

2 Gábor Lukács

3
4 Halifax, Nova Scotia

5
6 September 24, 2012

7 **VIA EMAIL**

8 The Secretary
9 Canadian Transportation Agency
10 Ottawa, Ontario, K1A 0N9

11 Attention: Mr. Mike Redmond, Chief, Tariff Investigation

12 Dear Madam Secretary:

13 **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

14 In Decision No. LET-C-A-105-2012, the Agency directed ten questions to Air Canada, and directed
15 that the Applicant may comment on Air Canada's answers to the questions. Air Canada filed its
16 answers to the Agency's questions on August 15, 2012, while the Applicant filed his comments on
17 August 31, 2012.

18 The Applicant directed ten questions to Air Canada in his August 31, 2012 comments. On Septem-
19 ber 6, 2012, in Decision No. LET-C-A-137-2012, the Agency directed Air Canada to answer these
20 questions by September 17, 2012. The Agency also directed that the Applicant may file a reply
21 with the Agency by September 24, 2012.

22 On September 17, 2012, Air Canada answered six of the Applicant's ten questions, while objecting
23 to four of the questions on various grounds.

24 Please accept these submissions as a reply to Air Canada's answers and as a motion pursuant to
25 Rule 20(3) of the *Canadian Transportation Agency General Rules*, SOR/2005-35 to compel Air
26 Canada to answer the Applicant's questions in full.

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1 **I. Conduct and credibility of Air Canada**

2 The Applicant submits that in the present proceeding, Air Canada has engaged in unacceptable
3 conduct to mislead the Agency and to delay the proceeding.

4 **(a) Providing incorrect information: answers to Questions Q6 – Q10**

5 On page 5 of its September 17, 2012 submissions, Air Canada made the following statement in
6 response to Questions Q6 – Q10:

7 Air Canada's specialized charter program, named Air Canada Jetz, operates both
8 A319 and A320 in a reduced capacity as they both have 58 economy class seats
9 available.

10 Exhibit "A" is Air Canada's brochure for the Air Canada Jetz service. On page 2, it states that:

11 Air Canada JetzTM brings you peace of mind and service of the highest quality on
12 board an Airbus 320, specially configured for superior comfort. On the ground, our
13 concierge service provides personalized attention to ensure all your needs are met.

14 Page 7 of the same brochure is entitled "Technical specifications" and states that "No. of seats: 64
15 business class". Exhibit "B" is a printout from Air Canada's website about the fleet of Air Canada
16 Jetz, also demonstrating that the fleet consists of only A320 aircrafts.

17 Thus, the evidence clearly establishes that, contrary to Air Canada's representations:

- 18 (i) Air Canada Jetz does not operate A319 aircrafts;
19 (ii) A320 aircrafts have 64 seats available.

20 It is submitted that by making the aforementioned representations to the Agency, Air Canada con-
21 travened s. 173(1) of the *Canada Transportation Act*.

22 Even if Air Canada's misleading representations in response to these questions are a result of
23 a genuine error, it is plain and clear that Air Canada's answers to Questions Q6 – Q10 are incorrect,
24 and incomplete.

25 Therefore, it is respectfully submitted that Air Canada ought to be ordered to provide full and
26 complete answers to Questions Q6 – Q10.

27 **(b) Abuse of process: request for an extension**

28 On September 6, 2012, Air Canada was provided with Decision No. LET-C-A-137-2012 of the
29 Agency, which directed Air Canada to answer the Applicant's questions by September 17, 2012.

1 On September 12, 2012, Air Canada made a motion seeking to extend the September 17, 2012
2 deadline based on the “complexity of the questions posed and the extent of the arguments raised”.

3 On his September 13, 2012 answer, the Applicant demonstrated beyond any doubt that the ques-
4 tions were not complex at all, and that the data sought was readily available to Air Canada. (The
5 expert’s report by Professor Jeremy Cooperstock, which is attached as Exhibit “C”, supports the
6 same finding.)

7 Then, on September 14, 2012, Air Canada attempted to argue that in light of the Applicant’s motion
8 for directions of September 13, 2012, Air Canada ought to be entitled to an extension automatically.
9 The Applicant vehemently opposed this position in his letter of September 14, 2012.

10 Finally, on September 17, 2012, Air Canada withdrew its motion for an extension, and argued that
11 most of the information requested by the Applicant was “not currently available” and/or was “not
12 relevant to the present proceedings”.

13 It is submitted that Air Canada’s objections to the Applicant’s Questions Q1 – Q3 and Q5 are
14 a colourable attempt by Air Canada to forcefully get the extension that it sought, but was not
15 entitled to, by illegitimate means.

16 Furthermore, regardless of the merits of Air Canada’s position, it is submitted that the conduct of
17 Air Canada in relation to the motion for an extension amounts to an abuse of process, because the
18 motion served no purpose other than attempting to delay the present proceeding.

19 **(c) Vexatious conduct: objection to the Applicant’s submissions on page 8 of his August 31,**
20 **2012 comments**

21 On page 6 of its September 17, 2012 submissions, Air Canada objects to the submissions of the
22 Applicant on page 8 of the Applicant’s comments dated August 31, 2012.

23 The Applicant respectfully disagrees with Air Canada’s position, and submits that Air Canada’s
24 objection amounts to vexatious conduct. On July 19, 2012, in Decision No. LET-C-A-105-2012,
25 the Agency specifically directed that the Applicant would have an opportunity to file any comments
26 with the Agency in response to Air Canada’s answers to the Agency’s questions.

27 Page 8 of the Applicant’s comments dated August 31, 2012, bears the title “II. It is unreasonable
28 for Air Canada to oversell its domestic itineraries”. This is precisely the issue identified as Issue I
29 in the Applicant’s complaint dated December 12, 2011, and it is not a new issue at all.

30 The Applicant’s submissions of August 31, 2012 on this issue are reflections on the answers pro-
31 vided by Air Canada, including Annex E. The arguments presented there are new only to the extent
32 that Annex E was new information. In the alternative, the Applicant submits that his submissions
33 on page 8 of his August 31, 2012 comments are relevant to the proceeding, and as such, ought to
34 be considered by the Agency.

1 **II. Relevance**

2 **(a) The “train of inquiry” test for relevance of questions**

3 Rule 20(2) allows a party to whom questions were directed to refuse to answer on the ground
4 that the questions are not relevant to the proceeding. This begs the question of how to determine
5 whether a question is relevant to a proceeding.

6 The widely accepted answer to this question by the federal courts is more than a century old, and
7 it was given in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company*
8 (1882), 11 Q.B.D. 55 (C.A.), where Brett, L.J. was called upon to interpret the phrase “a document
9 relating to any matter in question in the action”:

10 It seems to me that every document relates to the matters in question in the action,
11 which not only would be evidence upon any issue, but also which, it is reasonable
12 to suppose, contains information which may - not which must - either directly or in-
13 directly enable the party requiring the affidavit either to advance his own case or to
14 damage the case of his adversary. I have put in the words “either directly or indi-
15 rectly,” because, as it seems to me, a document can properly be said to contain infor-
16 mation which may enable the party requiring the affidavit either to advance his own
17 case or to damage the case of his adversary, if it is a document which may fairly lead
18 him to a train of inquiry, which may have either of these two consequences.

19 [Emphasis added.]

20 Although this test was established more than a century ago, it is still the current state of federal
21 law. Indeed, in *Smithkline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229, Sharlow, J.A.,
22 writing for a unanimous court, used the “train of inquiry” test to determine the relevance of ques-
23 tions asked during discovery. He also explained the long chain of cases where this test was used in
24 the context of documentary discovery:

25 [25] The “train of inquiry” test for documentary discovery was expressly approved
26 by this Court in *Everest & Jennings Canadian Ltd. v. Invacare Corp.*, [1984] 1 F.C.
27 856, 55 N.R. 73, 79 C.P.R. (2d) 138 (F.C.A.), adopting the test from *Boxer v. Reesor*
28 1983 CanLII 449 (BC S.C.), (1983), 43 B.C.L.R. 352, 35 C.P.C. 68 (B.C.S.C.). See
29 also *Ikea Ltd. v. Idea Design Ltd.*, [1987] 3 F.C. 317, 13 F.T.R. 306, 16 C.P.R. (3d)
30 65 (F.C.T.D.) and *Oro Del Norte, S.A. v. The Queen*, (1990), 35 F.T.R. 107, [1990] 2
31 C.T.C. 67, 90 D.T.C. 6373 (F.C.T.D).

32 The “train of inquiry” test was most recently re-affirmed by the Federal Court of Appeal in *Canada*
33 *v. Lehigh Cement Limited*, 2011 FCA 120.

34 Therefore, the Applicant submits that in order to determine whether a question directed to Air
35 Canada is relevant, the Agency ought to consider whether the question may directly or indirectly
36 enable the Applicant to advance his own case or to damage the case of Air Canada.

1 In order to examine whether the Applicant's questions are capable of advancing his own case or
2 damaging the case of Air Canada, it is necessary to first formulate the issues in the proceeding, and
3 then articulate the legal test applicable to determining these issues.

4 **(b) Formulation of the issues in the proceeding**

5 The present proceeding was commenced by a complaint dated December 12, 2011 of the Applicant,
6 where the following three issues were raised:

7 I. Is it reasonable for Air Canada to oversell its domestic flights?

8 II. Is Air Canada's Rule 245(E)(1)(b)(iv) reasonable?

9 III. Is Air Canada's Rule 245(E)(2), governing the amount of denied boarding compensa-
10 tion, reasonable?

11 Both Air Canada's answer dated January 16, 2012 and the Applicant's January 24, 2012 reply
12 addressed primarily these three issues. On July 19, 2012, in Decision No. LET-C-A-105-2012, the
13 Agency directed a total of ten questions to Air Canada: three concerning Rule 245(E)(1)(B), and
14 seven concerning Rule 245(E)(2). In other words, three of the questions concerned Issue II, while
15 seven concerned Issue III. In his August 31, 2012 comments, the Applicant addressed primarily
16 the aforementioned three issues.

17 Thus, it is plain and clear that the present proceeding concerns the above-noted Issues I, II, and III.

18 **(c) The legal test for determining the issues in the proceeding**

19 All three issues in the present proceeding concern the reasonableness of certain tariff provisions
20 and practices of Air Canada within the meaning of s. 67.2(1) of the *Canada Transportation Act*. In
21 *Lukács v. Air Canada*, 251-C-A-2012, the Agency articulated the test for determining reasonable-
22 ness as follows:

23 [8] The Agency has stated in previous decisions that in order to determine whether a
24 term or condition of carriage applied by a carrier is "reasonable" within the meaning
25 of subsection 67.2(1) of the CTA, a balance must be struck between the rights of
26 passengers to be subject to reasonable terms and conditions of carriage, and the
27 particular air carrier's statutory, commercial and operational obligations. [Footnote:
28 *Lukács v. WestJet*, Decision No. 418-C-A-2011.]

29 [9] The terms and conditions of carriage are set out by an air carrier unilaterally
30 without any input from passengers. The air carrier sets its terms and conditions
31 of carriage on the basis of its own interests, which may have their basis in purely
32 commercial requirements. There is no presumption that a tariff is reasonable.

1 [10] When balancing the passengers' rights against the carrier's obligations, the
2 Agency must consider the whole of the evidence and the submissions presented by
3 both parties and make a determination on the reasonableness or unreasonableness
4 of the term or condition of carriage based on which party has presented the more
5 compelling and persuasive case.

6 Thus, relevant considerations are the carrier's statutory, commercial and operational obligations,
7 and the extent to which the carrier's case is compelling and persuasive.

8 **(d) Questions Q1, Q2, Q3, and Q5 are relevant to Issue III**

9 As a preliminary matter, the Applicant notes that Air Canada misstates the issue by stating that
10 it has fully answered the Agency's questions about how domestic denied boarding compensation
11 amounts are currently determined.

12 The issue is not whether Air Canada's answers to the Agency's questions are complete, but rather
13 whether these answers are (inadvertently) misleading and whether the questions that the Appli-
14 cant directed to Air Canada are relevant to the issues in the proceeding. In particular, whether
15 Air Canada's method for determining the amount of domestic denied boarding compensation is
16 reasonable is intimately related and relevant to Issue III.

17 In its August 15, 2012 submissions, Air Canada stated that it used the "average Air Canada do-
18 mestic economy cabin fare" to establish the amount of its domestic denied boarding compensation.
19 While the Applicant does not dispute that Air Canada used this method to establish the amount of
20 its domestic denied boarding compensation, the Applicant most vehemently contests the reason-
21 ableness of this method.

22 The Applicant, who is a mathematician and as such is qualified to provide such an opinion, advised
23 the Agency that it is misleading to rely on a single statistical quantity, such as the average of
24 a dataset, without disclosing the entire dataset. The Applicant did not only assert his professional
25 opinion, but also demonstrated the anomaly that a reliance on a single statistical quantity may
26 cause (see the four examples on page 3 of the Applicant's comments dated August 31, 2012).
27 While Air Canada stated that it objects to the Applicant's professional opinion on this point, Air
28 Canada did not present any evidence or expert's opinion to contradict the Applicant's opinion, nor
29 did it challenge the Applicant's qualifications.

30 The relevance of Questions Q1 – Q3 is in testing the reliability of the data used and the reasonable-
31 ness of Air Canada's method for setting the amount of its domestic denied boarding compensation:

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

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

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

3 Questions Q1 and Q2 seek specific statistical quantities in relation to the same datasets whose
4 averages were submitted as evidence by Air Canada. These statistical quantities may enable the
5 Applicant to demonstrate that Air Canada's reliance solely on averages is not only misleading, but
6 in fact unreasonable in the specific circumstances of Air Canada. Doing so will both advance the
7 Applicant's case and damage the case of Air Canada in relation to Issue III.

8 Question Q3 seeks the datasets that were used for calculating the averages (or the total revenue) that
9 Air Canada relied upon in setting the amount of its domestic denied boarding compensation. The
10 receipt of the datasets will enable the Applicant to not only test whether Air Canada's calculations
11 are correct, but also to run additional statistical tests and calculations that may demonstrate that
12 Air Canada's amount of domestic denied boarding compensation is unreasonable. Doing so will
13 both advance the Applicant's case and damage the case of Air Canada in relation to Issue III.

14 Question Q5 seeks statistical quantities concerning the "total price" of Air Canada domestic econ-
15 omy cabin fares, that is, the price that also includes third party imposed taxes and fees:

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

18 This question relevant to Issue III for two reasons:

19 (a) In answer to Question Q4, Air Canada conceded that the figures used for calculating the "av-
20 erage Air Canada domestic economy cabin fare" do not include third party imposed fees and
21 taxes. Thus, the averages do not reflect the total price paid by passengers for the transportation,
22 but only the portion that is a revenue for Air Canada.

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

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

29 Obtaining statistical quantities about Air Canada's domestic economy cabin total prices, which
30 include all taxes and fees and thus are comparable to the American regime of denied boarding
31 compensation, may enable the Applicant to further demonstrate that Air Canada's amount of do-
32 mestic denied boarding compensation is unreasonable. Doing so will both advance the Applicant's
33 case and damage the case of Air Canada in relation to Issue III.

1 Therefore, it is submitted that Questions Q1, Q2, Q3, and Q5 meet the “train in inquiry” test, and
2 are relevant to Issue III. It is further submitted that these questions are not fishing expeditions,
3 because they arose naturally in response to evidence put forward by Air Canada.

4 **III. Availability**

5 Air Canada submitted averages of certain figures as evidence, and claims that any other information
6 about these figures (datasets) “is not currently available” (page 1 of Air Canada’s September 17,
7 2012 submissions; emphasis added).

8 Air Canada’s absurd position is akin to attempting to file a single paragraph from an email, while
9 refusing to produce the complete email on the basis that it would require downloading the email
10 from a server and printing it.

11 Air Canada’s arguments introduce issues related to e-discovery into the present proceeding.

12 **A. The facts**

13 The Applicant accepts that in order provide the datasets in response to Question Q3 and possibly
14 Question Q5, Air Canada would need to create a specific query in order to obtain the information
15 from its databases (statement of Mr. Ng dated September 17, 2012, paragraph 6). In particular, it is
16 clear that the requested information is available to Air Canada: all it has to do is to create and run
17 a query on its databases.

18 In order to ascertain the burden that retrieving the requested information may impose upon Air
19 Canada, the Applicant has retained an expert witness, Professor Jeremy Cooperstock (Department
20 of Electrical and Computer Engineering, McGill University). Professor Cooperstock’s report (Ex-
21 hibit “C”) states that:

22 10. For an individual reasonably acquainted with the structure and organization of
23 Air Canada’s database, the task of formulating a query to extract all passengers’
24 fares within a specified range of dates would likely take a few minutes of time.
25 Such queries, typically consisting of a conjunction of logical operators expressed
26 in a Structured Query Language (SQL) are conceptually very simple to express and
27 take advantage of the power of the underlying database engine to perform the actual
28 processing.

29 ∴

30 13. Assuming that Air Canada’s equipment meets industry norms, the completion
31 time of the query should be in the order of magnitude of a few hours at the most.

1 14. It should be emphasized that query execution is entirely autonomous in that once
2 the query is submitted to the database engine, there is no further need for human
3 involvement in the process, and the computer can run unattended.

4 **B. The law on databases**

5 **(a) Preliminary matter: caselaw cited by Air Canada**

6 On page 4 of its September 17, 2012 submissions, Air Canada refers to two cases from the Quebec
7 Court of Appeal, a case decided by a Master in Ontario, and a case from the Quebec Access to
8 Information Commission.

9 The Applicant submits at the outset that the Agency is not bound by the decisions of courts in
10 Quebec or any other provincial superior court, although they may provide some guidance. The
11 Applicant further submits that the Agency ought to consider first and foremost decisions from the
12 Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada.

13 The Applicant further notes that neither of the two cases from the Quebec Court of Appeal deal
14 with retrieving information from databases within the possession and control of a party. As such,
15 these cases are of no assistance to Air Canada's arguments.

16 *Mutuelle du Canada, cie d'assurance sur la vie c. Cie d'assurance vie Manufacturers*

17 The case *Mutuelle du Canada, cie d'assurance sur la vie c. Cie d'assurance vie Manufacturers*,
18 1987 CanLII 394 cited by Air Canada was decided in 1987, that is, 25 years ago. It clearly pre-
19 dates the technological development that the entire society has undergone in the past 25 years.
20 Indeed, in 1987, electronic databases were not as commonly used as today. (Apparently, MS-DOS
21 3.3 was released in April 1987, while Microsoft introduced Windows 2.0 in December 9, 1987.)
22 Consequently, the applicability of the *Mutuelle du Canada* to electronic databases of 2012 is more
23 than questionable.

24 Even if this decision were not outdated, it can easily be distinguished from the present case by
25 observing that *Mutuelle du Canada* was about producing information in the possession of third
26 parties, who are not parties to the litigation, pursuant to Article 402 of the Quebec *Code of Civil*
27 *Procedure*, R.S.Q., chapter C-25:

28 La Mutuelle du Canada, Compagnie d'Assurance sur La Vie, se pourvoit d'un juge-
29 ment interlocutoire qui a rejeté sa "requête pour communication d'un document en
30 la possession d'un tiers, article 402 C.P."

31 In the present case, however, Air Canada is not a third party, and the information sought is in its
32 possession and control (as confirmed by the statement of Mr. Ng, dated September 17, 2012, at
33 paragraph 6).

1 ***Industries GDS Inc. c. Carbotech Inc.***

2 In *Industries GDS Inc. c. Carbotech Inc.*, 2005 QCCA 655, cited by Air Canada, the four issues,
3 as identified by the court at paragraph 12, were: (1) absence of evidence for the existence of the
4 sought documents; (2) the sought documents were not in the possession of the parties; (3) the
5 request amounts to a fishing expedition; (4) the requests are repetitive or redundant.

6 In the present case, however, Air Canada admitted that the sought information can be produced by
7 a query to its databases (as confirmed by the statement of Mr. Ng, dated September 17, 2012, at
8 paragraph 6). Thus, the documents not only exist, but are in Air Canada's possession and control.
9 The request is also very specific; indeed, Air Canada's own evidence describes how it could be
10 answered, namely, by querying Air Canada's databases.

11 ***R.G. c. Commission administrative des régimes de retraite et d'assurances***

12 The Applicant has been unable to locate *R.G. c. Commission administrative des régimes de re-*
13 *traite et d'assurances*, 2001 QCCAI 197 even after reviewing the archive of all 2001 decisions of
14 the Quebec Access to Information Commission on the Internet. While the Applicant is unable to
15 comment on this case directly, it is submitted that this decision is clearly outdated in light of the
16 landmark decision of the Ontario Court of Appeal in *Toronto Police Services Board v. (Ontario)*
17 *Information and Privacy Commissioner*, 2009 ONCA 20.

18 ***Guzha v. Eclipse Colour & Imaging Corp.***

19 The Applicant has been unable to locate *Guzha v. Eclipse Colour & Imaging Corp.*, [2004] O.J.
20 No. 5686. While two later decisions in this file are available on CanLII, this decision does not seem
21 to be available there, nor on Westlaw Canada. Thus, the only comment that the Applicant is able
22 to make is that this decision has been superseded by the landmark decision of the Ontario Court
23 of Appeal in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*,
24 2009 ONCA 20.

25 ***Request pursuant to Rule 15***

26 The Applicant requests pursuant to Rule 15 of the Agency that Air Canada provide the Applicant
27 with electronic copies of the two missing decisions:

- 28 1. *R.G. c. Commission administrative des régimes de retraite et d'assurances*, 2001 QCCAI 197;
- 29 2. *Guzha v. Eclipse Colour & Imaging Corp.*, [2004] O.J. No. 5686.

30 The Applicant further requests that should the Agency intend to rely on any of these cases, the
31 Agency provide the Applicant with a reasonable opportunity to comment on them once Air Canada
32 has provided copies to the Applicant.

1 **(b) Applicable Rules of the Agency**

2 Section 1 of the *Canadian Transportation Agency General Rules* provides a very broad definition
3 of the notion of a document:

4 “document”
5 « *document* »

6 “document” includes any correspondence, memorandum, book, plan, map, draw-
7 ing, diagram, pictorial or graphic work, photograph, film, microform, sound record-
8 ing, videotape, machine readable record and any other recorded material, regardless
9 of its physical form or characteristics, and any copy of it.

10 [Emphasis added.]

11 In particular, “document” within the meaning of the Rules entails any electronic record, including
12 electronic databases.

13 Under Rule 15, a party may request the production of a document that an opposing party has
14 referred to:

15 15. (1) If in any pleading a party refers to a document on which the party intends to
16 rely in a proceeding, any other party may make a request to that party that, as soon
17 as is reasonably possible,

18 (a) the document be produced for inspection and copying by the party making the
19 request; or

20 (b) a copy of the document be provided to the party making the request.

21 (2) Subject to subsection (3), a party who fails to comply with a request made under
22 subsection (1) within 10 days after receiving the request may not enter the document
23 as evidence in the proceeding.

24 A party may also request the production of a document that relates to any matter in dispute that
25 is in the possession or control of the other party, and the Agency may compel the other party to
26 produce such a document:

27 16. (1) A party may give a notice in writing to any other party to produce, within
28 10 days after receipt of the notice, a document that relates to any matter in dispute
29 that is in the possession or control of the other party and shall specify the document
30 to be produced.

31 (2) Subject to a determination by the Agency under section 24 or 25, if a party fails
32 to respond to the notice to produce a document, within the period prescribed in
33 subsection (1), the Agency may

1 (a) order production of the document; or

2 (b) permit the party who gave the notice to submit secondary evidence of the con-
3 tents of the document.

4 The Agency may order a party to provide the Agency with any additional information, particulars
5 or documents that the Agency considers necessary, and subject to confidentiality, may provide it to
6 other parties in the proceeding:

7 18. The Agency may, by order,

8 (a) require that a party provide it with any additional information, particulars or
9 documents that the Agency considers necessary;

10 (b) require that, subject to sections 23 to 26, any information, particulars or docu-
11 ments obtained under paragraph (a) be made available for inspection by, or be
12 provided to, any other party to the proceeding;

13 Finally, a party may direct questions to another party, and the Agency may order the other party to
14 answer the questions in full:

15 19. A party to a proceeding may direct questions to any other party if the party files
16 with the Agency, and serves on the other parties, a copy of the questions along with
17 the reasons for them and their relevance to the proceeding.

18 20. (3) If a party who directed questions is not satisfied that the response is com-
19 plete or adequate, the party may request the Agency to order that the questions be
20 answered in full, and the Agency may order that the questions be answered in full
21 or in part, or not at all.

22 **(c) Databases and queries**

23 Production of information in databases is relatively new to our legal system; however, there is
24 already a considerable amount of caselaw on the subject. Before turning to the issue of production
25 of such documents, it is important to first review the meaning of the notions “database” and “query”
26 from a legal perspective. In *Sourian v. Sporting Exchange Ltd.*, 2005 CanLII 4938 (ON SC), it was
27 held (at para. 11) that:

28 An electronic database falls within the definition of “document” in our rules. Rule
29 30.01 (1) (a) defines document as including “a sound recording, videotape, film,
30 photograph, chart, graph, map, plan, survey, book of account, and data and infor-
31 mation in electronic form”. The challenge in dealing with a database, however, is
32 that a typical database would contain a great deal of information that is not rele-
33 vant to the litigation. In fact a database is more akin to a filing cabinet or document

1 warehouse than to a single document. Unless the entire database is to be produced
2 electronically together with any necessary software to allow the other party to ex-
3 amine its contents, what is produced is not the database but a subset of the data
4 organized in readable form. This is accomplished by querying the database and
5 asking the report writing software to generate a list of all data in certain fields
6 having particular characteristics.

7 [Emphasis added.]

8 Similarly, in *Andersen v. St. Jude Medical, Inc.*, 2008 CanLII 29591 (ON SC), it was held (at para.
9 23) that:

10 Although data stored in electronic form is defined as a document under our rules,
11 it is of course a document of a different kind than traditional paper documents.
12 In the first place, it exists as electronic impulses which cannot be viewed directly
13 so the only way to inspect the document is to read output from the database on
14 a computer screen or by means of a paper printout. This output is obtained by
15 querying the database. That is running a program which extracts certain information
16 and organizes it as readable words or numbers.

17 [Emphasis added.]

18 Thus, querying a database is the electronic equivalent of manually viewing and searching hard
19 copies of documents.

20 **(d) Access to information in electronic databases under freedom of information legislation**

21 Section 4(3) of the *Access to Information Act*, R.S.C. 1985, c. A-1 states that:

22 For the purposes of this Act, any record requested under this Act that does not exist
23 but can, subject to such limitations as may be prescribed by regulation, be produced
24 from a machine readable record under the control of a government institution us-
25 ing computer hardware and software and technical expertise normally used by the
26 government institution shall be deemed to be a record under the control of the gov-
27 ernment institution.

28 In *Yeager v. Canada (Correctional Service)*, 2003 FCA 30, [2003] 3 FC 107, the Federal Court of
29 Appeal interpreted s. 4(3) of the *Access to Information Act* (at para. 33) as follows:

30 In my opinion that subsection provides that a non-existent record that can be pro-
31 duced from an existing machine readable record is deemed to be a record to which
32 the respondent is entitled access.

1 Application for leave to appeal to the Supreme Court of Canada from the judgment of the Federal
2 Court of Appeal was denied ([2003] S.C.C.A. No. 120).

3 This approach of the Federal Court of Appeal was also cited with approval in *Toronto Police*
4 *Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20, where the
5 Ontario Court of Appeal upheld the following findings of an adjudicator:

6 (i) re-formatting information that already existed in a recorded form does not constitute
7 “creating” a record (para. 35);

8 (ii) where the information being sought can be produced from an institution’s existing
9 computer software by means of technical expertise normally used by it, it will consti-
10 tute a record under s. 2(1)(b) of the *Municipal Freedom of Information and Protection*
11 *of Privacy Act*, R.S.O. 1990, c. M. 56 (para. 59).

12 **(e) Electronic databases and discovery: e-Discovery**

13 The notion of electronic discovery, or e-discovery, was introduced as a response to the rapid devel-
14 opment of electronic data storage technologies. While in the past, corporations had large storage
15 rooms with archives of documents and indexing systems for the documents, this is no longer the
16 case. A substantial portion of documents in the possession and control of corporations is no longer
17 stored as hard copies, but rather as electronic documents in large databases.

18 These databases are stored as machine readable records, and the only way to retrieve and inspect
19 documents from them is to create a query, which outputs the information (into a file, on the screen,
20 or as a paper printout). The fact that databases cannot be meaningfully searched manually, but only
21 electronically, has altered the meaning and practice of discovery as well. In the case of electronic
22 databases, relevant documents are searched for and identified using sets of “search terms”. This
23 process is explained in *Air Canada v. Westjet Airlines Ltd.*, 2006 CanLII 14966 (ON SC):

24 [6] With respect to electronic production, Air Canada identified a set of relevant
25 search terms to be applied to its electronic database in an effort to identify relevant
26 documents. [...]

27 In *Sourian v. Sporting Exchange Ltd.*, 2005 CanLII 4938 (ON SC), the principles applicable to
28 production of information from databases were described as follows:

29 [12] Unlike other documents, unless such a report is generated in the usual course
30 of business, the new document, the requested report (whether on paper or on CD
31 ROM) would have to be created or generated. Ordering a report to be custom writ-
32 ten and then generated is somewhat different than ordering production of an existing
33 document. I have no doubt that the court may make such an order because it is the
34 only way to extract the subset of relevant information from the database in usable
35 form. On the other hand such an order is significantly more intrusive than ordi-

1 nary document production. A party must produce relevant documents but it is not
2 normally required to create documents. Accordingly such an order is discretionary
3 and the court should have regard for how onerous the request may when balanced
4 against its supposed relevance and probative value.

5 This also underscores the importance of the finding upheld by the Ontario Court of Appeal in the
6 *Toronto Police Services Board* case that re-formatting information that already existed in a recorded
7 form does not constitute “creating” a record.

8 In *Shields Fuels Inc. v. More Marine Ltd.*, 2008 FC 947, the Federal Court also considered the
9 question of production of information from electronic databases:

10 [12] Rules 222 to 226 contemplate the production of documents “in the possession,
11 power or control” of a party. The most relevant electronic data and information in
12 the “control” of a party will be that which can be accessed by the party’s computer
13 users in the ordinary course of business, otherwise known as the active data.

14 [13] The rules should not be interpreted, however, so narrowly as to prevent a party
15 from obtaining other relevant information, such as archival data that is still readily
16 accessible and not obsolete. In exercising its discretion whether to compel produc-
17 tion, the Court should have regard to how onerous the request for a generated record
18 may be when balanced against its relevance and probative value.

19 [14] [...] Since there appears to be an existing program that can print out a report in
20 readable form at little cost to the Defendants, I conclude that the Plaintiff’s motion
21 should be granted.

22 **C. Application of the law to the present case**

23 **(a) Air Canada ought to be compelled to answer Question Q3**

24 Question Q3 reads as follows:

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

27 According to Air Canada’s own evidence (statement of Mr. Ng, dated September 17, 2012, para-
28 graph 4(a)), Air Canada calculated in some way its revenue from domestic economy travel for
29 each of the years 2004-2012. The revenue is the sum of the fare paid by each and every domestic
30 passenger in these years. Consequently, Air Canada must have a record of each of the airfares it
31 sold to passengers in the years 2004-2012. (Otherwise, it would not be able to calculate their sum,
32 that is, the revenue.)

1 The only question is in what form or format Air Canada has these records. It appears from the
2 evidence that these records are in Air Canada's electronic databases. According to the evidence of
3 Mr. Ng (dated September 17, 2012, paragraph 6), the sought datasets can be retrieved from Air
4 Canada's databases by creating a specific query.

5 As the Ontario Court of Appeal held in *Toronto Police Services Board v. (Ontario) Information*
6 *and Privacy Commissioner*, 2009 ONCA 20 (at para. 35), re-formatting information that already
7 exists in a recorded form does not constitute "creating" a record. Furthermore, when information
8 being sought can be produced from an existing computer software by means of technical expertise
9 normally used, it can reasonably be expected to be produced.

10 In the present case, the expert's evidence (Exhibit "C") is clear that the "specific query" referred
11 to in the statement of Mr. Ng can be produced in a few minutes. Once the query is created, it can
12 be executed without any further human intervention. Consequently, there is already an existing
13 program that produces the sought datasets at little cost to Air Canada.

14 Therefore, in accordance with the principles of *Shields Fuels Inc. v. More Marine Ltd.*, 2008 FC
15 947, it is respectfully submitted that Air Canada ought to be compelled to answer Question Q3 in
16 full and to produce the sought datasets pursuant to Rules 16(2)(a) and 20(3).

17 **(b) Air Canada ought to be compelled to answer Questions Q1 and Q2**

18 The questions in issue are:

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

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

23 In the present case, Air Canada's position is that "the document does not exist" because "we know
24 where the information is found, but we refuse to retrieve it".

25 Both questions require the performance of an elementary calculation that is a standard function not
26 only in commercially used databases, but even in spreadsheets, such as Microsoft Excel (where
27 they can be calculated using STDEV and AVEDEV, respectively).

28 The very essence of Rules 18(a), 19, and 20 is that the party to whom questions are directed is
29 required to find out the answers to the questions. It is submitted that finding out the answers may
30 include making some reasonable effort. Certainly, not every person at a corporation has knowledge
31 of each and every aspect of the corporation's operations. Thus, locating an employee who is able to
32 answer the questions does take some effort, and in fact, a greater effort than querying a database.

1 Air Canada's refusal to make even the most minimal effort to answer the questions directed to it
2 opens the floodgate to similar refusals to directions of the Agency under Rules 18(a), 19 or 20,
3 even when the information is available to someone within a corporation, on the grounds of "we do
4 not know which employee has the information, and finding out would require making a specific
5 query." It is submitted that accepting such objections would entirely undermine the Agency's power
6 to obtain relevant information.

7 It is submitted that the same way that a party can be expected to print out a document from a
8 database (given that "print" is a standard function on computers), Air Canada can reasonably be
9 expected to use standard functions of its databases to answer the above-noted questions, which
10 will provide the Agency and the Applicant with valuable information about the dispersion and
11 distribution of Air Canada's domestic fares.

12 In the alternative, even if these calculations require some programming, the Applicant has already
13 demonstrated in his September 13, 2012 submissions that a program performing the sought calcu-
14 lations is well within the realm of an exercise for first-year university students, and as such it does
15 not impose any substantial burden on Air Canada.

16 **(c) Air Canada ought to be compelled to answer Question Q5**

17 The question in issue is:

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

20 The "total price" paid by each and every domestic passenger is clearly recorded by Air Canada,
21 at the very least for accounting purposes (for instance, the Canada Revenue Agency). Tax-related
22 documents must be retained, as a general rule, for at least 7 years. Thus, unless Air Canada dis-
23 carded vital accounting and business documents, which is highly unlikely, Air Canada ought to
24 have the "total price" paid by each and every domestic passenger for at least the last 7 years, that
25 is, for the 2005-2012 period. Consequently, the information sought is with respect to records that
26 exist and are within the possession and control of Air Canada.

27 According to the expert's evidence (Exhibit "C"), it is clear that the "specific query" referred to in
28 the statement of Mr. Ng required for retrieving the necessary data from Air Canada's databases can
29 be produced in a few minutes. Once the query is created, it can be executed without any further
30 human intervention. Consequently, there is already an existing program that produce the sought
31 datasets at little cost to Air Canada.

32 Once the datasets are available, the calculation of the average, standard deviation, and average de-
33 viation can be performed through standard functions of the database. These functions are available
34 even in spreadsheets, such as Microsoft Excel.

1 Therefore, in accordance with the principles of *Shields Fuels Inc. v. More Marine Ltd.*, 2008 FC
2 947, it is respectfully submitted that Air Canada ought to be compelled to answer Question Q5 in
3 full.

4 **(d) Alternative remedy**

5 Air Canada's insistence on submitting the averages of certain figures while refusing to disclose the
6 datasets themselves is akin to attempting to file a single paragraph of a letter as evidence, while
7 refusing to disclose the letter in its entirety. It effectively prevents the Agency and the other party
8 from reviewing the entirety of the available evidence.

9 Should the Agency decline to order Air Canada to answer Questions Q1, Q2, Q3, and Q5 of the
10 Applicant (dated August 31, 2012), the Applicant seeks as an alternative remedy an order pursuant
11 to Rules 14(3)(b) and 15(2) striking out all submissions and documents filed by Air Canada that
12 refer to average domestic economy cabin fares as being prejudicial and inadmissible in evidence.

13 While datasets themselves, being business records, are admissible as evidence, information derived
14 from them, such as their averages, are admissible only if the datasets themselves are accessible (or
15 by consent); otherwise, without access to the datasets, information derived from the datasets is
16 inadmissible as evidence because it is unverifiable and it is hearsay.

17 Therefore, it is submitted that Air Canada ought not be allowed to submit averages of certain
18 datasets as evidence without providing the datasets themselves.

19 **IV. Relief sought**

20 In light of the foregoing, the Applicant prays the Agency that:

- 21 A. the Agency order Air Canada to answer Questions Q6 – Q10 in full;
22 B. the Agency order Air Canada to answer Questions Q1, Q2, Q3, and Q5 in full;
23 C. in the alternative, the Agency strike out all submissions and documents filed by Air Canada
24 that refer to average domestic economy cabin fares.

25 All of which is most respectfully submitted.

26
27

Gábor Lukács
Applicant

28 Cc: Ms. Julianna Fox, Counsel, Regulatory and International, Air Canada

1 **EXHIBITS**

- 2 A. Brochure of Air Canada Jetz, downloaded from Air Canada's website from
3 http://www.aircanada.com/en/travelinfo/before/jetz/doc/jetz_brochure.pdf
4 (retrieved on September 22, 2012).
- 5 B. Printout from Air Canada's website showing the fleet of Air Canada Jetz (retrieved on Septem-
6 ber 22, 2012).
- 7 C. Report of Professor Jeremy Cooperstock, dated September 24, 2012.

1 **LIST OF AUTHORITIES**

2 **Legislation**

- 3 1. *Access to Information Act*, R.S.C. 1985, c. A-1.
4 2. *Canada Transportation Act*, S.C. 1996, c. 10.
5 3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
6 4. *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56.
7 5. *Code of Civil Procedure*, R.S.Q., chapter C-25.

8 **Foreign legislation**

- 9 6. United States: 14 CFR Part 250, as amended by 76 FR 23100.

10 **Case law**

- 11 7. *Air Canada v. Westjet Airlines Ltd.*, 2006 CanLII 14966.
12 8. *Andersen v. St. Jude Medical, Inc.*, 2008 CanLII 29591 (ON SC).
13 9. *Canada v. Lehigh Cement Limited*, 2011 FCA 120.
14 10. *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11
15 Q.B.D. 55 (C.A.).
16 11. *Industries GDS Inc. c. Carbotech Inc.*, 2005 QCCA 655.
17 12. *Lukács v. Air Canada, Canadian Transportation Agency*, 251-C-A-2012.
18 13. *Mutuelle du Canada, cie d'assurance sur la vie c. Cie d'assurance vie Manufacturers*, 1987
19 CanLII 394.
20 14. *Shields Fuels Inc. v. More Marine Ltd.*, 2008 FC 947.
21 15. *Smithkline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229.
22 16. *Sourian v. Sporting Exchange Ltd.*, 2005 CanLII 4938 (ON SC).
23 17. *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009
24 ONCA 20.

¹ 18. *Yeager v. Canada (Correctional Service)*, 2003 FCA 30, [2003] 3 FC 107.