

**FEDERAL COURT OF APPEAL**

**BETWEEN:**

**DR. GÁBOR LUKÁCS**

**Moving Party**

**- and -**

**CANADIAN TRANSPORTATION AGENCY and  
BRITISH AIRWAYS PLC**

**Respondents**

**MEMORANDUM OF FACT AND LAW OF  
THE RESPONDENT BRITISH AIRWAYS PLC**

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**COURT OF APPEAL FOR ONTARIO**

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**PART I - STATEMENT OF FACTS**

**OVERVIEW**

1. This is the Memorandum of Fact and Law of the Respondent British Airways PLC (“British Airways”) in opposition to the application filed by Dr. Gábor Lukács (“Lukács”) for leave to appeal from Decision No. 91-C-A-2016 of the Canadian Transportation Agency (the “Agency”).

2. The moving party claims that Decision No. 91-C-A-2016 failed to comply with Decision No. 49-C-A-2016 because the tariff wording proposed by British Airways and found by the Agency to be in compliance with Decision No. 49-C-A-2016 did not include the words “Regulation (EC) No. 261/2004.”

3. The moving party's further ground for the proposed appeal is that the Agency erred in law and rendered an unreasonable decision in that the tariff rule proposed by British Airways differed from Regulation (EC) No. 261/2004 in that it contained exceptions relieving British Airways of the obligation to pay compensation in accordance with Regulation (EC) No. 261/2004.

4. The moving party's further ground for the proposed appeal is that the Agency erred in law and rendered an unreasonable decision in that the tariff rule proposed by British Airways differed from Regulation (EC) No. 261/2004 in that it omitted the requirement in Regulation (EC) No. 261/2004 to obtain an agreement in writing from the passenger who are provided with travel vouchers instead of cash.

5. The moving party's further ground for the proposed appeal is that the Agency erred in law and rendered an unreasonable decision in that the tariff rule proposed by British Airways contains an exception to the obligation to pay compensation that was found to be unreasonable and disallowed in *Lukacs v. Air Canada*: Decision No. 204-C-A-2013.

6. The moving party's further ground for the proposed appeal is that the Agency breached its duty of procedural fairness owed to the moving party by basing Decision No. 91-C-A-2016 on ex-parte communications of British Airways.

7. On January 30, 2013, Lukács filed a Complaint with the Agency, challenging the reasonableness and clarity of certain policies of British Airways, including Tariff Rule 87(B)(3)(B) governing the amount of compensation payable to passengers who are denied boarding on oversold flights ("denied boarding compensation").

**Decision No. 10-C-A-2014, para. 1 – Respondent British Airways’ Motion Record – Tab 1, p. 1**

8. In his January 30, 2013 Complaint to the Agency, the moving party did not challenge as unreasonable the identical wording in British Airways Rule 87(B)(3)(B) (Subject to the provisions of paragraph (B)(3)(A) of this rule) that he now challenges for the first time in new British Airways Rule 87(B)(3)(C), as set out in paragraph 5 above, as a basis for asserting that the Agency decision on the new Rule 87(B)(3)(C) was unreasonable.

**Decision No. 10-C-A-2014, paras. 95-130 – Respondent British Airways’ Motion Record – Tab 1, pp. 17-23**

9. On January 17, 2014, the Agency issued Decision No. 10-C-A-2014, which resolved all the issues in the Complaint of the moving party except the issue of amount of denied boarding compensation to be tendered to passengers. The Agency provided British Airways with the opportunity to show cause why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:

- (a) The regime applicable in the United States of America;
- (b) The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
- (c) The regime proposed by Air Canada during the proceedings related to Decision No. 442 C-A-2013; or
- (d) Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

**Decision No. 10-C-A-2014, paras. 140, 144 – Respondent British Airways’  
Motion Record – Tab 1, p. 23, 24**

10. In his submissions to the Agency the moving party argued that the British Airways Tariff should reflect British Airways’ legal obligation under E.U. Regulation (EC) 261/2004 and noted that this regulation applies to every flight departing from an airport in the United Kingdom. British Airways asserted that it was inappropriate for the Agency to enforce foreign laws, either directly or indirectly, by requiring carriers to include provisions of a European regulation as a Tariff Rule incorporated in a carrier’s Canadian contract of carriage. The Agency decided that it would “not require British Airways to incorporate the provisions of E.U. Regulation (EC) 261/2004 into British Airways’ Tariff, or make reference to that Regulation.” The moving party did not file any application for leave to appeal from this decision.

**Decision No. 10-C-A-2014, paras. 139, 144 – Respondent British Airways’  
Motion Record – Tab 1, p. 23, 24**

11. On March 17, 2014, British Airways filed a submission to the Agency, in response to the show cause order of the Agency in Decision No. 10-C-A-2014, proposing a tariff rule to implement one of the choices specified by the Agency. It set out the denied boarding compensation regime that was “proposed by Air Canada as set out in Decision No. 442-C-A-2013,” and tariff wording to implement this regime on flights from Canada to the United Kingdom. The proposed wording set out in Decision No. 442-C-A-2013 was as follows:

| <b>Proposed denied boarding compensation amounts for travel from Canada to the European Union</b> |                           |
|---|---------------------------|
| <b>Delay at arrival caused by involuntary denied boarding</b>                                     | <b>Cash or equivalent</b> |
| 0-4 hours   | CAD 400                   |
| Over 4 hours  | CAD 800                   |

Although British Airways proposed that the compensation apply to travel from Canada to the United Kingdom, the Agency ultimately ordered British Airways to file its proposed tariff rule for compensation of CAD 400/800 for delay caused by involuntary denied boarding with application to all travel from Canada to the European Union.

**Decision No. 201-C-A-2014 – Moving Party’s Motion Record – p.11**

12. The moving party was granted leave to appeal Decision No. 201-C-A-2014 and appealed to the Federal Court of Appeal on the basis that the Decision No. 201-C-A-2014 created a legal loophole that undermined the ability of passengers bumped from British Airways flights to Canada to commence an action for denied boarding compensation in Canada. The appeal dealt only with the amount of denied boarding compensation for passengers bumped from British Airways flights from the European Union to Canada.

13. The moving party made no challenge on the appeal to the following revised wording of British Airways Tariff Rule 87(B)(3)(B) for passengers travelling from Canada to the European Union:

AMOUNT OF COMPENSATION PAYABLE FOR FLIGHTS FROM THE EUROPEAN UNION TO CANADA

(I) SUBJECT TO THE PROVISIONS OF PARAGRAPH (B)(3)(A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES FOR DELAY AT ARRIVAL AT POINT OF DESTINATION CAUSED BY INVOLUNTARY DENIED BOARDING CASH OR EQUIVALENT IN THE AMOUNT OF 400 CAD FOR DELAY OF 0 TO 4 HOURS AND IN THE AMOUNT OF 800 CAD FOR DELAY OVER 4 HOURS.

(II) SAID TENDER WILL BE MADE BY CARRIER IN THE DAY AND AT THE PLACE WHERE THE FAILURE OCCURS, AND IF ACCEPTED WILL BE RECEIPTED FOR BY THE PASSENGER.



PROVIDED, HOWEVER, THAT WHEN CARRIER ARRANGES, FOR BY THE PASSENGER'S CONVENIENCE, ALTERNATE MEANS OF TRANSPORTATION WHICH DEPARTS PRIOR TO THE TIME SUCH TENDER CAN BE MADE TO THE PASSENGER, TENDER SHALL BE MADE BY MAIL OR OTHER MEANS WITHIN 24 HOURS AFTER THE TIME THE FAILURE OCCURS.

(III) AT THE PASSENGER'S OPTION CARRIER MAY COMPENSATE THE PASSENGER WITH A VOUCHER VALID FOR FUTURE TRANSPORTATION IN LIEU OF MONETARY COMPENSATION. THE AMOUNT OF THE TRANSPORTATION VOUCHER OFFERED SHALL BE EQUAL TO 300 PERCENT OF THE MONETARY COMPENSATION DUE TO THE PASSENGER UNDER SUBSECTION (I) AND WILL BE VALIDATED ONLY FOR TRAVEL ON BA. THE TRANSPORTATION VOUCHER WILL BE VALID FOR ONE YEAR FROM THE DATE OF ISSUE AND WILL BE NON-REFUNDABLE AND NON-TRANSFERABLE. THE PASSENGER IS ENTITLED TO EXCHANGE A TRAVEL VOUCHER FOR MONETARY COMPENSATION AT A RATE OF 1 CAD FOR 3 CAD OF VOUCHER VALUE WITHIN ONE MONTH OF THE DATE ON THE VOUCHER.

**Affidavit of Gabor Lukacs - Moving Party's Motion Record, Exhibit "E" - Tab 7, p. 65**

14. The Federal Court of Appeal allowed the appeal and decided that the matter should be returned to the Agency for re-determination and that the Agency was to address how British Airways is to "meet its tariff obligations of clarity" so that "the rights and obligations of both the carrier and passengers are stated in such a way as to exclude doubt, ambiguity or uncertain meaning". In particular, the Agency was required to "clarify whether the tariff must in all circumstances set out denied boarding compensation provisions for flights to and from Canada, or whether the fact that British Airways passengers from the E.U. to Canada are covered by E.U. Regulation (EC) No. 261/2004 is sufficient."

***Lukacs v. Canada (Canadian Transportation Agency), 2015 FCA 269 – Moving Party's Motion Record, Tab 4, p.23, para. 40***

15. The Federal Court of Appeal did not deal with the wording of revised Tariff Rule 87(B)(3)(B) applicable to passengers travelling from Canada to the European Union.

***Lukacs v. Canada (Canadian Transportation Agency), 2015 FCA 269 – Moving Party’s Motion Record, Tab 4, p.23, para. 40***

16. The Agency issued Decision No. 49-C-A-2016 on February 18, 2016, without having requested or having received submissions from either the moving party or British Airways. In Decision No. 49-C-A-2016, in its reference to E.U. Regulation (EC) No. 261/2004, the Agency noted that the legal basis for not enforcing foreign legislation or regulation is lack of jurisdiction. “The Agency is a creature of statute, namely, the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, *and must exercise its powers according to that statute*. The *Canada Transportation Act* does not empower the Agency to enforce foreign instruments.”

**Decision No. 49-C-A-2016 - Moving Party’s Motion Record, Tab 5, p. 30, para. 16**

17. The Agency determined that it “was not sufficient that the passenger travelling from the European Union to Canada are covered by Regulation (EC) 261/2004” and that the “Tariff must clearly state the carrier’s policy with respect to these flights.”

**Decision No. 49-C-A-2016 - Moving Party’s Motion Record, Tab 5 – p. 30, para. 17**

18. The Agency ordered British Airways to include “the incorporation by reference of Regulation (EC) 261/2004, to amend its Tariff by March 10, 2016.

**Decision No. 49-C-A-2016 - Moving Party’s Motion Record, Tab 5 – p. 30, para. 18**

19. On March 9, 2016, the proposed wording for the new tariff rule amending the British Airways Tariff was sent by e-mail by counsel for British Airways to Tariffs Analyst Christine

Solomon at the Industry Regulation and Determinations Branch of the Canadian Transportation Agency in order to comply with the order of the Agency in Decision No. 49-C-A-2016.

20. The proposed wording for the new tariff rule amending the British Airways Tariff was in the exact form of existing British Airways Tariff Rule 87(B)(3(B) applicable to passengers travelling from Canada to the European Union, but substituted the amounts of denied boarding compensation of 300/600 Euros provided in Article 7 of E.U. Regulation (EC) 261/2004.

RULE 87(B)(3)(C)

AMOUNT OF COMPENSATION PAYABLE FOR FLIGHTS FROM THE EUROPEAN UNION TO CANADA

(I) SUBJECT TO THE PROVISIONS OF PARAGRAPH (B)(3)(A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES FOR DELAY AT ARRIVAL AT POINT OF DESTINATION CAUSED BY INVOLUNTARY DENIED BOARDING CASH OR EQUIVALENT IN THE AMOUNT OF 300 EUR FOR DELAY OF 0 TO 4 HOURS AND IN THE AMOUNT OF 600 EUR FOR DELAY OVER 4 HOURS.

(II) SAID TENDER WILL BE MADE BY CARRIER IN THE DAY AND AT THE PLACE WHERE THE FAILURE OCCURS, AND IF ACCEPTED WILL BE RECEIPTED FOR BY THE PASSENGER PROVIDED, HOWEVER, THAT WHEN CARRIER ARRANGES, FOR BY THE PASSENGER'S CONVENIENCE, ALTERNATE MEANS OF TRANSPORTATION WHICH DEPARTS PRIOR TO THE TIME SUCH TENDER CAN BE MADE TO THE PASSENGER, TENDER SHALL BE MADE BY MAIL OR OTHER MEANS WITHIN 24 HOURS AFTER THE TIME THE FAILURE OCCURS.

(III) AT THE PASSENGER'S OPTION CARRIER MAY COMPENSATE THE PASSENGER WITH A VOUCHER VALID FOR FUTURE TRANSPORTATION IN LIEU OF MONETARY COMPENSATION. THE AMOUNT OF THE TRANSPORTATION VOUCHER OFFERED SHALL BE EQUAL TO 300 PERCENT OF THE MONETARY COMPENSATION DUE TO THE PASSENGER UNDER SUBSECTION (I) AND WILL BE VALIDATED ONLY FOR TRAVEL ON BA. THE TRANSPORTATION VOUCHER WILL BE VALID FOR ONE YEAR FROM THE DATE OF ISSUE AND WILL BE NON-REFUNDABLE AND NON-TRANSFERABLE. THE PASSENGER IS ENTITLED TO EXCHANGE A TRAVEL

VOUCHER FOR MONETARY COMPENSATION AT A RATE OF 1 EUR FOR 3 EUR OF VOUCHER  
VALUE WITHIN ONE MONTH OF THE DATE ON THE VOUCHER.

**Affidavit of Gabor Lukacs - Moving Party's Motion Record, Exhibit "E" - Tab  
7 - p. 65**

21. Submitting proposed tariff rule wording to Agency staff for review prior to filing the new amended tariff rule with the Canadian Transportation Agency by British Airways' filing agent ATPCO is a standard practice in the steps taken to comply with an order of the Agency to amend a tariff rule. It is not a step that involves submissions by complainants. British Airways provided Tariff Analyst Christine Solomon with proposed wording for the previous tariff rule amendments ordered by the Agency in Decision No. 10-C-A-2014 and Decision No. 201-C-A-2014 that also arose from the Complaint filed by the moving party on January 30, 2013, and the moving party was not requested to file submissions and did not file submissions regarding whether the proposed wording for tariff amendments complied with the orders made by the Agency.

**Affidavit of Gabor Lukacs - Moving Party's Motion Record, Exhibit "D" -  
Tab 7 - p. 52**

22. In Decision No. 91-C-A-2016, the Agency stated that it "ordered British Airways to make reference to Regulation (EC) No. 261/2004 in its Tariff in relation to its policy for the payment of denied boarding compensation for flights from the European Union to Canada. The proposed wording incorporates, not simply by referring to it, but by actually including the relevant terms of Regulation (EC) No. 261/2004. The Agency finds that, by including the relevant terms, British Airways has not only complied with the Decision, but it has done so in a way that has provided greater clarity in its tariff than if it had simply included a cross-reference to the provision ."

## PART II – POINTS IN ISSUE

23. The question to be decided on this motion is whether this Honourable Court should grant the moving party leave to appeal. The moving party's Memorandum of Fact and Law raises the following issues:

(a) Did the Agency err in law in making Decision No. 91-C-A-2016 by failing to comply with Decision No. 49-C-A-2016 in that the tariff wording proposed by British Airways and found by the Agency to be in compliance with Decision No. 49-C-A-2016 did not include the words "Regulation (EC) No. 261/2004"; and

(b) Whether the Agency breached its duty of procedural fairness owed to the moving party by basing Decision No. 91-C-A-2016 on ex-parte communications of British Airways.

## PART III - SUBMISSIONS

24. British Airways submits that the moving party requesting leave to appeal decisions of the Agency to this Honourable Court must establish "some arguable ground upon which the appeal might succeed."

*Martin v. Canada (Minister of Human Resources Development)*, (1999), 252 N.R. 141 (F.C.A) at para 5., Respondent British Airways' Book of Authorities – Tab 1

25. Under section 41 of the *Canada Transportation Act* there is a limited scope of appeals and the court cannot interfere with a decision of the Agency in the absence of an error of law or jurisdiction. The appropriate standard of review for a decision of the Agency when the Agency is interpreting its home statute is reasonableness and the question to be addressed is whether the

Agency acted reasonably when making the decision in respect of which the moving party is seeking leave to appeal.

***Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC, at para. 99, Respondent British Airways' Book of Authorities – Tab 2**

26. The Agency is responsible for the economic regulation of modes of transportation under federal jurisdiction. The *Canada Transportation Act* empowers the Agency to regulate domestic and international air transportation services.

27. The Agency is a highly specialized and expert tribunal, charged with the responsibility of overseeing a complex array of transportation matters.

***Northwest Airlines Inc. v. Canadian Transportation Agency*, 2004 FCA 238 at para. 30**

28. The Agency reviews and analyses international air carrier tariffs when they are filed initially, when they are amended and when there are complaints that the tariff terms and conditions lack clarity or are unjust, unreasonable and discriminatory. With its decades of experience it has acquired extensive experience and technical expertise in understanding and administering the regulatory structure applicable to international air services.

29. The Decision of the Agency on British Airways proposed Tariff Rule 87(B)(3)(C) is based on the specialized expertise of the Agency in dealing with airline regulatory matters and is reasonable. The moving party is trying to have the Agency enforce Regulation (EC) No. 261/2004 in its entirety in Canada, including all the provisions in the Regulation. Nothing other than the amount of the Denied Boarding Compensation was ever at issue in the consideration of

whether British Airways should have a Tariff Rule applying to passengers travelling from the European Union to Canada.

30. British Airways submits that Decision No. 49-C-A-2016 did not order British Airways to include Regulation (EC) 261/2004 in its entirety as a terms of its Canadian contract of carriage with passengers travelling from the European Union to Canada.

31. The new British Airways Rule 87(B)(3)(C) would allow the Agency to receive a complaint from a passenger travelling from the EU to Canada, who did not receive DBC of the 300 or 600 Euros to which the passenger was entitled, and to order the payment of the appropriate 300 or 600 Euros. That order would be enforceable in Canada. A mere reference to Regulation (EC) No. 261/2004 as a policy of British Airways in a British Airways Tariff Rule would not have clarity or be enforceable by the Agency upon complaint by a passenger.

32. British Airways submits that the Agency made a reasonable decision in accepting the proposed tariff rule wording submitted on behalf of British Airways and properly determined whether the wording of amended Rule 87(B)(3)(C) complied with the Agency's Decision No. 49-C-A-2016 and applied its extensive experience and expertise to analysing the proposed amended tariff rule. The proposed wording is clear, reasonable and enforceable in Canada, and not simply a policy statement.

33. Mr. Lukács was not denied any procedural fairness by the Agency and had full opportunity to provide extensive submissions in his initial complaint and at all subsequent stages of the proceedings arising from the decisions of the Agency prior to Decision No. 49-C-A-2016 and Decision No. 91-C-A-2016. The Agency had been well informed of the moving party's position that provisions of Regulation (EC) 261/2004 should be added to British Airways

Canadian Tariff and become contractual terms of its Canadian contracts of carriage. British Airways submits that the Agency was correct in proceeding with a determination of whether the tariff rule amendment proposed by British Airways complied with its order without requesting and receiving further submissions from the moving party.

34. British Airways submits that the Agency made a reasonable decision and did not err in law in its Decision No. 91-C-A-2016.

#### **PART IV - ORDER SOUGHT**

35. British Airways respectfully submits that the Application for Leave to Appeal does not indicate any arguable ground upon which the proposed appeal might succeed.

36. Therefore, British Airways respectfully requests that this Honourable Court dismiss the moving party's application for leave to appeal Agency Decision No. 91-C-A-2016.

37. British Airways seeks an order granting it costs of this application, and such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of May, 2016.



Carol E. McCall  
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Lawyer for the Respondent British Airways PLC



**PART V - LIST OF AUTHORITIES**

1. *Martin v. Canada (Minister of Human Resources Development)*, (1999), 252 N.R. 141 (F.C.A);
2. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650; and
3. *Northwest Airlines Inc. v. Canadian Transportation Agency*, 2004 FCA 238.

DR. GÁBOR LUKÁCS  
Moving Party

and

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Respondents

Court File No. 16-A-15

**FEDERAL COURT OF APPEAL**

Proceeding commenced at Halifax

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