resolve a delayed inbound flight is a deliberate operational decision: it may save the carrier the cost of compensating *all* passengers for the delay, but it is done at the cost of denied boarding to *some* of the passengers due to the smaller capacity of the substitute aircraft.

The Applicant submits that there is no reason to deprive passengers stranded in such a situation of the benefit of the DBC.

Furthermore, the mere fact that an inbound flight is delayed does not mean that it is not possible for the carrier, with some effort (and perhaps cost), to arrange for another aircraft of the same or higher capacity to transport the passengers. In other words, downgauging is not always the only reasonable measure that Air Canada could take in order to transport the passengers in a timely manner, although it might be the cheapest one, and the most preferred one for the carrier; that, however, is an airline-centred approach, which fails to strike the balance between the passengers' right to be subject to reasonable terms and conditions and Air Canada's statutory, commercial and operational obligations.

Therefore, it is submitted that it is unreasonable for Air Canada to refuse to pay DBC to stranded passengers in the case of downgauging caused in relation to a delayed inbound flight.

(e) 2003 SARS epidemic

The Applicant was struggling to follow Air Canada's submissions related to the 2003 SARS epidemic and how it may have affected "flight capacity". The Applicant submits that the 2003 SARS epidemic is not relevant to the present case.

(f) Conclusion

There may be some truly exceptional and extraordinary situations that are entirely beyond Air Canada's control, such as when a bird strikes an aircraft, where Air Canada may relieve itself from the obligation of paying denied boarding compensation in relation to downgauging.

However, the general categories listed in Air Canada's submissions do not constitute extraordinary circumstances, and clearly demonstrate the abuse that can be, and apparently has been, made with Rule 245(E)(1)(b)(iv) to the detriment of the travelling public.

Therefore, the Applicant submits that Rule 245(E)(1)(b)(iv) is unreasonable.

The Applicant further submits that Rule 245(E)(1)(b)(iv) ought to be substituted with a provision that relieves Air Canada from the obligation to pay DBC only in truly exceptional and extraordinary situations that are entirely beyond Air Canada's direct and indirect control as described in the decision of the European Court of Justice in *Wallentin-Hermann v. Alitalia*. An essential element of the new rule ought to be a provision shifting the burden of proof to Air Canada, as in Article 19 of the *Montreal Convention* and in Article 5(3) of the *Regulation (EC) 261/2004*.

IV. Air Canada's Rule 245(E)(2), governing the amount of denied boarding compensation, is unreasonable

A. Misleading, outdated, and inadmissible statements in Air Canada's submissions (p. 5)

On page 5 of its August 15, 2012 submissions, Air Canada purports to summarize in a table the denied boarding policies of its "competitor airlines". The Applicant objects to its admissibility on a number of grounds.

(a) Misleading and prejudicial: Partners or competitors?

A carrier's ability to meet its commercial obligations is one of the considerations in deciding whether a tariff provision is reasonable. Thus, determining which airlines are the competitors of a carrier is a fundamental question in this context.

On page 5 of is submissions, Air Canada represented to the Agency that certain airlines are its competitors. While the Applicant accepts that WestJet and Porter are competitors of Air Canada, the Applicant disputes that the following airlines are competitors of Air Canada:

- Air Creebec;
- Canadian North;
- Central Mountain Air;
- Bearskin Airlines;
- First Air.

Indeed, the aforementioned airlines are listed on Air Canada's own website as Air Canada's partners (see Exhibit "B").

The Applicant was unable to ascertain the relationship between Air Canada and the remaining airlines listed on page 5 of Air Canada's submissions; however, by examining their routes and networks, they do not appear to be competing with Air Canada at all.

The Applicant submits that the onus is on Air Canada to demonstrate that the airlines listed on page 5, other than WestJet and Porter, are its competitors, and it has failed to provide any evidence in support.

Therefore, it is submitted that there is no evidence on the record to support that the airlines listed on page 5, other than WestJet and Porter, are competitors of Air Canada. Furthermore, Exhibit "B" shows that some of these airlines are not competitors.

(b) Outdated

The information contained in the table on page 5 of Air Canada's August 15, 2012 submissions is manifestly outdated, and Air Canada ought to have known that it is outdated.

In *Lukács v. WestJet*, 252-C-A-2012, released on June 28, 2012, the Agency considered Proposed Rule 12 of WestJet concerning compensation of passengers affected by overbooking or cancellation, and ordered WestJet to make certain changes to it, and to publish it within 30 days (para. 115). These new tariff provisions were already in effect on August 15, 2012 (the date of Air Canada's submissions). One is left pondering why Air Canada failed to incorporate this information into its submissions.

Similarly, Porter's website clearly states in relation to overbooking that (see Exhibit "C"):

> All affected passengers are protected on a later Porter flight. With few exceptions, persons denied boarding involuntarily are entitled to compensation.

This clearly shows that Porter's domestic tariff is outdated and (undoubtedly contrary to the applicable legislation) fails to reflect Porter's current practices.

(c) Hearsay

The table on page 5 of Air Canada's August 15, 2012 submissions contains two airlines marked with a star (∗), and a note below the table that states:

> Note: Lowest retail selling fares are significantly higher than Air Canada's average domestic economy fares.

Air Canada provided no evidence to support this claim, and thus this representation constitutes inadmissible hearsay.

(d) Conclusion

The table on page 5 of Air Canada's August 15, 2012 submissions contains misleading, prejudicial, outdated, and inadmissible statements, which in totality render the entire table inadmissible. The prejudice created by accepting the content of the table as evidence outweighs its probative value.

Therefore, it is submitted that the table in question ought to be expunged from the record.

B. Form of payment: Cash vs. voucher

(a) Factual error in Air Canada's submissions

At the bottom of page 6 of its August 15, 2012 submissions, Air Canada claims that offering travel vouchers in lieu of denied boarding compensation is a common practice internationally. This statement must be qualified.

Article 7(3) of *Regulation (EC) 261/2004* provides that:

> The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

In other words, passengers are entitled to a cash (or equivalent) compensation, but may agree to accept another form of payment if they choose to. The requirement that passengers provide a written agreement confirming that they accept compensation in the form other than cash (or equivalent) underscores the legislative intent to ensure that the standard form of compensation be by cash.

In the United States, 14 CFR Part 250.5(c)(3) provides a similar stipulation, with the additional restriction that the passenger's agreement to forego the cash compensation that they are otherwise entitled to in exchange for free or reduced rate transportation must be an informed one, based on full disclosure of all material restrictions applicable.

(b) Denied board compensation by voucher: Disadvantages for passengers

Although in theory, receiving a travel voucher for an amount equal to double or triple the cash DBC (Denied Boarding Compensation) may mutually benefit Air Canada and its passengers, in practice, the vouchers tend to be nearly worthless due to the many restrictions imposed on their use (see Exhibit "D"), and benefit only Air Canada:

1. Vouchers are valid only for one year, after which they expire and become worthless.

2. Vouchers are valid only on transportation on Air Canada or Jazz, and on Air Canada Vacations; they cannot be used on itineraries that also involve a code-sharing partner of Air Canada. The number of the ticket obtained on a voucher must start with 014.

3. Taxes, fees, charges and surcharges related to an itinerary cannot be paid by a voucher. The sum of these charges is often equal to or even exceeds the base fare.

4. Although travel vouchers can be combined, only a maximum of three vouchers may be used for the purchase of a new ticket.

5. It appears from Air Canada's submissions that vouchers received as DBC on domestic flights are valid only for domestic flights, or perhaps flights within North America; they are not valid for transatlantic travel.

6. Passengers are not aware of the aforementioned restrictions, and even if they are made aware of it at the airport, they cannot make an informed decision in a matter of minutes as to whether to seek cash compensation or accept a travel voucher instead.

(c) Conclusion

The international standard is that passengers are entitled to denied boarding compensation in cash; nevertheless, after being fully informed of the restrictions, they may choose to accept a travel voucher offered by the airline if they wish and feel comfortable with doing so. This is consistent with the Agency's position in Decision No. LET-C-A-83-2011, namely that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger.

It is submitted that passengers should retain not only the choice between cash and voucher compensation, but also the option to change their minds within a reasonable amount of time, and exchange their travel voucher for cash. It is further submitted that the restrictions imposed by Air Canada on the use of its travel vouchers are excessive and unreasonable.

The Applicant accepts the principle stemming from Air Canada's submissions that an exchange rate of 1:3 is reasonable between cash and travel vouchers, that is, $1 of cash compensation should be considered equivalent to $3 worth of travel voucher.

C. Quantum of compensation

Air Canada advances three arguments in support of the reasonableness of $100 as cash denied boarding compensation: its extensive network, its average economy cabin fare, and the DBC paid by other Canadian airlines.

In what follows, the Applicant submits that the first two considerations clearly militate in favour of increasing the amount of cash DBC that Air Canada must pay, while the third argument is irrelevant.

(a) Air Canada's extensive domestic network

Clearly, the inconvenience of a passenger delayed for only 1 and a half hours is smaller than in the case of a passenger delayed by 6 or 8 hours as a result of a denied boarding. Thus, the Applicant agrees that Air Canada's new denied boarding compensation rules should include a provision similar to Article 7(2) of *Regulation (EC) 261/2004* or 14 CFR 250.5(a)(2), which allows the carrier to reduce the amount of compensation payable by 50% if the passengers reach their destinations within less than, for example, two hours after their originally booked arrival time.

Such a provision would create an incentive for Air Canada to re-route passengers as quickly as possible (which clearly benefits the passengers), and would relieve Air Canada from part of the financial burden. It would particularly benefit Air Canada, because, as it stated in its submissions, it is able to re-route passengers quickly to their final destinations. On the other hand, it would protect those passengers whom Air Canada is unable to re-route to their final destinations in a timely manner in spite of its extensive network.

Nevertheless, the Applicant respectfully disagrees with Air Canada that the mere fact of having an extensive network, on its own, justifies paying less denied boarding compensation, because the size of the network does not necessarily correlate to availabilities and efficiency of its use. In other words, Air Canada should not be "rewarded" for its extensive network alone, but rather the denied boarding compensation policy should reward it for using its network well, to the benefit of the passengers, by ensuring that they reach their final destinations within 2 hours of the originally booked arrival time.

The Applicant further notes that Air Canada is not the only airline having an extensive network in a particular region. A number of American airlines have as extensive, or even larger, networks than Air Canada, and similarly, Lufthansa or Air France have huge networks in Europe. Nevertheless, legislators and regulators chose to impose on these airlines the same rules concerning denied boarding compensation as on smaller airlines. They decided to "reward" airlines based on their efficiency in re-routing victims of denied boarding to their final destinations (by reducing the amount of DBC payable), and not merely based on the size of the airlines' networks, precisely as the Applicant is proposing.

(b) The average domestic economy cabin fare

Air Canada relies very heavily on the notion of "average Air Canada domestic economy cabin fare" in its August 15, 2012 submissions in order to justify the amount of its cash denied boarding compensation. The Applicant objects to the use of this quantity as a benchmark for determining the quantum of denied boarding compensation for a number of reasons.

First, the Applicant is a mathematician. In the Applicant's professional opinion, it misleading to rely on a single statistical quantity, such as the average of a dataset, without Air Canada disclosing the entire dataset itself, that is, the full database of the economy cabin fares that it sold each year. Without that information, it is impossible make meaningful submissions in response. In particular, it is not clear how Air Canada calculated the said average, and what weights were used. The Applicant objects to the admissibility of these unverifiable figures without having had the opportunity to review the entire dataset used for calculating the average, and without being able to calculate other important statistical quantities (e.g., standard deviation, average deviation, mode, median, etc.).

Second, it is plain and clear from the fact that these averages remained almost unchanged in the last 10 years that the "average domestic economy cabin fare" excludes all surcharges taxes. This renders the figures provided by Air Canada incompatible and incomparable with the American system for denied boarding compensation, which provides in 14 CFR 250.1 that:

> *Fare* means the price paid for air transportation including all mandatory taxes and fees. It does not include ancillary fees for optional services.

Even if one accepts, only for the sake of the present argument, that $185.00 reflects the average value of a domestic economy cabin fare, it does not justify providing only $100.00 in cash as denied boarding compensation, which is less than 55% of the average value of a domestic economy cabin fare. As the American regime of denied boarding compensation shows, the standard is 200% or 400% of the (total) fare paid by the passenger, depending on the length of the delay caused by the denied boarding. Consequently, using the amount of $185.00 as a benchmark, Air Canada's denied boarding compensation ought to be $370.00 for short delays caused by denied boarding, and $740.00 for long ones.

The Applicant notes that the figures $370.00 and $740.00 are approximately equal to 300 EUR and 600 EUR, respectively, which are the current denied boarding compensation rates under *Regulation (EC) 261/2004* for itineraries over 3,500 km. (Given the geographical distances within Canada, there are many domestic itineraries whose distance exceeds 3,500 km.) The Applicant further notes that according to *Regulation (EC) 261/2004*, which Air Canada is required to apply on some of its international itineraries, airlines also have to provide meals, accommodation, and ground transportation, as necessary, to passengers stranded as a result of denied boarding. Thus, the fact that Air Canada is required to provide a similar assistance to its passengers does not relieve or mitigate Air Canada's obligations to pay reasonable denied boarding compensation.

Therefore, although the Applicant most vehemently disputes the reliability and admissibility of the "average domestic economy cabin fare" information provided by Air Canada (without complete datasets to back it up), it is submitted that these figures clearly demonstrate that Air Canada's policy of providing only $100.00 cash denied boarding compensation is unreasonable.

(c) Concrete example demonstrating the unreasonableness of Air Canada's DBC policy

In order to further demonstrate the unreasonableness of Air Canada's denied boarding compensation policy, the Applicant proposes examining a concrete example of travelling from Halifax (YHZ) to Vancouver (YVR) on September 20, 2012 (a date in the future chosen to avoid last-minute prices, which are not representative). A copy of a one-way itinerary, showing the lowest available basic fare of $245.00 and total fare of $343.91, is attached and marked as Exhibit "E". The table below summarizes the cash DBC payable to a passenger on this itinerary under Air Canada's policy, and the European and the American DBC regimes, in the case where the passenger is denied boarding on the first leg (Halifax-Toronto), depending on the length of the delay.

The Applicant notes that under the American regime, 14 CFR 250.1 provides that "fare" includes all charges, surcharges, taxes and fees, and thus $343.91 is the applicable fare for the purpose of the calculations below. Furthermore, since the distance between Halifax and Vancouver is over 3,500 km, it falls under Article 7(1)(c) of the *Regulation (EC) 261/2004*. For the sake of the comparison, Canadian and US Dollars are assumed to be at parity, and 300 EUR is assumed to be equal to $370. In the table below, "costs" refers to meals, accommodation, and ground transportation costs.

	Air Canada	**European Union**	**United States**
less than 1 hour	$100 + costs	$370 + costs	$0
1-2 hours	$100 + costs	$370 + costs	$650
2-4 hours	$100 + costs	$370 + costs	$1,300
over 4 hours	$100 + costs	$740 + costs	$1,300 + costs*

(*) It is the Applicant's understanding that in the United States, if a denied boarding results in an overnight stay, then airlines would be liable for the costs of the passenger under other provisions of their tariffs.

As the table clearly demonstrates, while Air Canada's policy may be favourable to passengers delayed by less than 1 hour as a result of denied boarding, it shortchanges all other passengers who experience a longer delay, and thus suffer significantly more inconvenience.

Therefore, it is submitted that Air Canada's current denied boarding compensation policy is unreasonable, because it provides a significantly lower compensation than other international standards, and furthermore, it fails to make any attempt to be proportional to the length of the delay and the amount of inconvenience caused.

(d) Low DBC paid by other Canadian airlines is not relevant

On page 5 of its August 15, 2012 submissions, Air Canada purports to summarize the denied boarding compensation policies of various Canadian airlines in relation to domestic travel. The information contained in the table in question is misleading, outdated, and contains inadmissible hearsay. Furthermore, even if the information in the table were accurate and admissible (which the Applicant disputes), this information is irrelevant, for two reasons.

First, as the Agency noted in *Lukács v. Air Canada*, in Decisions No. LET-C-A-129-2011 (para. 154) and No. 251-C-A-2012 (para. 75), "an industry practice does not, in itself, mean that the practice is reasonable." In other words, two (or many) wrongs do not make a right: it does not make Air Canada's denied boarding compensation provisions reasonable that, perhaps, the DBC policy of other Canadian airlines is unreasonable and substantially behind the international standards established and applied in the United States and the European Union.

Second, there is no evidence that Air Canada would suffer a competitive disadvantage if it raised the amount of denied boarding compensation that it pays. In fact, based on Air Canada's submissions, it is possible to determine with great certainty that Air Canada would not suffer such a disadvantage at all, and the impact on Air Canada would be negligible.

(e) Financial impact on Air Canada of paying higher DBC

The Applicant's accepts Air Canada's representation that only 0.089% of passengers were subject to denied boarding on its domestic flights. This means that one in every 1123 passengers was subject to denied boarding. Consequently, every increase of $100 in the denied boarding compensation payable to victims of denied boarding means an extra cost of $0.089 per passengers to Air Canada.

Thus, based on the data provided by Air Canada, increasing the cash denied boarding compensation from its current amount of $100.00 to $740.00 would mean an additional cost of less than $0.57 per passenger.

This cost could further be reduced to about $0.28 per passenger by a two-tier denied boarding compensation policy similar to the European one, which would allow Air Canada to reduce the compensation payable by 50% if the stranded passengers are quickly re-routed and reach their final destinations within a short time (e.g., 2 hours) after the originally booked time. The said amount could be reduced further by Air Canada revising its overselling practices, and increasing the efficiency of its re-routing procedures.

Therefore, based on Air Canada's own representations, it is submitted that significantly increasing the cash denied boarding compensation that Air Canada has to pay to stranded passengers would have no impact at all or negligible impact on Air Canada's ability to meet its commercial obligations. (Air Canada never argued that such an increase would affect its ability to meet its statutory or operational obligations.)

Hence, it is submitted that the present cash DBC of $100 fails to strike a balance between Air Canada's statutory, commercial and operational obligations, and the rights of passengers to be subject to reasonable terms and conditions.

(f) Conclusion

The purpose of providing denied boarding compensation is three-fold: first, to reasonably compensate passengers for their inconvenience; second, to create an incentive for airlines to re-route stranded passengers as quickly as possible; and third, to create an incentive for airlines to establish responsible overselling practices.

As the foregoing arguments demonstrate, Air Canada's current denied boarding compensation policy fails to reasonably compensate passengers for their inconvenience, and it is unreasonably low in comparison with international standards; the financial impact of increasing Air Canada's cash denied boarding compensation to amounts comparable to international standards would have a negligible financial impact on Air Canada. Furthermore, Air Canada's current denied boarding compensation policy also fails to create any incentive for Air Canada to re-route stranded passengers in a timely manner, because the amount of compensation is independent of the length of the delay caused to passengers.

Thus, Rule 245(E)(2) fails to strike a balance between Air Canada's statutory, commercial and operational obligations, and the rights of passengers to be subject to reasonable terms.

Therefore, it is submitted that Air Canada's Rule 245(E)(2) is unreasonable.

All of which is most respectfully submitted.

Gábor Lukács
Applicant

Cc: Ms. Julianna Fox, Counsel, Regulatory and International, Air Canada
Ms. Martine De Serres, Counsel, Regulatory and International, Air Canada

EXHIBITS

A. Printout from WestJet's website stating that WestJet never overbooks its flights (retrieved on August 18, 2012).

B. Printout from Air Canada's website showing the list of Air Canada's partner airlines (retrieved on: August 18, 2012).

C. Printout from Porter's website showing Porter's denied boarding compensation policy (retrieved on August 18, 2012).

D. Printout from Air Canada's website showing the terms and conditions of travel vouchers (retrieved on August 18, 2012).

E. Printout from Air Canada's website showing a one-way economy cabin fare for September 20, 2012 from Halifax to Vancouver (retrieved on August 19, 2012).

LIST OF AUTHORITIES

Legislation

1. *Canada Transportation Act*, S.C. 1996, c. 10.
2. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
3. *Global Positioning System (GPS) Equipment and Installation Approval*, Policy No. 551-003 of Transport Canada, effective May 9, 2005.

International instruments

4. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

Foreign legislation

5. European Union: *Regulation (EC) 261/2004*.
6. United States: 14 CFR Part 250, as amended by 76 FR 23100.

Case law

7. *Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11.
8. *Lambert v. Minerve Canada*, 1998 CanLII 12973 (QC C.A.).
9. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-129-2011.
10. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.
11. *Lukács v. WestJet*, Canadian Transportation Agency, 249-C-A-2012.
12. *Lukács v. WestJet*, Canadian Transportation Agency, 252-C-A-2012.
13. *Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555.
14. *Wallentin-Hermann v. Alitalia*, European Court of Justice, Case C-549/07.