

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 RESPONDENT, BRITISH AIRWAYS PLC**

October 17, 2014

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**MEMORANDUM OF FACT AND LAW
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PART I – STATEMENT OF FACTS

1. On January 30, 2013, the Appellant (“Mr. Lukács”) filed a complaint with the Canadian Transportation Agency (the “Agency”) and challenged the reasonableness and clarity of certain policies of the Respondent (“British Airways”) set out in its tariff filed with the Agency pursuant to Canadian regulatory requirements set out in the Air Transportation Regulations, S.O.R./88-58, ss 110.

Complaint of Dr. Lukács to the Canadian Transportation Agency, dated January 30, 2013, Appeal Book, Tab 15, pp. 219-278

2. In the complaint, Part VI dealt with British Airways Tariff Rule 87(B)(3)(B) on denied boarding compensation. Firstly, Mr. Lukács challenged the reasonableness of the Rule and secondly, he submitted that British Airways’ Tariff Rule ought to reflect its legal obligations to provide denied boarding compensation in accordance with Regulation (EC) No. 261/2004.

Complaint of Dr. Lukács to the Canadian Transportation Agency, dated January 30, 2013, Appeal Book, Tab 15, p. 240

3. Mr. Lukács set out in his complaint as Exhibit “H” Regulation (EC) No. 261/2004 and stated that it “applies to every flight departing from an airport in the United Kingdom, regardless of the destination and the carrier”.

Complaint of Dr. Lukács to the Canadian Transportation Agency, dated January 30, 2013, Appeal Book, Tab 15, p. 241

4. In Part VII (E) set out in the complaint, Mr. Lukács sought as relief from the Agency that Rule 87(B)(3)(B) be disallowed and that British Airways be directed to incorporate into its rules the obligations set out in Regulation (EC) No. 261/2004.

Complaint of Dr. Lukács to the Canadian Transportation Agency, dated January 30, 2013, Appeal Book, Tab 15, p. 244

5. In the response of British Airways dated March 22, 2013, it stated that British Airways complies with Regulation (EC) No. 261/2004 which was legislated by the European Parliament and provides rights to passengers under that law and that the Regulation does not grant passengers contractual rights.

Answer of British Airways, dated March 22, 2013, Appeal Book, Tab 14, p. 200

6. British Airways submitted in its response that it is inappropriate for the Agency to be enforcing foreign laws by requiring air carriers to include provisions of a European regulation in Canadian contracts of carriage and that neither the Canadian Transportation Act nor the Air Transportation Regulations empower or authorize the Agency to enforce foreign laws.

Answer of British Airways, dated March 22, 2013, Appeal Book, Tab 14, p. 200

7. British Airways submitted that in the absence of any authority or jurisdiction to enforce foreign laws directly, neither did the Agency have any authority or jurisdiction to enforce foreign laws indirectly by requiring air carriers to incorporate rights granted by foreign laws as terms of their contracts of carriage in their Canadian Tariff Rules.

**Answer of British Airways, dated March 22, 2013, Appeal Book,
Tab 14, p. 200**

8. On October 20, 2013, following the filing of information requested by Mr. Lukács on denied boarding compensation paid by British Airways, he filed a lengthy reply, largely dealing with whether Rule 87(B)(3)(B) on denied boarding compensation was reasonable and what compensation amount should be determined by the Agency to be reasonable.

**Reply of Dr. Lukács , dated October 20, 2013, Appeal Book,
Tab 13, pp. pp. 127-134**

9. In his reply, Mr. Lukács fully accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to flights departing from the United Kingdom to Canada.

**Reply of Dr. Lukács , dated October 20, 2013, Appeal Book,
Tab 13, pp. 128 -130**

10. Mr. Lukács further stated that British Airways was not complying with its obligations under Regulation (EC) No. 261/2004 with respect to passengers departing from Canada to the United Kingdom because it was not paying denied boarding compensation according to the rates set out in the Regulation.

**Reply of Dr. Lukács , dated October 20, 2013, Appeal Book,
Tab 13, pp. 129 -130**

11. Mr. Lukács' reply further submitted that the Agency ought to substitute Rule 87(B)(3)(B) with a provision that sets out British Airway's current practice of paying passengers departing from the United Kingdom to Canada.

**Reply of Dr. Lukács , dated October 20, 2013, Appeal Book,
Tab 13, p. 130**

12. In Mr. Lukács' reply he proposed that Biritish Airways should pay denied boarding compensation for passengers departing from Canada to the United Kingdom to match the amounts prescribed by Regulation (EC) No. 261/2004.

**Reply of Dr. Lukács , dated October 20, 2013, Appeal Book,
Tab 13, p. 133**

13. In Decision No. 10-C-A-2014 dated January 17, 2014 the Agency considered Mr. Lukács' request that it disallow Rule 87(B)(3)(B) and direct British Airways to incorporate into its rules the obligations set out in Regulation (EC) No. 261/2004.

**Decision No. 10-C-A-2014 of the Canadian Transportation
Agency, dated January 17, 2014, Appeal Book, Tab 12, p. 82**

14. The Agency considered the issue of whether British Airway's Tariff should reflect British Airways' legal obligation under Regulation (EC) No. 261/2004 and in its "Analysis and findings" referred to the Agency's Decision No. 432-C-A-2013 in which the Agency had addressed a submission that Sunwing's tariff neglected to reflect its obligations relating to denied boarding as imposed by Regulation (EC) No. 261/2004 and stated:

"As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) No. 261/2004, do not

satisfy that criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.”

Decision No. 10-C-A-2014 of the Canadian Transportation Agency, dated January 17, 2014, Appeal Book, Tab 12, p. 100

15. Accordingly, the agency did not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or to make reference to that Regulation.

Decision No. 10-C-A-2014 of the Canadian Transportation Agency, dated January 17, 2014, Appeal Book, Tab 12, p. 100

16. The Agency concluded that British Airways Rule 87 (B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the Air Transportation Regulations.

Decision No. 10-C-A-2014 of the Canadian Transportation Agency, dated January 17, 2014, Appeal Book, Tab 12, p. 103

17. The Agency provided British Airways with the opportunity to show cause why the Agency should not require British Airways, with respect to denied boarding compensation tendered to passengers under Rule 87 (B)(3)(B), apply either:

1. The regime applicable in the United States of America;
2. The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or
4. Any other regime that British Airways may wish to propose that Agency may consider to be reasonable.

Decision No. 10-C-A-2014 of the Canadian Transportation Agency, dated January 17, 2014, Appeal Book, Tab 12, p. 104

18. Mr. Lukács has not sought leave to appeal Decision No. 10-C-A-2014.

19. By a three page submission dated March 17, 2014 British Airways proposed to apply the regime proposed by Air Canada as set out in Decision No. 442-C-A-2013 and set out the wording from that decision on denied boarding compensation.

Proposed denied boarding compensation amounts for travel from Canada to the European Union

Delay at arrival caused by involuntary denied boarding	Cash or equivalent
0 – 4 hours	CAD 400
Over 4 hours	CAD 800

and proposed appropriate wording of a revised Rule 87(B)(3)(B) with the destination changed from European Union to the United Kingdom because British Airways operates flights from Canada to the United Kingdom.

Submissions of British Airways, dated March 17, 2014, Appeal Book, Tab 10, p. 78

20. In his previous reply, Mr. Lukács fully accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to flights departing from the United Kingdom to Canada.

**Reply of Dr. Lukács , dated October 20, 2013, Appeal Book,
Tab 13, pp. 128 -130**

21. Mr. Lukács filed a reply to British Airway's submission challenging the reasonableness of its proposed Rule 87(B)(3)(B) based on Air Canada's proposed regime in Decision No. 442-C-A-2013 because it failed to deal with denied boarding compensation for passengers on flights to Canada from the European Union and asserting that British Airway's proposed rule purports to exempt itself from the obligation to pay denied boarding compensation on flights to Canada.

**Reply of Dr. Lukács , dated March 26, 2014, Appeal Book,
Tab 9 p. 45**

22. Mr. Lukács also submitted in his reply that the amount of the proposed compensation was unreasonable because it was at that time eleven percent (11%) less than the compensation set out in Regulation (EC) No. 261/2004 that had been incorporated in the tariffs of two European competitors.

**Reply of Dr. Lukács , dated March 26, 2014, Appeal Book,
Tab 9 pp. 47-50**

23. Mr. Lukács submitted that British Airways' tariff rule should provide for denied boarding compensation in its tariff of 300 EUR / 600 EUR, based on the length of the delay, for flights from the European Union to Canada.

**Reply of Dr. Lukács , dated March 26, 2014, Appeal Book,
Tab 9 p. 52**

24. Mr. Lukács submitted that for flights from Canada to the European Community, British Airway's denied boarding compensation should be 300 EUR / 600 EUR, based on length of delay, or alternatively CAD 450 / CAD 900, based on length of delay, or alternatively the US regime for calculating denied boarding compensation.

**Reply of Dr. Lukács , dated March 26, 2014, Appeal Book,
Tab 9 p. 53**

25. British Airways submitted a brief response to Mr. Lukács ' reply stating that Mr. Lukács was seeking to accomplish the same result of having the provisions of Regulation (EC) No. 261/2004 incorporated in British Airway's tariff rule that had been denied by the Agency in Decision No. 10-C-A-2014.

**Further Submissions of British Airways, dated March 28, 2014,
Appeal Book, Tab 8, p. 42**

26. By letter dated April 1, 2014, Mr. Lukács objected to British Airways' March 28, 2014 submission after the close of pleadings and sought leave to make a further submission in response to the March 28, 2014 submission by British Airways.

**Letter of Dr. Lukács to the Agency, dated April 1, 2014,
Appeal Book, Tab 8, p. 40**

27. The Agency issued LET-C-A-25-2014 regarding the reply of Mr. Lukács , the further submission of British Airways and Mr. Lukács ' request to be allowed to respond to British Airways' additional submissions and, after reviewing the content of the three pleadings, determined that parts of Mr. Lukács ' reply submissions were unrelated to British Airways' show cause submissions on the compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 and directed Mr. Lukács to refile his reply of March 26,

2014 with all submissions unrelated to the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted and also stipulated that the March 28, 2014 and subsequent April 1, 2014 submissions were not to form part of the record.

Decision No. LET-C-A-25-2014 of the Canadian Transportation Agency, dated April 16, 2014, Tab 6, Appeal Book, p. 39

28. Mr. Lukács filed a motion dated April 23, 2014 for reconsideration of Decision No. LET-C-A-25-2014 requiring him to delete portions of his reply unrelated to the denied boarding compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013.

Motion of Dr. Lukács to reconsider Decision No. LET-C-A-25-2014, dated April 23, 2014, Appeal Book, Tab 5, p. 31

29. The Agency reconsidered its decision LET-C-A-25-2014 and decided in LET-C-A-29-2014 that Mr. Lukács' reply submissions exceeded the scope of British Airways' proposed adoption of the regime proposed by Air Canada during proceedings respecting Decision No. 442-C-A-2013, one of the four alternatives set out by the Agency in Decision No. 10-C-A-2014, and effectively represented re-arguments of determinations previously made by the Agency and specified what portions of his March 26, 2014 reply were to be deleted.

Decision LET-C-A-29-2014 of the Canadian Transportation Agency, dated May 2, 2014, Appeal Book, Tab 4, pp. 29-30

30. Mr. Lukács filed his revised reply on May 8, 2014 under protest.

Revised Reply of Dr. Lukács, dated May 8, 2014, Appeal Book, Tab 3, p. 9

31. On May 26, 2014, the Agency, by Decision No. 201-C-A-2014 on the issue of whether British Airways' Proposed Rule complies with the show cause direction set out in Decision No. 10-C-A-2014, ordered that British Airways file the Proposed Rule, with the application being for travel from Canada to the European Union, as reflected in the proposal made by Air Canada during the proceedings related to Decision No. 442-C-A-2013.

**Revised Reply of Dr. Lukács , dated May 8, 2014, Appeal Book,
Tab 3, p. 8**

PART II – STATEMENT OF POINTS IN ISSUE

32. The questions to be decided are:

- (a) Was it reasonable for the Agency to make Decision No. 201-C-A-2014 ordering British Airways to file its proposed rule for travel from Canada to the European Union, as reflected in the proposal made by Air Canada during proceedings related to Decision No. 442-C-A-2013?
- (b) Was it reasonable for the Agency to order Mr. Lukács to delete all submissions in his reply that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013, one of the four alternatives set out by the Agency in Decision No. 10-C-A-2014?

PART III – STATEMENT OF SUBMISSIONS

33. Under Section 41 of the *Canada Transportation Act*, the scope of appeals is limited to an error of law or jurisdiction.

34. The Agency is a federal regulator and is established pursuant to the provisions of the *Canada Transportation Act*.

Canada Transportation Act, S.C. 1996, c. 10, s. 86

35. The Agency has jurisdiction and authority to review any tariff of an air carrier and to disallow any tariff or portion of a tariff that appears not to conform with the requirement that it be just and reasonable, and to establish or substitute another tariff or portion thereof for the disallowed tariff or portion thereon.

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

36. The standard of review on appeal of decisions of the Agency is a standard of reasonableness.

***Council of Canadians with Disabilities v. Via Rail Canada Inc.,*
[2007] 1 S.C.R. 650 at para. 99**

37. 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**

38. Determining whether tariffs or portions thereof are just and reasonable engages the specialized knowledge and expertise of the agency on matters relating to the regulation of air transportation.

39. The issue on appeal is whether it was reasonable for the Agency to make the impugned decisions on the amount of denied boarding compensation payable to passengers travelling from Canada to the European Union and on the content of submissions filed by Mr. Lukács in reply to the show cause submission of British Airways.

40. Mr. Lukács was not denied any procedural fairness by the Agency and had full opportunity to provide extensive submissions in his initial complaint and subsequent reply in the proceedings related to Decision No. 10-C-A-2014 and in his reply in the limited show cause proceedings pursuant to Decision No. 10-C-A-2014, and British Airways submits that the Agency's decision on the appropriate scope of Mr. Lukács' reply was reasonable and properly based on its consideration of the issues contemplated by the Agency in its show cause order and the response of British Airways to the order.

41. British Airways submits that because British Airways' flights from the United Kingdom / European Union to Canada are subject to the provisions of Regulation (EC) No. 261/2004 which provides compensation for denied boarding for passengers departing European airports, the Agency's decision that a Canadian tariff provision providing denied boarding compensation for passengers travelling from Canada to the European Union was reasonable as requiring a tariff provision for passengers travelling from the European Union to Canada was unnecessary. Its ruling was also respectful of the laws of a foreign jurisdiction.

42. Mr. Lukacs fully accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to the payment of denied boarding compensation with respect to passengers on flights departing from the United Kingdom to Canada.

43. The Agency's Decision No. 201-C-A-2014 does not create a legal loophole because the foreign jurisdiction, the European Union with which Canada has an air services agreement, has enacted regulations specifically providing for denied boarding compensation in respect of flights from the European Union to Canada and elsewhere.

44. The Canadian regime on denied boarding compensation applicable to foreign air carriers operating to and from Canada is based on tariff rules providing terms and conditions in the contract of carriage between the passenger and the carrier while the European Union has a regulatory regime providing denied boarding compensation. The regimes overlap and reasonable accommodation avoids conflicts between the regimes.

45. British Airways submits that the Agency's Decisions No. 10-C-A-2014 and No. 201-C-A-2014 accommodate in a reasonable manner the different regimes applicable to an air carrier operating between Canada and the European Union.

PART IV – ORDER SOUGHT

46. British Airways respectfully requests that this Honourable Court dismiss the appellant's appeal of Decision No. 201-C-A-2014 and procedural Decisions No. LET-C-A-25-2014 and LET-C-A-29-2014.

47. British Airways seeks an order granting its costs of this appeal and such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 17, 2014



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PART V – LIST OF AUTHORITIES

CASES

1. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650.
2. *Northwest Airlines Inc. v. Canadian Transportation Agency*, 2004 FCA 238.

STATUTES AND REGULATIONS

1. *Canada Transportation Act*, S.C. 1996, c. 10
2. *Air Transportation Regulations*, S.O.R./88-58

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Applicant

and
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