Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPELLANT, DR. GÁBOR LUKÁCS

Dated: January 6, 2015

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Appellant

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Barbara Cuber

Tel: (819) 994 2226
Fax: (819) 953 9269

Solicitor for the Respondent,
Canadian Transportation Agency

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PART I – STATEMENT OF FACTS

1. The present appeal, brought with leave of this Honourable Court under s. 41 of the *Canada Transportation Act*, S.C. 1996, c. 10., raises questions of law and/or jurisdiction concerning the validity, reasonableness, and fairness of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("New Rules").

2. The Canadian Transportation Agency ("Agency"), established pursuant to the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. One of the Agency's key functions is to resolve commercial and consumer transportation-related disputed as a quasi-judicial tribunal.

3. The vast majority of the complainants in consumer disputes before the Agency are not represented by counsel.

***Nawrots v. Sunwing Airlines*, 432-C-A-2013, para. 133**

4. The Agency's procedural rules serve as a complete code for proceedings before the Agency that self-represented parties can read and use.

***Nawrots v. Sunwing Airlines*, 432-C-A-2013, para. 134**

5. Since 2005, proceedings before the Agency had been governed by the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 ("Old Rules").

6. On May 21, 2014, the New Rules were published in the *Canada Gazette*. Section 44 of the New Rules repealed the Old Rules effective June 4, 2014.

New Rules, s. 44 **Appeal Book, Tab 2, p. 23**

PART II – STATEMENT OF THE POINTS IN ISSUE

7. The issues to be determined on this appeal are:

(a) whether subsections 41(2)(b), 41(2)(c), and 41(2)(d) of the New Rules are *ultra vires* and/or invalid; and

(b) whether the New Rules are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency.

PART III – STATEMENT OF SUBMISSIONS

A. SUBSECTIONS 41(2)(B)-(D) OF THE NEW RULES ARE ULTRA VIRES AND/OR INVALID

8. Subsection 41(2) of the New Rules purports to confer on the Agency the power to stay a decision or order that has already been rendered.

> (2) The Agency may, at the request of a party, stay a decision or order of the Agency in any of the following circumstances:
>
> (a) a review or re-hearing is being considered by the Agency under section 32 of the Act;
>
> (b) a review is being considered by the Governor in Council under section 40 of the Act;
>
> (c) an application for leave to appeal is made to the Federal Court of Appeal under section 41 of the Act;
>
> (d) the Agency considers it just and reasonable to do so.

***New Rules*, s. 41(2)** **Appeal Book, Tab 2, p. 22**

9. The fundamental constitutional principle of the rule of law dictates that all powers must find their source in law. Accordingly, administrative bodies, such as the Agency, can exercise only those powers that were explicitly assigned to them, and may exercise them only in the form prescribed by law.

***Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 27-30**

10. The New Rules were promulgated pursuant to section 17 of the *CTA*, which provides that the Agency may make "rules" concerning the manner of and procedures for dealing with matters and business before the Agency.

***Canada Transportation Act*, s. 17**

11. This Honourable Court held that the meaning of the term “rule” in the *CTA* is confined to internal or procedural matters, and does not encompass external or substantive matters. Thus, the Agency cannot make valid rules for exercising powers that the Agency does not possess, and the rule-making powers of the Agency pursuant to s. 17 of the *CTA* cannot be used by the Agency to confer additional (substantive) powers upon itself, which Parliament did not confer upon the Agency.

> ***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, paras. 39-41**

12. Therefore, only those provisions of subsection 41(2) of the New Rules are *intra vires* and valid which govern the manner and procedure of exercising powers that Parliament did confer upon the Agency. Hence, the validity of the provisions of subsection 41(2) of the New Rules depends on whether and in what circumstances the Agency has jurisdiction to stay its own order or decision after it has been rendered.

13. According to the doctrine of *functus officio*, once decision-makers make a final decision or order in a matter, they exhaust their authority with respect to that matter, and the decision or order cannot be reopened and/or varied by the decision-makers, but only by the appellate jurisdiction. This principle, which equally applies to administrative tribunals, such as the Agency, is subject to two exceptions. Final decisions or orders can be varied by decision-makers only if: (a) authorized by statute; or (b) there was a slip in drawing up the decision or there was an error in expressing the manifest intention of the tribunal.

> ***Fowlie v. Air Canada*, CTA, 488-C-A-2010, para. 28, citing:**
> ***Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848**

14. Section 32 of the *CTA* permits the Agency to reopen and vary its own decisions only in limited circumstances. Consequently, at the heart of the present issue is a question of statutory interpretation.

(i) The standard of review

15. The *CTA* is the Agency's home statute. Thus, the Agency's interpretation of s. 32 of the *CTA* is reviewable on a standard of reasonableness.

(ii) Applicable principles of statutory interpretation

16. The interpretation of a statutory provision must be made according to a textual, contextual, and purposive analysis to find a meaning that is harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament.

> ***Lukács v. Canada (Transportation Agency)*,**
> **2014 FCA 76, paras. 22-25**

(iii) Textual and contextual analysis

17. The *CTA* contains no provision that would explicitly permit the Agency to stay its decisions or orders; however, section 32 of the *CTA* provides that:

> 32. The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing. [Emphasis Added.]
>
> ***Canada Transportation Act*, s. 32**

18. The limited nature of this power is underscored by the contrast between section 32 of the *CTA* and section 62 of the *Telecommunications Act*, the enabling statute of the CRTC. While the *CTA* provides limited powers to review, rescind, or vary decisions or orders, in the case of the CRTC, Parliament chose not to restrict or qualify these powers:

> 62. The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.
>
> ***Telecommunications Act*, s. 62**

19. The difference in the respective enabling statutes reflects Parliament's intent to confine the Agency's power to review and vary its own decisions and orders to very specific situations, namely, where there has been a change in the facts or circumstances pertaining to a particular decision since its issuance. Thus, as the Agency correctly acknowledged in *Fowlie v. Air Canada*, this power is not open-ended.

***Fowlie v. Air Canada*, CTA, 488-C-A-2010, para. 27**

(iv) Purposive analysis

20. The Agency has a dual role: it functions both as a quasi-judicial tribunal that resolves commercial and consumer transportation-related disputes (including accessibility issues for persons with disabilities) and as an economic regulator that makes determinations and issues licenses and permits.

***Lukács v. Canada (Transportation Agency)*,**
2014 FCA 76, paras. 50-52

21. The Agency is required to act rapidly. Section 29 of the *CTA* requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received. The Governor in Council may shorten this time frame by regulations, but neither the Governor in Council nor the Agency itself can extend this statutory timeline; however, the parties may agree to a longer timeline.

***Lukács v. Canada (Transportation Agency)*,**
2014 FCA 76, para. 53

22. The purpose of section 32 of the *CTA* is to allow the Agency to respond to changes in the circumstances that affect the modes of transportation regulated by the Agency, and flexibly adapt its decisions and orders to new situations without being fully bound by the doctrine of *functus officio*. The limited powers conferred on the Agency by section 32 reflect the intent of Parliament to strike a balance between the interest in finality of decisions and the need for flexibility to adapt to new circumstances.

(a) Implied powers

23. It is reasonable to hold that, in spite of the absence of an explicit legislative provision, Parliament implicitly conferred upon the Agency the power to stay a decision or order for the purpose and duration of a review or re-hearing pursuant to section 32 of the *CTA*, because such powers are necessary for the Agency to carry out its mandate under section 32. (It is for this reason that the validity of subsection 41(2)(a) of the New Rules is not being challenged on the present appeal.)

24. Such implied powers do not extend beyond the purpose and scope of section 32 of the *CTA*, and the Agency may not exercise such implied powers in the absence of an application to review or vary a decision or order under section 32.

(b) Subsection 41(2)(d) of the New Rules

25. Subsection 41(2)(d) of the New Rules purports to confer open-ended powers on the Agency to stay its decisions and orders if "the Agency considers it just and reasonable to do so," without any reference to change in the facts or circumstances pertaining to the decision or order.

26. The *CTA* contains no statutory authorization for such open-ended powers, which would result in delaying the remedy sought by parties, contrary to the explicit statutory requirement that the Agency must render its decision as expeditiously as possible, and no later than 120 days after the originating documents are received.

27. Thus, subsection 41(2)(d) of the New Rules purports to confer upon the Agency powers that Parliament did not expressly nor implicitly confer upon it.

(c) Subsections 41(2)(b) and 41(2)(c) of the New Rules

28. Subsections 41(2)(b)-(c) of the New Rules purport to allow the Agency to stay its decisions and orders pending an appeal to the Governor in Council or a motion for leave to appeal to this Court.

29. Does an appeal to the Governor in Council or a motion for leave to appeal to this Court constitute "change in the facts or circumstances" within the meaning of section 32 of the *CTA*? Answering this question in the affirmative leads to the absurd conclusion that the Agency may rescind or vary its decision or order every time it is being appealed, and thus may augment or alter its reasons in light of the grounds of appeal. This would turn each decision and order into a "moving target" and would make review by this Honourable Court or the Governor in Council impossible. Since Parliament did intend to subject the Agency's decisions and orders to review by the Governor in Council and this Court, such an excessively broad interpretation of section 32 must be rejected.

30. Therefore, appeals do not constitute "change in the facts or circumstances" within the meaning of section 32 of the *CTA*, and section 32 does not authorize the Agency to stay its decisions and orders in such cases.

31. Both this Honourable Court and the Governor in Council have jurisdiction to stay decisions and orders that are being appealed to them (or when leave to appeal is sought). Thus, concurrent powers to stay decisions and orders in such cases are not necessary for the Agency to carry out its mandate under the *CTA*. Consequently, the Agency has no implied powers of this nature.

> ***Association des Compagnies de Téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 203, paras. 18-19, 30-33**

32. Hence, subsections 41(2)(b)-(c) of the New Rules purport to confer upon the Agency powers that Parliament did not expressly nor implicitly confer on it.

B. THE NEW RULES ARE UNREASONABLE AND ESTABLISH INHERENTLY UNFAIR PROCEDURES THAT ARE INCONSISTENT WITH THE INTENT OF PARLIAMENT

33. Although the Agency is the master of its own procedures, the Agency must establish procedures that are fair, reasonable, and consistent with the principles of natural justice and the purpose for which Parliament established the Agency as a quasi-judicial tribunal.

> The first, and most important, point to be made is that it is not written within the purview of a tribunal bound by the requirements of procedural fairness to dispense with those requirements because, in its view the result of the hearing will be the same.
>
> ***Ayele v. Minister of Citizenship and Immigration*, 2007 FC 126, para. 9**

34. In the present case, it is submitted that the New Rules fail to meet the aforementioned requirements, because:

(a) parties have no opportunity to object to requests of non-parties to intervene;

(b) the requirement to provide reasons, which existed in the Old Rules, has been abolished; and

(c) the New Rules establish a paper-only proceeding, and provide for no meaningful opportunity to challenge the statements of adverse witnesses or for calling witnesses to testify orally.

35. Bearing in mind the nature of disputes and parties before the Agency, these shortcomings create a proceeding that is inherently unfair to parties in general, and to complainants in particular, and make it virtually impossible for complainants to prove their version of the events if the facts are disputed.

(i) The standard of review

36. The Supreme Court of Canada confirmed that compliance with the duty of procedural fairness is reviewed on the standard of correctness even in cases where the substance of a decision is subject to a deferential standard of review:

> Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".
>
> [Emphasis added.]
>
> ***Mission Institution v. Khela*, 2014 SCC 24, para. 79**

37. Thus, it is submitted that the question of whether the New Rules establish fair procedures is to be reviewed on a standard of correctness. It is further submitted that for the reasons set out below, the New Rules cannot be maintained even under a more deferential standard of reasonableness.

(ii) Complete code for unrepresented complainants

38. One of the Agency's key functions is to resolve commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities.

> ***Lukács v. Canada (Transportation Agency)*,**
> **2014 FCA 76, para. 51**

39. The Agency's procedural rules serve as a complete code for proceedings before the Agency that parties can read and use. The vast majority of consumer complaints are made by unrepresented complainants, who have no prior experience or training in law, and thus neither expect nor know that they may have rights beyond what is in the rules. Hence, the vast majority of complainants cannot assert or exercise procedural rights not set out in the rules.

> ***Nawrots v. Sunwing Airlines*, 432-C-A-2013, paras. 133-134**

(iii) No opportunity to object to requests of non-parties to intervene

40. Section 29 of the New Rules governs requests of non-parties for leave to intervene in a proceeding. While subsection 29(1) describes the procedure for making a request to intervene, there are no provisions in section 29 that speak about parties responding to the request to intervene. In other words, according to section 29, the Agency will rule on requests to intervene without receiving submissions from the parties to the proceeding on the question of whether leave to intervene should be granted.

***New Rules*, s. 29**	**Appeal Book, Tab 2, p. 17**
Regulatory Impact Analysis Statement	**Appeal Book, Tab 2, p. 37**

41. Granting intervener status to non-parties affects the substantive rights and access to justice of parties in general, and unrepresented parties with limited resources in particular, because it complicates the proceeding, and increases the demand on parties' resources.

42. While in the case of sophisticated litigants with deep pockets the impact of adding interveners may be minor, in the case of unrepresented parties with limited resources, interveners can create a prohibitive burden that forces vulnerable parties to give up and not pursue their rights.

43. Therefore, it is submitted that parties to a proceeding are entitled, as a matter of procedural fairness, to lead evidence and make submissions in opposition to requests of non-parties to intervene.

44. Hence, section 29 of the New Rules is unreasonable and inherently unfair in the absence of a provision that provides parties with a reasonable opportunity to respond and object to requests to intervene.

(iv) Abolishment of the requirement to provide reasons

45. Section 36 of the Old Rules provides that:

> 36. The Agency shall give oral or written reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed.
>
> **Old Rules, s. 36**

46. The New Rules, however, contain no such or similar provision that would require the Agency to provide reasons for its orders and decisions. The omission indicates and/or creates the impression that the Agency is no longer bound by the duty to provide reasons.

47. The duty to give reasons is a salutary one, and it is measured against the functions for which the duty to provide them was imposed. Reasons serve a number of purposes:

> (a) focus the decision-maker on the relevant factors and evidence;
>
> (b) provide the parties with the assurance that their representations have been considered;
>
> (c) provide a basis for an assessment of possible grounds for appeal; and
>
> (d) allow the appellate court to determine whether the decision-maker erred and thereby render him or her accountable.
>
> ***Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, paras. 13-14**

48. Parliament envisioned the Agency as a tribunal that provides reasons for its decisions and orders. By enacting subsection 41(1) of the *CTA*, Parliament

chose to subject decisions, orders, rules, and regulations of the Agency to the appellate review of this Honourable Court. In judicial review of decisions and orders, the justification, transparency and intelligibility within the decision-making process and its reasons are of primary concern. The absence of reasons would frustrate the ability of this Honourable Court to carry out its mandate pursuant to section 41 of the *CTA*.

***Canada Transportation Act*, s. 41(1)**

***Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 47**

49. In addition to the legal duty to provide reasons, one should be mindful of that the rules serve as a complete procedural code for proceedings before the Agency that the Agency expects self-represented parties to read and use. The omission of the duty to provide reasons from the New Rules is also unreasonable, because it deprives unrepresented parties of knowledge about their most basic procedural rights before the Agency.

***Nawrots v. Sunwing Airlines*, 432-C-A-2013, para. 134**

(v) Paper proceeding with no meaningful opportunity to challenge statements of adverse witnesses or to call oral evidence

50. The New Rules contain no provisions concerning out-of-hearing examination of deponents and affiants (such as section 34 of the Old Rules) nor rules governing the conduct of oral hearings (see sections 48-67 of the Old Rules).

Old Rules, ss. 34, 48-67

51. The New Rules establish a paper-only proceeding:

(a) Pursuant to Rule 18(1), an application (complaint) must include any legislative provisions, a clear statement of the issues, a full description of the facts, the relief claimed, the arguments in support of the application, and a copy of each document submitted in support of the application.

(b) Pursuant to Rule 19, an answer to an application must include a statement that sets out the elements that the respondent agrees with or disagrees with in the application, a full description of the facts, the arguments in support of the answer, and a copy of each document supporting the answer.

(c) Rule 20(1) provides the applicant (complainant) with a right of submitting a written reply to the answer; however, Rule 20(2) prohibits not only raising new issues on reply, but also introducing new evidence, unless the Agency granted permission to do so.

(d) Rule 24 provides that parties may direct written questions to each other and may seek production of documents.

New Rules, ss. 18-20 and 24 **Appeal Book, Tab 2, pp. 13-14**

52. The New Rules contain no procedures for cross-examination of deponents or affiants whose written statements were submitted to the Agency as evidence, nor procedures for calling witnesses to provide oral evidence. Thus, the New Rules codify the Agency's view and practice to decide consumer disputes based only on written statements, without hearing any oral evidence or at the very least having the benefit of transcripts of cross-examinations.

***Azar v. Air Canada*, LET-C-A-180-2012, p. 28**

53. It is submitted that the absence of procedures for cross-examination of a person whose statement has been tendered as evidence to the Agency and for calling witnesses to provide oral testimony is contrary to the intent of Parliament in establishing the Agency, degrades the Agency's fact-finding process to a storytelling contest, deprives parties of a meaningful opportunity to respond to the case against them, and renders the Agency's proceedings inherently unfair to parties in general, and to complainants in particular.

(a) Procedural fairness and cross-examination

54. Cross-examination is fundamental to the truth seeking function of courts, and has been found to be no less important in the context of administrative law and tribunals that perform a quasi-judicial function to adjudicate individual claims or *inter partes* disputes; in these cases, it was held that procedural fairness requires that parties be afforded the right to cross-examine.

> ***Rezmuves v. Canada (Citizenship and Immigration)*, 2013 FC 973, para. 29**

55. In *Norway House Indian Band v. Canada*, the Federal Court set aside a labour arbitration award (in spite of a very strong privative clause) and held that the proceeding was "patently unreasonable" because of the lack of opportunity to cross-examine:

> The opportunity to cross-examine is the paramount aspect of the right to confront one's adversary, and is of the essence to fair proceedings.
>
> ***Norway House Indian Band v. Canada (Adjudicator, Labour Code)* (T.D.), [1994] 3 F.C. 376, para. 60**

56. The right to cross-examine in proceedings before tribunals was analyzed by the Supreme Court of Canada in *Innisfil (Township) v. Vespra (Township)*:

> It is within the context of a statutory process that it must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. Indeed the adversarial system, founded on cross-examination and the right to meet the case being made against the litigant, civil or criminal, is the procedural substructure upon which the common law itself has been built.

The Court went on to cite from *Wigmore on Evidence*:

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the

> value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.
>
> Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.

Then the Court concluded that:

> The procedural format adopted by the administrative tribunal must adhere to the provisions of the parent statute of the Board. [...] Where the Board proceeds in the discharge of its mandate to determine the rights of the contending parties before it on the traditional basis wherein the onus falls upon the contender to introduce the facts and submissions upon which he will rely, the Board technique will take on something of the appearance of a traditional court.
>
> ***Innisfil (Township) v. Vespra (Township)*,**
> **[1981] 2 S.C.R. 145, pp. 17-18**

57. Therefore, in adversarial proceedings of a quasi-judicial nature, involving determination of the rights of contending parties based on their evidence, parties must be afforded the right to cross-examine.

(b) The statutory scheme

58. One of the Agency's key functions is to resolve consumer transportation-related disputes, including accessibility issues for persons with disabilities. When the Agency adjudicates such complaints, it determines the rights and obligations of the parties in much the same way that a court or a small claims court would do.

59. An electronic search of the *CTA* discloses that uses of the words “hear” and “hearing” include:

(a) “the Chairperson may authorize the member to continue to hear any matter” (s. 8(3));

(b) “Where a member who is conducting a hearing in respect of a matter...” (ss. 16(2) and 16(3));

(c) “which hearings may be held in private” and “number of members that are required to hear any matter” (s. 17(b) and 17(c));

(d) “an adjourned hearing of the matter” (s. 28(2));

(e) “jurisdiction to hear and determine the same question” (s. 30);

(f) “re-hear any application” and “hearing of the application” (s. 32); and

(g) “The Agency may inquire into, hear and determine a complaint” (s. 37).

Thus, Parliament intended the Agency to conduct hearings.

***Canada Transportation Act*, ss. 8(3), 16, 17, 28, 30, 32, and 37**

60. Parliament also envisioned the Agency receiving evidence in the same manner as a superior court in the course of carrying out its mandate:

> 25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.
>
> [Emphasis added.]

***Canada Transportation Act*, s. 25**

61. Sections 30 and 31 of the *CTA* reflect the legislative intent to make fact-finding and discovery of the truth an essential part of the Agency's mandate:

> 30. The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.
>
> 31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.
>
> ***Canada Transportation Act*, ss. 30-31**

62. Section 25.1 of the *CTA*, permitting the Agency to award costs in the same manner as the Federal Court, lends further support to the conclusion that Parliament intended the Agency to adjudicate disputes before it in a judicial manner, as a court or a small claims court would do.

> ***Canada Transportation Act*, s. 25.1**

(c) Nature of transportation-related consumer disputes

63. Most consumer disputes within the jurisdiction of the Agency fall into one of the following three categories:

(1) policy complaints, alleging that a carrier's policies are unreasonable, unclear, or fail to accommodate passengers with disabilities;

(2) monetary claims for expenses incurred as a result of a carrier failing to follow the terms and conditions set out in its tariff; and

(3) refusal to transport (including lifetime ban), involving allegations of unruly behaviour of passengers.

64. Disputes belonging to the last two categories tend to be fact-driven, and involve substantial factual disputes about events involving the passenger and the carrier's employees or agents.

65. Due to the nature of travel, the only witnesses to most incidents who are available to the parties are the passengers themselves and the carriers' employees. Carriers typically submit reports, statements, or declarations of their employees in response to complaints to the Agency. The employees' version of the events often differs from the recollection of the complainant, and involves allegations of improper behaviour of the complainant.

> ***Lukacs v. United Airlines Inc., et al.*, 2009 MBQB 29, para. 17**
> ***Boutin v. Air Canada*, 444-C-A-2012, para. 41**
> ***Forsythe v. Air Canada*, 260-C-A-2014, para. 23**
> ***K. v. Air Canada*, 383-C-A-2008, paras. 19-23**

66. Thus, a substantial portion of transportation-related consumer disputes require the decision-maker to decide whom they believe: the carrier's employees or the complainant. It is impossible to determine questions of this nature in a fair and reasonable manner without affording parties a meaningful opportunity to test the evidence of their adversaries.

67. There is no doubt that a skilled counsel can draft what the Agency called in *Boutin* "consistent and persuasive" written statements; furthermore, there is no doubt that a carrier's employees have a significant incentive to agree with the content of such "consistent and persuasive" written statements drafted by counsel and to remember the events accordingly, provided that they are shielded from cross-examination. (Indeed, employees who are found to have acted improperly or to have assisted their co-workers in doing so may be facing discipline, including termination.) The duty of the Agency, however, is not to test the drafting skills of the carrier's counsel, but rather to discover the truth. In other words, the Agency's mandate is to determine what *did* happen between the parties involved, and not what the parties *wish to have* happened.

> ***Boutin v. Air Canada*, 444-C-A-2012, para. 41**

68. Parliament did not intend parties before the Agency to be afforded less procedural fairness than they would be entitled before a small claims court adjudicating the same issue. Holding to the contrary would discourage passengers from using the Agency's complaint procedures, and thus would defeat the purpose for which Parliament created the Agency.

69. The procedures of small claims courts are established so as to enable unrepresented parties, with no or very limited legal knowledge, to gain access to justice. In spite of the informal, expeditious, and cost-efficient nature of small claims proceedings, contested claims are nevertheless adjudicated at an oral hearing, where witnesses can be cross-examined by the opposing party. The reason for this practice is found in the role of cross-examination in the fact-finding process, which was noted by the Supreme Court of Canada in *Innisfil*.

70. It is submitted that the same principles are applicable to consumer disputes before the Agency: decision-makers faced with conflicting evidence of the parties must decide whom they believe. It is impossible to make such decisions in a fair and reasonable way without allowing parties to cross-examine adverse witnesses, and having the decision-makers observe the witnesses as they testify.

(d) Conclusion

71. The Agency is required to discover the truth in the course of carrying out its mandate as an adjudicator of transportation-related consumer disputes. Parliament intended that in discharging this function, which involves determination of the rights and obligations of the parties, the Agency receive evidence in the same manner as courts do, or at the very least as small claims courts do.

72. Due to the nature of consumer disputes, the parties' evidence about what happened is often conflicting. Cross-examination of witnesses in such circumstances is the only available means for parties to meet the case being made against them. Therefore, procedural fairness requires that parties to dispute proceedings before the Agency be afforded the right to cross-examine witnesses, including deponents of adverse written statements, if the facts are contested.

73. The absence of procedures for challenging and testing the evidence of adverse witnesses at an oral hearing or at an examination whose transcript is submitted to the Agency renders the New Rules unfit for the discovery of the truth and creates an inherently unfair proceeding. This state of affairs is inconsistent with the legislative intent manifested in section 25 of the *CTA*, degrades the proceeding into a storytelling contest, and defeats the purpose for which the Agency was created.

74. Since the New Rules make it virtually impossible for complainants to prove their version of the events if the facts are disputed, the New Rules are particularly prejudicial and inherently unfair to complainants, who bear the burden of proof in most cases.

C. COSTS

75. Lukács is respectfully asking this Honourable Court that he be awarded his disbursements in any event of the cause, and if successful, also a modest allowance for his time, for the following reasons.

76. In *Lukács v. Canada (Transportation Agency)*, this Honourable Court awarded the appellant disbursements even though the appeal was dismissed:

> In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.
>
> ***Lukács v. Canada (Transportation Agency)*,**
> **2014 FCA 76, para. 62**

77. It is submitted that the same holds in the present case: the issues raised are not frivolous (demonstrated by the fact that the motion for leave to appeal was unopposed and was granted by this Honourable Court), and the appeal is in the nature of public interest litigation.

PART IV – ORDER SOUGHT

78. The Appellant, Dr. Gábor Lukács, is seeking an Order:

(a) quashing sections 41(2)(b), 41(2)(c), and 41(2)(d) of the New Rules and declaring these provisions to be *ultra vires* the powers of the Agency and/or invalid and/or of no force or effect;

(b) declaring that the New Rules are invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency;

(c) referring the New Rules back to the Agency with directions to revise them within 60 days by establishing rules that:

i. provide parties a reasonable opportunity to respond and object to requests of non-parties to intervene;

ii. require the Agency to provide reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed; and

iii. govern examinations of deponents and affiants, oral hearings, and in particular, requests for oral hearings.

(d) directing the Respondents to pay Dr. Lukács disbursements of the appeal and a moderate allowance for the time and effort Lukács devoted to the present appeal; and

(e) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 6, 2015

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Appellant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Canada Transportation Act, S.C. 1996, c. 10,
ss. 8, 16, 17, 25, 28-32, 37, 40, 41

Canadian Transportation Agency General Rules, S.O.R./2005-35
ss. 34, 36, and Part 3

Telecommunications Act, S.C. 1993, c. 38,
s. 62

CASE LAW

Association des Compagnies de Téléphone du Québec Inc. v. Canada (Attorney General), 2012 FCA 203

Ayele v. Canada, 2007 FC 126

Azar v. Air Canada, Canadian Transportation Agency,
Decision No. LET-C-A-180-2012

Boutin v. Air Canada, Canadian Transportation Agency,
Decision No. 444-C-A-2012

Dunsmuir v. New Brunswick, 2008 SCC 9

Forsythe v. Air Canada, Canadian Transportation Agency,
Decision No. 260-C-A-2014

Fowlie v. Air Canada, Canadian Transportation Agency,
Decision No. 488-C-A-2010

Innisfil (Township) v. Vespra (Township), [1981] 2 S.C.R. 145

K. v. Air Canada, Canadian Transportation Agency,
Decision No. 383-C-A-2008

Lukács v. Canada (Transportation Agency), 2014 FCA 76

CASE LAW (CONTINUED)

Lukacs v. United Airlines Inc., et al., 2009 MBQB 29

Mission Institution v. Khela, 2014 SCC 24

Nawrots v. Sunwing Airlines, Canadian Transportation Agency, Decision No. 432-C-A-2013

Norway House Indian Band v. Canada (Adjudicator, Labour Code) (T.D.), [1994] 3 F.C. 376

Rezmuves v. Canada (Citizenship and Immigration), 2013 FC 973

Vancouver International Airport Authority v. Public Service Alliance of Canada, 2010 FCA 158