Gábor Lukács

Halifax, Nova Scotia

September 27, 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
Supplementary submissions on caselaw that was not provided earlier and answer to Air Canada's letter of September 25, 2012.

Please accept the following supplementary submissions in relation to the above-noted matter to address two decisions that were provided by Air Canada on September 25, 2012, as well as in response to Air Canada's letter of September 25, 2012.

ISSUES

I. Supplementary submissions

In its September 17, 2012 submissions, Air Canada referred to two decisions that the Applicant was unable to access:

1. *R.G. c. Commission administrative des régimes de retraite et d'assurances*, 2001 QCCAI 197;

2. *Guzha v. Eclipse Colour & Imaging Corp.*, [2004] O.J. No. 5686.

As it turns out, the Applicant was not able to access the first one due to a typo in Air Canada's submissions; the correct citation is 2011 QCCAI 197. On September 24, 2012, the Applicant made a request pursuant to Rule 15 that Air Canada provide the Applicant with copies of these missing decisions. The Applicant also requested that the Agency provide him with a reasonable opportunity to comment on these two cases, which the Applicant was unable to comment on earlier.

On September 25, 2012, Air Canada provided copies of both decisions. Thus, the Applicant is asking for the Agency to accept the supplementary submissions below, whose scope is limited to these two authorities relied upon by Air Canada.

(a) *R.G. c. Commission administrative des régimes de retraite et d'assurances*

This case concerns an application under a freedom and access to information legislation of Quebec, specifically, the *Act respecting access to documents held by public bodies and the Protection of personal information*, RSQ, c. A-2.1. This case turned on Article 15 of the legislation, which reads as follows:

> **15.** The right of access applies only to documents that can be released without requiring computation or comparison of information.

This unique feature of the legislation in question was observed by the tribunal as well:

> [30] L'organisme n'a aucune obligation de créer un document afin de répondre à la demande qui lui est soumise.
>
> [31] La preuve démontre qu'une extraction et une compilation de données sont requises pour satisfaire la requête particulière du demandeur car ces résultats ne sont aucunement colligés par l'organisme. Cette opération implique une confection sur mesure pour le demandeur et va au-delà des exigences légales imposées à l'organisme.
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> [32] Sur cette question, les auteurs Doray et Charette [Footnote: Raymond DORAY et François CHARETTE, *Accès à l'information : loi annotée, jurisprudence, analyse et commentaires*, Cowansville, Éditions Y. Blais, 2001, feuilles mobiles, à jour au 1er décembre 2010, vol. 1, p. II/15-1.] énoncent ce qui suit :

> « [...]
>
> Il ressort d'une analyse de la jurisprudence que l'article 15 vise les situations où l'organisme ne détient pas le document demandé mais seulement un ensemble de renseignements contenus dans divers documents ou sur un support informatique et qu'il faudrait retracer, extraire, compiler, coupler ou agglomérer ces renseignements afin de créer un nouveau document qui répondrait à la demande. L'article 15 fait en sorte que l'organisme n'a pas l'obligation de procéder à une telle tâche, ni de créer un nouveau programme informatique pour confectionner le document demandé. [...] »

In other words, the tribunal reached its conclusion based on the specific and explicit restriction that Article 15 creates in the statutory scheme.

The *Canadian Transportation Agency General Rules*, S.O.R./2005-35 contain no provisions similar to Article 15 of the Quebec *Act respecting access to documents held by public bodies and the Protection of personal information*. Thus, the absence of such a specific and explicit restriction from the Agency's Rules clearly distinguishes the case at bar from the *R.G.* case that Air Canada is attempting to rely on.

The *R.G.* case is unique to the Quebec legislation. Indeed, in *Yeager v. Canada (Correctional Service)*, 2003 FCA 30, [2003] 3 FC 107, the Federal Court of Appeal interpreted s. 4(3) of the federal *Access to Information Act* (at para. 33) as follows:

> In my opinion that subsection provides that a non-existent record that can be produced from an existing machine readable record is deemed to be a record to which the respondent is entitled access.

Application for leave to appeal to the Supreme Court of Canada from the judgment of the Federal Court of Appeal was denied ([2003] S.C.C.A. No. 120). This approach was also adopted by the Ontario Court of Appeal in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

Therefore, in light of the substantial difference between the statutory schemes, it is submitted that the *R.G.* case is unique to the Quebec access to information legislation, and is of no assistance for Air Canada's position.

(b) *Guzha v. Eclipse Colour & Imaging Corp.*, [2004] O.J. No. 5686

This case concerns issues related to affidavit of documents in a simplified procedure, which is governed by Rule 76 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194. Master MacLeod summarized the issue (at para. 6) as follows:

> The question that is apparently posed by this motion - and which caused me to

> reserve to give written reasons - is whether the rules of civil procedure should be applied and interpreted in the same manner as in a Rule 76 case as otherwise.

With due respect to Air Canada, the Applicant fails to see the relevance of this authority to the case at bar. In the case at bar, Air Canada voluntarily tendered evidence confirming that the information is within Air Canada's possession and control, and thus existence of the information is not in issue. Indeed, in paragraph 6 of his September 17, 2012 statement filed by Air Canada as evidence, Mr. Gordon Ng admits that:

> Air Canada would need to create a specific query in order to obtain said information from its extensive databases.

In particular, Air Canada's own evidence leaves no doubt that the information exists and it is in Air Canada's possession and control.

Therefore, it is respectfully submitted that the *Guzha* case is not relevant to the case at bar, and is of no assistance to Air Canada's position.

II. Answer to Air Canada's letter of September 25, 2012: conduct and credibility of Air Canada

On September 25, 2012, Air Canada made an additional, unsolicited, submission to the Agency, where it purports to address some of the Applicant's submissions dated September 24, 2012.

As a preliminary matter, the Applicant submits that since the Agency did not invite Air Canada to make submissions on these points, Air Canada's September 25, 2012 letter was inappropriately filed, and ought to be expunged from the record. In the alternative, should the Agency find it appropriate to retain Air Canada's September 25, 2012 letter on the record, the Applicant makes the following submissions in response.

The judicial system, including quasi-judicial expert tribunals such as the Agency, operate at a substantial cost, which is borne by the taxpayers. Thus, it is imperative to ensure that these limited resources are used in the most efficient way. In particular, there is a public interest in preventing any misuse of the judicial system by way of abuse of process or other methods to create unnecessary delays and costs.

This is also one of the public policy considerations for having a provision allowing to dismiss or strike out documents that are frivolous or vexatious or amount to abuse of process in the rules of every Canadian court. In particular, a party to a proceeding is entitled to allege that an opposing party has engaged in such a conduct.

In the case at bar, the Applicant has taken exception to Air Canada's conduct in his September 24, 2012 submissions. While Air Canada understandably disagrees with these submissions, the Applicant was entitled to make these submissions, and they were made carefully and respectfully.

A. Providing incorrect information to the Agency

The Agency, as any tribunal, relies on the evidence provided by the parties. Consequently, accuracy of the evidence placed before the Agency is vital for the fairness of the adjudication. The importance of providing accurate information to the Agency is also enshrined in s. 173 of the *Canada Transportation Act*.

(a) The fleet of Air Canada Jetz

There is no doubt that the information provided by Air Canada in response to Questions Q6 - Q10 is inconsistent with the information on the website of Air Canada. In its September 25, 2012 letter, Air Canada insists that its September 17, 2012 answers to these questions were accurate, and that Air Canada has already begun the process of updating its website.

The Applicant has a number of reasons to doubt the credibility and accuracy of Air Canada's September 25, 2012 submissions.

First, on September 27, 2012, the Applicant called Air Canada's Group Reservations department at 1-888-567-4160 to inquire about the aircrafts used by Air Canada Jetz. The recording of the Applicant's conversation with Air Canada's agent is attached and marked as Exhibit "A". The transcript of the same conversation is attached and marked as Exhibit "B". (The Applicant refers to paragraphs 5-6 of the Agency's decision in *Lukács v. United*, 182-C-A-2012 concerning the admissibility of the recordings of telephone communications.) During the conversation with Air Canada's agent, the agent stated (on p. 3, l. 14-15) that:

> Uh, like I said, it's usually 320, we don't, we don't use 319 for the Jetz service.

The agent went on, and stated in response to the Applicant's question (on p. 3, l. 20-21) that:

> But if you talk about Jetz service, the aircraft that we use, that's dedicated for that, is Airbus 320.

The Applicant also asked the Agent about Airbus 319 aircrafts with 58 seats. The agent confirmed that Air Canada was not using such aircrafts for Air Canada Jetz (on p. 3, l. 24).

Second, Air Canada's submissions were not supported by a statement of an employee of Air Canada who is likely to have first hand knowledge of Air Canada Jetz's fleet.

Third, several days after the issue was brought to Air Canada's attention, its website has not been changed yet, even though the content of a website can be changed in a matter of minutes. In particular, Air Canada's website showing Air Canada's entire fleet by Registration Mark and Fin Numbers (Exhibit "C") shows only five aircrafts as being operated by Air Canada Jetz (C-GPWG, C-FPWE, C-GQCA, C-FPWD, and C-FDCA). All five of them happen to be Airbus 320. None of the Airbus 319 aircrafts listed on the page are marked as being operated by Air Canada Jetz.

Fourth, it is difficult to believe that Air Canada would not provide up-to-date information about its charter service fleet on its website, because its revenue depends on having such information readily available.

Fifth, even if Air Canada Jetz also operates an Airbus 319 (a fact that the Applicant disputes), this does not explain the discrepancy about the information provided by Air Canada concerning the capacity of the aircrafts operated by Air Canada Jetz. Indeed, at the bottom of page 5 of its September 17, 2012 submissions, Air Canada claimed that "both only have 58 economy class seats available". However, according to Air Canada's own website, the capacity of the five Airbus 320 operated by Air Canada Jetz is "64 business class" seats. Given that Airbus 320 aircrafts are larger than Airbus 319 ones, it is difficult to believe that both A319 and A320 would have the same seating capacity in their Air Canada Jetz configurations.

The Applicant takes no position on whether these demonstrate to the criminal standard of "beyond reasonable doubt" that Air Canada provided misleading information to the Agency; however, the standard in the present proceeding is simply "balance of probabilities".

Thus, it is submitted that on balance of probabilities, Air Canada submitted incorrect and misleading information to the Agency on September 24, 2012.

Even if this discrepancy is a result of a genuine error, it supports the finding that information provided by Air Canada is unreliable, at the very least, and that the answers to Questions Q6 - Q10 are incorrect and incomplete.

The latter alone is sufficient to warrant directing Air Canada to provide full and adequate answers to these questions, which are supported by a signed statement from a knowledgeable employee.

(b) Existence of information sought

It it September 25, 2012 submissions, Air Canada refers to submissions about "non-existence of the requested information". These representations constitute blatant misrepresentation of the evidence on record. Indeed, Air Canada contradicts here its own evidence submitted on September 17, 2012, where Mr. Gordon Ng admitted at paragraph 6 of his statement that the information sought is in the possession and control of Air Canada:

> Air Canada would need to create a specific query in order to obtain said information from its extensive databases.

The statement of Mr. Ng leaves no doubt that the requested information does exist, albeit Air Canada does not wish to make the minimal effort required to retrieve it from its databases.

The Applicant submits that Air Canada has deliberately attempted to create confusion and to mislead the agency in relation to the existence of the information sought.

(c) The Applicant was careful and respectful in his submissions

There are a number of other occasions where the representations made by Air Canada were misleading, although it is not clear that Air Canada was aware of this. On these occasions, the Applicant indicated in his submissions that he did not allege bad faith or malice. For example, on page 3 of the Applicant's August 31, 2012 submissions, the Applicant stated that:

> 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.

Similarly, on page 7 of the Applicant's September 24, 2012, the Applicant stated that:

> The issue is not whether Air Canada's answers to the Agency's questions are complete, but rather whether these answers are (inadvertently) misleading and whether the questions that the Applicant directed to Air Canada are relevant to the issues in the proceeding.
>
> [Emphasis added.]

These submissions of the Applicant clearly convey that no bad faith or intention to mislead the Agency is alleged in relation to these representations. Nevertheless, the Applicant submitted that certain representations made by Air Canada were, unintentionally, incorrect and/or misleading, and the Applicant was entitled to do so.

The effort that the Applicant has made to delineate submissions in which certain representations are inaccurate and/or inadvertently misleading from those where the Applicant alleges intent to mislead the Agency clearly demonstrates that the Applicant was careful to make such serious allegations only when they were warranted. The aforementioned submissions of the Applicant also demonstrate that the Applicant has conducted himself in the most respectful manner, and in a way that ensures that his submissions are not misconstrued as allegations of bad faith when such allegations are not warranted.

At the same time, it is submitted that a party is entitled to allege that an opposing party has placed misleading or false information before a tribunal, and it is for the tribunal to rule on such an allegation.

B. Abuse of process: delaying tactics

Section 29(1) of the *Canada Transportation Act* clearly reflects Parliament's intent to see all disputes before the Agency resolved quickly and without a delay:

> **29.** (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the

> originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

Thus, steps taken by a party whose sole aim is to unnecessarily prolong a proceeding (that is, delaying tactics) clearly frustrate the legislative intent for establishing the Agency, and amount to an abuse of process.

In the case at bar, the Applicant submitted on September 24, 2012 that Air Canada has engaged in a conduct aimed to delay the proceeding. The Applicant stands behind his submissions to this effect, and further submits that Air Canada's letter of September 25, 2012 provides further evidence of the Applicant's allegations to this effect.

(a) Request for an extension on September 12, 2012

On September 6, 2012, Air Canada was provided with Decision No. LET-C-A-137-2012 of the Agency, which directed Air Canada to answer the Applicant's questions by September 17, 2012. On September 12, 2012, Air Canada made a motion seeking to extend the September 17, 2012 deadline based on the "complexity of the questions posed and the extent of the arguments raised". Air Canada's motion for an extension was vehemently opposed by the Applicant.

Subsequently, on September 17, 2012, Air Canada filed an answer in which it disputed the relevance of some of the questions and the Applicant's right to seek the information sought.

The Applicant submits that Air Canada knew or ought to have known by September 12, 2012 whether it was intending to challenge the relevance of the questions, or instead intending to answer the questions. Once Air Canada knew that it would challenge the relevance of the questions, it no longer need the time to formulate answers to the questions.

Consequently, Air Canada sought an extension on September 12, 2012 completely unnecessarily, and with the sole purpose to delay the proceeding.

(b) Further request for additional time based on absence of Ms. Fox

In its September 25, 2012 submissions, Air Canada states that Ms. Fox will be away from her office from October 5, 2012 to October 14, 2012, and is requesting additional time in the event that the Agency directs Air Canada to provide additional information.

The Applicant submits that these submissions of Air Canada further prove that Air Canada is attempting to unnecessarily delay the present proceeding.

Air Canada is a very large corporation, which has a substantial legal department, with a large number of experts in regulatory affairs. (The Applicant has so far encountered at least four of these counsels in various proceedings before the Agency.) It is not reasonable for Air Canada to seek

additional time on the basis of the absence of one of its employees. There is no doubt that there are a number of other members of Air Canada's legal department who are qualified and capable of handling the file, and responding to the Agency's directions in a timely manner.

Therefore, it is submitted that the Agency ought not consider the temporary absence of Ms. Fox as a barrier for directing Air Canada to answer Questions Q1, Q2, Q3, and Q5 fully and adequately without delay.

C. Vexatious conduct: objecting to the Applicant making submissions

On page 6 of its September 17, 2012 submissions, Air Canada objected to the submissions of the Applicant on page 8 of the Applicant's comments dated August 31, 2012. For greater clarity, Air Canada was objecting not to the content of the Applicant's submissions, but rather the mere fact that the Applicant addressed one of the issues in dispute.

Given that the Applicant was making these submissions in full compliance with the Agency's Decision No. LET-C-A-105-2012, the Agency, which specifically directed that the Applicant would have an opportunity to file any comments with the Agency in response to Air Canada's answers to the Agency's questions, the Applicant is struggling to view Air Canada's objection as anything but vexatious conduct.

For greater clarity, the Applicant submits that Air Canada ought to object to the arguments put forward by the Applicant, and not to the Applicant putting forward arguments.

Having said these, the Applicant concedes that Air Canada providing misleading information to the Agency and engaging in delaying tactics dwarf the issue of vexatious conduct.

All of which is most respectfully submitted.

Gábor Lukács
Applicant

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

EXHIBITS

A. Recording of telephone conversation between Gábor Lukács and airline's Group Reservations agent, dated September 27, 2012.

B. Transcript of telephone conversation between Gábor Lukács and airline's Group Reservations agent, dated September 27, 2012.

C. Printout from Air Canada's website showing Air Canada's entire fleet by Registration Mark and Fin Numbers (retrieved on September 27, 2012).

LIST OF AUTHORITIES

Legislation

1. *Access to Information Act*, R.S.C. 1985, c. A-1.
2. *Act respecting access to documents held by public bodies and the Protection of personal information*, RSQ, c. A-2.1.
3. *Canada Transportation Act*, S.C. 1996, c. 10.
4. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
5. *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194.

Case law

6. *Guzha v. Eclipse Colour & Imaging Corp.*, [2004] O.J. No. 5686.
7. *Lukács v. United*, Canadian Transportation Agency, 182-C-A-2012.
8. *R.G. c. Commission administrative des régimes de retraite et d'assurances*, 2011 QCCAI 197.
9. *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.
10. *Yeager v. Canada (Correctional Service)*, 2003 FCA 30, [2003] 3 FC 107.