

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

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

Dated: September 17, 2014

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**MEMORANDUM OF FACT AND LAW OF THE APPELLANT,
DR. GÁBOR LUKÁCS****PART I – STATEMENT OF FACTS****A. OVERVIEW**

1. The Appellant appeals from a Final Decision of the Canadian Transportation Agency (the “Agency”) about British Airways’ policy governing denied boarding compensation, and two related Procedural Decisions. This Court granted leave to appeal pursuant to s. 41 of the *Canada Transportation Act*.
2. British Airways engages in the unfortunate practice of selling more seats than are physically available on its aircrafts. If all passengers show up for an oversold flight, then some passengers are “bumped” from the flight by the airline. Passengers who are bumped from an oversold flight would normally be entitled to “denied boarding compensation” for their inconvenience.
3. The Agency erred in law and rendered an unreasonable decision:
 - (i) the Final Decision is inconsistent with the requirements set out in subsection 122(c)(iii) of the *Air Transportation Regulations*;

- (ii) the Final Decision creates a legal loophole that undermines the ability of passengers bumped from British Airways flights departing from abroad to Canada to commence an action for denied boarding compensation in Canada.

4. The Agency also breached its duty to observe procedural fairness by making the Procedural Decisions and ordering the Appellant to delete the vast majority of his reply submissions to the Agency.

B. THE STATUTORY SCHEME

5. Airlines operating international flights to and from Canada must comply with Canadian regulatory requirements, including the requirement to create and file with the Agency a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and the terms and conditions set out in the tariff are enforceable in Canada.

Air Transportation Regulations, ss. 110(1), 113.1

6. Every tariff must clearly state the airline's policy with respect to an enumerated list of core areas, including the "compensation for denial of boarding as a result of overbooking," that is, denied boarding compensation.

Air Transportation Regulations, s. 122(c)(iii)

7. 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)

8. All terms and conditions of carriage established by an airline must be “just and reasonable.”

Air Transportation Regulations, s. 111(1)

9. 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

C. PROCEEDINGS BEFORE THE AGENCY

10. The Appellant, Dr. Gábor Lukács, is a Canadian air passenger rights advocate and a frequent traveller. Lukács has a track record of approximately two dozen successful regulatory complaints with the Agency on a variety of issues, ranging from baggage liability to denied boarding compensation.

(i) The Show Cause Decision

11. On January 30, 2013, Lukács filed a complaint with the Agency, and challenged the reasonableness and clarity of certain policies of British Airways, including the policy governing the denied boarding compensation payable to passengers bumped from oversold British Airways flights.

Decision No. 10-C-A-2014, para. 1

Appeal Book, Tab 12, P81

12. On January 17, 2014, the Agency issued Decision No. 10-C-A-2014, which resolved with finality all but one issue in the complaint of Lukács, leaving the issue of the amount of denied boarding compensation that British Airways is required to pay to bumped passengers as the only outstanding matter.

Decision No. 10-C-A-2014, paras. 142-144

Appeal Book, Tab 12, P104

13. With respect to the issue of denied boarding compensation, the Agency agreed with Lukács that British Airways' policy, known as Rule 87(B)(3)(B), was unreasonable, but disagreed with the particular policy that Lukács proposed to impose on British Airways as a substitute.

Decision No. 10-C-A-2014, paras. 138-140 **Appeal Book, Tab 12, P103**

14. The Agency sought submissions from the parties about an appropriate substitute for the airline's denied boarding compensation policy: The Agency ordered British Airways to either explain why the Agency should not impose on it one of the three regimes referenced in the decision for determining the amount of denied boarding compensation, or to propose a new policy on its own (the "Show Cause Decision"). The Agency also invited Lukács to comment on British Airways' submissions in response to the Show Cause Decision.

Decision No. 10-C-A-2014, para. 144 **Appeal Book, Tab 12, P104**
Erratum to Decision No. 10-C-A-2014 **Appeal Book, Tab 11, P80**

(ii) Submissions in response to the Show Cause Decision

15. On March 17, 2014, British Airways proposed to implement the denied boarding compensation regime that was "proposed by Air Canada as set out in Decision No. 442-C-A-2014," and it also proposed a tariff wording purporting to implement this regime, albeit only on flights from Canada to the UK. The proposed wording was silent about flights from Canada to other destinations and flights from abroad to Canada.

Submissions of British Airways **Appeal Book, Tab 10, P77**
(March 17, 2014)

16. On March 26, 2014, Lukács filed his reply, and submitted that:

- (a) the tariff wording proposed by British Airways did not reflect the regime proposed by Air Canada, and it was inconsistent with the obligation to provide denied boarding compensation on all flights to and from Canada;

- (b) the regime of Air Canada was not reasonable in the case of British Airways, whose statutory and commercial environment substantially differs from Air Canada's; and
- (c) there had been significant material changes since the proposal of Air Canada was put forward, and it would be unreasonable for British Airways to apply that regime.

Reply of Lukács (March 26, 2014)

Appeal Book, Tab 9, P43

17. On March 28, 2014, British Airways made additional submissions without being invited to do so by the Agency. On April 1, 2014, Lukács asked the Agency for permission to respond to these additional submissions.

**Additional Submissions of British Airways
(March 28, 2014)**

Appeal Book, Tab 8, P41

Letter of Lukács to the Agency

Appeal Book, Tab 7, P40

(iii) The Procedural Decisions

18. On April 16, 2014, in Decision No. LET-C-A-25-2014, the Agency not only struck out the additional submissions of British Airways, but also ordered Lukács to refile his reply "with all submissions that are unrelated to the specific matter of denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted."

Decision No. LET-C-A-25-2014

Appeal Book, Tab 6, P36

19. On April 23, 2014, Lukács made a motion to the Agency to reconsider Decision No. LET-C-A-25-2014, because it deprived him of the right to make submissions by ordering him to delete submissions that fell squarely within the scope of comments on British Airways' submissions, and which directly responded to those submissions.

**Motion of Lukács to reconsider
Decision No. LET-C-A-25-2014**

Appeal Book, Tab 5, P31

20. On May 2, 2014, in Decision No. LET-C-A-29-2014, the Agency ordered Lukács to delete all but one section of his March 26, 2014 submissions.

Decision No. LET-C-A-29-2014

Appeal Book, Tab 4, P28

21. On May 8, 2014, Lukács filed his revised reply as per the Agency's decisions; however, he did so under protest, and reserved his right to challenge the decision as part of an appeal from the final decision that the Agency would issue in the file.

Revised (under protest) Reply of Lukács

Appeal Book, Tab 3, P9

(iv) The Final Decision

22. On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the "Final Decision"). In the Final Decision, the Agency:

- (a) confused Decision No. 227-C-A-2013 (*Lukács v. WestJet*) with Decision No. 442-C-A-2013 (*Azar v. Air Canada*) at paragraphs 10-11;
- (b) found that the tariff language proposed by British Airways was unreasonable, because it did not apply to all travel from Canada to the European Union; and
- (c) ordered British Airlines to amend its proposed tariff rule by extending its application to all travel from Canada to the European Union (at paragraph 12).

Decision No. 201-C-A-2014

Appeal Book, Tab 2, P6

23. The Final Decision is inconsistent with subsection 122(c)(iii) of the *Air Transportation Regulations* by failing to establish a tariff rule governing denied boarding compensation payable to passengers travelling on British Airways flights from abroad to Canada (for example, from London Heathrow to Toronto). The Final Decision also creates a legal loophole.

PART II – STATEMENT OF THE POINTS IN ISSUE

24. There are two questions of law to be decided on this appeal:
- (a) Did the Agency err in law and render an unreasonable decision by imposing on British Airways a denied boarding compensation policy that is silent about flights departing from abroad to Canada?
 - (b) Did the Agency deny Lukács procedural fairness by ordering him to delete the vast majority of his reply to British Airways' response to the Show Cause Decision?

25. With respect to the first question, the issue is not that Lukács wanted the Agency to impose a different denied boarding compensation policy on the airline, but rather that the Agency neglected to impose any denied boarding compensation policy at all for British Airways flights departing from the European Union to Canada. Lukács submits that no interpretation of subsection 122(c)(iii) of the *Air Transportation Regulations* is capable of supporting this omission.

26. With respect to the second question, Lukács submits that the Agency deprived him of a meaningful opportunity to reply to British Airways' response to the Show Cause Decision, and he was thus denied procedural fairness.

PART III – STATEMENT OF SUBMISSIONS

A. STANDARD OF REVIEW: REASONABLENESS

27. Since *Dunsmuir*, there are only two standards of review, namely, correctness and reasonableness. It is common ground among the parties that the present appeal is to be reviewed on the deferential standard of reasonableness.

28. A court conducting a reasonableness review examines the justification, transparency, and intelligibility of the decision-making process, and ascertains that the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law.

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

B. PRIMARY GROUND: THE FINAL DECISION IS UNREASONABLE

29. The Final Decision imposes a tariff rule on British Airways that governs the payment of denied boarding compensation only on flights departing from Canada to the European Union, but it is silent about the rights of passengers who are bumped from flights departing from the European Union (or elsewhere) to Canada.

30. Lukács submits that this final outcome is unreasonable, in the sense that it falls outside the range of possible reasonable outcomes for two reasons:

- (i) it is inconsistent with the requirements of section 122(c)(iii) of the *Air Transportation Regulations*; and
- (ii) it creates a legal loophole, and defeats the purpose for which section 122(c)(iii) of the *Air Transportation Regulations* was enacted.

(i) **The obligation to state denied boarding compensation policy for travel to and from Canada (textual and contextual analysis)**

31. Subsection 122(c)(iii) of the *Air Transportation Regulations* states that:

122. Every tariff shall contain

⋮

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

⋮

(iii) compensation for denial of boarding as a result of overbooking,

Air Transportation Regulations, s. 122(c)(iii)

32. Section 122 is found in Division II of Part V of the *Air Transportation Regulations*. Division II is applicable to every air carrier that operates "international service" (except certain transborder charter services).

Air Transportation Regulations, s. 108

33. Section 55(1) of the *Canada Transportation Act* states that:

"international service" means an air service between Canada and a point in the territory of another country;

[Emphasis added.]

Canada Transportation Act, s. 55(1)

34. Thus, "international service" means both service from Canada to the territory of another country and service from the territory of another country to Canada. In particular, the obligation set out in section 122(c)(iii) of the *Air Transportation Regulations* applies not only to service from Canada to destinations abroad, but also to service from abroad to Canada.

35. In *Lukács v. WestJet*, 227-C-A-2013, the Agency reached the same conclusion with respect to the symmetric nature of the obligation to state the denied boarding compensation policy:

[21] [...] the Agency, in Decision No. 666-C-A-2001, held, in part, that any passenger who is denied boarding is entitled to compensation. Given that Existing Tariff Rule 110(E) does not provide for that compensation for flights to and from Canada, it is inconsistent with Decision No. 666-C-A-2001. The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.

:

[39] [...] The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[Emphasis added.]

***Lukács v. WestJet*, Canadian Transportation Agency, Decision No. 227-C-A-2013, paras. 21, 39**

36. Therefore, the tariff must address denied boarding compensation for:

- i. flights departing from Canada to destinations abroad; and
- ii. flights departing from abroad to Canada.

37. The Final decision imposes a tariff rule on British Airways that accomplishes (i), but fails to accomplish (ii); indeed, it is silent with respect to denied boarding compensation on flights departing from abroad to Canada.

38. Hence, the tariff rule imposed by the Agency on British Airways in the Final Decision is inconsistent with the requirements of section 122(c)(iii) of the *Air Transportation Regulations*, because it fails to establish conditions governing denied boarding compensation for flights departing from abroad to Canada.

(ii) **Ability to enforce rights in Canada (purposive analysis)**

39. The tariff is the contract of carriage between the passenger and the airline. The terms and conditions set out in the tariff are enforceable in Canada by way of a complaint to the Agency or commencing an action in Canadian courts. In *Kirkham v. Air Canada*, for example, the airline was ordered to comply with the terms and conditions set out in its tariff, and to pay denied boarding compensation to a passenger who was bumped in Los Angeles, California from a flight to Calgary, Alberta.

Kirkham v. Air Canada, Canadian Transportation Agency, Decision No. 268-C-A-2007

40. Conversely, terms and conditions that are not contained in the tariff cannot be enforced in Canada, even if the absence of these terms and conditions is contrary to the *Air Transportation Regulations*. Indeed, as noted by the Agency in *Nathanson v. LACSA*:

[26] The Agency notes that, in this case, as stated above, LACSA's Tariff does not set out its policy related to denied boarding compensation. Accordingly, the Agency finds that LACSA has contravened subparagraph 122(c)(iii) of the ATR. In this regard, LACSA should be aware that the Agency considers contraventions of provisions of the CTA or the ATR to be serious and will take appropriate punitive action should any such contraventions occur in the future.

[27] Further, it is important to note that the authority of the Agency in such situations is limited to requiring a carrier to amend its tariff so as to comply with subparagraph 122(c)(iii) of the ATR. The Agency cannot require a carrier to apply a policy if that policy is not reflected in its tariff.

[Emphasis added.]

Nathanson v. LACSA, Canadian Transportation Agency, Decision No. 201-C-A-2005, paras. 26-27

41. Thus, the purpose of the requirement to state the denied boarding compensation policy for travel to and from Canada in the tariff, set out in subsection

122(c)(iii) of the *Air Transportation Regulations*, is to ensure that the right to denied boarding compensation is enforceable in Canada.

42. The Final Decision creates a legal loophole and defeats this purpose by leaving Canadian passengers who are bumped from British Airways flights from abroad to Canada (for example, from London Heathrow to Toronto) without a remedy: they will not be able to commence a proceeding to obtain denied boarding compensation before the Agency or a Canadian court.

43. This final outcome, which allows British Airways to evade the obligation to pay denied boarding compensation to Canadian passengers, is inconsistent with the purpose of subsection 122(c)(iii) of the *Air Transportation Regulations*, and as such it falls outside the range of possible, acceptable outcomes. Hence, the Final Decision is unreasonable.

C. SECONDARY GROUND: DENIAL OF PROCEDURAL FAIRNESS

44. This Honourable Court also granted leave to appeal from the Procedural Decisions that ordered Lukács to delete the vast majority of his reply to British Airways' response to the Show Cause Decision.

Order granting leave to appeal

Appeal Book, Tab 16, P279

45. Since as a general rule, interlocutory, procedural decisions made by a tribunal in the course of a proceeding must be challenged as part of the appeal from the final decision, the Procedural Decisions are being appealed together with the Final Decision.

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

46. Lukács submits that he was denied procedural fairness by the Agency making the Procedural Decisions.

(i) **The outstanding issue in the show-cause proceeding: amounts**

47. British Airways' Tariff Rule 87(B)(3)(B), entitled "Amount of compensation payable," provided for denied boarding compensation in the amount equal to the value of the passenger's remaining flight coupons, but:

- i. for flights departing from Canada, at least \$50.00 and at most \$200.00; and
- ii. for flights departing from the United Kingdom to Canada, at least 10.00 UKL and at most 100.00 UKL.

Decision No. 10-C-A-2014, Appendix

Appeal Book, Tab 12, P108

48. On January 17, 2014, the Agency determined that British Airways' Rule 87(B)(3)(B) was unreasonable, and made the Show Cause Decision to seek further submissions from the parties about the appropriate substitute for Rule 87(B)(3)(B). Further submissions were necessary, because the Agency disagreed with the particular policy that Lukács initially proposed to impose on British Airways as a substitute for the regime set out in Rule 87(B)(3)(B).

Decision No. 10-C-A-2014, paras. 138-144
Erratum to Decision No. 10-C-A-2014

Appeal Book, Tab 12, P103
Appeal Book, Tab 11, P80

49. Since Rule 87(B)(3)(B) addressed the amount of denied boarding compensation for both flights from Canada and to Canada, common sense dictates that the substitute for Rule 87(B)(3)(B) must at the very least do the same.

50. Thus, the outstanding issue in the show-cause proceeding included the method ("regime") that British Airways shall use to determine the amount of denied boarding compensation payable to bumped passengers on flights from Canada and to Canada.

(ii) **Lukács directly responded to British Airways' submissions**

51. In response to the Show Cause Decision, British Airways purported to replace Rule 87(B)(3)(B) with a rule that:

- i. for flights from Canada to the United Kingdom, provided denied boarding compensation in the amount of \$400 or \$800, depending on the length of the delay; but
- ii. contained no provisions about denied boarding compensation on flights departing from abroad to Canada.

British Airways also incorrectly claimed that its proposed tariff rule was an implementation of Air Canada's policy, proposed during the proceeding leading to *Azar v. Air Canada*, Decision No. 442-C-A-2013.

**Submissions of British Airways
(March 17, 2014)**

Appeal Book, Tab 10, P77

52. Lukács, whom the Agency invited to comment on British Airways' submissions, had a reasonable expectation to be heard, and was entitled:

- (a) to address the lack of provisions governing denied boarding compensation for British Airways' flights from the European Union to Canada, and to urge the Agency to establish such provisions to avoid the creation of a legal loophole; and
- (b) to oppose the denied boarding compensation regime proposed by British Airways for flights departing from Canada to the United Kingdom on the grounds that it was unreasonable given the airline's competitive environment, and that material changes have occurred since Air Canada's policy was reviewed by the Agency.

This is precisely what Lukács did in his reply.

Reply of Lukács (March 26, 2014)

Appeal Book, Tab 9, P43

53. In his reply submissions, Lukács cited the legal test for “unreasonable” terms or conditions, a test that was established by the Agency, and endorsed by this Honourable Court. Lukács went on to apply the legal test to British Airways’ proposal. Since the commercial obligations (that is, the competitive environment) is one of the factors in the legal test, Lukács addressed this factor in his submissions.

Reply of Lukács (March 26, 2014), pp. 4-9 **Appeal Book, Tab 9, P46**

Anderson v. Air Canada, Canadian Transportation Agency, Decision No. 666-C-A-2001

Air Canada v. Canadian Transportation Agency, 2009 FCA 95, para. 1

(iii) The Agency denied Lukács procedural fairness

54. The Agency could have agreed or disagreed with the reply submissions of Lukács, and the Agency’s reasons for doing so would have been entitled to deference. The Agency, however, chose an unreasonable course of action by ordering Lukács to delete the vast majority of his reply submissions critical of British Airways’ proposal, and by doing so, the Agency effectively muzzled Lukács. The Agency’s reasons for these Procedural Decisions are incomprehensible and defy common sense.

Decision No. LET-C-A-29-2014
Decision No. LET-C-A-25-2014

Appeal Book, Tab 4, P28
Appeal Book, Tab 6, P36

55. Therefore, it is submitted that the Procedural Decisions are unreasonable and they deprived Lukács of his procedural right for an opportunity to make meaningful submissions in response to British Airways’ proposal.

56. Since Lukács is asking that the present matter be remitted to the Agency for redetermination based on the existing record (but by a differently constituted panel), setting aside the Procedural Decisions will not only serve justice, but will also have an immediate practical purpose and benefit.

D. COSTS

(i) Disbursements

57. 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**

58. The present appeal is of the nature of public interest litigation, because it raises a question that has never been addressed by this Court, it concerns the rights of all passengers travelling on British Airways flights, and the Appellant's individual financial interest in this matter is minimal, not greater than that of any other passenger. The present appeal is clearly not frivolous, as this Court granted leave to appeal.

59. Lukács respectfully asks the Honourable Court to exercise its discretion by not awarding costs to the Respondents and requiring the Respondents to pay his disbursements in any event of the cause.

(ii) Moderate allowance for time and effort

60. The Appellant, who is self-represented, is also asking the Honourable Court to award him a moderate allowance for the time and effort he devoted to preparing and presenting the appeal before this Court, following the principles articulated by this Court in *Sherman v. Canada*.

***Sherman v. Canada (Minister of National Revenue)*, 2004 FCA 29**

PART IV – ORDER SOUGHT

61. The Appellant, Dr. Gábor Lukács, is seeking an Order:
- (a) setting aside Decision No. 201-C-A-2014 (the “Final Decision”), and remitting the matter to the Agency for redetermination based on the existing record, by a differently constituted panel, with the direction that the Agency is to establish a tariff rule governing denied boarding compensation on all flights of British Airways (to and from Canada);
 - (b) setting aside Decision Nos. LET-C-A-25-2014 and LET-C-A-29-2014 (the “Procedural Decisions”) to the extent that they direct the Appellant to delete portions of his submissions to the Agency;
 - (c) directing the Respondents to pay Dr. Lukács:
 - i. disbursements of the present appeal; and
 - ii. moderate allowance for the time and effort Lukács devoted to the present appeal;
 - (d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 17, 2014

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Appellant

PART V – LIST OF AUTHORITIES

CASES

Anderson v. Air Canada, Canadian Transportation Agency,
Decision No. 666-C-A-2001

Air Canada v. Canadian Transportation Agency, 2009 FCA 95

Dunsmuir v. New Brunswick, 2008 SCC 9

Kirkham v. Air Canada, Canadian Transportation Agency,
Decision No. 268-C-A-2007

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

Lukács v. WestJet, Canadian Transportation Agency,
Decision No. 227-C-A-2013

Nathanson v. LACSA, Canadian Transportation Agency,
Decision No. 201-C-A-2005

Sherman v. Canada (Minister of National Revenue),
2004 FCA 29

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

STATUTES AND REGULATIONS

Canada Transportation Act, S.C. 1996, c. 10,
ss. 41, 55, 86

Air Transportation Regulations, S.O.R./88-58,
ss. 108, 110, 111, 113, 113.1, and 122