Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and DR. GÁBOR LUKÁCS

Moving Parties

– and –

CANADIAN TRANSPORTATION AGENCY and AIR CANADA

Respondents

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTIES

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Moving Parties are seeking leave to appeal Decision No. 286-C-A-2016 [Final Decision] of the Canadian Transportation Agency [Agency], dismissing their complaint concerning Air Canada's systemic breach of its obligations to delayed passengers under the *Montreal Convention*. They are also seeking leave, if separate leaves are necessary, to appeal four interlocutory decisions that were made by the Agency in the course of the proceeding.

2. The *Montreal Convention* is an international treaty that has the force of law in Canada, being Schedule VI to the *Carriage by Air Act*. It imposes a regime of strict liability on airlines with respect to delay of passengers, and a non-removable liability cap of approximately **CAD$8,500**. The *Convention* places the burden of proof on the airline to rebut the presumption of liability and establish an affirmative defence.

***Montreal Convention*, Articles 19, 22(2), 26** **App. A, p. 409**

3. In sharp contrast with the obligations and liability limit set out in the *Montreal Convention*, Air Canada has been using an Expense Policy and other similar "internal documents" to determine the amount of compensation it pays to delayed passengers; they contain schedules such as the following, which limit the compensation to **less than 2%** of the cap set out in the *Convention*:

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

Air Canada's Expense Policy **Tab 6, p. 130**

Air Canada's Expense Guidelines **Tab 15, p. 211**

4. In the Final Decision, the Agency dismissed the joint complaint of the Moving Parties about Air Canada evading its obligations under the *Montreal* Convention by using such and similar policies systematically, and in the specific case of Col. Johnson.

5. The Moving Parties submit that the Agency erred in law, denied them procedural fairness, fettered its discretion, and rendered unreasonable decisions by, among other things:

(a) barring all evidence about the systemic nature of the complaint;

(b) misinterpreting the *Montreal Convention*; and

(c) granting Air Canada's request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]**.

B. AIR CANADA SHORTCHANGED COL. JOHNSON

6. Col. Christopher C. Johnson, one of the Moving Parties, was scheduled to fly from London, UK to Ottawa on Flight AC 889 on December 10, 2013. His flight was first delayed for more than four hours with passengers on board, and then was cancelled.

Johnson Statement, paras. 1-3 **Tab 3, p. 44**

7. The reason for the cancellation of his flight was mechanical failure in the 25-year-old aircraft that Air Canada had assigned to Flight AC 889.

Air Canada's Answers dated April 6, 2016, Document AQ3-1 **Tab 17, p. 218**

8. Based on the assurance that Air Canada would provide him with overnight accommodation and meals, Johnson volunteered to stay in London for the night and to be transported to Ottawa the next day. He was directed by Air Canada's agents to collect his checked baggage and to wait outside the Arrivals Area for a van to take volunteers to a local hotel where he and the other volunteers would be provided with a room and meal vouchers.

Johnson Statement, paras. 5-6 **Tab 3, p. 44**

9. Johnson did as he was told and waited outside the Arrivals Area for almost 30 minutes, but he saw neither a van nor anyone else from the group of 20 volunteers who would be staying in London.

Johnson Statement, para. 7 **Tab 3, p. 45**

10. He then re-entered the terminal, and asked an airport attendant to contact any Air Canada staff who might still be available, but the attendant was unable to locate any.

Johnson Statement, para. 8 **Tab 3, p. 45**

11. Johnson then contacted Air Canada Reservations in Montreal, and spoke to an Air Canada agent. The agent was unable to reach any Air Canada staff at Terminal 3 in London. She advised Johnson to seek his own accommodation and dinner, and then seek reimbursement from Air Canada after the fact.

Johnson Statement, para. 9 **Tab 3, p. 45**
Air Canada's answer (January 20, 2016), para. 13 **Tab 9, p. 147**

12. Johnson did as Air Canada's agent advised him, reserved a room at the Holiday Inn at London Heathrow, and incurred out-of-pocket expenses in the amount of $461.77 for his accommodation, and $69.79 for his dinner.

Johnson Statement, paras. 10-11 **Tab 3, p. 45**

13. On December 22, 2013, Air Canada refused to reimburse Johnson for the full amount of his out-of-pocket expenses on the basis that:

> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner. [Emphasis Added.]

Johnson Statement, Exhibit "E" **Tab 3, p. 59**

14. In a subsequent correspondence, Air Canada wrote to Johnson that:

> In the event a customers travel plans are disrupted, Air Canada does provide assistance towards the cost of hotel and meals. To be consistent, we follow a guideline so that all customers are treated equally. We realize you have requested an exception to this policy, however, to allow this can be seen as discriminatory to those customers who received the normal assistance.
>
> [Emphasis added.]

Johnson Statement, Exhibit "K" **Tab 3, p. 95**

15. Eventually, Air Canada reimbursed Johnson $222.00, leaving him out of pocket for $309.56.

Johnson Statement, Exhibit "M" **Tab 3, p. 102**

C. RECURRENT AND SYSTEMIC ISSUE

16. Air Canada's refusal to fully reimburse Johnson for the out-of-pocket expenses he incurred as a result of delay in his transportation was not an isolated incident; rather, it is a recurrent pattern, demonstrating a systemic issue.

17. On February 6, 2014, Air Canada quoted the same "policy" in an email to Mr. Albert Leatherman, a delayed passenger unrelated to Johnson:

> The maximum amount we cover for hotel is $100.00 CAD, breakfast $10.00 CAD and dinner $15.00 CAD.

Complaint, Document No. 2 **Tab 4, p. 120**

18. On November 12, 2014, Air Canada wrote to Ms. Michele Fiona Allen, another delayed passenger unrelated to Johnson:

> [...] in accordance with our policy, passengers not provided meal vouchers at the airport may claim up to $15.00 CAD for dinner, $10.00 CAD for lunch and $7.00 CAD for breakfast. If you could kindly forward your original meal receipts, we would be happy to reimburse you up to the maximum allowable amount.
>
> [Emphasis added.]

Complaint, Document No. 3 **Tab 4, p. 122**

19. Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein were delayed by sixty-five (65) hours while travelling with Air Canada, and were out-of-pocket for a total of $633.91 for accommodation and meals as a result. They sought reimbursement for their out-of-pocket expenses, and explicitly identified the *Montreal Convention* as the basis for their claim. Air Canada refused to reimburse the full amount of their expenses, and on April 29, 2016, wrote to the Rubensteins:

> The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.

Statement of Dr. Rubenstein **Tab 20, p. 243**

Statement of Ms. Rubenstein **Tab 21, p. 276**

20. Mr. Darren Powell was stranded in Frankfurt, and was told that Air Canada would cover his full accommodation costs. When he sought reimbursement for the $228 of expenses that he incurred, on February 3, 2016, Air Canada wrote to him:

> You will soon receive a draft in the amount of $120 CAD which is the standardized amount permitted for one nights' hotel stay and meals.
>
> [Emphasis added.]

Position statement & documents of Mr. Powell **Tab 27, p. 340**

21. The recurrence of the dollar amounts in these communications is not a coincidence. Air Canada has been using an Expense Policy **[Tab 6, p. 130]** and other similar "internal documents" **[Tab 15, p. 211]** to determine the amount of compensation payable to passengers; they contain schedules such as the following:

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

D. LEGISLATIVE CONTEXT

(i) *Montreal Convention*

22. The *Montreal Convention* is an international treaty, signed by over 120 states including Canada and the UK, governing certain aspects of the rights of passengers travelling internationally, including the liability of airlines in the event of a delay. The *Montreal Convention* has the force of law in Canada by virtue of subsection 2(2.1) of the *Carriage by Air Act*.

***Carriage by Air Act*, s. 2(2.1)** **App. A, p. 401**

23. Article 19 of the *Montreal Convention* imposes a regime of strict (but not absolute) liability on airlines with respect to delay of passengers. The airline is presumed to be liable for damages occasioned by delay of passengers up to a monetary limit set out in the *Convention*. The burden of rebutting the presumption of liability and establishing an affirmative defence is on the airline:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

***Montreal Convention*, Article 19** **App. A, p. 409**

24. Since 2009, the liability limit provided by the *Montreal Convention* in the event of delay of passengers has been 4,694 SDR, which is approximately **CAD$8,500**. (The limit of 4,150 SDR provided by Article 22(2) has been reviewed and updated in accordance with Article 24.)

***Montreal Convention*, Article 22(2)** **App. A, p. 410**

25. A key feature of the *Montreal Convention* is that the liability regime and limits set out in it cannot be lawfully contracted out:

> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

***Montreal Convention*, Article 26** **App. A, p. 412**

(ii) Regulatory scheme

26. Air carriers operating international flights to and from Canada are required to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is the contract of carriage between the passengers and the air carrier.

***Air Transportation Regulations*, s. 110** **App. A, p. 389**
***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 20** **Tab 40, p. 572**

27. The tariff of an air carrier must clearly state the terms and conditions with respect to an enumerated list of core areas, including “limits of liability respecting passengers and goods”; “exclusions from liability respecting passengers and goods”; and “procedures to be followed, and time limitations, respecting claims.”

***Air Transportation Regulations*, s. 122(c)(x)-(xii)** **App. A, p. 392**

28. All terms and conditions of carriage established by an air carrier are required to be “just and reasonable.”

***Air Transportation Regulations*, s. 111** **App. A, p. 390**
***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 22** **Tab 40, p. 573**

29. The Agency is a federal regulator and quasi-judicial tribunal created by the *Canada Transportation Act*. Parliament conferred upon the Agency broad powers with respect to the contractual terms and conditions that are imposed by airlines on passengers travelling internationally, to and from Canada.

***Canada Transportation Act*, s. 86(1)(h)** **App. A, p. 397**

30. The Agency may disallow any tariff or tariff rule that fails to be just and reasonable, and then it may substitute the disallowed tariff or tariff rule with another one established by the Agency itself.

***Air Transportation Regulations*, s. 113** **App. A, p. 391**

***Lukács v. Canada (CTA)* 2015 FCA 269, para. 23** **Tab 40, p. 574**

31. The Agency may also direct a carrier who fails to apply the terms and conditions set out in its tariff to take corrective measures and to compensate affected passengers.

***Air Transportation Regulations*, s. 113.1** **App. A, p. 391**

(iii) Air Canada's International Tariff

32. Air Canada's International Tariff Rule 55(B)(5)(a) provides that:

> For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

Complaint, Document No. 4 **Tab 4, p. 125**

33. Air Canada explicitly acknowledged that its Expense Policy **[Tab 6]** is not set out in its International Tariff.

Air Canada's answers (January 11, 2016), Q2 **Tab 6, p. 132**

E. PROCEEDINGS BEFORE THE AGENCY

(i) Complaint

34. On December 3, 2015, Johnson and Lukács filed a complaint with the Canadian Transportation Agency against Air Canada alleging that:

(a) since 2013 or earlier, Air Canada has been shortchanging the public and limiting its liability with respect to delay of passengers to the amounts set out in the Expense Policy, contrary to the explicit language of the *Montreal Convention* and Air Canada's International Tariff; and

(b) Johnson was adversely affected by and incurred expenses as a result of Air Canada's failure to comply with the *Convention* with respect to his delay on December 10-11, 2013.

As remedies, they sought corrective measures to bring Air Canada into compliance with the *Montreal Convention* and its own tariff, and an order directing Air Canada to reimburse Johnson for the outstanding $309.56.

Complaint **Tab 4, p. 107**

(ii) Air Canada's answer

35. Air Canada argued in response to the complaint that:

(a) Air Canada was not liable for the expenses of Johnson, because the mechanical failure of its 25-year-old aircraft "could not have been detected and controlled by Air Canada," and it took all reasonable measures in making a pre-departure check (para. 16);

(b) the Expense Policy **[Tab 6, p. 130]** contains mere recommendations and "do[es] not constitute Air Canada's policy for passenger claims, which are rather reviewed on a case by case basis" (paras. 21-22); and

(c) the amounts set out in the Expense Policy and other similar internal documents are "often exceeded" (para. 22).

Air Canada's answer (January 20, 2016) **Tab 9, p. 147**

(iii) Confidentiality Decision

36. On January 20, 2016, Air Canada requested that the Agency treat its Expense Policy **[Tab 6, p. 130]** and Expense Guidelines **[Tab 15, p. 211]** confidentially, and not place them on public record.

Air Canada's request for confidentiality **Tab 10, p. 179**

37. Johnson and Lukács objected to the request, which unnecessarily limits the public access guaranteed by the open court principle.

Opposition to the request for confidentiality **Tab 11, p. 184**

38. On February 24, 2016, in Decision No. LET-C-A-6-2016, the Agency erred in law and made an unreasonable decision by granting Air Canada's request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]** (referenced as A-2), while correctly denying the request with respect to the Expense Policy **[Tab 6, p. 130]** (referenced as A-1).

Decision No. LET-C-A-6-2016 **Tab 13, p. 199**

(iv) Refusals Decision

39. On April 8, 2016, Johnson and Lukács requested the Agency to compel Air Canada:

(a) to produce the Expense Guidelines **[Tab 15, p. 211]** in its entirety, including the portion about expenses of bumped passengers;

(b) to state whether it was denying liability for the expenses of passengers who are delayed as a result of a schedule change; and

(c) to provide particulars of Air Canada's allegation that the limits set out in its Expense Policy are "often exceeded."

Written questions (March 18, 2016)	**Tab 16, p. 214**
Request to compel answers and productions	**Tab 18, p. 230**

40. On May 4, 2016, the Agency denied the request to compel answers and productions, with reasons to follow. According to the reasons contained in the Final Decision, the Agency erred in law, denied Johnson and Lukács procedural fairness, and rendered an unreasonable decision in holding that:

(a) the requested information was not relevant (paras. 18, 22, 32);

(b) the requests were disproportionate (paras. 17, 22, 34); and

(c) under s. 230 of the *Income Tax Act*, Air Canada had no obligation to keep the requested records (para. 33).

Decision dated May 4, 2016	**Tab 19, p. 241**
Final Decision, paras. 7-36	**Tab 1, p. 3**

(v) Exclusion of Evidence Decision No. 1

41. On May 17, 2016, Johnson and Lukács requested to adduce the witnessed statements of Dr. Rubenstein and Ms. Rubenstein, who recently suffered similar treatment at the hands of Air Canada as Johnson did in 2013.

Statement of Dr. Rubenstein	**Tab 20, p. 243**
Statement of Ms. Rubenstein	**Tab 21, p. 276**
Request to adduce evidence	**Tab 22, p. 302**

42. On June 10, 2016, in Decision No. LET-C-A-24-2016, the Agency erred in law, denied Johnson and Lukács procedural fairness, and rendered an unreasonable decision in denying the request to adduce the evidence.

Decision No. LET-C-A-24-2016	**Tab 25, p. 315**

(vi) Exclusion of Evidence Decision No. 2

43. On June 17, 2016, Mr. Darren Powell submitted to the Agency a "Position Statement" with supporting documents relating to the complaint of Johnson and Lukács. Mr. Powell's statement and documents indicated that he was also a victim of Air Canada applying its Expense Policy instead of the *Montreal Convention*.

Position statement & documents of Mr. Powell	**Tab 27, p. 340**

44. On June 23, 2016, the Agency erred in law, fettered its discretion, denied Johnson and Lukács procedural fairness, and rendered an unreasonable decision by excluding the submission of Mr. Powell on the sole basis that it was submitted at 11:42 pm on June 17, 2016, some 6 hours and 42 minutes late.

Decision dated June 23, 2016	**Tab 28, p. 346**

(vii) Final Decision

45. On September 21, 2016, in Decision No. 286-C-A-2016, the Agency dismissed the complaint of Johnson and Lukács. The Agency erred in law and rendered an unreasonable decision by, among other things:

(a) refusing to consider the emails sent by Air Canada to Mr. Leatherman and Ms. Allen on the basis that they were hearsay (para. 73);

(b) failing to give effect to the presumption of liability under Article 19 of the *Montreal Convention* with respect to the incidents where Air Canada led no evidence to rebut the presumption (para. 73);

(c) making inconsistent findings, including attributing evidence to Johnson that is not in the record and explicitly denying the existence of evidence that is in the record (para. 50);

(d) holding that checking an aircraft prior to every flight is sufficient to meet the "all reasonable measures" defence of the *Montreal Convention* (para. 51);

(e) holding that offering accommodation and meals without actually providing same is sufficient to meet the "all reasonable measures" defence of the *Montreal Convention* (para. 54); and

(f) placing a duty of care on the passenger and not the airline with respect to alternative travel arrangements (para. 55).

PART II – STATEMENT OF THE POINTS IN ISSUE

46. The question to be decided on the present motion is whether this Honourable Court should grant Johnson and Lukács leave to appeal.

PART III – STATEMENT OF SUBMISSIONS

47. The main issue underpinning the complaint of Johnson and Lukács is that Air Canada has been systematically shortchanging and breaching its obligations to delayed passengers under the *Montreal Convention*. The individual case of Johnson is only one piece of this jigsaw puzzle.

48. Most recently, this Honourable Court held that:

(a) The role of the Agency is not only to provide redress to individual passengers, but also to ensure that policies pursued by the legislator are carried out.

(b) It is incumbent on the Agency to intervene at the earliest possible opportunity to prevent harm and damage to the public, rather than merely compensating those who have been affected after the fact.

***Lukács v. Canada (CTA)*, 2016 FCA 220, paras. 19 & 26** **Tab 41, pp. 590 & 592**

49. Johnson and Lukács are seeking the appellate intervention of this Honourable Court because the Agency not only failed to carry out its mandate with respect to the systemic issue they raised, but also proactively swept it under the rug by barring all evidence supporting the existence of a systemic issue.

A. JURISDICTION OF THIS HONOURABLE COURT

50. Every decision, order, rule or regulation of the Agency may be appealed to this Honourable Court on a question of law or a question of jurisdiction with the leave of the Court.

***Canada Transportation Act*, s. 41(1)** **App. A, p. 395**

51. The general rule is that interlocutory, procedural decisions made by a tribunal in the course of a proceeding must be challenged after the final decision has been rendered, as part of the appeal from the final decision. Furthermore, the time period for appealing such interlocutory decisions does not begin until the final decision has been rendered.

***Zündel v. Canada (Human Rights Commission)*, [2000] 4 FC 255, paras. 10-13, 17** **Tab 45, p. 636**

52. Thus, the proposed appeal from the Final Decision is the appropriate procedure and time to challenge the four interlocutory decisions. Furthermore, in light of the rationale for the aforementioned general rule, the time period to seek leave to appeal from the Procedural Decisions (if a separate leave is necessary) did not begin until the Final Decision was rendered.

53. In 2014, this principle was followed by this Honourable Court in granting leave to appeal from a final decision and two interlocutory decisions of the Agency relating to British Airways' denied boarding compensation policy.

***Lukács v. CTA & British Airways*, File No. 14-A-37** **Tab 38, p. 559**

B. DENIAL OF PROCEDURAL FAIRNESS AND FETTERING OF DISCRETION

54. The right of a party to be heard entails the right to lead evidence, and imposes a duty on the decision-maker to consider the totality of the evidence. The Agency breached this duty by first barring all evidence unfavourable to Air Canada relating to the systemic nature of the issue raised in the complaint, and then concluding that Johnson and Lukács failed to prove what they alleged.

55. The standard of review for procedural fairness issues is correctness.

***Air Canada v. Greenglass*, 2014 FCA 288, para. 26** **Tab 31, p. 440**

(i) Exclusion of emails sent by Air Canada to passengers

56. The Agency erred in law, applied a double standard, denied Johnson and Lukács procedural fairness, and made an unreasonable decision by excluding the emails sent by Air Canada to Mr. Leatherman and Ms. Allen:

> Firstly, these emails constitute hearsay and therefore we would not consider them.

Final Decision, para. 73 **Tab 1, p. 19**

57. First, the emails are not hearsay, because Air Canada acknowledged having sent them, and did not dispute their content.

Air Canada's answers (January 11, 2016), Q2 **Tab 6, p. 132**

58. Second, the longstanding practice of the Agency, which is not a court, has been to admit emails tendered by Air Canada, even if they constituted hearsay. The Agency provided no reasons for excluding "hearsay" evidence unfavourable to Air Canada, while having admitted favourable ones in the past.

***Azar v. Air Canada*, LET-C-A-180-2012, pp. 26-29** **Tab 32, pp. 472-475**

(ii) Exclusion of Evidence Decision No. 2

59. On June 17, 2016, at 11:42 pm, Mr. Powell submitted to the Agency a position statement and supporting documents with respect to the complaint of Johnson and Lukács:

> [...] I am writing to you today to document my similar experience to Christopher C. Johnson and Air Canada's failure to properly recompense me [...]

Position statement & documents of Mr. Powell **Tab 27, p. 340**

60. The Agency erred in law, fettered its discretion, denied Johnson and Lukács procedural fairness, applied a double standard, and made an unreasonable decision in excluding the position statement of Mr. Powell on the sole basis that it was submitted 6 hours and 42 minutes after the 5:00 pm deadline.

Decision dated June 23, 2016 **Tab 28, p. 346**

61. First, the Agency fettered its discretion by applying its rules of procedures "mechanically," without acknowledging the flexibility that they provide and the power of the Agency to accept late submissions.

***Lukács v. CTA*, 2015 FCA 200, para. 7** **Tab 39, p. 564**

62. Second, the Agency's decision is unreasonable, because the delay of 6 hours and 42 minutes in the submission of Mr. Powell's documents could not possibly have caused any prejudice.

63. Third, the Agency denied Johnson and Lukács procedural fairness and applied a double standard, because it has been the longstanding practice of the Agency to excuse minor delays with respect to Air Canada's submissions.

***Burns v. Air Canada*, 163-C-A-2007, para. 7** **Tab 33, p. 482**

(iii) Exclusion of Evidence Decision No. 1

64. The Agency erred in law, denied Johnson and Lukács procedural fairness, applied a double standard, and made an unreasonable decision in refusing to admit the witnessed statements (which are equivalent to sworn affidavits before the Agency) of the Rubensteins.

Decision No. LET-C-A-24-2016 **Tab 25, p. 315**

65. First, the Agency applied the wrong legal principles in superimposing the jurisprudence with respect to rebuttal evidence and re-opening cases on the regulatory regime put in place by Parliament. The Agency is not a court, but an administrative body that has important inquisitorial powers for the purpose of protecting the public at large, not just the parties before it.

***Canada Transportation Act*, s. 37** **App. A, p. 395**

***Lukács v. Canada (CTA)*, 2016 FCA 220, paras. 19, 20, 26** **Tab 41, pp. 590 & 592**

66. Second, the Agency applied a double standard in considering the emails sent by Air Canada to the Rubensteins for the truth of their content in the face of the witnessed statements of both passengers to the contrary:

> The statements of these passengers indicate that they were delayed and that Air Canada did not offer accommodation. However, attached to one of the statements is an email dated April 21, 2016, wherein an Air Canada representative states that in accordance with its tariff a hotel room is provided, that hotel rooms had been booked and blocked for passengers on the flight which was delayed, and that the accommodation was offered but declined.
>
> [Emphasis added.]

Decision No. LET-C-A-24-2016, p. 5 **Tab 25, p. 319**

67. Third, the statements of the Rubensteins that “they were delayed and that Air Canada did not offer accommodation” and that Air Canada refused

to compensate them were clearly and obviously relevant to the question of whether Air Canada continued to deny claims contrary to the *Montreal Convention*, which was before the Agency.

68. Finally, the Agency erred in law with respect to the threshold for admitting the evidence. The evidence need not be conclusive. Whether Air Canada had any evidence in response is not relevant to determining whether to admit the statements of the Rubensteins.

(iv) Refusals Decision

69. The Agency erred in law, denied Johnson and Lukács procedural fairness, and made an unreasonable decision in refusing to compel Air Canada:

> (Q9) to produce the Expense Guidelines **[Tab 15, p. 211]** in its entirety, including the portion about expenses of bumped passengers;
>
> (Q12) to state whether it was denying liability for the expenses of passengers who are delayed as a result of a schedule change; and
>
> (Q18) to provide particulars of Air Canada's allegation that the limits set out in its Expense Policy are "often exceeded."

Decision dated May 4, 2016 — **Tab 19, p. 241**
Final Decision, paras. 7-36 — **Tab 1, p. 3**

70. First, the Agency erred in law by holding that the complaint of Johnson and Lukács was confined to delays caused by "schedule irregularities." It is apparent on the face of the complaint that it was challenging Air Canada's conduct without restriction to a specific cause of delay.

Complaint, Document No. 2 — **Tab 4, p. 120**
Final Decision, paras. 16-17 — **Tab 1, p. 5**

71. Second, the Agency erred in law in determining the relevance of production Q9 and question Q12 based on the aforementioned erroneous finding of law as to the scope of the complaint.

Final Decision, paras. 18 & 22 **Tab 1, pp. 5-6**

72. Delay of passengers can come in many shapes and forms, including as a result of "schedule change" or bumping (involuntary denied boarding), and the *Montreal Convention* applies to the rights of such passengers. Thus, as a matter of law, Q9 and Q12 were relevant to whether Air Canada has been evading its obligations under the *Convention*. Furthermore, the Agency unreasonably held that requiring Air Canada to answer these would be disproportionate; there was no evidence that doing so would have been onerous for Air Canada.

***Lukács v. Air Canada*, 250-C-A-2012, para. 34** **Tab 36, p. 519**

73. ***Question 18.*** First, the Agency erred in law and engaged in circular reasoning by relying on the evidence of Ms. Robinson (Manager, Customer Relations) in support of the the reliability of the very same evidence, which question Q18 was aiming to challenge. The reasons provided suggest that the Agency had made up its mind to accept the evidence of Ms. Robinson even before Johnson and Lukács had an opportunity to test the evidence.

Final Decision, para. 8 **Tab 1, p. 8**

74. Second, the Agency erred in law with respect to the issue of relevance. Air Canada claimed that it "often" paid compensation to passengers in excess of the miniscule amounts set out in the Expense Policy **[Tab 6]**, while the Expense Policy states that the compensation paid "should never exceed" the ones in the schedules. Thus, Johnson and Lukács were entitled to evidence as to:

(a) whether Air Canada was labelling most delays as "uncontrollable" to evade liability; and

(b) whether, in cases that Air Canada considers "controllable," it was following the maximum amounts set out in the Expense Policy or the *Montreal Convention*.

Final Decision, para. 9 **Tab 1, p. 9**

75. Third, the Agency erred in law in interpreting the *Income Tax Act* concerning the obligation of Air Canada to retain records and books. Section 230 requires corporations, including Air Canada, to retain records and books for six (6) years from the end of the last taxation year to which the records and books relate. Section 248 defines "record" as:

> "record" includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form;
>
> [Emphasis added.]

***Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), ss. 230-248** **Tab 6, pp. 428-431**

76. "Records" that Air Canada is required to keep under the *Income Tax Act* include the receipts submitted by passengers with claims, and all related information. Air Canada provided no evidence that it would be onerous to retrieve these records, or their summaries, from its accounting department, which must have most if not all information necessary for answering question Q18.

77. Finally, the Agency misstated the substance of its own Decision No. LET-C-A-173-2009, which reads as follows:

> 5. For the most recent 6-month period for which data are available, WestJet is requested to advise the average amount of compensation tendered to passengers travelling domestically for damage to, or loss or delay in delivery of baggage. During the same period, did WestJet tender an amount to a passenger in excess of $250? If so, how many times did this occur, and what were the individual amounts?
>
> ***Lukács v. WestJet*, LET-C-A-173-2009, p. 2** **Tab 42, p. 596**

78. Given that the Agency required WestJet to compile information about the amounts of compensation that it was paying to passengers in relation to loss, delay, or damage to baggage (which does require categorizing expenses), the Agency's decision of refusing to do the same with respect to the compensation paid by Air Canada in relation to delay of passengers is unreasonable.

C. THE AGENCY ERRED IN INTERPRETING THE MONTREAL CONVENTION

79. The *Montreal Convention* balances the rights of passengers and airlines by imposing a presumption of liability on the airlines in relation to delays, but limiting the liability arising under the presumption to approximately $8,500. The liability cannot be contracted out (Article 26), and an airline can exonerate itself from liability only if proves that it has taken "all reasonable measures" necessary to prevent damage to passengers or that no such measures were available; most importantly, the burden of proof is on the airline, not the passengers.

> ***Montreal Convention*, Articles 19, 22(2), 26** **App. A, p. 409**

80. Although nothing turns on standard of review, it is submitted that the standard should be correctness, because the *Montreal Convention* is an international treaty that is interpreted by the courts of all 120 signatory states.

(i) Systemic issue

81. Air Canada did not dispute that Mr. Leatherman and Ms. Allen were delayed, but were refused full compensation for their expenses based on the Expense Policy. Instead, Air Canada argued that:

> The reference to a Policy in refusing to reimburse the totality of expenses claimed by two other passengers does not equate to a systematic denial of expenses in controllable situations.
>
> **Air Canada's answer (January 20, 2016), para. 22** **Tab 9, p. 149**
>
> **Complaint, Document Nos. 2 & 3** **Tab 4, pp. 120 & 122**

82. The Agency refused to consider the emails that Air Canada sent to these two passengers, and as an alternative position held that:

> [...] even if they were admissible, in order to conclude in these cases that Air Canada is applying a policy that purports to limit its liability with respect to delay, the Agency would have to be in the position to conclude that there was an obligation to compensate these passengers for the expenses claimed, and that Air Canada applied a policy to limit its liability in this regard. In both cases, it is not known whether Air Canada or its agents did everything that could reasonably be required to avoid the damage incurred as a result of the delay.
>
> **Final Decision, para. 73** **Tab 1, p. 19**

83. The Agency erred in law and misinterpreted the *Montreal Convention* by failing to give effect to the presumption of liability prescribed by Article 19, and failing to place the burden of proof on Air Canada. The legal effect of this presumption is that in the absence of exonerating evidence, Air Canada is automatically liable for the damages of the passengers. Johnson and Lukács were not required to establish the absence of an affirmative defence. Instead, it was up to Air Canada to lead evidence to establish such a defence, and Air Canada chose not to do so.

84. Thus, in the absence of any evidence exonerating Air Canada from liability with respect to Mr. Leatherman and Ms. Allen, the only possible outcome was that Air Canada is liable for the damages of these two passengers under the *Montreal Convention*. Consequently, it was not open for the Agency to find that Air Canada has complied with its obligations under its tariff. Therefore, the Final Decision is unreasonable.

Final Decision, para. 75 **Tab 1, p. 19**

85. In addition, the Agency erred in law and rendered an unreasonable decision by failing to address the systemic issue of Air Canada using the cause-and-fault oriented classification of "controllable" and "uncontrollable" events and "schedule change" to determine whether to compensate passengers for their delay-related expenses. This classification is inconsistent with the liability-based regime of the *Montreal Convention*. Although the Agency acknowledged the lengthy submissions of Johnson and Lukács on this point, its reasons are silent with respect to the issue.

Final Decision, paras. 66-69 **Tab 1, pp. 17-18**

(ii) The individual case of Col. Johnson

86. ***Preliminary matter: Error apparent on the face of the decision.*** The Agency contradicted itself at para. 50 of the Final Decision in stating that:

> Mr. Johnson's evidence is that the other passengers were able to obtain transportation to the hotel, hotel rooms, and meal vouchers, but that he was not. He does not explain how this happened.

First, in paragraph 39 of the Final Decision, the Agency explicitly acknowledged the explanation of Johnson. Second, Johnson neither did nor could give evidence relating to the fate of other passengers.

Final Decision, para. 39 **Tab 1, p. 10**

87. ***Liability for delay caused by mechanical failure.*** The Agency erred in law in concluding at para. 51 of the Final Decision that the routine checking of the aircraft prior to every flight is sufficient to meet the "all reasonable measures" defence of the *Montreal Convention*. This interpretation would mean that airlines are virtually never liable for delay of their passengers caused by mechanical failure of the aircraft, and thus would render Article 19 of the *Montreal Convention* devoid of any meaning. This interpretation flies in the face of both Canadian and European case law holding that mechanical issues are inherent to the normal operation of airlines, and must be anticipated by the airline.

> [...] the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of that carrier, since the latter is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business.
>
> [Emphasis added.]

***van der Lans v. KLM*, European Court of Justice, Case C-257-14, para. 43**	**Tab 35, p. 510**
***Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11, para. 13**	**Tab 34, p. 495**
***Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, paras. 15-16**	**Tab 43, p. 603**

88. ***Damages "occasioned by delay" and duty of care.*** The Agency erred in law and rendered an unreasonable decision by failing to give effect to the phrase "occasioned by delay" in Article 19, and concluding at para. 55 that Johnson's damages were not "the result of the delay."

89. The typical damages of delayed passengers include accommodation and meals; yet neither of these are directly and immediately caused by the delay. For example, passengers could sleep at the airport, and missing a few meals might not be detrimental to the health of passengers. Yet, these ex-

penses are commonly recognized as “occasioned by delay,” because but for the delay, the passenger would not have incurred them.

90. The Agency erroneously failed to apply the same principle to the expenses incurred by Johnson, who would not have incurred those expenses but for the cancellation of his flight and the subsequent failure of Air Canada to transport him on the same day. Since Air Canada led no evidence that it was impossible to transport Johnson on the same day (for example, on flights of other airlines), Air Canada is liable for his expenses pursuant to Article 19 of the *Montreal Convention*.

***Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, para. 16** **Tab 43, p. 603**

91. Finally, since Johnson did board his original flight on time, from that point on it was Air Canada’s responsibility to look after him, and to ensure that he got the accommodation and meals that Air Canada promised him. Article 20 of the *Montreal Convention* imposes the burden of proof on the airline to show contributory negligence of passengers. Air Canada led no such evidence nor argued contributory negligence on the part of Johnson. Therefore, the Agency’s conclusion that Air Canada was not liable for his expenses is unreasonable and inconsistent with the *Montreal Convention*.

***Montreal Convention*, Article 20** **Tab 4, p. 409**

D. CONFIDENTIALITY DECISION

92. The Agency erred in law and made an unreasonable decision by granting Air Canada’s request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]** (referenced as A-2), while correctly denying the request with respect to the Expense Policy **[Tab 6, p. 130]** (referenced as A-1).

Decision No. LET-C-A-6-2016 **Tab 13, p. 199**

93. First, the two documents are virtually identical in content, although they somewhat differ in form. As such, making one confidential while placing the other on public record defeats common sense and is unreasonable.

94. Second, Air Canada has not consistently treated the information in the Expense Guidelines as confidential; indeed, it has been communicated to passengers, as numerous emails demonstrate.

Complaint, Document Nos. 2 & 3 **Tab 4, pp. 120 & 122**

95. Third, the Agency is subject to the open court principle. The legal test for confidentiality set out by the Supreme Court of Canada in *Sierra Club* requires a "real and substantial risk" that is "well grounded in the evidence" and that the risk must pose a serious threat to an interest that can be expressed in terms of public interest in confidentiality. Since there was no such evidence before the Agency, the Confidentiality Decision was unreasonable, and the document should be placed on public record.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, paras. 54-55** **Tab 44, p. 623**

E. COSTS

96. Johnson and Lukács respectfully ask the Honourable Court that they be awarded their disbursements in any event of the cause, and if successful, also a moderate allowance for their time, because the present motion and the proposed appeal are in the nature of public interest litigation, and the issues raised in the motion are not frivolous.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62** **Tab 37, p. 558**

***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 43** **Tab 40, p. 579**

PART IV – ORDER SOUGHT

97. The Moving Parties, Col. Christopher C. Johnson and Dr. Gábor Lukács, are seeking an Order:

(a) granting Johnson and Lukács leave to appeal Decision No. 286-C-A-2016 of the Canadian Transportation Agency;

(b) granting Johnson and Lukács leave to appeal, if separate leaves are necessary, the following interlocutory decisions made by the Canadian Transportation Agency:

(1) Decision No. LET-C-A-6-2016, dated February 24, 2016 **[Tab 13, Confidentiality Decision]**;

(2) Decision dated May 4, 2016 **[Tab 19, Refusals Decision]**;

(3) Decision No. LET-C-A-24-2016, dated June 10, 2016 **[Tab 25, Exclusion of Evidence Decision No. 1]**; and

(4) Decision dated June 23, 2016 **[Tab 28, Exclusion of Evidence Decision No. 2]**;

(c) granting Johnson and Lukács costs and/or reasonable out-of-pocket expenses of this motion; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 21, 2016

COL. CHRISTOPHER C. JOHNSON

Kanata, ON

ccjohnson@sympatico.ca

Moving Party

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, SOR/88-58,
ss. 110, 111, 113, 113.1, 122

Canada Transportation Act, S.C. 1996, c. 10,
ss. 41 and 86

Carriage by Air Act, R.S.C. 1985, c. C-26,
s. 2

Montreal Convention (Schedule VI to the *Carriage by Air Act*,
R.S.C. 1985, c. C-26)

Federal Courts Rules, S.O.R./98-106,
Rules 352 and 369

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.),
ss. 230 and 248

CASE LAW

Air Canada v. Greenglass, 2014 FCA 288

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

Burns v. Air Canada, Canadian Transportation Agency,
Decision No. 163-C-A-2007

Elharradji c. Compagnie nationale Royal Air Maroc, 2012 QCCQ 11

van der Lans v. KLM, European Court of Justice, Case C-257-14

Lukács v. Canadian Transportation Agency and British Airways,
File No. 14-A-37

CASE LAW (CONTINUED)

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

Lukács v. Canada (Canadian Transportation Agency),
2015 FCA 200

Lukács v. Canada (Canadian Transportation Agency),
2015 FCA 269

Lukács v. Canada (Canadian Transportation Agency),
2016 FCA 220

Quesnel c. Voyages Bernard Gendron inc.,
[1997] J.Q. no 5555

Sierra Club v. Canada (Minister of Finance), 2002 SCC 41

Zündel v. Canada (Human Rights Commission), [2000] 4 FC 255