

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

MOTION RECORD OF THE MOVING PARTY
(Motion for Leave to Appeal)

Dated: April 11, 2016

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DECISION NO. 91-C-A-2016

March 23, 2016

REPROPOSED TARIFF of British Airways PLC carrying on business as British Airways (British Airways) pursuant to Decision No. 49-C-A-2016.

Case No. 16-01304

BACKGROUND

- [1] This matter relates to the denied boarding compensation provisions found in Rule 87(B)(3)(b) of British Airways International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 (Tariff). In Decision No. 49-C-A-2016 (Decision), the Canadian Transportation Agency (Agency) found that British Airways did not meet its tariff obligation of clarity and that the Tariff should clearly state its policy regarding the payment of denied boarding compensation for flights originating in the European Union and destined for Canada. The Agency noted in the Decision that British Airways complied with Regulation (EC) No. 261/2004, however, its tariff did not reflect its policy in this regard.
- [2] The Agency ordered British Airways to amend its Tariff to include a reference to Regulation (EC) No. 261/2004.
- [3] On March 9, 2016, British Airways submitted to the Agency proposed wording for its Tariff. The proposed wording does not mention Regulation (EC) No. 261/2004 but sets out the specific amounts of compensation that reflect the amounts stipulated therein. The issue is therefore whether the wording proposed by British Airways complies with the Decision.

ISSUE

Does the wording proposed by British Airways dealing with denied boarding compensation for flights from the European Union to Canada comply with Decision No. 49-C-A-2016?

ANALYSIS AND FINDING

- [4] The Agency 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.

CONCLUSION

- [5] The Agency therefore finds that the wording proposed by British Airways dealing with denied boarding compensation for flights from the European Union to Canada complies with Decision No. 49-C-A-2016.

(signed)

Sam Barone
Member

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT THE MOVING PARTY will make a motion in writing to the Court under Rules 352 and 369 of the *Federal Courts Rules*, S.O.R./98-106.

THE MOTION IS FOR:

1. An Order, pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, granting the Moving Party leave to appeal a decision made by the Canadian Transportation Agency (the “Agency”) dated March 23, 2016 and bearing Decision No. 91-C-A-2016; and
2. Costs and/or reasonable out-of-pocket expenses of this motion forthwith and in any event of the cause; and
3. Such further and other relief or directions as the Moving Party may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. On January 30, 2013, Dr. Gábor Lukács, the Moving Party, filed a complaint with the Agency concerning a number of matters involving British Airways, including the terms and conditions governing the compensation of passengers who are denied boarding as a result of overbooking (“denied boarding compensation”).
2. On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 that determined, with finality, the issue of denied boarding compensation.
3. On November 27, 2015, in *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269, the Federal Court of Appeal granted the appeal of Lukács, set aside Decision No. 201-C-A-2014, and directed the Agency to redetermine the issue of denied boarding compensation. The Agency was directed (at paras. 40 and 42) to:

clarify whether the tariff must in all instances 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.
4. On February 18, 2016, in Decision No. 49-C-A-2016, the Agency redetermined the issue of denied boarding compensation, concluding that:

It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier’s policy with respect to these flights.

Furthermore, the Agency ordered British Airways to amend its tariff so as to incorporate Regulation (EC) 261/2004 by reference.

5. On February 22, 2016, Lukács filed Decision No. 49-C-A-2016 in Federal Court pursuant to subsection 33(1) of the *Canada Transportation Act*.
6. Neither Lukács nor British Airways sought leave to appeal from Decision No. 49-C-A-2016, and the time to do so passed.

Ex-parte communications between British Airways and the Agency

7. Unbeknownst to Lukács at the time, British Airways communicated with the Agency about a tariff wording that would comply with Decision No. 49-C-A-2016. These ex-parte communications included a March 9, 2016 proposal for a new tariff rule governing denied boarding compensation on flights from the EU to Canada.
8. Lukács was not served with or otherwise copied on these communications, and neither had nor could have had knowledge of them.

The decision challenged by the proposed appeal

9. On March 23, 2016, the Agency issued Decision No. 91-C-A-2016 (the “Impugned Decision”), in which it found that:
 - (a) British Airways was ordered to amend its tariff to include a reference to Regulation (EC) No. 261/2004 (para. 2);
 - (b) the tariff rule proposed by British Airways does not mention Regulation (EC) No. 261/2004 (para. 3); and
 - (c) nevertheless, the tariff rule proposed by British Airways complies with Decision No. 49-C-A-2016 (para. 5).

Grounds for the proposed appeal

10. The Agency breached its duty of procedural fairness owed to Lukács by making the Impugned Decision based on ex-parte representations of British Airways, without affording Lukács an opportunity to object to British Airways' representation that the proposed tariff rule complies with Decision No. 49-C-A-2016.

11. The Impugned Decision is unreasonable, because:
 - (a) having found that British Airways was ordered to include a reference to Regulation (EC) No. 261/2004 in its tariff but failed to do so, the conclusion that British Airways complied with Decision No. 49-C-A-2016 falls outside the range of reasonable outcomes;

 - (b) the tariff rule proposed by British Airways differs from Regulation (EC) No. 261/2004 in that:
 - i. it contains additional exceptions, relieving British Airways from the obligation to pay compensation, that are not set out in Regulation (EC) No. 261/2004; and

 - ii. it omits the requirement, set out in Regulation (EC) No. 261/2004, to obtain an agreement in writing from passengers who are provided travel vouchers instead of cash;

 - (c) the tariff rule proposed by British Airways contains an exception to the obligation to pay compensation that was previously found to be unreasonable and was disallowed in Decision No. 204-C-A-2013 of the Agency (para. 45).

Statutes and regulations relied on

12. Sections 108, 110, 111, 113, and 122 of the *Air Transportation Regulations*, S.O.R./88-58.
13. Sections 33, 41, 86 of the *Canada Transportation Act*, S.C. 1996, c. 10.
14. Sections 1, 2, and 8 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104.
15. Rules 352 and 369 of the *Federal Courts Rules*, S.O.R./98-106.
16. Such further and other grounds as the Moving Party may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on April 11, 2016.
2. Such further and additional materials as the Moving Party may advise and this Honourable Court may allow.

April 11, 2016

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DECISION NO. 201-C-A-2014

May 26, 2014

RESPONSE BY British Airways Plc carrying on business as British Airways to the show cause direction set out in Decision No. 10-C-A-2014.

File No. M4120-3/14-00909

BACKGROUND

- [1] In Decision No. 10-C-A-2014, the Canadian Transportation Agency (Agency), among other matters, directed British Airways Plc carrying on business as British Airways (British Airways) 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), International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 (Tariff), to apply either:
1. The regime applicable in the United States of America;
 2. The regime proposed by Gábor Lukács in the proceedings related to Decision No. 342-C-A-2013 (*Lukács v. Air Canada*);
 3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
 4. 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 *Air Transportation Regulations*, SOR/88-58, as amended.
- [2] The Decision provided Mr. Lukács with the opportunity to comment on British Airways' submission.
- [3] On March 17, 2014, British Airways filed its answer, which includes a Proposed Rule, and on March 26, 2014, Mr. Lukács filed his reply.

ISSUE

- [4] Does British Airways' Proposed Rule comply with the show cause direction set out in Decision No. 10-C-A-2014?

POSITIONS OF THE PARTIES**British Airways**

[5] British Airways proposes to apply the regime proposed by Air Canada set out in Decision No. 442-C-A-2013, which provides for compensation in cash or the equivalent of CAD\$400 for delays of zero to four hours, and CAD\$800 for delays in excess of four hours, for travel from Canada to the European Union.

[6] British Airways proposes to amend Rule 87(B)(3)(B) of the Tariff to read:

Amount of compensation payable for flights from Canada to the United Kingdom

- (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 CAD 400 for delay of 0 to 4 hours and in the amount of CAD 800 for delay over 4 hours.
- (II) Said tender will be made by carrier on 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 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.

Mr. Lukács

[7] Mr. Lukács submits that the Agency held in Decision No. 227-C-A-2013 (*Lukács v. WestJet*) that:

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 by Mr. Lukács]

[8] Mr. Lukács contends that British Airways' Proposed Rule fails to establish conditions governing denied boarding compensation for flights to Canada, and from Canada to points within the "European Community" that are outside the United Kingdom, and requires British Airways to pay denied boarding compensation only "for flights from Canada to the United Kingdom." (Emphasis added by Mr. Lukács).

[9] Mr. Lukács concludes that based on the principles set out in Decision No. 227-C-A-2013, the Proposed Rule is unreasonable.

ANALYSIS AND FINDINGS

- [10] British Airways' Proposed Rule provides that cash or equivalent in the amount of CAD\$400 for delay of zero to four hours, and CAD\$800 for delay over 4 hours will be tendered as compensation for denied boarding. The Agency finds that this is consistent with the compensation proposed by Air Canada during the proceedings relating to Decision No. 227-C-A-2013.
- [11] With respect to the carriage to which British Airways' Proposed Rule applies, the Agency notes that the application of the Proposed Rule is restricted to flights from Canada to the United Kingdom. This application is inconsistent with what Air Canada proposed during the proceedings relating to Decision No. 227-C-A-2013, which proposal applied to travel from Canada to the European Union. Given this inconsistency, the Agency finds that British Airways' Proposed Rule is unreasonable, and that, therefore, British Airways has failed to show cause in respect of this matter.

ORDER

- [12] In light of the foregoing, the Agency orders British Airways, by no later than June 9, 2014, to file with the Agency the Proposed Rule, with the application of that Proposed Rule 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.

(signed)

Sam Barone
Member

(signed)

Geoffrey C. Hare
Member

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between

**Dr. Gabor Lukacs, Appellant, and
Canadian Transportation Agency and
British Airways PLC, Respondents**

[2015] F.C.J. No. 1398

2015 FCA 269

Docket: A-366-14

Federal Court of Appeal
Halifax, Nova Scotia

Dawson, Ryer and Near JJ.A.

Heard: September 15, 2015.

Judgment: November 27, 2015.

(61 paras.)

Transportation law -- Air transportation -- Regulations -- Federal -- Tariffs, rates and service charges -- Appeal by Lukacs from decision of Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers denied boarding due to overbooking allowed -- Agency ordered British Airways to file Proposed Rule that would apply to flights from Canada to EU -- Agency's decision lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from EU and did not address apparent tension between decision and Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada.á

Appeal by Lukacs from a decision of the Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers to whom it denies boarding as a result of overbooking a flight. The appellant had filed a complaint with the Agency alleging that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff were unclear or unreasonable. The appellant argued

that the amount payable under Rule 87(B)(3)(B) should reflect British Airways' obligations under Regulation (EC) which applied to all flights departing from an airport in the UK and operated by European Union airlines with a destination in the UK. The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation on the basis of the Agency's 2013 decision. In the 2013 decision the Agency considered an argument regarding the same EU Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that the Agency was able to enforce. The Agency then provided British Airways with the opportunity to show cause why it should not be required to amend Rule 87(B)(3)(B) to bring it in conformity with one of three denied boarding compensation schemes listed by the Agency or to propose a new scheme. British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the UK, passengers who were denied boarding would be compensated CAD \$400 for delays of zero to four hours and CAD \$800 for delays of over four hours. The Agency concluded that the Proposed Rule was unreasonable, as the proposal applied only to flights from Canada to the UK. The Agency therefore concluded that British Airways had failed to show cause and ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the EU.

HELD: Appeal allowed. The Agency appeared to have implicitly decided that it was not necessary for an airline to include in its tariff a provision that clearly set out its obligations with respect to denied boarding compensation for flights departing the EU and coming to Canada. The Agency's 2013 decision offered little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada. The Agency's decision in the present case lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the EU. In addition, there was an apparent tension between the current decision and the Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada. It was necessary for the Agency to address this tension and apparent inconsistency directly. The Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada or whether the fact that British Airways passengers from the EU to Canada were covered by Regulation (EC) was sufficient.

Statutes, Regulations and Rules Cited:

Air Transportation Regulations, SOR/88-58, s. 110, s. 111, s. 113, s. 122(c)(iii)

Canada Transportation Act, S.C. 1996, c. 10, s. 41

Appeal From:

An appeal from a decision of the Canadian Transportation Agency dated May 26, 2014, Decision No. 201-C-A-2014.

Counsel:

Dr. Gabor Lukacs, for the Appellant (on his own behalf).

Allan Matte, for the Respondent, Canadian Transportation Agency.

Carol E. McCall, for the Respondent, British Airways PLC.

REASONS FOR JUDGMENT

Reasons for judgment were delivered by Near J.A., concurred in by Ryer J.A. Separate dissenting reasons were delivered by Dawson J.A.

NEAR J.A.:--

I. Introduction

1 The appellant appeals from a May 26, 2014 decision of the Canadian Transportation Agency (the Agency), which concerns the compensation that British Airways must pay to passengers to whom it denies boarding (Decision No. 201-C-A-2014). He contests both the substance of the decision and the fairness of the procedure leading up to it. This Court granted the appellant leave to appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

II. Facts

2 On January 30, 2013, the appellant filed a complaint with the Agency concerning a number of matters involving British Airways. On January 17, 2014, after an exchange of submissions by the parties, the Agency released its decision.

3 Only one of the matters figuring in the January 17, 2014 decision remains at issue in this appeal, namely the matter of "denied boarding compensation". This term refers to the compensation that an airline must pay to passengers to whom it denies boarding as a result of overbooking a flight. The amount that British Airways is required to pay is set out in Rule 87(B)(3)(B) of International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306.

4 In his initial complaint, the appellant argued that Rule 87(B)(3)(B) was unreasonable within the meaning of section 111 of the *Air Transportation Regulations*, SOR/88-58 (the *ATR*). The appellant put forward a number of arguments in support of this submission.

5 First, the appellant argued that the Rule should reflect British Airways' obligations under

European Union Regulation (EC) No. 261/2004, which applies to all flights departing from an airport in the United Kingdom (U.K.) and operated by European Union (E.U.) airlines (air carriers, or carriers) with a destination in the U.K. The appellant maintained that British Airways would not suffer any competitive disadvantage by amending the Rule to reflect the E.U. Regulation. He further submitted that British Airways has complied with the Regulation for flights from the U.K. to Canada, but has failed to comply with the Regulation for flights from Canada to the U.K. The appellant stated that he was not asking the Agency to enforce the E.U. Regulation. Rather, he was asking the Agency to consider the reasonableness of the Rule, and appropriate substitutes, in light of the Regulation.

6 The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation. The Agency based its conclusion on one of its previous decisions, Decision No. 432-C-A-2013 (*Nawrot et al v. Sunwing Airlines Inc.*), in which it considered an argument regarding the same E.U. Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that it is able to enforce. The relevant paragraph of Decision No. 432-C-A-2013 reads as follows:

[103] 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) 261/2004, do not satisfy this 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.

7 Second, the appellant argued that Rule 87(B)(3)(B) was unreasonable because it was inconsistent with the principle of a flat rate of denied boarding compensation. Rule 87(B)(3)(B) provides that when a passenger is denied boarding to a flight from Canada to the U.K., British Airways will pay the full value of the replacement ticket to the passenger's next stopover, plus between \$50 and \$200.

8 The Agency concluded that the Rule may be unreasonable within the meaning of subsection 111(1) of the *ATR* because British Airways had not demonstrated how it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation.

9 Third and finally, the appellant argued that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under other laws and, as such, fails to provide passengers with a reasonable opportunity to fully assess their compensation options. The Agency agreed, finding the Rule unreasonable within the meaning of subsection 111(1) of the *ATR* insofar as it purports to provide a "sole remedy" for denied boarding.

10 In the Order issued with its January 17, 2014 decision, the Agency provided British Airways with the opportunity to "show cause" why it should not be required to amend Rule 87(B)(3)(B) to

bring it in conformity with one of three denied boarding compensation schemes listed by the Agency, or to propose a new scheme that the Agency may consider to be reasonable. The Order also stipulated that the appellant would have the opportunity to file comments on British Airways' answer to the show cause Order.

11 On March 17, 2014, British Airways filed its answer. In this answer, British Airways stated that it was choosing to implement one of the four schemes listed in the Order, namely "[t]he regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*)". British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the U.K., passengers who were denied boarding would be compensated in the amount of CAD\$400 in cash or equivalent for delays of zero to four hours, and in the amount of CAD\$800 for delays of over four hours.

12 On March 26, 2014, in accordance with the show cause Order, the appellant filed comments in response to the answer given by British Airways.

13 On March 28, 2014, British Airways filed a reply to the appellant's March 26, 2014 submissions. On April 1, 2014, the appellant wrote to the Agency seeking permission to provide submissions in response to British Airways' March 28, 2014 reply.

14 In Decision No. LET-C-A-25-2014, dated April 16, 2014, the Agency struck from the record the submissions made by British Airways on March 28, 2014 and those made by the appellant on April 1, 2014. The Agency also directed the appellant to amend his March 26, 2014 comments by removing any submissions unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

15 On April 23, 2014, the appellant asked the Agency to reconsider its April 16, 2014 decision. On May 2, 2014, in Decision No. LET-C-A-29-2014, the Agency denied the appellant's request for reconsideration. The appellant filed a redacted version of his March 26, 2014 submissions "under protest" shortly thereafter, on May 8, 2014.

16 On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the final decision), the decision at issue in this appeal.

17 In this decision, the Agency first summarized the appellant's response, which was that the Proposed Rule was unreasonable because it only applied to flights from Canada to the U.K., and not to flights from the U.K. to Canada. In support of this argument, the appellant referenced Decision No. 227-C-A-2013 (*Lukacs v. WestJet*), in which the Agency had determined that:

... 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.

(At para. 39; emphasis added)

18 In its analysis, the Agency determined that British Airways' Proposed Rule was consistent with the proposal made by Air Canada in Decision No. 442-C-A-2013 in terms of the amount of compensation. However, the Agency determined that, in terms of its application, the Proposed Rule was inconsistent with Air Canada's proposal in Decision No. 442-C-A-2013. Air Canada's proposal applied to flights from Canada to the E.U., whereas British Airways' proposal applied only to flights from Canada to the U.K.

19 The Agency therefore concluded that the Proposed Rule was unreasonable, and that, as a result, British Airways had failed to show cause. The Agency ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the E.U.

III. Legislative Framework

20 Section 110 of the *Air Transportation Regulations* requires air carriers operating international service in Canada to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is a contract between the carrier and its passengers.

21 Paragraph 122(c)(iii) of the *ATR* stipulates that carriers are required to include in their tariff terms and conditions relating to denied boarding compensation:

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,

...

* * *

122. Les tarifs doivent contenir :

[...]

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

[...]

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

[...]

22 Section 111 of the *ATR* sets out the requirements by which carriers must abide when setting terms and conditions of carriage:

111. (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under

substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

* * *

111. (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

23 Section 113 of the *ATR* allows the Agency to disallow any tariff, or any portion of a tariff, that does not comply with the requirements of section 111:

113. The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

* * *

113. L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa a).

IV. Positions of the Parties

24 The appellant submits that the Agency's final decision is unreasonable, as it neglects to impose any denied boarding compensation on British Airways flights departing from the E.U., contrary to paragraph 122(c)(iii) of the *ATR*. The appellant also submits that the Agency deprived him of a meaningful opportunity to reply to British Airways' response to the show cause Order, and thus breached its duty of procedural fairness.

25 The appellant asks this Court to allow the appeal and to set aside the final decision of the Agency. He also asks the Court to set aside the Agency's procedural decisions, to the extent that these decisions direct the appellant to delete portions of his submissions. The appellant seeks his disbursements in any event of the cause and, if he is successful, a moderate allowance for the time that he devoted to this appeal.

26 The respondent British Airways submits that the Agency's final decision is reasonable, and asks this Court to dismiss the appeal, with costs. The respondent Agency has not provided any written submissions in this appeal.

V. Issues

27 There are two issues in this appeal:

1. Does the substance of the Agency's final decision contain a reversible

error?

2. Did the Agency breach its duty of procedural fairness?

VI. Standard of Review

28 The standard of review applicable to the first issue, the Agency's substantive decision, is reasonableness. The issue of whether British Airways had indeed "shown cause" is a question of mixed fact and law. As such, the standard of review is presumed to be reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 51, [2008] 1 S.C.R. 190). Furthermore, the courts have generally reviewed decisions of the Agency -- an administrative body with specialized expertise -- on a deferential standard (*Canadian National Railway Company v. Canadian Transportation Agency*, 2013 FCA 270 at para. 3, 454 N.R. 125, citing *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 100, [2007] 1 S.C.R. 650).

29 Issues of procedural fairness are reviewable on the correctness standard (*Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502). Correctness is therefore the standard of review applicable to the second issue in this appeal.

VII. Analysis

A. Reasonableness of the Decision

30 The appellant submits that the final decision of the Agency is unreasonable because it imposes on British Airways a tariff relating to denied boarding compensation that only covers passengers travelling from Canada to the E.U., and not those travelling from the E.U. to Canada.

31 The appellant submits that this outcome is unreasonable because it is contrary to paragraph 122(c)(iii) of the *ATR*, and creates a legal loophole, defeating the purpose for which paragraph 122(c)(iii) of the *ATR* was enacted.

32 The appellant submits that paragraph 122(c)(iii), which requires carriers to include in their tariff a policy concerning denied boarding compensation, applies to both service from Canada to destinations abroad, and to service from destinations abroad to Canada. The appellant supports this submission by reference to the Agency's Decision No. 227-C-A-2013 (*Lukacs v. WestJet*). The appellant also refers to the more recent Agency Decision No. 148-C-A-2015 (*Ahmad v. Pakistan International Airlines Corporation*). The Agency found in both of these cases that an airline's tariff must include provisions that deal with denied boarding compensation both to and from Canada.

33 As the appellant correctly points out, in Decision No. 227-C-A-2013, the Agency found that a tariff rule that WestJet had proposed was unreasonable because it did not set out compensation for flights to and from Canada. The relevant paragraph which the appellant has relied upon reads as

follows:

[39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. 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.

34 Similarly, in Decision No. 148-C-A-2015 the Agency found as follows:

[29] As PIA's Tariff does not contain terms and conditions of carriage that clearly state its policy in respect of denied boarding and compensation for denied boarding as a result of overbooking for travel to and from Canada, the Agency finds that PIA contravened paragraph 122(c) and subparagraph 122(c)(iii) of the ATR.

35 In the case before us the Agency appears to have implicitly decided that it is not necessary for an airline to include in its tariff a provision that clearly sets out its obligations with respect to denied boarding compensation for flights departing the E.U. and coming to Canada. The Agency found that British Airways need not reference E.U. Regulation (EC) No. 261/2004 in its Tariff. It is accepted by all parties to this appeal that British Airways is bound by E.U. Regulation (EC) No. 261/2004 for its flights departing the E.U. to other countries, including Canada.

36 The Agency supported this finding on the basis of its prior Decision No. 432-C-A-2013, in which it stated:

[103] 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) 261/2004, do not satisfy this 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.

37 In my view, the finding in paragraph 103 merely sets forth a policy decision that the Agency will not force an airline to incorporate by reference a provision of another jurisdiction's legislation on the basis that the Agency cannot enforce the provisions of foreign legislation. It does not specifically address whether a tariff must include a provision that deals with denied boarding compensation quite independent of another jurisdiction's legislation for flights to and from Canada.

38 It is instructive to note that British Airways' existing Tariff did in fact cover denied boarding compensation for flights "between points in Canada and points in the United Kingdom served by British Airways" (Rule 87(B)). No clear explanation was provided by the Agency as to why this was no longer required. Further, in Decision No. 432-C-A-2013 at paragraphs 71 and 72, the Agency found that the absence of language providing that passengers affected by denied boarding will be eligible for compensation is unreasonable. In the case before us there is also no language dealing with denied boarding compensation for flights from the E.U. to Canada. It seems to me that Decision No. 432-C-A-2013 offers little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada.

39 In addition, the option chosen by British Airways pursuant to the show cause Order was "The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*)". While the regime proposed by Air Canada in *Azar v. Air Canada* dealt only with flights from Canada to the E.U. pursuant to the facts of that case, it is important to note that the tariff in respect of which the proposal applied also covers flights from the E.U. to Canada. This is pursuant to Rule 90(A) of Air Canada's tariff regime, which adopts by reference E.U. Regulation (EC) No. 261/2004 for flights originating in the E.U. and Switzerland.

40 The Agency decision in the case before us lacks clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the E.U. In addition, there is an apparent tension between the decision before us and the Agency's prior decisions, which seem to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada. In my view it is necessary for the Agency to address this tension and apparent inconsistency directly. In light of this, in my view this matter should be returned to the Agency for re-determination. The Agency must clearly 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 any reasonable doubt, ambiguity or uncertain meaning" in situations where the tariff is silent with respect to denied boarding compensation for inbound flights to Canada (Decision No. 432-C-A-2013, referencing Decision No. 344-C-A-2013 (*Lukacs v. Porter Airlines Inc.*)). In particular, the Agency must clarify whether the tariff must in all instances 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.

B. *Procedural Fairness*

41 The appellant submits that the Agency breached its duty of procedural fairness when it ordered him to redact the majority of his March 26, 2014 submissions. He submits that in doing so, the Agency deprived him of his right to make meaningful submissions in response to British Airways' proposal. Given the decision to refer this matter back to the Agency there is no need to consider the procedural fairness issue raised by the appellant. The Agency is best positioned to

determine the extent of submissions it will require for the redetermination of the issue set out above.

VIII. Conclusion

42 I would allow the appeal and remit the matter to the Agency for redetermination in accordance with these reasons.

43 This Court has previously seen fit to award this appellant his disbursements, on the basis that his appeal was in the nature of public interest litigation and that the issue raised was not frivolous (*Lukacs v. Canada (Transportation Agency)*, 2014 FCA 76 at para 62, 456 N.R. 186). I would award the appellant costs in the amount of \$250.00 and his disbursements in this Court, such amounts to be payable by British Airways.

NEAR J.A.

RYER J.A.:-- I agree.

44 DAWSON J.A. (dissenting):-- I would dismiss this appeal for the following reasons.

45 As noted by the majority, on January 30, 2013, the appellant, Gabor Lukacs, filed a complaint with the Canadian Transportation Agency. The complaint alleged that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 were unclear and/or unreasonable. Amongst other relief, the appellant requested that the Agency disallow Rule 87(B)(3)(B) of the Tariff and direct British Airways to incorporate into the Tariff the obligations contained in Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004.

46 Regulation (EC) No. 261/2004 deals with compensation to be paid to passengers in the event they are denied boarding. It applies to every flight departing from an airport in the United Kingdom, and every flight operated by a European Union carrier with a destination in the United Kingdom. The appellant argued that British Airways' Tariff should reflect its legal obligation under the regulation.

47 In response, British Airways noted that while it complies with Regulation (EC) No. 261/2004, it would be inappropriate for the Agency to enforce foreign laws by requiring carriers to include provisions of a European regulation in their Canadian contracts of carriage.

48 In his reply to British Airways' response, the appellant:

- i) accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to passengers flying from the United Kingdom to Canada;
- ii) submitted that British Airways was currently not complying with its

obligations under Regulation (EC) No. 261/2004 with respect to passengers flying from Canada to the United Kingdom;

- iii) submitted that the Agency ought to substitute in the relevant portion of the Tariff a provision that reflects British Airways' current practice with respect to denied boarding compensation paid to passengers flying from the United Kingdom to Canada; and
- iv) submitted that the Tariff should require British Airways to pay denied boarding compensation to passengers flying from Canada to the United Kingdom in the amounts prescribed by Regulation (EC) No. 261/ 2004.

49 In Decision No. 10-C-A-2014, the Agency rejected the appellant's submissions on Regulation (EC) No. 261/2004, stating at paragraph 113 of the decision that it would "not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation". In reaching this conclusion, the Agency quoted as follows from its earlier Decision No. 432-C-A-2013:

As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determination 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) 261/2004, do not satisfy this criterion. If a carrier feels compelled or had 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.

50 The order which accompanied the decision required British Airways "to amend its Tariff and conform to this Order and the Agency's findings set out in [the] Decision".

51 The order went on to provide, at paragraph 144, that:

[...] the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, 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:

1. The regime applicable in the United States of America;
2. The regime proposed by Mr. Lukacs 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 the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

52 Decision No. 442-C-A-2013, referred to in the third option offered to British Airways, dealt with the reasonableness of Air Canada's tariff as it related to denied boarding compensation for travel from Canada to the European Union. The Agency found Air Canada's existing denied boarding compensation in connection with flights from Canada to the European Union to be unreasonable. In the result, the Agency ordered Air Canada to amend its tariff by filing its proposed denied boarding compensation amounts for travel from Canada to the European Union.

53 As argued by British Airways, the appellant did not seek leave to appeal Decision No. 10-C-A-2014 (British Airways' memorandum of fact and law at paragraph 18).

54 In response to this decision, British Airways proposed to apply the compensation regime proposed by Air Canada as set out in Agency Decision No. 442-C-A-2013. The text of British Airways' proposed tariff was clear that it applied only to compensation payable for flights from Canada to the United Kingdom. The proposed tariff was silent with respect to compensation payable for flights from the United Kingdom to Canada.

55 The appellant replied to the proposal advanced by British Airways, challenging the reasonableness of the proposal on the ground that it failed to establish conditions governing denied boarding compensation for flights from the United Kingdom to Canada. The appellant submitted that British Airways' proposal purported, albeit implicitly, to exempt it from the obligation to pay denied boarding compensation for flights from the United Kingdom to Canada.

56 Subsequently, in Decision No. LET-C-A-25-2014, the Agency found that parts of the appellant's reply submissions were unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in the proceeding that led to Decision No. 442-C-A-2013. In result, the Agency directed the appellant to refile his reply submissions, deleting all submissions that were unrelated to the denied boarding compensation regime proposed previously by air Canada in the proceeding that led to Decision No. 442-C-A-2013.

57 Later, the Agency dismissed a request that it reconsider this decision (Decision No. LET-C-A-29-2014).

58 From this chronology it is apparent that in Decision No. 10-C-A-2014, the Agency made a final decision that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into its tariff. By allowing British Airways the option to propose the same compensation regime previously proposed by Air Canada, the Agency also made a final decision that British Airways could, as it did, propose a tariff that dealt only with denied boarding compensation amounts for travel from Canada to the United Kingdom.

59 Any challenge to these decisions ought to have been brought as an application for leave to appeal Decision No. 10-C-A-2014. The appellant cannot challenge these decisions under the guise of a challenge to Decision No. 201-C-A-2014.

60 It further follows that the Agency did not breach procedural fairness by ordering that the appellant delete submissions in his final reply that were not relevant to the proposed tariff regime advanced by Air Canada that led to Decision No. 442-C-A-2013. The impugned submissions were not relevant to the remaining issue before the Agency, and it was not unfair for the Agency to ignore them and order that they be removed from the record.

61 For these reasons, I would dismiss the appeal with costs.

DAWSON J.A.



DECISION NO. 49-C-A-2016

February 18, 2016

REDETERMINATION of Decision No. 201-C-A-2014 respecting an application filed by Gábor Lukács against British Airways Plc carrying on business as British Airways (British Airways).

Case No. 15-05535

INTRODUCTION

- [1] On November 27, 2015, the Federal Court of Appeal (FCA), in Docket No. A-366-14, allowed the appeal filed by Gábor Lukács respecting Decision No. 201-C-A-2014, and remitted the matter back to the Canadian Transportation Agency (Agency) for re-determination.

BACKGROUND

- [2] On January 30, 2013, Mr. Lukács filed an application with the Agency, alleging, in part, that Rule 87(B)(3)(B) (Rule) of British Airways' Tariff was unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). The impugned Rule, which applied to carriage between Canada and the United Kingdom, established the compensation tendered to passengers who were denied boarding. Mr. Lukács submitted that the Tariff should reflect British Airways' legal obligations under European Union Regulation (EC) No. 261/2004, which prescribes compensation levels for denied boarding for flights departing from every European Union country, and for flights operated by a European Union carrier destined to a European Union country.
- [3] In Decision No. 10-C-A-2014 dated January 17, 2014, the Agency determined, in part, that the Rule, insofar as it related to denied boarding compensation, may be unreasonable within the meaning of subsection 111(1) of the ATR. The Agency also determined that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.
- [4] In Decision No. 10-C-A-2014, the Agency provided British Airways with the opportunity to show cause why the Agency should not require the carrier, with respect to the denied boarding compensation tendered to passengers, to 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 (*Lukács v. Air Canada*);

3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
4. Any other regime British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

- [5] On March 17, 2014, British Airways responded to the show cause, proposing to apply the regime advanced by Air Canada in the proceedings related to Decision No. 442-C-A-2013, which regime applied to travel from Canada to the European Union only, and stating that British Airways applies this Regulation where applicable. It should be noted that Air Canada's tariff incorporates by reference Regulation (EC) No. 261/2004.
- [6] By revised submissions dated May 8, 2014, Mr. Lukács objected to British Airways' election, arguing that the Tariff should include denied boarding compensation for flights both to and from Canada.
- [7] In Decision No. 201-C-A-2014, the Agency ordered British Airways to file a revised Tariff provision to reflect the regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013, and which applies to carriage from Canada to the European Union. On June 6, 2014, British Airways filed the revised Tariff provision for effect June 7, 2014.
- [8] In its judgment, the FCA noted that the regime selected by British Airways, which only related to flights from Canada, reflected the framework proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013, but that Air Canada's tariff included a provision incorporating by reference Regulation (EC) No. 261/2004, which addressed flights departing from the European Union. The FCA also found it instructive that British Airways' existing Tariff applied to carriage between both Canada and the United Kingdom.
- [9] The majority of the FCA panel concluded that there was an apparent tension between Decision No. 201-C-A-2014, which appears to have implicitly found that British Airways need not include in the Tariff a denied boarding compensation provision that pertains to carriage both to and from Canada, and previous Agency decisions that required such a provision.
- [10] The FCA therefore found that Decision No. 201-C-A-2014 lacks clarity, and that the Agency should directly address the aforementioned tension. The FCA stated that the Agency must clearly explain how British Airways can meet its obligation to clearly state the carrier's policy governing denied boarding compensation when the Tariff is silent with respect to compensation for flights from the European Union to Canada. In particular, the FCA concluded that the Agency must clarify whether the Tariff must include provisions relating to flights both to and from Canada, or whether the fact that British Airways is bound by Regulation (EC) No. 261/2004 is sufficient.

ISSUE

- [11] Can the Tariff be said to clearly state British Airways' policy regarding denied boarding compensation when that Tariff is silent with respect to flights from the European Union to Canada?

ANALYSIS AND FINDINGS

- [12] Subparagraph 122(c)(iii) of the ATR requires a carrier to clearly state in its tariff the carrier's policy relating to denied boarding compensation. If the tariff is considered to be a means by which a person learns of rights and obligations, as they relate to both the person and the carrier, then it is difficult to justify the tariff's silence with respect to some of those rights and obligations.
- [13] In the circumstances of this case, British Airways elected to apply the compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. The denied boarding compensation regime appearing in Air Canada's tariff clearly establishes the carrier's policy, which includes not just the specific compensation that was proposed, but also incorporates by reference Regulation (EC) 261/2004. Therefore, British Airways' election of the compensation regime proposed by Air Canada includes not just the specific amounts of compensation proposed for outbound flights, but the context in which these amounts are set out, which includes a tariff provision that incorporates by reference Regulation (EC) 261/2004.
- [14] The Agency notes that in submissions during the proceedings related to Decision No. 10-C-A-2014, British Airways stated that it complies with Regulation (EC) 261/2004.
- [15] In Decision No. 10-C-A-2014, the Agency noted that in Decision No. 432-C-A-2013 (*Nawrots v. Sunwing*) the Agency stated, in reference to a submission that Sunwing's tariff neglected to reflect the carrier's obligations under Regulation (EC) No. 261/2004:
- 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) 261/2004, do not satisfy this 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.
- [16] The legal basis for not enforcing foreign legislation or regulations 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.
- [17] With respect to the specific directions from the FCA, British Airways does not meet its tariff obligation of clarity when the Tariff is silent with respect to part of British Airways' policy regarding denied boarding compensation. As noted above, previous Agency decisions have stated that the Agency will not require a carrier to include a reference to foreign law in the carrier's tariff; however, the carrier's policy must be clearly stated. In this case, British Airways chose to include in its Tariff the regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier's policy with respect to these flights.

CONCLUSION

- [18] In light of the foregoing, the Agency orders British Airways, in accordance with its election to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004, to amend its Tariff by March 10, 2016.

(signed)

Sam Barone
Member



Federal Court



Cour fédérale

Court File No.: T-316-16

In the matter of the *Canadian Transportation Act*

Between:

GÁBOR LUKÁCS

Applicant

and

BRITISH AIRWAYS Plc
carrying on business as **BRITISH AIRWAYS (British Airways)**

Respondent

CERTIFICATE OF FILING

I **HEREBY CERTIFY** the attached to be a true copy of the decision of the Canadian Transportation Agency filed the 22nd day of February, 2016, in the Registry of the Federal Court of Canada pursuant to subsection 33(1) of the *Canadian Transportation Act*.

Michael Kowalchuk
Registry Officer

DATED AT HALIFAX, N.S. THIS 22ND DAY OF FEBRUARY, 2016



DECISION NO. 49-C-A-2016

February 18, 2016

REDETERMINATION of Decision No. 201-C-A-2014 respecting an application filed by Gábor Lukács against British Airways Plc carrying on business as British Airways (British Airways).

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BACKGROUND

- [2] On January 30, 2013, Mr. Lukács filed an application with the Agency, alleging, in part, that Rule 87(B)(3)(B) (Rule) of British Airways' Tariff was unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). The impugned Rule, which applied to carriage between Canada and the United Kingdom, established the compensation tendered to passengers who were denied boarding. Mr. Lukács submitted that the Tariff should reflect British Airways' legal obligations under European Union Regulation (EC) No. 261/2004, which prescribes compensation levels for denied boarding for flights departing from every European Union country, and for flights operated by a European Union carrier destined to a European Union country.
- [3] In Decision No. 10-C-A-2014 dated January 17, 2014, the Agency determined, in part, that the Rule, insofar as it related to denied boarding compensation, may be unreasonable within the meaning of subsection 111(1) of the ATR. The Agency also determined that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.
- [4] In Decision No. 10-C-A-2014, the Agency provided British Airways with the opportunity to show cause why the Agency should not require the carrier, with respect to the denied boarding compensation tendered to passengers, to 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 (*Lukács v. Air Canada*);

3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
4. Any other regime British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

- [5] On March 17, 2014, British Airways responded to the show cause, proposing to apply the regime advanced by Air Canada in the proceedings related to Decision No. 442-C-A-2013, which regime applied to travel from Canada to the European Union only, and stating that British Airways applies this Regulation where applicable. It should be noted that Air Canada's tariff incorporates by reference Regulation (EC) No. 261/2004.
- [6] By revised submissions dated May 8, 2014, Mr. Lukács objected to British Airways' election, arguing that the Tariff should include denied boarding compensation for flights both to and from Canada.
- [7] In Decision No. 201-C-A-2014, the Agency ordered British Airways to file a revised Tariff provision to reflect the regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013, and which applies to carriage from Canada to the European Union. On June 6, 2014, British Airways filed the revised Tariff provision for effect June 7, 2014.
- [8] In its judgment, the FCA noted that the regime selected by British Airways, which only related to flights from Canada, reflected the framework proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013, but that Air Canada's tariff included a provision incorporating by reference Regulation (EC) No. 261/2004, which addressed flights departing from the European Union. The FCA also found it instructive that British Airways' existing Tariff applied to carriage between both Canada and the United Kingdom.
- [9] The majority of the FCA panel concluded that there was an apparent tension between Decision No. 201-C-A-2014, which appears to have implicitly found that British Airways need not include in the Tariff a denied boarding compensation provision that pertains to carriage both to and from Canada, and previous Agency decisions that required such a provision.
- [10] The FCA therefore found that Decision No. 201-C-A-2014 lacks clarity, and that the Agency should directly address the aforementioned tension. The FCA stated that the Agency must clearly explain how British Airways can meet its obligation to clearly state the carrier's policy governing denied boarding compensation when the Tariff is silent with respect to compensation for flights from the European Union to Canada. In particular, the FCA concluded that the Agency must clarify whether the Tariff must include provisions relating to flights both to and from Canada, or whether the fact that British Airways is bound by Regulation (EC) No. 261/2004 is sufficient.

ISSUE

- [11] Can the Tariff be said to clearly state British Airways' policy regarding denied boarding compensation when that Tariff is silent with respect to flights from the European Union to Canada?

ANALYSIS AND FINDINGS

- [12] Subparagraph 122(c)(iii) of the ATR requires a carrier to clearly state in its tariff the carrier's policy relating to denied boarding compensation. If the tariff is considered to be a means by which a person learns of rights and obligations, as they relate to both the person and the carrier, then it is difficult to justify the tariff's silence with respect to some of those rights and obligations.
- [13] In the circumstances of this case, British Airways elected to apply the compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. The denied boarding compensation regime appearing in Air Canada's tariff clearly establishes the carrier's policy, which includes not just the specific compensation that was proposed, but also incorporates by reference Regulation (EC) 261/2004. Therefore, British Airways' election of the compensation regime proposed by Air Canada includes not just the specific amounts of compensation proposed for outbound flights, but the context in which these amounts are set out, which includes a tariff provision that incorporates by reference Regulation (EC) 261/2004.
- [14] The Agency notes that in submissions during the proceedings related to Decision No. 10-C-A-2014, British Airways stated that it complies with Regulation (EC) 261/2004.
- [15] In Decision No. 10-C-A-2014, the Agency noted that in Decision No. 432-C-A-2013 (*Nawrots v. Sunwing*) the Agency stated, in reference to a submission that Sunwing's tariff neglected to reflect the carrier's obligations under Regulation (EC) No. 261/2004:
- 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) 261/2004, do not satisfy this 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.
- [16] The legal basis for not enforcing foreign legislation or regulations 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.
- [17] With respect to the specific directions from the FCA, British Airways does not meet its tariff obligation of clarity when the Tariff is silent with respect to part of British Airways' policy regarding denied boarding compensation. As noted above, previous Agency decisions have stated that the Agency will not require a carrier to include a reference to foreign law in the carrier's tariff; however, the carrier's policy must be clearly stated. In this case, British Airways chose to include in its Tariff the regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier's policy with respect to these flights.

CONCLUSION

- [18] In light of the foregoing, the Agency orders British Airways, in accordance with its election to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004, to amend its Tariff by March 10, 2016.

(signed)

Sam Barone
Member

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

**AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: April 11, 2016)**

I, Dr. Gábor Lukács, of the City of Halifax in the Regional Municipality of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. I am the Moving Party in the present proceeding. As such, I have personal knowledge of the matters to which I depose.

THE MOVING PARTY

2. I am a Canadian air passenger rights advocate. My work and public interest litigation have been recognized by the Federal Court of Appeal in a number of judgments:
 - (a) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, at para. 1;
 - (b) *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, at para. 62; and
 - (c) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 269, at para. 43.

3. My activities as an air passenger rights advocate also include:
 - (a) filing approximately two dozen successful regulatory complaints with the Canadian Transportation Agency (“**Agency**”), resulting in airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;
 - (b) promoting air passenger rights through the press and social media;
 - (c) referring passengers mistreated by airlines to legal information and resources.

4. On September 4, 2013, the Consumers’ Association of Canada recognized my achievements in the area of air passenger rights by awarding me its Order of Merit for “singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking.”

PROCEDURAL HISTORY

5. On January 30, 2013, I filed a complaint with the Agency concerning a number of matters involving British Airways, including the terms and conditions governing the compensation of passengers who are denied boarding as a result of overbooking (“denied boarding compensation”).

6. On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 that determined, with finality, the issue of denied boarding compensation.

7. On November 27, 2015, in *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269, the Federal Court of Appeal granted my ap-

peal, set aside Decision No. 201-C-A-2014, and directed the Agency to redetermine the issue of denied boarding compensation. The Agency was directed (at paras. 40 and 42) to:

clarify whether the tariff must in all instances 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.

8. On February 18, 2016, in Decision No. 49-C-A-2016, the Agency redetermined the issue of denied boarding compensation (the “**Redetermination Decision**”), concluding that:

It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier’s policy with respect to these flights.

Furthermore, the Agency ordered British Airways to amend its tariff so as to incorporate Regulation (EC) 261/2004 by reference.

9. A copy of Air Canada’s tariff rule governing denied boarding compensation, which is implicitly referenced in the Redetermination Decision, is attached and marked as **Exhibit “A”**.
10. On February 22, 2016, I filed the Redetermination Decision in Federal Court pursuant to subsection 33(1) of the *Canada Transportation Act*. On March 2, 2016, I provided both British Airways and the Agency with an electronic copy of the Certificate of Filing by email.
11. Neither British Airways nor I sought leave to appeal from the Redetermination Decision.

12. Although British Airways requested the Agency to reconsider the Redetermination Decision, it has subsequently withdrawn the request. A copy of British Airways' withdrawal of the request, dated March 23, 2016, is attached and marked as **Exhibit "B"**.

THE IMPUGNED DECISION

13. On March 23, 2016, the Secretary of the Agency notified me that the Agency issued Decision No. 91-C-A-2016 (the "**Impugned Decision**"). A copy of the email of the Secretary of the Agency, addressed to myself and Ms. Carol McCall, counsel for British Airways, is attached and marked as **Exhibit "C"**.
14. I learned from the Impugned Decision that on March 9, 2016 (that is, two weeks earlier), British Airways had submitted to the Agency a proposed tariff amendment.
15. Up until March 23, 2016, I had no knowledge of any communications relating to the tariff amendments between British Airways and the Agency, nor did I know that the Agency was considering whether British Airways had complied with the order contained in the Redetermination Decision.
16. Had I been aware of British Airways' proposed tariff amendment, I would have opposed it on the basis that it does not comply with the Redetermination Decision and that it imposes unreasonable conditions for receiving denied boarding compensation.

17. I am seeking leave to appeal the Impugned Decision on the grounds that it is unreasonable and that the Agency breached its duty of procedural fairness owed to me in making it based on ex-parte representations of British Airways.

ATTEMPTS TO OBTAIN COPIES OF THE EX-PARTE COMMUNICATIONS

18. Since March 23, 2016, I have made numerous attempts to obtain copies of all ex-parte communications that took place between British Airways and the Agency, and I wrote both to the Secretary of the Agency and to Ms. Carol McCall, counsel for British Airways.
19. A copy of my email correspondence with Ms. McCall on March 23, 2016 is attached and marked as **Exhibit "D"**.
20. On March 24, 2016, Ms. McCall forwarded to me two emails that she had sent to Ms. Christine Solomon at the Agency on March 7 and 9, 2016, respectively. A bundle of three emails received from Ms. McCall on March 24, 2016 is attached and marked as **Exhibit "E"**.
21. On March 24, 2016, the Secretary of the Agency provided me with a revised tariff page for British Airways that post-dates the Impugned Decision, but ignored my request to be provided with all documents in Case No. 16-01304. A copy of the email received from the Secretary on March 24, 2016 is attached and marked as **Exhibit "F"**.
22. A copy of my email to the Secretary of the Agency, dated March 28, 2016, reiterating my request to be provided with all documents in Case No. 16-01304, is attached and marked as **Exhibit "G"**.

23. A copy of my email to Ms. McCall, dated March 28, 2016, requesting that she provide me with all ex-parte communications between British Airways and the Agency, is attached and marked as **Exhibit “H”**.
24. A copy of the email of Ms. McCall, dated April 8, 2016, is attached and marked as **Exhibit “I”**.
25. A copy of the email of Mr. Allan Matte, counsel for the Agency, dated April 8, 2016, is attached and marked as **Exhibit “J”**.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on April 11, 2016.

Dr. Gábor Lukács

Halifax, NS

Tel:

lukacs@AirPassengerRights.ca

This is **Exhibit “A”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2

17th Revised Page AC-19-A
 Cancels 16th Revised Page AC-19-A

44

| RULE | <p style="text-align: center;">AIR CANADA SECTION I - GENERAL RULES</p> |
|------|--|
| 90 | <p><u>DENIED BOARDING</u></p> <p>(A) When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule, except for employee and industry discounted travel, unless applicable local law provides otherwise. In particular, for flights departing from the following countries, Air Canada will apply the provisions of the following legislations: United States: US 14 CFR part 250; European Union and Switzerland: EC regulation No. 261/2004; Andean community countries: Decision 619; Argentina: Administrative Order PRE-CJU-002-05 (18 November 2004) Israel: Aviation Services Law (Compensation and Assistance for flight cancellation or change of conditions), 5772-2012. Turkey: Regulations on Air Passenger Rights (SHY-Passenger)</p> <p>(B) <u>REQUEST FOR VOLUNTEERS</u></p> <p>(1) AC will request volunteers from among the confirmed passengers to relinquish their seats in exchange for compensation, the amount and form of which will be at Air Canada's discretion. (2) Once a passenger has voluntarily relinquished his seat, he will not later be involuntarily denied boarding unless he was advised at the time he volunteered of such possibility and the amount of compensation to which he would be entitled. (3) The request for volunteers and the selection of passengers to be denied boarding shall be in a manner solely determined by AC.</p> <p>(C) <u>BOARDING PRIORITIES</u></p> <p>(1) If a flight is oversold, no passenger may be involuntarily denied boarding until AC has first requested volunteers to relinquish their seats. (2) In the event there are not enough volunteers, other passengers may be involuntarily denied boarding in accordance with AC boarding priority policy. Passengers with confirmed reservations, will be permitted to board in the following order until all available seats are occupied: (a) Disabled passengers, unaccompanied children under 12 years of age and others for whom, in AC'S assessment, failure to carry would cause severe hardship. (b) Passengers paying Executive (J cabin) or Premium Economy (O Cabin). (c) All other passengers, based on itinerary, fare paid status of loyalty program membership and the time in which the passenger presents herself for check in without advance seat assignment.</p> <p>(D) <u>TRANSPORTATION FOR PASSENGERS DENIED BOARDING</u></p> <p>When A passenger has been denied boarding, either voluntarily or involuntarily, (1) A passenger will be considered to have been denied boarding when (a) The passenger presented himself for carriage in accordance with this tariff: Having complied fully with AC applicable reservation, ticketing, Immigration formalities, check-in and boarding within the time limits and at the location set out in Rule 70; and, (b) It must not have been possible to accommodate the passenger on the flight on which he held confirmed reservations and the flight must have departed without him. (2) In such instances, carrier will: (a) Carry the passenger on another of its passenger aircraft or class of service on which space is available without additional charge regardless of the class of service; or, at carrier's option; (b) Endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or at carrier's option; (c) Reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower; or, (d) If the passenger chooses to no longer travel or if carrier is unable to perform the option stated in (a) thru (c) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D), or upon request, for denied boardings within Air Canada's control, return passenger to point of origin and refund in accordance with Rule 90(D)(2)(a), as if no portion of the trip had been made (irrespective of applicable fare rules), or subject to passenger's agreement, offer a travel voucher for future travel in the same amount; or, (e) upon passenger's request, for denied boardings within Air Canada's control, if passenger provides credible verbal assurance to Air Canada of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (a) thru (c) above, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account and subject to availability, buy passenger seat on another carrier whose flight is scheduled to arrive appreciably earlier than the options proposed in (a) thru (c) above.</p> |

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: October 17, 2013

EFFECTIVE: December 1, 2013

AIR CANADA
SECTION I - GENERAL RULES

90 DENIED BOARDING (Continued)

(E) COMPENSATION FOR INVOLUNTARY DENIED BOARDING

In addition to providing transportation in accordance with (D), a passenger who has been denied boarding involuntarily will be compensated by AC as follows:

(1) Conditions for Payment

†[C](a) The passenger must be considered to have been denied boarding in accordance with (D)(1) above.

†[C](b) The passenger will not be eligible for compensation:

- (i) If he is offered accommodation or is seated in a compartment of the aircraft other than that specified on his ticket at no extra charge to him. (Should he be seated in a compartment for which a lower fare applies, he shall be entitled to the appropriate refund); or
- (ii) If he has been refused transportation in accordance with Rule 75; or,
- (iii) When the flight on which he holds a confirmed and ticketed reservation is cancelled or space has been requisitioned by the government; or,
- (iv) If, for operational and safety reasons beyond carrier's control, his aircraft has been substituted with one having lesser capacity and carrier is able to demonstrate that all reasonable measures were taken to avoid substitution or it was impossible to take such measures.
- (v) No denied boarding compensation will be provided to the attendant of a passenger with a disability pursuant to Rule 40.
- (vi) On a flight operated with an aircraft 60 having or fewer seats, passenger is denied boarding due to safety-related weight/balance restrictions that limit payload.

(2) Amount of Compensation

Subject to the provisions of (E)(1) AC will tender liquidated damages in cash/cheque/Bank Draft or in MCO (credit voucher good for future travel on Air Canada) in the amounts as follows:

For flights from Canada to Destination in North America (US/Mexico/Caribbean/Bermuda):

†[C]DELAY AT ARRIVAL CASH/BANK
 AT POINT OF DESTINATION DRAFT

CAUSED BY INVOLUNTARY DENIED BOARDING
 0 to 2 hours CAD 200
 Over 2 hours to 6 hours CAD 400
 Over 6 hours CAD 800

For flights from Canada to all other destinations:

Draft: CAD 200 MCO: CAD 500

†[N]Effective December 20, 2013 for flights from Canada to all other destinations:

DELAY AT ARRIVAL CASH/BANK
 AT POINT OF DESTINATION DRAFT

CAUSED BY INVOLUNTARY DENIED BOARDING
 0 to 4 hours CAD 400
 Over 4 hours CAD 800

For flights from to Caribbean/Bermuda to Canada, compensation by cash is equal to the value of coupons remaining to an online or interline destination, or next stopover points, maximum is CAD 200.00. Compensation by MCO (credit voucher), is equal to twice the value of coupons remaining to an online or interline destination or next stopover point, minimum is CAD 100.00, maximum is CAD 500.00.

| | Draft | MCO (credit voucher) |
|--|------------|--|
| Mexico to Canada | CAD 100.00 | CAD 200.00 |
| Asia to Canada (excluding Japan and Korea) | CAD 300.00 | CAD 600.00 |
| Japan to Canada (compensation is offered in cash only) | JPY 30,000 | not applicable (paid by bank transfer) |
| Seoul to Canada Y class (compensation is offered in cash only) | USD 400.00 | not applicable |
| J class | USD 600.00 | not applicable |
| South America/South Pacific to Canada (except Brazil, Venezuela, Peru, Columbia) | CAD 200.00 | CAD 500.00 |

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: December 4, 2013

EFFECTIVE: January 18, 2014

(Except as Noted)

| | |
|------|---|
| RULE | AIR CANADA SECTION I - GENERAL RULES |
|------|---|

| | |
|-------------|---|
| 90 C | <p><u>DENIED BOARDING</u> (Continued)</p> <p>(E) <u>COMPENSATION</u> (Continued)</p> <p>†(C)†(3) For routings not specified †(X), refer to applicable legislative requirements.</p> <p>(4) <u>Form of Payment</u> Passengers will be offered compensation in the form of cash/bank draft or, if accepted a credit valid for the purchase of transportation issued in the name of the passenger. This voucher is valid for 1 year from issuance, is non-transferable, non-convertible into money and valid for travel on AC- operated flights only.</p> <p>(5) <u>Time of Offer of Compensation</u></p> <p>(a) Compensation will be offered to the passenger on the day and at the place where the denied boarding occurs unless circumstances prevent the offer to be made or where alternate transportation departs before the offer can be made in which case it shall be made by mail or other means after the time the failure to accommodate has occurred.</p> <p>(b) Payment of the compensation will be received by the passenger as soon as practicable by mail or other means after the time the failure to accommodate has occurred.</p> |
|-------------|---|

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

| | |
|---------------------------------|--|
| ISSUED: October 24, 2013 | EFFECTIVE: December 8, 2013 (Except as Noted) |
|---------------------------------|--|

† - Effective October 25, 2013 and issued on not less than one (1) day's notice under NTA(A) Special Permission No. 76039.

This is **Exhibit “B”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

March 23, 2016

Via email: Secretariat.Secretariat@otc-cta.gc.ca

The Secretary
Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9


Dear Sirs:

**RE: Request to Withdraw the Request for Reconsideration
of Decision No. 49-C-A-2016
Case no. 15-05535: Gabor Lukacs v. British Airways**

Please accept the following request to withdraw the submission to reconsider Decision No. 49-C-A-2016, dated February 26, 2016, with respect to the order therein requiring British Airways, in accordance with its election to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004, to amend its Tariff by March 10, 2016.

This request is being made pursuant to Section 36 of the *Canada Transportation Agency Dispute Application Rules*.

Respectfully submitted,



Carol E. McCall
Solicitor for British Airways Plc

cc Dr. Gabor Lukacs - by email: lukacs@AirPassengerRights.ca
Mike Redmond – by email: Mike.Redmond@otc-cta.gc.ca
Sylvain Lefebvre – by email: Sylvain.Lefebvre@otc-cta.gc.ca

This is **Exhibit “C”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From Secretariat.Secretariat@otc-cta.gc.ca Wed Mar 23 11:55:38 2016
Date: Wed, 23 Mar 2016 14:55:28 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: "lukacs@AirPassengerRights.ca" <lukacs@airpassengerrights.ca>, "cmcall@pmlaw.com" <cmcall@pmlaw.com>
Cc: Hilary Percival <Hilary.Percival@otc-cta.gc.ca>, Allison Fraser <Allison.Fraser@otc-cta.gc.ca>
Subject: Decision No. 91-C-A-2016 dated March 23, 2016 ? Case No. 16-01304

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Please find attached a PDF version of the above Decision.

Please confirm receipt to all.

Sincerely,

Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca

Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Canadian Transportation Agency / Government of Canada
secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca

Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

[Part 2, "91-C-A-2016.pdf" Application/PDF (Name: "91-C-A-2016.pdf")]
[69 KB.]
[Unable to print this part.]

This is **Exhibit “D”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From lukacs@AirPassengerRights.ca Wed Mar 23 21:38:26 2016

Date: Wed, 23 Mar 2016 21:38:18 -0300 (ADT)

From: Gabor Lukacs <lukacs@AirPassengerRights.ca>

To: Carol McCall <cmccall@pmlaw.com>

Subject: Re: Your ex-parte communications with the Canadian Transportation Agency [Re : Decision No. 91-C-A-2016 dated March 23, 2016 ? Case No. 16-01304]

[The following text is in the "windows-1256" character set.]
 [Your display is set for the "ISO-8859-2" character set.]
 [Some special characters may be displayed incorrectly.]

Ms. McCall:

1. The Agency found it necessary to render an additional Decision in relation to the matter. As a party, I was entitled to a notice and I was entitled to be served by you with all your submissions.
2. Your ongoing refusal to provide me with your ex-parte communications with the Agency demonstrates that your failure to serve me was not an innocent oversight, but rather a deliberate act.
3. Should you continue to refuse to provide me with a copy of your ex-parte communications with the Agency, I will have no choice but to seek production through the procedures of the Federal Court of Appeal. Should this be the case, I will rely on your conduct as an additional basis for seeking costs, including possibly against you personally.

Yours very truly,
 Dr. Gabor Lukacs

PS: While you are entitled to your opinion about s. 33 of the Canada Transportation Act, the fact remains that Parliament saw it fit to permit parties, such as myself, to register the orders and decisions of the Agency in Federal Court. As the Panel of the Federal Court of Appeal pointed out to you, you are welcome to lobby Parliament to change the Act.

On Wed, 23 Mar 2016, Carol McCall wrote:

- > Dear Dr. Lukacs,
- >
- > I acknowledge receipt of your email. I disagree with your position. You
- > had no complaint about the two previous occasions on which I
- > communicated with Ms. Solomon in this same matter. An airlines'
- > compliance with the Decision of the Agency is a matter for the Agency
- > and its staff?, not you. Your role ended.
- >
- > I specifically addressed this issue with you when you threatened to move
- > in the Federal Court to cite British Airways for contempt for
- > non-compliance with Decision No. 10-C-A- 2014. Registering and filing
- > Agency Decisions in Federal Court to turn them into court orders for you
- > to enforce personally is an abuse of process.
- >
- > The Agency deals with enforcement of its decisions and issues Notices of
- > Violation and significant monetary penalties for non- compliance. That
- > function is its statutory responsibility. This was not a civil
- > litigation action between a plaintiff and defendant in which you as

> plaintiff have a judgment to pay you money or do something for your
> personal benefit. When the only issue was the wording of the tariff rule
> to be filed to comply with the order of the Agency, your role as a
> complainant was at an end.
>
> Yours sincerely,
>
> Carol McCall
>
> Original Message
> From: Gabor Lukacs
> Sent: Wednesday, March 23, 2016 4:34 PM
> To: Carol McCall
> Subject: Your ex-parte communications with the Canadian Transportation Agency [Re:
Decision No. 91-C-A-2016 dated March 23, 2016 ? Case No. 16-01304]
>
>
> Ms. McCall:
>
> Thank you for acknowledging having had ex-parte communications with the
> Agency, specifically, with Ms. Christine Solomon, about British Airways'
> purported compliance with Decision No. 49-C-A-2016.
>
> Since I am a party to the proceeding giving rise to Decision No.
> 49-C-A-2016, you should have copied me to all subsequent correspondence,
> as required by the written rules of professional conduct and the unwritten
> rules of professional courtesy.
>
> I am particularly perplexed by your conduct given that on March 2, 2016,
> you were informed that I registered and filed Decision No. 49-C-A-2016 in
> Federal Court to ensure compliance.
>
> On a going forward basis, I request that you provide me with all your
> correspondence with Ms. Solomon and/or any other person at the Agency
> since February 18, 2016 relating to this matter.
>
> Yours very truly,
> Dr. Gabor Lukacs
>
>
>
> On Wed, 23 Mar 2016, Carol McCall wrote:
>
>> Dear Mr. Lukacs,
>>
>> I communicated with Christine Solomon, Tariffs Analyst, in the same
>> manner as I communicated with her previously in this matter, by
>> providing her with tariff wordings for compliance with Decision No.
>> 10-C-A-2014 and Decision No. 201-C-A-2014.
>>
>> I provided her with British Airways' wording for a tariff rule complying
>> with the Decision No. 49-C-A-2016. I never copied you in the previous
>> tariff rule wordings that I sent to Tariffs Analyst Christine Solomon,
>> who handles compliance with Agency Decisions.
>>
>> Separately, I send the request for reconsideration and an extension of
>> time for compliance to Secretariat, which I copied to you.
>>
>> Sincerely,
>>
>> Carol McCall
>>

>> Carol McCall | Partner
>> Paterson MacDougall, LLP | 1 Queen Street East | Suite 900 | Toronto, Ontario
| M5C 2W5
>>
>> T: (416) 643-3309 | F: (416) 366-3743 | Law Clerk: Veronica Rodericks | Website: w
ww.pmlaw.com | Twitter: www.twitter.com/pmlawcanada
>>
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>> _____
>> From: Gabor Lukacs [lukacs@AirPassengerRights.ca]
>> Sent: March-23-16 11:21 AM
>> To: Carol McCall
>> Subject: Your ex-parte communications to the Agency [Re: Decision No. 91-C-A-2016 d
ated March 23, 2016 ? Case No. 16-01304]
>>
>> Ms. McCall:
>>
>> It stems from the Agency's decision that you have had ex-parte
>> communications with the Agency in relation to British Airways.
>>
>> I request that you provide me with all your communications with the Agency
>> and its staff relating to British Airways since February 18, 2016 (the
>> date of Decision No. 49-C-A-2016).
>>
>> Yours very truly,
>> Dr. Gabor Lukacs
>>
>>
>> On Wed, 23 Mar 2016, Carol McCall wrote:
>>
>>> Thank you. I acknowledge receipt of the decision.
>>>
>>> Sincerely,
>>>
>>> Carol McCall
>>> Paterson MacDougall LLP
>>>
>>> From: secretariat
>>> Sent: Wednesday, March 23, 2016 8:55 AM
>>> To: 'lukacs@AirPassengerRights.ca'; Carol McCall
>>> Cc: Hilary Percival; Allison Fraser
>>> Subject: Decision No. 91-C-A-2016 dated March 23, 2016 ? Case No. 16-01304
>>>
>>> Please find attached a PDF version of the above Decision.
>>>
>>>
>>>
>>> Please confirm receipt to all.
>>>
>>>
>>>
>>> Sincerely,
>>>
>>>
>>>

>>>
>>>
>>> Office des transports du Canada / Gouvernement du Canada
>>> secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
>>>
>>> Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575
>>>
>>>
>>> Canadian Transportation Agency / Government of Canada
>>> secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
>>>
>>> Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575
>>>
>>>
>>>
>>
>

This is **Exhibit “E”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From cmccall@pmlaw.com Thu Mar 24 12:01:58 2016
Date: Thu, 24 Mar 2016 15:01:46 +0000
From: Carol McCall <cmccall@pmlaw.com>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: RE: Communications with Tariffs Analyst at Canadian Transportation Agency Re
: Decision No. 91-C-A-2016 dated March 23, 2016 ? Case No. 16-01304]

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dear Mr. Lukacs,

I am responding to your last email yesterday.

I sent my email to Christine Solomon, Tariffs Analyst at the Industry Regulation and Determinations Branch, not to The Secretariat. I did not request a decision by the Agency.

I did not refuse to provide you with a copy of my email to Ms. Solomon. I had not provided it to you because it was not a submission to the Agency. It is however in a file at the Industry Regulation and Determinations Branch. Rather than have you seek a Federal Court of Appeal order for production of a copy of my email to Ms. Solomon, I will forward it to you shortly.

I have also attached a copy of the new Rule 87(B)(3)(c) filed by ATPCO today. I fail to understand why you are attacking this rule which provides precisely what you were seeking. You have achieved the passenger rights result you wanted with this change to the British Airways' tariff.

Yours sincerely,

Carol McCall

Carol McCall | Partner
Paterson MacDougall, LLP | 1 Queen Street East | Suite 900 | Toronto, Ontario | M5C 2W5

T: (416) 643-3309 | F: (416) 366-3743 | Law Clerk: Veronica Rodericks | Website: www.pmlaw.com | Twitter: www.twitter.com/pmlawcanada

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[Part 2, "BA rule 87(B)(3)(c) revised 24.03.2016.pdf"]
[Application/PDF (Name: "BA rule 87(B)(3)(c) revised 24.03.2016.pdf")]
[161 KB.]
[Unable to print this part.]

RULE

SECTION I - GENERAL RULES

87

DENIED BOARDING COMPENSATION (Continued)

(B) APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE EUROPEAN UNION SERVED BY BRITISH AIRWAYS

(Continued)

(3) (Continued)

(a) (Continued)

(ii) (Continued)

EXCEPTION 1: The passenger will not be eligible for compensation if the flight on which the passenger holds confirmed reserved space is unable to accommodate him because of:

- (aa) government requisition of space, or
- (bb) substitution of equipment of lesser capacity when required by operational or safety reasons.

EXCEPTION 2: The passenger will not be eligible for compensation if he is offered accommodations or is seated in a section of the aircraft other than that specified on his ticket at no extra charge, except that a passenger seated in a section for which a lower fare applies shall be entitled to an appropriate refund.

(b) Amount of compensation payable for flights from Canada to the European Union

(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 CAD 400 for delay of 0 to 4 hours and in the amount of CAD 800 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 CAD 1 for CAD 3 of voucher value within one month of the date on the voucher.

C

+ [N](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.

(4) Carrier shall furnish all passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space a copy of the following written statement:

COMPENSATION FOR DENIED BOARDING

If you have been denied a reserved seat on British Airways, you are probably entitled to monetary compensation. This notice explains the airline's obligations and the passenger's rights in the case of an oversold flight.

COMPENSATION FOR INVOLUNTARY DENIED BOARDING

If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless:

- (a) you have not fully complied with the airline's ticketing, check-in, and reconfirmation requirements, or you are not acceptable for transportation under the airline's tariff filed with the CTA(A); or
- (b) you are denied boarding because the flight is cancelled; or
- (c) you are denied boarding because of Government requisition of space or because a smaller capacity aircraft was substituted for safety or operational reasons; or
- (d) you are offered accommodations in a section of the aircraft other than that specified in your ticket, at no extra charge. (A passenger seated in a section for which a lower fare is charged must be given an appropriate refund.)

†-Effective March 25, 2016 per CTA Decision No. 91-C-A-2016

For unexplained abbreviations, reference marks and symbols see Pages 21 through 30.

ISSUED: March 24, 2016

EFFECTIVE: May 8, 2016

(Except as Noted)

From cmccall@pmlaw.com Thu Mar 24 12:08:44 2016
Date: Thu, 24 Mar 2016 15:08:32 +0000
From: Carol McCall <cmccall@pmlaw.com>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: FW: CTA Decision No.49-C-A- 2016

[The following text is in the "windows-1256" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dear Mr. Lukacs,

I am also sending you this email that advises Ms. Solomon of the status regarding British Airways' compliance with Decision No. 49-C-A-2016.

Regards,

Carol McCall

From: Carol McCall
Sent: March-07-16 4:22 PM
To: Christine Solomon
Subject: CTA Decision No.49-C-A- 2016

Hi Christine,

I am emailing you to bring you up to date. I am waiting for instructions from British Airways Legal on proposed wording for? a revision of Rule 87 to comply with the Decision. BA also has filed a motion for reconsideration of the CTA Decision and may well file a Leave to Appeal to the Federal Court of Appeal. Are you available this week to look at a proposed rule wording if I receive instructions?

Best regards,

Carol McCall
Paterson MacDougall LLP

From cmccall@pmlaw.com Thu Mar 24 12:08:23 2016
Date: Thu, 24 Mar 2016 15:08:13 +0000
From: Carol McCall <cmccall@pmlaw.com>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: FW: British Airways re CTA Decision No. 49-C-A-2016

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dear Mr. Lukacs,

Here is my email to Ms. Solomon with the wording for the new tariff rule.

Regards,

Carol McCall

From: Carol McCall
Sent: March-09-16 4:34 PM
To: Christine Solomon
Subject: British Airways re CTA Decision No. 49-C-A-2016

Hello Christine,
I have attached wording for a new tariff rule that complies with the decision of the Agency providing DBC for passengers travelling from the EU to Canada. I can discuss it with you at your convenience. Please call me on my cell phone at 416 209 6719.

Best regards,

Carol

Carol McCall | Partner

Paterson MacDougall, LLP | 1 Queen Street East | Suite 900 | Toronto,
Ontario | M5C 2W5

T: (416) 643-3309 | F: (416) 366-3743 | Law Clerk: Veronica Rodericks | Website:
www.pmlaw.com | Twitter: www.twitter.com/pmlawcanada

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[Part 2, "Tariff Revision Rule 87(B)(3)(c).doc" Application/MSWORD]
[(Name: "Tariff Revision Rule 87(B)(3)(c).doc") 31 KB.]
[Unable to print this part.]

*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 CONVIENCE, 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.

*Effective March 10, 2016 per CTA Decision No. 49-C-A-2016

This is **Exhibit “F”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From Secretariat.Secretariat@otc-cta.gc.ca Thu Mar 24 12:40:06 2016
Date: Thu, 24 Mar 2016 15:39:57 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: RE: Decision No. 91-C-A-2016 dated March 23, 2016 ? Case No. 16-01304

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dr. Lukacs,

1. For Case No. 16-01304, we attach BA's revised tariff page containing the language which was the subject of Decision No. 91^^C^^A-2016.
2. For Case No. 16-01055, the application for review of Decision No. 49-C-A-2016, the matter is being reviewed by the Agency.

Sincerely,

Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Canadian Transportation Agency / Government of Canada
secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

-----Original Message-----

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Sent: March-23-16 11:12 AM
To: secretariat
Subject: Re: Decision No. 91-C-A-2016 dated March 23, 2016 ? Case No. 16-01304

Dear Madam Secretary,

I am in receipt of Decision No. 91-C-A-2016 of the Agency; however, I have never received the March 9, 2016 submission of British Airways.

1. Kindly please provide me with that submission as well as all documents in Case No. 16-01304 as soon as possible, so as to allow me to make an informed decision about my next steps.
2. On February 26, 2016, British Airways made an application for review of Decision No. 49-C-A-2016 pursuant to s. 32 of the Act. Kindly please advise me about that case number and status of that application.

I look forward to hearing from you.

Sincerely yours,
Dr. Gabor Lukacs

On Wed, 23 Mar 2016, secretariat wrote:

>
> Please find attached a PDF version of the above Decision.
>
>

>
> Please confirm receipt to all.
>
>
>
> Sincerely,
>
>
>
>
>
> Office des transports du Canada / Gouvernement du Canada
> secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
>
> Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575
>
>
>
> Canadian Transportation Agency / Government of Canada
> secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
>
> Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575
>
>
>

[Part 2, "BA Page 80 (3).pdf" Application/PDF (Name: "BA Page 80]
[(3).pdf") 44 KB.]
[Unable to print this part.]

| RULE | SECTION I - GENERAL RULES |
|---|--|
| 87 | <p>DENIED BOARDING COMPENSATION (Continued)</p> <p>(B) APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE EUROPEAN UNION SERVED BY BRITISH AIRWAYS (Continued)</p> <p>(3) (Continued)</p> <p>(a) (Continued)</p> <p>(ii) (Continued)</p> <p>EXCEPTION 1: The passenger will not be eligible for compensation if the flight on which the passenger holds confirmed reserved space is unable to accommodate him because of:</p> <p>(aa) government requisition of space, or</p> <p>(bb) substitution of equipment of lesser capacity when required by operational or safety reasons.</p> <p>EXCEPTION 2: The passenger will not be eligible for compensation if he is offered accommodations or is seated in a section of the aircraft other than that specified on his ticket at no extra charge, except that a passenger seated in a section for which a lower fare applies shall be entitled to an appropriate refund.</p> <p>(b) Amount of compensation payable for flights from Canada to the European Union</p> <p>(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 CAD 400 for delay of 0 to 4 hours and in the amount of CAD 800 for delay over 4 hours.</p> <p>(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.</p> <p>(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 CAD 1 for CAD 3 of voucher value within one month of the date on the voucher.</p> <p>+ [N](c) Amount of compensation payable for flights from the European Union to Canada</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(4) Carrier shall furnish all passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space a copy of the following written statement:</p> <p style="text-align: center;">COMPENSATION FOR DENIED BOARDING</p> <p>If you have been denied a reserved seat on British Airways, you are probably entitled to monetary compensation. This notice explains the airline's obligations and the passenger's rights in the case of an oversold flight.</p> <p style="text-align: center;">COMPENSATION FOR INVOLUNTARY DENIED BOARDING</p> <p>If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless:</p> <p>(a) you have not fully complied with the airline's ticketing, check-in, and reconfirmation requirements, or you are not acceptable for transportation under the airline's tariff filed with the CTA(A); or</p> <p>(b) you are denied boarding because the flight is cancelled; or</p> <p>(c) you are denied boarding because of Government requisition of space or because a smaller capacity aircraft was substituted for safety or operational reasons; or</p> <p>(d) you are offered accommodations in a section of the aircraft other than that specified in your ticket, at no extra charge. (A passenger seated in a section for which a lower fare is charged must be given an appropriate refund.)</p> |
| †-Effective March 25, 2016 per CTA Decision No. 91-C-A-2016 | <p>For unexplained abbreviations, reference marks and symbols see Pages 21 through 30.</p> <p>ISSUED: March 24, 2016</p> <p>EFFECTIVE: May 8, 2016</p> <p>(Except as Noted)</p> |

This is **Exhibit “G”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From lukacs@AirPassengerRights.ca Mon Mar 28 16:29:30 2016
Date: Mon, 28 Mar 2016 16:29:23 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
Subject: Request No. 2 for all documents in Case No. 16-01304

Dear Madam Secretary:

On March 23, 2016, I advised you that I had never received the March 9, 2016 submission of British Airways, referenced in Decision No. 91-C-A-2016.

I requested that you provide me with that submission as well as with all documents in Case No. 16-01304 as soon as possible, so as to allow me to make an informed decision about my next steps.

On March 24, 2016, you provided me with British Airways' tariff page issued on March 24, 2016; however, you DID NOT provide me with British Airways' submission of March 9, 2016 nor with any other documents in the file.

I reiterate my request that you provide me with ALL documents in Case No. 16-01304 forthwith, to which I am entitled both as a party to the dispute with British Airways as well as in accordance with the open court principle.

Sincerely yours,
Dr. Gabor Lukacs

This is **Exhibit “H”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From lukacs@AirPassengerRights.ca Mon Mar 28 17:03:22 2016
Date: Mon, 28 Mar 2016 17:03:16 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Carol McCall <cmccall@pmlaw.com>
Subject: Your ex-parte communications with the Agency [Decision No. 91-C-A-2016 dated March 23, 2016 -- Case No. 16-01304]

Dear Ms. McCall

I am pleased that you have changed your mind and decided to do the right thing by providing me with your emails of March 7, 2016 and March 9, 2016 to Ms. Solomon at the Agency.

1. Kindly please provide me with the responses of Ms. Solomon to your communications of March 7 and 9, 2016.
2. Kindly please advise whether you had any other ex-parte communications with Ms. Solomon and/or anyone else at the Agency, since February 18, 2016, and provide me with same.
3. You stated that you did not request a decision by the Agency. If so, can you explain how Decision No. 91-C-A-2016 was made?
4. In response to your question about why I attacking the tariff that you ex-parte proposed on March 9, 2016, I can advise you, without prejudice to my right to argue additional and/or different grounds before the Federal Court of Appeal, as follows.
 - (a) Decision No. 49-C-A-2016 ordered British Airways to incorporate Regulation (EC) 261/2004 by reference. British Airways did not seek leave to appeal the order, but did something else. Thus, the Agency's Decision No. 91-C-A-2016 is unreasonable, and the error is apparent on the face of the decision.
 - (b) Rule 87(B)(3)(c) does NOT adequately reflect the denied boarding compensation regime set out in Regulation (EC) 261/2004:
 - (i) it subjects the right to compensation to paragraph 87(B)(3)(a), which contains conditions that are not part of the Regulation; and
 - (ii) it omits the requirement, set out in Regulation (EC) 261/2004, that if compensation is made by way of voucher, then BA must obtain a written agreement of the passenger (see Article 7(3)).
 - (c) The Agency found in the past that condition 87(B)(3)(a)(ii)(bb) was unreasonable as it stands (see Decision No. 204-C-A-2013, para. 45).

I look forward to hearing from you.

Sincerely yours,
Dr. Gabor Lukacs

On Thu, 24 Mar 2016, Carol McCall wrote:

> Dear Mr. Lukacs,
>
> I am responding to your last email yesterday.
>
> I sent my email to Christine Solomon, Tariffs Analyst at the Industry
> Regulation and Determinations Branch, not to The Secretariat. I did not
> request a decision by the Agency.
>
> I did not refuse to provide you with a copy of my email to Ms. Solomon.
> I had not provided it to you because it was not a submission to the
> Agency. It is however in a file at the Industry Regulation and
> Determinations Branch. Rather than have you seek a Federal Court of
> Appeal order for production of a copy of my email to Ms. Solomon, I will
> forward it to you shortly.
>
> I have also attached a copy of the new Rule 87(B)(3)(c) filed by ATPCO
> today. I fail to understand why you are attacking this rule which
> provides precisely what you were seeking. You have achieved the
> passenger rights result you wanted with this change to the British
> Airways' tariff.
>
> Yours sincerely,
>
> Carol McCall
>
> Carol McCall | Partner
> Paterson MacDougall, LLP | 1 Queen Street East | Suite 900 | Toronto, Ontario |
> M5C 2W5
>
> T: (416) 643-3309 | F: (416) 366-3743 | Law Clerk: Veronica Rodericks | Website: ww
> w.pmlaw.com | Twitter: www.twitter.com/pmlawcanada
>
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> y the sender.
>
>

This is **Exhibit “I”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From cmccall@pmlaw.com Fri Apr 8 14:53:26 2016
Date: Fri, 8 Apr 2016 17:53:08 +0000
From: Carol McCall <cmccall@pmlaw.com>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Canadian Transportation Agency Decisions No. 49-C-A-2016 and No. 91-C-A-2016

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dear Mr. Lukacs,

I am responding to your email dated March 28, 2016.

1. Ms. Solomon did not respond to either email prior to Decision No. 91-C-A-2016 being released on March 23, 2016. After the release of this decision, she followed up with me and sent me emails on March 23, 2016 and March 24, 2016 about British Airways being required to file the new Rule 87(B)(3)(c) through ATPCO by March 24th.

2. I spoke to Ms. Solomon on the telephone on March 10, 2016 and referred to my email sent to her on March 9th and explained that I had drafted new Rule 87(B)(3)(c) to include the actual amount of Denied Boarding Compensation (DBC) provided in Regulation (EC) 261/2004 and had drafted it in a format parallel in structure to the existing Rule 87(B)(3)(b) providing DBC for passengers travelling from Canada to the EU. I also called her on March 16, 2016 and spoke to her to ask whether she had had an opportunity to review the proposed Rule 87(B)(3)(c) and whether BA could instruct ATPCO to file it with the CTA because I was concerned about the passage of time since the March 10th compliance date and potential CTA penalties for non-compliance being levied on British Airways by CTA Enforcement. She explained that because BA had submitted proposed wording for the new Rule, no steps would be taken by CTA Enforcement.

3. I do not know why the Agency made Decision No. 91-C-A-2016.

4. The Agency stated in Decision No. 49-C-A-2016 that:

"The Canada Transportation Act does not empower the Agency to enforce foreign instruments. It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier's policy with respect to these flights. In light of the foregoing, the Agency orders British Airways, in accordance with its election to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004, to amend its Tariff by March 10, 2016."

The Agency stated in Decision No. 91-C-A-2016 that:

"The Agency 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 has provided greater clarity in its tariff than if it had simply included a cross-reference to the provision."

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. You are now trying to have the Agency enforce Regulation (EC) 261/2004 in its entirety in Canada, including the specific procedures under the Regulation. Nothing other than the amount of the Denied Boarding Compensation was ever at issue with regard to whether British Airways should have a tariff Rule applying to passengers travelling from the EU to Canada.

The new British Airways Rule 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 reference to Regulation (EC) No. 261/2004 in a British Airways Tariff Rule would not be enforceable by the Agency upon complaint by a passenger.

With respect to Rule 87(B)(3)(a)(ii)(bb), I have not reviewed that Rule because it was not the subject of a complaint against British Airways when it filed Rule 87(B)(3)(b), and accordingly, is not relevant to the wording of Rule 87(B)(3)(c) with which we are dealing.

I have been more than co-operative with you in providing information in an attempt to satisfy you that the procedure followed by me was the standard procedure for complying with an order of the Agency. Please direct all further inquiries to the Canadian Transportation Agency.

Sincerely,

Carol McCall

Carol McCall | Partner

Paterson MacDougall, LLP | 1 Queen Street East | Suite 900 | Toronto,
Ontario | M5C 2W5

T: (416) 643-3309 | F: (416) 366-3743 | Law Clerk: Veronica Rodericks | Website:

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This is **Exhibit “J”** to the Affidavit of Dr. Gábor Lukacs
affirmed before me on April 11, 2016

Signature

From Allan.Matte@otc-cta.gc.ca Fri Apr 8 15:42:17 2016
Date: Fri, 8 Apr 2016 18:42:07 +0000
From: Allan Matte <Allan.Matte@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: Case Number 16-01304

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Hi Dr. Lukacs,

Further to your emails of March 23, 2016 , and March 28, 2016, and our recent conversation, I attach the record from the above noted matter.

With respect to the question you raised during our conversation, please be advised that once a decision has issued in a dispute proceeding, that proceeding is completed and the Agency Panel is no longer seized with the matter. At that point, Agency staff engages in monitoring and compliance activities to ensure that the respondent complies with the Agency's decision or order and that while the applicant to the original dispute proceeding may provide information about compliance to Agency staff following the issuance of the decision, they are not considered a party once the decision is in the compliance stage.

I trust that responds to your inquiry. Please feel to contact me if you have any further questions.

Allan Matte

Avocat/Counsel

Direction des services juridiques /Legal Services Directorate

819-994-2226 | télécopieur/facsimile 819-953-9269

allan.matte@otc-cta.gc.ca

Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9

Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9

Gouvernement du Canada | Government of Canada

[Part 2, "Carol McCall submission.pdf" Application/PDF (Name: "Carol]
[McCall submission.pdf") 23 KB.]
[Unable to print this part.]

[Part 3, "March 23,2016 - Staff email to BA-ATPCO.PDF"]
[Application/PDF (Name: "March 23,2016 - Staff email to]
[BA-ATPCO.PDF") 13 KB.]
[Unable to print this part.]

[Part 4, "March 24,2016 - ATPCO email.pdf" Application/PDF (Name:]
["March 24,2016 - ATPCO email.pdf") 29 KB.]
[Unable to print this part.]

Christine Solomon

From: Carol McCall <cmccall@pmlaw.com>
Sent: March-09-16 4:34 PM
To: Christine Solomon
Subject: British Airways re CTA Decision No. 49-C-A-2016
Attachments: Tariff Revision Rule 87(B)(3)(c).doc.DRF

Categories: Follow Up

Hello Christine,

I have attached wording for a new tariff rule that complies with the decision of the Agency providing DBC for passengers travelling from the EU to Canada. I can discuss it with you at your convenience. Please call me on my cell phone at 416 209 6719.

Best regards,

Carol

Carol McCall ; Partner

Paterson MacDougall, LLP ; 1 Queen Street East ; Suite 900 ; Toronto, Ontario M5C 2W5

T: (416) 643-3309 ; F: (416) 366-3743 ; Law Clerk: [Veronica Rodericks](#) ; Website: www.pmlaw.com ; Twitter: www.twitter.com/pmlawcanada

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*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 CONVIENCE, 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.

*Effective March 10, 2016 per CTA Decision No. 49-C-A-2016

Christine Solomon

From: Carol McCall <cmccall@pmlaw.com>
Sent: March-23-16 12:51 PM
To: Christine Solomon
Cc: Myrtle Buchanan
Subject: Re: Proposed language for British Airways Compliance

Dear Ms. Solomon,

I'll try to arrange it, but one day is a bit short for dealing with the practicalities.

Regards,

Carol McCall

From: Christine Solomon
Sent: Wednesday, March 23, 2016 10:30 AM
To: Carol McCall
Cc: Myrtle Buchanan
Subject: Proposed language for British Airways Compliance

Dear Ms. McCall,

As per Agency Decision 91-C-A-2016 (see attached), the Agency found that the proposed language is indeed compliant with Decision 49-C-A-2016. Please go ahead and file the proposed language (see attached) to ATPCO and use the Decision 91-C-A-2016 to have it filed on one (1) day notice.

Also note, the last day for compliance is March 24, 2016.

Any questions, please do not hesitate to contact me.

Best regards,

Christine Solomon

Analyste aux tarifs, Direction générale de la réglementation et des déterminations de l'industrie
Office des transports du Canada | Gouvernement du Canada
Christine.Solomon@otc-cta.gc.ca | Tél.: 819-953-8954 | ATS 1-800-669-5575

Tariffs Analyst, Industry Regulation and Determinations Branch
Canadian Transportation Agency | Government of Canada
Christine.Solomon@otc-cta.gc.ca | Tel.: 819-953-8954 | TTY 1-800-669-5575

Christine Solomon

From: Buchanan, Myrtle <MBuchanan@ATPCO.NET>
Sent: March-24-16 8:57 AM
To: Carol McCall; Christine Solomon; david.durance@ba.com
Subject: RE: Proposed language for British Airways Compliance

Good morning,

The changes for rule 87 have been filed this morning effective March 25, 2016 per CTA decision no. 91-C-A-2016. Christine, the job is filing advice no. 69462.

Regards

Myrtle

Myrtle Buchanan
 Customer Support Consultant
mbuchanan@atpco.net
 +1-703-661-7486

ATPCO

ATPCO is the trade name of

From: Carol McCall [<mailto:cmccall@pmlaw.com>]
Sent: Wednesday, March 23, 2016 3:47 PM
To: Christine Solomon <Christine.Solomon@otc-cta.gc.ca>
Cc: Buchanan, Myrtle <MBuchanan@ATPCO.NET>
Subject: RE: Proposed language for British Airways Compliance

Dear M. Solomon,

I have provided the decision and the tariff rule wording for new rule Rule 87(B)(3)(c) and the March 24th compliance date to British Airways Legal in New York. Jim Blaney, the counsel handling this matter is at meetings in Washington D.C. today. The law clerk in his office in New York is working on contacting him about this filing. David Durance, the British Airways person who has the authority to request ATPCO to do the filing, is in the British Airways London UK office. We are doing our best to have the filing done as soon as possible. I'll keep you advised.

Regards,

Carol McCall

Carol McCall | Partner
 Paterson MacDougall, LLP | 1 Queen Street East | Suite 900 | Toronto, Ontario | M5C 2W5

T: (416) 643-3309 | F: (416) 366-3743 | Law Clerk: [Veronica Rodericks](mailto:Veronica.Rodericks) | Website: www.pmlaw.com | Twitter: [www.twitter.com/pmlawcanada](https://twitter.com/pmlawcanada)

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From: Carol McCall
Sent: March-23-16 12:51 PM
To: Christine Solomon
Cc: Myrtle Buchanan
Subject: Re: Proposed language for British Airways Compliance

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Regards,

Carol McCall

From: Christine Solomon
Sent: Wednesday, March 23, 2016 10:30 AM
To: Carol McCall
Cc: Myrtle Buchanan
Subject: Proposed language for British Airways Compliance

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Any questions, please do not hesitate to contact me.

Best regards,

Christine Solomon

Analyste aux tarifs, Direction générale de la réglementation et des déterminations de l'industrie
Office des transports du Canada | Gouvernement du Canada
Christine.Solomon@otc-cta.gc.ca | Tél.: 819-953-8954 | ATS 1-800-669-5575

Tariffs Analyst, Industry Regulation and Determinations Branch
Canadian Transportation Agency | Government of Canada
Christine.Solomon@otc-cta.gc.ca | Tel.: 819-953-8954 | TTY 1-800-669-5575

Court File No.:

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 MOVING PARTY

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The proposed appeal is a sequel to *Lukács v. Canada (CTA)*, 2015 FCA 269, where this Honourable Court granted the appeal of Dr. Gábor Lukács and directed the Canadian Transportation Agency (the “Agency”) to redetermine certain issues relating to the tariff rules governing payment of denied boarding compensation by British Airways.

***Lukács v. Canada (CTA)*, 2015 FCA 269**

Tab 4, p. 12

2. Following the judgment of this Court, the Agency correctly determined that British Airways’ tariff lacked the required clarity and ordered the airline to amend its tariff by incorporating “by reference” *Regulation (EC) No. 261/2004* (the “Redetermination Decision”).

***Lukács v. British Airways*,
Decision No. 49-C-A-2016**

Tab 5, p. 28

3. British Airways then had ex-parte communications with the Agency, and submitted a proposed tariff wording purporting to comply with the Redetermination Decision. Lukács had no knowledge of any of these at the time.

Lukács Affidavit, Exhibit “E”

Tab 7E, pp. 59-60

4. The Agency then proceeded to consider whether the proposed tariff wording complied with the Redetermination Decision without giving Lukács any notice or opportunity to make submissions in response to British Airways’ ex-parte submissions.

5. Lukács is seeking leave to appeal, pursuant to section 41 of the *Canada Transportation Act*, from Decision No. 91-C-A-2016 (“Impugned Decision”) of the Agency, finding that British Airways complied with the Redetermination Decision, on the following proposed grounds:

- (a) The Agency breached its duty of procedural fairness owed to Lukács by making the Impugned Decision based on ex-parte representations, and without affording Lukács any opportunity to make submissions.
- (b) The Impugned Decision is unreasonable, because:
 - i. British Airways was ordered to include a reference to *Regulation (EC) No. 261/2004* in its tariff, but failed to do so;
 - ii. the tariff rule proposed by British Airways differs from *Regulation (EC) No. 261/2004*; and
 - iii. the tariff rule proposed by British Airways contains an exception to the obligation to pay compensation that was previously found to be unreasonable and was disallowed by the Agency.

B. THE LEGISLATIVE SCHEME

6. 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 Appendix A, p. 109
Lukács v. Canada (CTA), 2015, FCA 269, para. 20 Tab 4, p. 17

7. The tariff of an air carrier must clearly state the terms and conditions with respect to an enumerated list of core areas, including “compensation for denial of boarding as a result of overbooking,” that is, denied boarding compensation.

Air Transportation Regulations, s. 122(c)(iii) Appendix A, p. 113
Lukács v. Canada (CTA), 2015, FCA 269, para. 21 Tab 4, p. 17

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

Air Transportation Regulations, s. 111 Appendix A, p. 110
Lukács v. Canada (CTA), 2015, FCA 269, para. 22 Tab 4, p. 18

9. 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) Appendix A, p. 119

10. 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 Appendix A, p. 111
Lukács v. Canada (CTA), 2015, FCA 269, para. 23 Tab 4, p. 19

C. PROCEDURAL HISTORY

(i) The complaint and the first decision of the Agency

11. The Moving Party, Dr. Gábor Lukács, is a Canadian air passenger rights advocate, whose work and public interest litigation have been recognized by this Honourable Court in a number of judgments. Lukács has a track record of approximately two dozen successful regulatory complaints with the Agency on various issues ranging from baggage liability to denied boarding compensation.

Lukács Affidavit, paras. 1-4

Tab 7, p. 37

12. 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.

Lukács Affidavit, para. 5

Tab 7, p. 37

***Lukács v. Canada (CTA)*, 2015, FCA 269, para. 2**

Tab 4, p. 14

13. On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the “First Decision”) that determined, with finality, the issue of denied boarding compensation.

***Lukács v. British Airways*,
Decision No. 201-C-A-2014**

Tab 3, p. 9

***Lukács v. Canada (CTA)*, 2015, FCA 269, para. 16**

Tab 4, p. 16

(ii) Judgment of the Federal Court of Appeal

14. On November 27, 2015, this Honourable Court granted the appeal of Lukács, set aside the First Decision, and directed the Agency to redetermine the issue of denied boarding compensation. This Court held that:

[...] the Agency must clarify whether the tariff must in all instances 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.

***Lukács v. Canada (CTA)*, 2015, FCA 269, para. 40**

Tab 4, p. 23

(iii) The Redetermination Decision of the Agency and its aftermath

15. On February 18, 2016, in Decision No. 49-C-A-2016 (the “Redetermination Decision”), the Agency redetermined the issue of denied boarding compensation, and correctly concluded that:

It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier’s policy with respect to these flights.

Furthermore, the Agency ordered British Airways to amend its tariff so as to incorporate Regulation (EC) No. 261/2004 by reference.

***Lukács v. British Airways*,
Decision No. 49-C-A-2016, paras. 17-18**

Tab 5, pp. 30-31

16. On February 22, 2016, Lukács filed Decision No. 49-C-A-2016 in Federal Court pursuant to subsection 33(1) of the *Canada Transportation Act*.

***Canada Transportation Act*, s. 33
Certificate of Filing**

**Appendix A, p. 115
Tab 6, p. 32**

17. Neither Lukács nor British Airways sought leave to appeal from the Redetermination Decision, and the time to do so passed. Although British Airways requested the Agency to reconsider the Redetermination Decision, it has subsequently withdrawn the request.

Lukács Affidavit, Exhibit “B”

Tab 7B, p. 47

(iv) **Ex-parte communications between British Airways and the Agency**

18. Unbeknownst to Lukács at the time, British Airways communicated with the Agency about a tariff wording that would comply with the Redetermination Decision. These ex-parte communications included a March 9, 2016 proposal for a new tariff rule governing denied boarding compensation on flights from the EU to Canada (the “Proposed Rule”).

Lukács Affidavit, Exhibit “E”

Tab 7E, pp. 59-60

19. The Proposed Rule makes no reference to *Regulation (EC) No. 261/2004*, differs from *Regulation (EC) No. 261/2004* by relieving British Airways from the obligation to pay in certain cases, and it contains an exception that was previously found to be unreasonable and was disallowed by the Agency.

20. Lukács was not served with or otherwise copied on these communications between British Airways and the Agency, and had no knowledge of them at the time.

Lukács Affidavit, paras. 14-16

Tab 7, p. 37

(v) **The Impugned Decision of the Agency**

21. The Agency proceeded to consider whether the Proposed Rule complied with the Redetermination Decision. The Agency gave Lukács no notice nor any opportunity to make submissions in response to British Airways’ Proposed Rule and ex-parte submissions.

Lukács Affidavit, paras. 14-16

Tab 7, p. 37

22. On March 23, 2016, the Secretary of the Agency notified Lukács and British Airways that the Agency issued Decision No. 91-C-A-2016 (the “Impugned Decision”), in which it found that:

- (a) British Airways was ordered to amend its tariff to include a reference to *Regulation (EC) No. 261/2004* (para. 2);
- (b) the tariff rule proposed by British Airways does not mention *Regulation (EC) No. 261/2004* (para. 3); and
- (c) nevertheless, the tariff rule proposed by British Airways complies with Decision No. 49-C-A-2016 (para. 5).

Lukács Affidavit, Exhibit “C”

Tab 7C, p. 49

***Lukács v. British Airways*,
Decision No. 91-C-A-2016**

Tab 1, p. 1

23. The Impugned Decision neither recognized nor considered that the Proposed Rule mischievously makes the obligation of British Airways to pay denied boarding compensation on flights from the EU to Canada “subject to the provisions of paragraph (B)(3)(a) of this rule,” which contains exceptions that are both inconsistent with *Regulation (EC) No. 261/2004* and unreasonable.

Lukács Affidavit, Exhibit “E”

Tab 7E, p. 61

(vi) Attempts to obtain copies of the ex-parte communications

24. Since learning from the Impugned Decision about the ex-parte communications between British Airways and the Agency, Lukács has made numerous attempts to obtain copies from the Agency and from British Airways, and to find out why the Agency proceeded ex-parte with the Impugned Decision.

Lukács Affidavit, paras. 18-25

Tab 7, p. 37

25. On March 24, 2016, Ms. Carol McCall provided Lukács with two emails she had sent to Ms. Christine Solomon at the Agency. Ms. McCall also stated, in reference to the Impugned Decision, that:

I did not request a decision by the Agency.

In response to a question about whether Ms. McCall could explain how the Impugned Decision came into existence, she stated on April 8, 2016 that:

I do not know why the Agency made Decision No. 91-C-A-2016.

Lukács Affidavit, Exhibits “E” and “I”

**Tabs 7E and 7I,
pp. 71 and 56**

26. Incidentally, also on April 8, 2016, Mr. Allan Matte, counsel for the Agency, wrote to Lukács that:

With respect to the question you raised during our conversation, please be advised that once a decision has issued in a dispute proceeding, that proceeding is completed and the Agency Panel is no longer seized with the matter. At that point, Agency staff engages in monitoring and compliance activities to ensure that the respondent complies with the Agency’s decision or order and that while the applicant to the original dispute proceeding may provide information about compliance to Agency staff following the issuance of the decision, they are not considered a party once the decision is in the compliance stage.

[Emphasis added.]

Lukács Affidavit, Exhibit “J”

Tab 7J, p. 75

PART II – STATEMENT OF THE POINTS IN ISSUE

27. The question to be decided on the present application is whether this Honourable Court should grant Lukács leave to appeal.

PART III – STATEMENT OF SUBMISSIONS

28. Lukács submits that the Agency breached its duty of procedural fairness owed to Lukács and that the Impugned Decision is unreasonable.

A. DENIAL OF PROCEDURAL FAIRNESS

(i) Standard of review: correctness

29. As this Honourable Court recently reaffirmed in *Air Canada v. Greenglass*, the standard of review for procedural fairness issues is correctness.

Air Canada v. Greenglass, 2014 FCA 288, para. 26

Tab 9, p. 147

(ii) The explanation provided by Agency counsel

30. There are several difficulties with the *ex post facto* explanation given by Mr. Matte, counsel for the Agency, which suggests that Lukács was not considered a party “in the compliance stage.”

Lukács Affidavit, Exhibit “J”

Tab 7J, p. 75

31. First, it is settled law that the Agency, being a tribunal, must speak through its decisions and reasons, and cannot provide supplementary reasons in the guise of communications by counsel. As a matter of fact, there is nothing in the Impugned Decision suggesting that Lukács was not a party.

32. Second, as the record shows, the Impugned Decision is a decision that was made by a Member of the Agency in exercising the quasi-judicial powers of the Agency, and not by an Agency staff monitoring compliance.

***Lukács v. British Airways*,
Decision No. 91-C-A-2016**

Tab 1, p. 1

33. Third, on March 23, 2016, the Secretary of the Agency sent a copy of the Impugned Decision both to Lukács and Ms. McCall, counsel for British Airways. It would be illogical for the Secretary of the Agency to do so if Lukács was no longer considered to be a party.

Lukács Affidavit, Exhibit “C”

Tab 7C, p. 49

34. Fourth, as explained below, the explanation of Mr. Matte is inconsistent with the Agency’s own rules of procedures.

35. Finally, if Mr. Matte’s explanation reflects the Agency’s current practice, then it lends further support to the conclusion that appellate intervention is necessary in order to address a systemic problem relating to the fairness of the procedures of the Agency.

(iii) Lukács was a party

36. Proceedings before the Agency are governed by the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (“*Agency Rules*”), which provide that:

applicant means a person that files an application with the Agency. (*demandeur*)

application means a document that is filed to commence a proceeding before the Agency under any legislation or regulations that are administered in whole or in part by the Agency. (*demande*)

party means an applicant, a respondent or a person that is named by the Agency as a party. (*partie*)

[Emphasis added.]

Agency Rules, s. 1

Appendix A, p. 122

37. It is common ground that on January 30, 2013, Lukács commenced a proceeding before the Agency against British Airways under the *Canada Transportation Act* and/or the *Air Transportation Regulations*.

38. Thus, Lukács was an “applicant” within the meaning of the *Agency Rules*; in particular, Lukács was a “party” within the meaning of the *Agency Rules*.

(iv) Lukács was entitled to be served with British Airways’ submissions

39. Section 2 of the *Agency Rules* provides that the rules apply to “dispute proceedings” other than mediations before the Agency. The *Agency Rules* define a “dispute proceeding” as follows:

dispute proceeding means any contested matter that is commenced by application to the Agency. (*instance de règlement des différends*)

Agency Rules, ss. 1-2

**Appendix A,
pp. 122-123**

40. Since the proceeding involving British Airways was commenced by the application of Lukács to the Agency and was contested, the proceeding was a “dispute proceeding” within the meaning of the *Agency Rules*.

41. Section 8 of the *Agency Rules* provides that:

8 A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party’s representative, except if the document is

- (a) a confidential version of a document in respect of which a request for confidentiality is filed under section 31;
- (b) an application; or
- (c) a position statement.

Agency Rules, s. 8

Appendix A, p. 124

42. Thus, according to s. 8 of the *Agency Rules*, Lukács was entitled to be served with British Airways' submissions, which do not fall into the exceptions enumerated there.

43. Furthermore, both the Agency and British Airways were fully aware of the ongoing interest of Lukács in ensuring that the airline complies with the Redetermination Decision. Indeed, on March 2, 2016, Lukács notified both the Agency and British Airways that he had filed the Redetermination Decision in Federal Court in accordance with section 33 of the *Canada Transportation Act*.

Canada Transportation Act, s. 33
Certificate of Filing
Lukács Affidavit, para. 10

Appendix A, p. 115
Tab 6, p. 32
Tab 7, p. 37

44. The effect of the filing of the Redetermination Decision in Federal Court by Lukács was that the decision became an order of the Federal Court that he could enforce in the same manner as any other order of the Federal Court.

Canada Transportation Act, s. 33

Appendix A, p. 115

45. Therefore, Lukács, who had a stake and interest in British Airways' compliance with the Redetermination Decision, was entitled to be served with British Airways' submissions not only pursuant to the *Agency Rules*, but also as a matter of common law procedural fairness.

(v) Lukács was denied procedural fairness

46. Lukács, who commenced the proceeding against British Airways before the Agency, was a party to the entire proceeding, and as such he was entitled to be provided with all submissions of British Airways and to be afforded a reasonable opportunity to respond to any new submissions made by the airline.

47. Nevertheless, British Airways engaged in ex-parte communications with the Agency about the Proposed Rule, which it represented to the Agency as complying with the Redetermination Decision. Lukács, who had no knowledge of these communications, had no opportunity to object to them.

48. The Agency improperly accepted these ex-parte communications from British Airways and, based on them, proceeded to consider whether British Airways complied with the Redetermination Decision without any notice to Lukács.

49. The fact that British Airways' ex-parte communications were nominally addressed to Ms. Solomon and not to the Secretary of the Agency does not affect the rights of Lukács and the obligations of British Airways and the Agency. As soon as British Airways' submissions were placed before a Member of the Agency, it was incumbent upon the Agency to give Lukács notice and an opportunity to respond to their content before the Agency made its decision.

50. Instead, the Agency acted in blatant disregard to the principle of *audi alteram partem* and the rights of Lukács, who as a result was deprived of any opportunity to make submissions in opposition to British Airways' representation that the Proposed Rule complies with the Redetermination Decision.

51. Therefore, it is submitted that the Agency breached its duty of procedural fairness owed to Lukács by making the Impugned Decision without notice to him and without affording him a reasonable opportunity to make submissions in response to ex-parte communications of British Airways, including the Proposed Rule.

B. REASONABLENESS OF THE IMPUGNED DECISION

52. It is trite law that reasonableness of a decision is measured by the existence of justification, transparency and intelligibility within the decision-making process, and whether the decision falls within a range of possible acceptable outcomes.

(i) Conclusion inconsistent with findings

53. The issue before the Agency in the Impugned Decision was:

Does the wording proposed by British Airways dealing with denied boarding compensation for flights from the European Union to Canada comply with Decision No. 49-C-A-2016?

Lukács v. British Airways,
Decision No. 91-C-A-2016

Tab 1, p. 1

54. In Decision No. 49-C-A-2016, the Agency made the following order:

[18] [...] the Agency orders British Airways, in accordance with its election to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004, to amend its Tariff by March 10, 2016.

[Emphasis added.]

Lukács v. British Airways,
Decision No. 49-C-A-2016, para. 18

Tab 5, p. 31

55. Air Canada's tariff rule referenced in Decision No. 49-C-A-2016 that governs flights from the European Union reads as follows:

When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement provisions of this rule, except for employee and industry discounted travel, unless applicable local law provides

otherwise. In particular, for flights departing from the following countries, Air Canada will apply the provisions of the following legislation:

[...]

European Union and Switzerland: EC regulation No. 261/2004;

[Emphasis added.]

Lukács Affidavit, Exhibit “A”

Tab 7A, p. 43

56. In the Impugned Decision, the Agency correctly characterized the order that it made in Decision No. 49-C-A-2016 as:

The Agency ordered British Airways to amend its Tariff to include reference to Regulation (EC) No. 261/2004.

Lukács v. British Airways,
Decision No. 91-C-A-2016, para. 2

Tab 1, p. 1

57. The Agency also correctly found in the Impugned Decision that:

The proposed wording does not mention Regulation (EC) No. 261/2004 [...]

Lukács v. British Airways,
Decision No. 91-C-A-2016, para. 3

Tab 1, p. 1

58. In light of these findings, it was not open for the Agency to reach the conclusion that British Airways complied with Decision No. 49-C-A-2016.

Lukács v. British Airways,
Decision No. 91-C-A-2016, para. 5

Tab 1, p. 1

59. The issue before the Agency was a narrow question of compliance with the Agency's order. The order unambiguously required British Airways to incorporate *Regulation (EC) No. 261/2004* into its tariff by reference. Thus, whether the Proposed Rule is better or worse than incorporating *Regulation (EC) No. 261/2004* by reference was not a question before the Agency and was entirely irrelevant to the sole question that was properly before the Agency, namely, whether British Airways complied with the order.

60. Therefore, the Impugned Decision's conclusion is inconsistent with the Agency's findings, lacks intelligibility, and falls outside the range of possible acceptable outcomes defensible in respect of the facts and the law.

(ii) Proposed Rule differs from *Regulation (EC) No. 261/2004*

61. Although British Airways' Proposed Rule reflects the same monetary amounts as set out in *Regulation (EC) No. 261/2004*, the Proposed Tariff includes a number of exceptions to the obligation of paying compensation that are inconsistent with *Regulation (EC) No. 261/2004*:

- (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.

[Emphasis added.]

62. The mischief in the Proposed Rule is the subjecting of the passengers' rights to the provisions of Rule 87(B)(3)(a), which contains two exceptions that limit entitlement to compensation and which are inconsistent with the terms of *Regulation (EC) No. 261/2004*:

EXCEPTION 1: The passenger will not be eligible to compensation if the flight on which the passenger holds confirmed reservation is unable to accommodate him because of:

- (aa) government requisition of space, or
- (bb) substitution of equipment of lesser capacity when required by operational or safety reasons.

EXCEPTION 2: The passenger will not be eligible for compensation if he is offered accommodations or is seated in a section of the aircraft other than that specified on his ticket at no extra charge, except that a passenger seated in a section for which a lower fare applies shall be entitled to an appropriate refund.

Lukács Affidavit, Exhibit "F"

Tab 7F, p. 65

63. The European Court of Justice, which is the highest court with expertise in interpreting *Regulation (EC) No. 261/2004*, found that "operational reasons" cannot relieve a carrier from the obligation to pay denied boarding compensation. Thus, the first exception is inconsistent with *Regulation (EC) No. 261/2004*.

***Finnair Oyj v. Timy Lassooy*,
European Court of Justice, Case C-22/11**

Tab 10, p. 153

64. Article 10(2)(c) of *Regulation (EC) No. 261/2004* requires an air carrier to compensate passengers on transatlantic flights who are placed in a lower class than what they paid for in the amount of 75% of the price of their tickets. Thus, the second exception referenced in the Proposed Rule does not reflect the terms of *Regulation (EC) No. 261/2004* either.

Regulation (EC) No. 261/2004, Article 10(2)(c)

Tab 4, p. 125

65. Finally, subsection (iii) of the Proposed Rule does not reflect the terms of Article 7(3) of *Regulation (EC) No. 261/2004*, which requires the passenger's agreement in writing to being provided travel vouchers in lieu of compensation instead of cash:

The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

[Emphasis added.]

Regulation (EC) No. 261/2004, Article 7(3)

Tab 4, p. 125

66. Hence, it is apparent on the face of the record that the Proposed Tariff does not reflect the terms of *Regulation (EC) No. 261/2004*, and imposes additional and different terms for the payment of denied boarding compensation.

(iii) Terms that were previously found to be unreasonable by the Agency

67. As noted earlier, the Proposed Rule subjects the right to denied boarding compensation to Rule 87(B)(3)(a), which contains the following exception:

EXCEPTION 1: The passenger will not be eligible to compensation if the flight on which the passenger holds confirmed reservation is unable to accommodate him because of:

[...]

(bb) substitution of equipment of lesser capacity when required by operational or safety reasons.

[Emphasis added.]

Lukács Affidavit, Exhibit "F"

Tab 7F, p. 65

68. In Decision No. 204-C-A-2013, the Agency considered the same exception in Air Canada's tariff (Rule 245(E)(1)(b)(iv)), and found that it was unreasonable and disallowed it.

***Lukács v. Air Canada*, Decision No. 204-C-A-2013, Tab 11, pp. 171-172 paras. 43-45**

69. Therefore, the Impugned Decision is unreasonable in that it enables British Airways to impose on the traveling public, under the guise of compliance with a decision of the Agency, terms and conditions that have previously been found to be unreasonable by the Agency.

C. COSTS

70. The present motion was largely necessitated by the conduct of the Respondents, who engaged in ex-parte communications to the exclusion of Lukács, and in blatant disregard of his rights as a party.

71. Had Lukács been given notice of the ex-parte communications, he could and would have opposed the Proposed Rule before the Agency on the grounds set out in the present memorandum.

Lukács Affidavit, para. 15

Tab 7, p. 37

72. It is submitted that these unique circumstances warrant requiring the Respondents to pay for the costs of Lukács forthwith and in any event of the cause. In the previous appeal relating to British Airways, this Honourable Court recognized that the appeal was in the nature of public interest litigation and awarded Lukács costs and his disbursements. Lukács is asking the Court to follow this jurisprudence on the present motion.

***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 43**

Tab 4, p. 24

PART IV – ORDER SOUGHT

73. The Moving Party, Dr. Gábor Lukács, is seeking an Order:
- (a) granting Lukács leave to appeal Decision No. 91-C-A-2016 of the Canadian Transportation Agency;
 - (b) granting Lukács costs and/or reasonable out-of-pocket expenses of this motion forthwith and in any event of the cause; and
 - (c) granting such further relief as the Moving Party may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 11, 2016

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. 33, 41, 86

Canada Transportation Act, S.C. 1996, c. 10,
ss. 108, 110, 111, 113, 122

*Canadian Transportation Agency Rules (Dispute Proceedings
and Certain Rules Applicable to All Proceedings)*,
S.O.R./2014-104
ss. 1, 2, 8

Regulation (EC) No. 261/2004, of the European Parliament and
of the Council

CASE LAW

Air Canada v. Greenglass, 2014 FCA 288

Finnair Oyj v. Timy Lassooy, European Court of Justice,
Case C-22/11

Lukács v. Air Canada, Canadian Transportation Agency,
Decision No. 204-C-A-2013

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

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Appendix A

Statutes and Regulations



CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to February 15, 2016

À jour au 15 février 2016

Last amended on December 14, 2012

Dernière modification le 14 décembre 2012

overcharged by the air carrier for fares or rates in respect of its air service pursuant to paragraph 66(1)(c) of the Act, the amount of the refunds shall bear interest from the date of payment of the fares or rates by those persons to the air carrier to the date of the Agency's order at the rate of interest charged by the Bank of Canada on short-term loans to financial institutions plus one and one-half percent.

SOR/2001-71, s. 3.

DIVISION II

International

Application

108 Subject to paragraph 135.3(1)(d), this Division applies in respect of every air carrier that operates an international service, except an air carrier that operates TPCs, TPNCs or TGCs.

SOR/96-335, s. 55.

Exception

109 An air carrier that operates an international service that serves the transportation requirements of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees and workers is excluded, in respect of the service of those requirements, from the requirements of subsection 110(1).

Filing of Tariffs

110 (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, before commencing the operation of an international service, an air carrier or its agent shall file with the Agency a tariff for that service, including the terms and conditions of free and reduced rate transportation for that service, in the style, and containing the information, required by this Division.

(2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency.

(3) No air carrier shall advertise, offer or charge any toll where

(a) the toll is in a tariff that has been rejected by the Agency; or

aérien de rembourser des sommes à des personnes ayant versé des sommes en trop pour un service, le remboursement porte intérêt à compter de la date du paiement fait par ces personnes au transporteur jusqu'à la date de délivrance de l'ordonnance par l'Office, au taux demandé par la Banque du Canada aux institutions financières pour les prêts à court terme, majoré d'un et demi pour cent.

DORS/2001-71, art. 3.

SECTION II

Service international

Application

108 Sous réserve de l'alinéa 135.3(1)d), la présente section s'applique aux transporteurs aériens qui exploitent un service international, sauf ceux qui effectuent des VAP, des VAPNOR ou des VAM.

DORS/96-335, art. 55.

Exception

109 Le transporteur aérien est exempté de l'application du paragraphe 110(1) en ce qui concerne l'exploitation d'un service international servant à répondre aux besoins de transport des véritables clients, des véritables employés et des véritables travailleurs d'un hôtel pavillonnaire, y compris le transport des bagages, du matériel et des fournitures de ces personnes.

Dépôt des tarifs

110 (1) Sauf disposition contraire des ententes, conventions ou accords internationaux en matière d'aviation civile, avant d'entreprendre l'exploitation d'un service international, le transporteur aérien ou son agent doit déposer auprès de l'Office son tarif pour ce service, conforme aux exigences de forme et de contenu énoncées dans la présente section, dans lequel sont comprises les conditions du transport à titre gratuit ou à taux réduit.

(2) L'acceptation par l'Office, pour dépôt, d'un tarif ou d'une modification apportée à celui-ci ne constitue pas l'approbation de son contenu, à moins que le tarif n'ait été déposé conformément à un arrêté de l'Office.

(3) Il est interdit au transporteur aérien d'annoncer, d'offrir ou d'exiger une taxe qui, selon le cas :

a) figure dans un tarif qui a été rejeté par l'Office;

b) a été refusée ou suspendue par l'Office.

(b) the toll has been disallowed or suspended by the Agency.

(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

SOR/96-335, s. 56; SOR/98-197, s. 6(E).

111 (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

SOR/93-253, s. 2; SOR/96-335, s. 57.

(4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

(5) Il est interdit au transporteur aérien ou à ses agents d'offrir, d'accorder, de donner, de solliciter, d'accepter ou de recevoir un rabais, une concession ou un privilège permettant, par un moyen quelconque, le transport de personnes ou de marchandises à une taxe ou à des conditions qui diffèrent de celles que prévoit le tarif en vigueur.

DORS/96-335, art. 56; DORS/98-197, art. 6(A).

111 (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

(a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

(b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

(c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

DORS/93-253, art. 2; DORS/96-335, art. 57.

112 (1) All air carriers having joint tolls shall establish just and reasonable divisions thereof between participating air carriers.

(2) The Agency may

- (a)** determine and fix just and equitable divisions of joint tolls between air carriers or the portion of the joint tolls to be received by an air carrier;
- (b)** require an air carrier to inform the Agency of the portion of the tolls in any joint tariff filed that it or any other carrier is to receive or has received; and
- (c)** decide that any proposed through toll is just and reasonable notwithstanding that an amount less than the amount that an air carrier would otherwise be entitled to charge may be allotted to that air carrier out of that through toll.

113 The Agency may

- (a)** suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and
- (b)** establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

SOR/93-253, s. 2; SOR/96-335, s. 58.

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

- (a)** take the corrective measures that the Agency considers appropriate; and
- (b)** pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

SOR/2001-71, s. 4; SOR/2009-28, s. 1.

114 (1) Every tariff or amendment to a tariff shall be filed with the Agency by the air carrier or by an agent appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(2) Every joint tariff or amendment to a joint tariff shall be filed by one of the air carriers that is a party thereto or by an agent of the air carrier appointed by power of attor-

112 (1) Les transporteurs aériens qui appliquent des taxes pluritransporteurs doivent établir une répartition juste et raisonnable de ces taxes entre les transporteurs aériens participants.

(2) L'Office peut procéder de la façon suivante :

- a)** déterminer et fixer la répartition équitable des taxes pluritransporteurs entre les transporteurs aériens, ou la proportion de ces taxes que doit recevoir un transporteur aérien;
- b)** enjoindre à un transporteur aérien de lui faire connaître la proportion des taxes de tout tarif pluritransporteur déposé que lui-même ou tout autre transporteur aérien est censé recevoir ou qu'il a reçue;
- c)** décider qu'une taxe totale proposée est juste et raisonnable, même si un transporteur aérien s'en voit attribuer une portion inférieure à la taxe qu'il serait autrement en droit d'exiger.

113 L'Office peut :

- a)** suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;
- b)** établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa a).

DORS/93-253, art. 2; DORS/96-335, art. 58.

113.1 Si un transporteur aérien n'applique pas les prix, taux, frais ou conditions de transport applicables au service international qu'il offre et figurant à son tarif, l'Office peut lui enjoindre :

- a)** de prendre les mesures correctives qu'il estime indiquées;
- b)** de verser des indemnités à quiconque pour toutes dépenses qu'il a supportées en raison de la non-application de ces prix, taux, frais ou conditions de transport.

DORS/2001-71, art. 4; DORS/2009-28, art. 1.

114 (1) Les tarifs et leurs modifications doivent être déposés auprès de l'Office par le transporteur aérien ou un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(2) Les tarifs pluritransporteurs et leurs modifications doivent être déposés par l'un des transporteurs aériens participants ou par un agent habilité par procuration à

(a) in the case of passenger transportation, at a fare per person; and

(b) in the case of goods transportation, at a rate per pound, or other specified unit.

SOR/96-335, s. 62.

Charter Tolls

118 (1) Subject to subsection (2), every air carrier operating a non-scheduled international service on a charter basis shall publish all its tolls for those services at a rate per mile, where distance can be measured, or at a rate per hour where distance cannot be measured, which tolls shall be applicable to the entire capacity of the aircraft.

(2) An air carrier that operates a non-scheduled international service on a charter basis may, in lieu of tolls described in subsection (1), establish specific point-to-point flat sum charter prices.

SOR/96-335, s. 63.

Currency

119 All tolls shall be expressed in Canadian currency and may also be expressed in terms of currencies other than Canadian.

Manner of Tariff Filing

120 (1) Tariffs in any medium may be filed with the Agency provided that, where a medium other than paper is to be used, the Agency and the filer have signed an agreement for the processing, storage, maintenance, security and custody of the data base.

(2) Tariffs shall be maintained in a uniform and consistent manner and shall be numbered consecutively with the prefix “CTA(A)” and every issuing air carrier or agent of the carrier shall number tariffs in the carrier’s or agent’s own series.

SOR/93-253, s. 2(F); SOR/96-335, s. 64.

121 [Repealed, SOR/96-335, s. 64]

Contents of Tariffs

122 Every tariff shall contain

(a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

a) à un prix par personne, pour le transport des passagers;

b) à un taux par livre ou autre unité désignée, pour le transport des marchandises.

DORS/96-335, art. 62.

Taxes d’affrètement

118 (1) Sous réserve du paragraphe (2), les transporteurs aériens qui exploitent un service international à la demande par affrètements doivent publier les taxes de ces services selon un taux par mille lorsque la distance est mesurable et selon un taux à l’heure dans les autres cas, pour la capacité entière de l’aéronef.

(2) Les transporteurs aériens qui exploitent un service international à la demande par affrètements peuvent établir des prix forfaitaires pour les vols affrétés entre des points déterminés, au lieu des taxes visées au paragraphe (1).

DORS/96-335, art. 63.

Devises

119 Les taxes doivent être indiquées en devises canadiennes et peuvent être données en outre en devises étrangères.

Modalités de dépôt

120 (1) Les tarifs peuvent être déposés auprès de l’Office sur tout support. Toutefois, si le support choisi n’est pas le papier, l’Office et le déposant doivent, avant le dépôt, conclure une entente pour le traitement, le stockage, la mise à jour, la sécurité et la garde de la base de données.

(2) Les tarifs doivent être uniformes et cohérents et être numérotés consécutivement, le numéro étant précédé de « OTC(A) ». Le transporteur aérien émetteur ou son agent doit numéroter les tarifs suivant ses propres séries.

DORS/93-253, art. 2(F); DORS/96-335, art. 64.

121 [Abrogé, DORS/96-335, art. 64]

Contenu des tarifs

122 Les tarifs doivent contenir :

a) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

(b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified; and

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

- (i)** the carriage of persons with disabilities,
- (ii)** acceptance of children for travel,
- (iii)** compensation for denial of boarding as a result of overbooking,
- (iv)** passenger re-routing,
- (v)** failure to operate the service or failure to operate on schedule,
- (vi)** refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
- (vii)** ticket reservation, cancellation, confirmation, validity and loss,
- (viii)** refusal to transport passengers or goods,
- (ix)** method of calculation of charges not specifically set out in the tariff,
- (x)** limits of liability respecting passengers and goods,
- (xi)** exclusions from liability respecting passengers and goods, and
- (xii)** procedures to be followed, and time limitations, respecting claims.

SOR/93-253, s. 2; SOR/96-335, s. 65.

123 [Repealed, SOR/96-335, s. 65]

Supplements

124 (1) A supplement to a tariff on paper shall be in book or pamphlet form and shall be published only for the purpose of amending or cancelling that tariff.

b) les taxes ainsi que les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

- (i)** le transport des personnes ayant une déficience,
- (ii)** l'admission des enfants,
- (iii)** les indemnités pour refus d'embarquement à cause de sur réservation,
- (iv)** le réacheminement des passagers,
- (v)** l'inexécution du service et le non-respect de l'horaire,
- (vi)** le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,
- (vii)** la réservation, l'annulation, la confirmation, la validité et la perte des billets,
- (viii)** le refus de transporter des passagers ou des marchandises,
- (ix)** la méthode de calcul des frais non précisés dans le tarif,
- (x)** les limites de responsabilité à l'égard des passagers et des marchandises,
- (xi)** les exclusions de responsabilité à l'égard des passagers et des marchandises,
- (xii)** la marche à suivre ainsi que les délais fixés pour les réclamations.

DORS/93-253, art. 2; DORS/96-335, art. 65.

123 [Abrogé, DORS/96-335, art. 65]

Suppléments

124 (1) Les suppléments à un tarif sur papier doivent être publiés sous forme de livres ou de brochures et ne doivent servir qu'à modifier ou annuler le tarif.



CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to February 15, 2016

À jour au 15 février 2016

Last amended on July 30, 2015

Dernière modification le 30 juillet 2015

(c) on the performance, to the satisfaction of the Agency or a person named by it, of any terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

Interim orders

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

Time for making decisions

29 (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

Period for specified classes

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

Pending proceedings

30 The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.

Fact finding is conclusive

31 The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

Review of decisions and orders

32 The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

Enforcement of decision or order

33 (1) A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order.

tale ou partielle ou subordonner celle-ci à la survenance d'un événement.

Arrêtés provisoires

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

Délai

29 (1) Sauf indication contraire de la présente loi ou d'un règlement pris en vertu du paragraphe (2) ou accord entre les parties sur une prolongation du délai, l'Office rend sa décision sur toute affaire dont il est saisi avec toute la diligence possible dans les cent vingt jours suivant la réception de l'acte introductif d'instance.

Délai plus court

(2) Le gouverneur en conseil peut, par règlement, imposer à l'Office un délai inférieur à cent vingt jours pour rendre une décision à l'égard des catégories d'affaires qu'il indique.

Affaire en instance

30 L'Office a compétence pour statuer sur une question de fait, peu importe que celle-ci fasse l'objet d'une poursuite ou autre instance en cours devant un tribunal.

Décision définitive

31 La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

Révision, annulation ou modification de décisions

32 L'Office peut réviser, annuler ou modifier ses décisions ou arrêtés, ou entendre de nouveau une demande avant d'en décider, en raison de faits nouveaux ou en cas d'évolution, selon son appréciation, des circonstances de l'affaire visée par ces décisions, arrêtés ou audiences.

Homologation

33 (1) Les décisions ou arrêtés de l'Office peuvent être homologués par la Cour fédérale ou une cour supérieure; le cas échéant, leur exécution s'effectue selon les mêmes modalités que les ordonnances de la cour saisie.

Procedure

(2) To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the registrar of the court a certified copy of the decision or order, signed by the Chairperson and sealed with the Agency's seal, at which time the decision or order becomes an order of the court.

Effect of variation or rescission

(3) Where a decision or order that has been made an order of a court is rescinded or varied by a subsequent decision or order of the Agency, the order of the court is deemed to have been cancelled and the subsequent decision or order may be made an order of the court.

Option to enforce

(4) The Agency may, before or after one of its decisions or orders is made an order of a court, enforce the decision or order by its own action.

1996, c. 10, s. 33; 2002, c. 8, s. 122; 2006, c. 11, s. 17; 2007, c. 19, s. 6.

Fees

34 (1) The Agency may, by rule, fix the fees that are to be paid to the Agency in respect of applications made to it, including applications for licences or permits and applications for amendments to or for the renewal of licences or permits, and any other matters brought before or dealt with by the Agency.

Advance notice to Minister

(2) The Agency shall give the Minister notice of every rule proposed to be made under subsection (1).

Fees for witnesses

35 Every person summoned to attend before the Agency under this Part or before a person making an inquiry under this Part shall receive the fees and allowances for so doing that the Agency may, by regulation, prescribe.

Approval of regulations required

36 (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

Advance notice of regulations

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

Procédure

(2) L'homologation peut se faire soit selon les règles de pratique et de procédure de la cour saisie applicables en l'occurrence, soit au moyen du dépôt, auprès du greffier de la cour par le secrétaire de l'Office, d'une copie certifiée conforme de la décision ou de l'arrêt en cause, signée par le président et revêtue du sceau de l'Office.

Annulation ou modification

(3) Les décisions ou arrêtés de l'Office qui annulent ou modifient des décisions ou arrêtés déjà homologués par une cour sont réputés annuler ces derniers et peuvent être homologués selon les mêmes modalités.

Faculté d'exécution

(4) L'Office peut toujours faire exécuter lui-même ses décisions ou arrêtés, même s'ils ont été homologués par une cour.

1996, ch. 10, art. 33; 2002, ch. 8, art. 122; 2006, ch. 11, art. 17; 2007, ch. 19, art. 6.

Droits

34 (1) L'Office peut, par règle, établir les droits à lui verser relativement aux questions ou demandes dont il est saisi, notamment les demandes de licences ou de permis et les demandes de modification ou de renouvellement de ceux-ci.

Préavis

(2) L'Office fait parvenir au ministre un avis relativement à toute règle qu'il entend prendre en vertu du paragraphe (1).

Indemnité des témoins

35 Il est alloué à toute personne qui se rend à la convocation de l'Office ou d'un enquêteur, dans le cadre de la présente partie, les indemnités que l'Office peut fixer par règlement.

Agrément du gouverneur en conseil

36 (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.

Préavis au ministre

(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary; and

(b) exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Review and Appeal

Governor in Council may vary or rescind orders, etc.

40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

Appeal from Agency

41 (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

tériel roulant ou navire — , quel qu'en soit le propriétaire ou le responsable, si elle l'estime nécessaire à l'enquête;

b) exercer les attributions d'une cour supérieure pour faire comparaître des témoins et pour les contraindre à témoigner et à produire les pièces — objets, livres, plans, cahiers des charges, dessins ou autres documents — qu'elle estime nécessaires à l'enquête.

Révision et appel

Modification ou annulation

40 Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

Appel

41 (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Air Travel Complaints

Review and mediation

85.1 (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.

Report

(2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.

Complaint not resolved

(3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

2000, c. 15, s. 7.1; 2007, c. 19, s. 25.

Regulations

Regulations

86 (1) The Agency may make regulations

- (a)** classifying air services;
- (b)** classifying aircraft;

Plaintes relatives au transport aérien

Examen et médiation

85.1 (1) L'Office ou son délégué examine toute plainte déposée en vertu de la présente partie et peut tenter de régler l'affaire; il peut, dans les cas indiqués, jouer le rôle de médiateur entre les parties ou pourvoir à la médiation entre celles-ci.

Communication aux parties

(2) L'Office ou son délégué fait rapport aux parties des grandes lignes de la position de chacune d'entre elles et de tout éventuel règlement.

Affaire non réglée

(3) Si l'affaire n'est pas réglée à la satisfaction du plaignant dans le cadre du présent article, celui-ci peut demander à l'Office d'examiner la plainte conformément aux dispositions de la présente partie en vertu desquelles elle a été déposée.

Inhabilité

(4) Le membre de l'Office ou le délégué qui a tenté de régler l'affaire ou joué le rôle de médiateur en vertu du présent article ne peut agir dans le cadre de procédures ultérieures, le cas échéant, devant l'Office à l'égard de la plainte en question.

Prolongation

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

Inclusion dans le rapport annuel

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

2000, ch. 15, art. 7.1; 2007, ch. 19, art. 25.

Règlements

Pouvoirs de l'Office

86 (1) L'Office peut, par règlement :

- a)** classifier les services aériens;
- b)** classifier les aéronefs;

- (c)** prescribing liability insurance coverage requirements for air services or aircraft;
- (d)** prescribing financial requirements for each class of air service or aircraft;
- (e)** respecting the issuance, amendment and cancellation of permits for the operation of international charters;
- (f)** respecting the duration and renewal of licences;
- (g)** respecting the amendment of licences;
- (h)** respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and
- (i)** providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,
 - (ii)** providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,
 - (iii)** authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and
 - (iv)** requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;
- (i)** requiring licensees to file with the Agency any documents and information relating to activities under their licences that are necessary for the purposes of enabling the Agency to exercise its powers and perform its duties and functions under this Part and respecting the manner in which and the times at which the documents and information are to be filed;
- (j)** requiring licensees to include in contracts or arrangements with travel wholesalers, tour operators, charterers or other persons associated with the provision of air services to the public, or to make those contracts and arrangements subject to, terms and conditions specified or referred to in the regulations;
- (k)** defining words and expressions for the purposes of this Part;
- (c)** prévoir les exigences relatives à la couverture d'assurance responsabilité pour les services aériens et les aéronefs;
- (d)** prévoir les exigences financières pour chaque catégorie de service aérien ou d'aéronefs;
- (e)** régir la délivrance, la modification et l'annulation des permis d'affrètements internationaux;
- (f)** fixer la durée de validité et les modalités de renouvellement des licences;
- (g)** régir la modification des licences;
- (h)** prendre toute mesure concernant le trafic et les tarifs, prix, taux, frais et conditions de transport liés au service international, notamment prévoir qu'il peut :
- (i)** annuler ou suspendre des tarifs, prix, taux ou frais,
 - (ii)** établir de nouveaux tarifs, prix, taux ou frais en remplacement de ceux annulés,
 - (iii)** enjoindre à tout licencié ou transporteur de prendre les mesures correctives qu'il estime indiquées et de verser des indemnités aux personnes lésées par la non-application par le licencié ou transporteur des prix, taux, frais ou conditions de transport applicables au service et qui figuraient au tarif,
 - (iv)** obliger tout licencié ou transporteur à publier les conditions de transport du service international sur tout site Internet qu'il utilise pour vendre ce service;
- (i)** demander aux licenciés de déposer auprès de lui les documents ainsi que les renseignements relatifs aux activités liées à leurs licences et nécessaires à l'exercice de ses attributions dans le cadre de la présente partie, et fixer les modalités de temps ou autres du dépôt;
- (j)** demander aux licenciés d'inclure dans les contrats ou ententes conclus avec les grossistes en voyages, voyagistes, affréteurs ou autres personnes associées à la prestation de services aériens au public les conditions prévues dans les règlements ou d'assujettir ces contrats ou ententes à ces conditions;
- (k)** définir les termes non définis de la présente partie;
- (l)** exempter toute personne des obligations imposées par la présente partie;

(l) excluding a person from any of the requirements of this Part;

(m) prescribing any matter or thing that by this Part is to be prescribed; and

(n) generally for carrying out the purposes and provisions of this Part.

Exclusion not to provide certain relief

(2) No regulation shall be made under paragraph (1)(l) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

(3) [Repealed, 2007, c. 19, s. 26]

1996, c. 10, s. 86; 2000, c. 15, s. 8; 2007, c. 19, s. 26.

Advertising regulations

86.1 (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.

Contents of regulations

(2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a carrier who advertises a price for an air service to include in the price all costs to the carrier of providing the service and to indicate in the advertisement all fees, charges and taxes collected by the carrier on behalf of another person in respect of the service, so as to enable a purchaser of the service to readily determine the total amount to be paid for the service.

Regulations may prescribe

(3) Without limiting the generality of subsection (1), the regulations may prescribe what are costs, fees, charges and taxes for the purposes of subsection (2).

2007, c. 19, s. 27.

Regulations and orders

86.2 A regulation or order made under this Part may be conditional or unconditional or qualified or unqualified and may be general or restricted to a specific area, person or thing or group or class of persons or things.

2007, c. 19, s. 27.

(m) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

(n) prendre toute autre mesure d'application de la présente partie.

Exception

(2) Les obligations imposées par la présente partie relativement à la qualité de Canadien, au document d'aviation canadien et à la police d'assurance responsabilité réglementaire en matière de service aérien ne peuvent faire l'objet de l'exemption prévue à l'alinéa (1)l).

(3) [Abrogé, 2007, ch. 19, art. 26]

1996, ch. 10, art. 86; 2000, ch. 15, art. 8; 2007, ch. 19, art. 26.

Règlement concernant la publicité des prix

86.1 (1) L'Office régit, par règlement, la publicité dans les médias, y compris dans Internet, relative aux prix des services aériens au Canada ou dont le point de départ est au Canada.

Contenu des règlements

(2) Les règlements exigent notamment que le prix des services aériens mentionné dans toute publicité faite par le transporteur inclue les coûts supportés par celui-ci pour la fourniture des services et que la publicité indique les frais, droits et taxes perçus par lui pour le compte d'autres personnes, de façon à permettre à l'acheteur de déterminer aisément la somme à payer pour ces services.

Précisions

(3) Les règlements peuvent également préciser, pour l'application du paragraphe (2), les types de coûts, frais, droits et taxes visés à ce paragraphe.

2007, ch. 19, art. 27.

Textes d'application

86.2 Les textes d'application de la présente partie peuvent être conditionnels ou absolus, assortis ou non de réserves, et de portée générale ou limitée quant aux zones, personnes, objets ou catégories de personnes ou d'objets visés.

2007, ch. 19, art. 27.



CANADA

CONSOLIDATION

CODIFICATION

**Canadian Transportation
Agency Rules (Dispute
Proceedings and Certain Rules
Applicable to All Proceedings)**

**Règles de l'Office des transports
du Canada (Instances de
règlement des différends et
certaines règles applicables à
toutes les instances)**

SOR/2014-104

DORS/2014-104

Current to March 28, 2016

À jour au 28 mars 2016

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Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

Interpretation

Definitions

1 The following definitions apply in these Rules.

Act means the *Canada Transportation Act*. (*Loi*)

affidavit means a written statement confirmed by oath or a solemn declaration. (*affidavit*)

applicant means a person that files an application with the Agency. (*demandeur*)

application means a document that is filed to commence a proceeding before the Agency under any legislation or regulations that are administered in whole or in part by the Agency. (*demande*)

business day means a day that the Agency is ordinarily open for business. (*jour ouvrable*)

dispute proceeding means any contested matter that is commenced by application to the Agency. (*instance de règlement des différends*)

document includes any information that is recorded in any form. (*document*)

intervener means a person whose request to intervene filed under section 29 has been granted. (*intervenant*)

party means an applicant, a respondent or a person that is named by the Agency as a party. (*partie*)

person includes a partnership and an unincorporated association. (*personne*)

proceeding means any matter that is commenced by application to the Agency, whether contested or not. (*instance*)

respondent means a person that is named as a respondent in an application and any person that is named by the Agency as a respondent. (*défendeur*)

Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

Définitions

Définitions

1 Les définitions qui suivent s'appliquent aux présentes règles.

affidavit Déclaration écrite certifiée par serment ou affirmation solennelle. (*affidavit*)

défendeur Personne nommée à ce titre dans une demande, ou toute autre personne désignée comme tel par l'Office. (*respondent*)

demande Document introductif d'une instance déposé devant l'Office en vertu d'une loi ou d'un règlement qu'il est chargé d'appliquer en tout ou en partie. (*application*)

demandeur Personne qui dépose une demande auprès de l'Office. (*applicant*)

document S'entend notamment de tout renseignement qui est enregistré, quel qu'en soit le support. (*document*)

instance Affaire, contestée ou non, qui est introduite devant l'Office au moyen d'une demande. (*proceeding*)

instance de règlement des différends Affaire contestée qui est introduite devant l'Office au moyen d'une demande. (*dispute proceeding*)

intervenant Personne dont la requête d'intervention déposée en vertu de l'article 29 a été accordée. (*intervener*)

jour ouvrable Jour où l'Office est normalement ouvert au public. (*business day*)

Loi La *Loi sur les transports au Canada*. (*Act*)

partie Le demandeur, le défendeur ou toute personne désignée comme telle par l'Office. (*party*)

personne S'entend notamment d'une société de personnes et d'une association sans personnalité morale. (*person*)

Application

Dispute proceedings

2 Subject to sections 3 and 4, these Rules apply to dispute proceedings other than a matter that is the subject of mediation.

All Proceedings

Quorum

3 In all proceedings, one member constitutes a quorum.

Principle of proportionality

4 The Agency is to conduct all proceedings in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed.

Dispute Proceedings

General

Interpretation and Dispensing with Compliance

Interpretation of Rules

5 (1) These Rules are to be interpreted in a manner that facilitates the most expeditious determination of every dispute proceeding, the optimal use of Agency and party resources and the promotion of justice.

Agency's initiative

(2) Anything that may be done on request under these Rules may also be done by the Agency of its own initiative.

Dispensing with compliance and varying rule

6 The Agency may, at the request of a person, dispense with compliance with or vary any rule at any time or grant other relief on any terms that will allow for the just determination of the issues.

Application

Instances de règlement des différends

2 Sous réserve des articles 3 et 4, les présentes règles s'appliquent aux instances de règlement des différends, à l'exception de toute question qui fait l'objet d'une médiation.

Toutes les instances

Quorum

3 Dans toute instance, le quorum est constitué de un membre.

Principe de proportionnalité

4 L'Office mène ses instances de manière qui soit proportionnée à l'importance et la complexité des questions en jeu et à la réparation demandée.

Instances de règlement des différends

Règles d'ordre général

Interprétation et dispense d'observation des règles

Interprétation des Règles

5 (1) Les présentes règles sont interprétées de façon à faciliter le règlement le plus expéditif qui soit de l'instance de règlement des différends, l'utilisation optimale des ressources de l'Office et des parties et à promouvoir la justice.

Initiative de l'Office

(2) Toute chose qui peut être faite sur requête au titre des présentes règles peut être faite par l'Office de sa propre initiative.

Dispense d'observation et modification de règles

6 L'Office peut, à la requête d'une personne, soustraire une instance de règlement des différends à l'application d'une règle, modifier celle-ci ou autoriser quelque autre réparation, avec ou sans conditions, en vue du règlement équitable des questions.

Filing of Documents and Sending of Copy to Parties

Filing

7 (1) Any document filed under these Rules must be filed with the Secretary of the Agency.

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Copy to parties

8 A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party's representative, except if the document is

- (a)** a confidential version of a document in respect of which a request for confidentiality is filed under section 31;
- (b)** an application; or
- (c)** a position statement.

Means of transmission

9 Documents may be filed with the Agency and copies may be sent to the other parties by courier, personal delivery, email, facsimile or other electronic means specified by the Agency.

Facsimile — cover page

10 A person that files or sends a document by facsimile must include a cover page indicating the total number of pages transmitted, including the cover page, and the name and telephone number of a contact person if problems occur in the transmission of the document.

Electronic transmission

11 (1) A document that is sent by email, facsimile or other electronic means is considered to be filed with the Agency and received by the other parties on the date of its transmission if it is sent at or before 5:00 p.m. Gatineau local time on a business day. A document that is sent after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

Dépôt de documents et envoi de copies aux autres parties

Dépôt

7 (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Copie aux autres parties

8 La personne qui dépose un document envoie le même jour une copie du document à chaque partie ou à son représentant, le cas échéant, sauf s'il s'agit :

- a)** d'une version confidentielle d'un document à l'égard duquel une requête de confidentialité a été déposée en vertu de l'article 31;
- b)** d'une demande;
- c)** d'un énoncé de position.

Modes de transmission

9 Le dépôt de documents et l'envoi de copies aux autres parties peut se faire par remise en mains propres, par service de messagerie, par courriel, par télécopieur ou par tout autre moyen électronique que précise l'Office.

Télécopieur — page couverture

10 La personne qui dépose ou transmet un document par télécopieur indique sur une page couverture le nombre total de pages transmises, y compris la page couverture, ainsi que le nom et le numéro de téléphone d'une personne à joindre en cas de difficultés de transmission.

Transmission électronique

11 (1) Le document transmis par courriel, télécopieur ou tout autre moyen électronique est considéré comme déposé auprès de l'Office et reçu par les autres parties à la date de la transmission s'il a été envoyé un jour ouvrable au plus tard à 17 heures, heure de Gatineau; sinon, il est considéré comme déposé et reçu le jour ouvrable suivant.

I

(Acts whose publication is obligatory)

REGULATION (EC) No 261/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 11 February 2004
establishing common rules on compensation and assistance to passengers in the event of denied
boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91
 (Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽²⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾, in the light of the joint text approved by the Conciliation Committee on 1 December 2003,

Whereas:

- (1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.
- (2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.
- (3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport ⁽⁴⁾ created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.

- (4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

- (5) Since the distinction between scheduled and non-scheduled air services is weakening, such protection should apply to passengers not only on scheduled but also on non-scheduled flights, including those forming part of package tours.

- (6) The protection accorded to passengers departing from an airport located in a Member State should be extended to those leaving an airport located in a third country for one situated in a Member State, when a Community carrier operates the flight.

- (7) In order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis.

- (8) This Regulation should not restrict the rights of the operating air carrier to seek compensation from any person, including third parties, in accordance with the law applicable.

- (9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

⁽¹⁾ OJ C 103 E, 30.4.2002, p. 225 and OJ C 71 E, 25.3.2003, p. 188.

⁽²⁾ OJ C 241, 7.10.2002, p. 29.

⁽³⁾ Opinion of the European Parliament of 24 October 2002 (OJ C 300 E, 11.12.2003, p. 443), Council Common Position of 18 March 2003 (OJ C 125 E, 27.5.2003, p. 63) and Position of the European Parliament of 3 July 2003. Legislative Resolution of the European Parliament of 18 December 2003 and Council Decision of 26 January 2004.

⁽⁴⁾ OJ L 36, 8.2.1991, p. 5.

- (10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.
- (11) Volunteers should also be able to cancel their flights, with reimbursement of their tickets, or continue them under satisfactory conditions, since they face difficulties of travel similar to those experienced by passengers denied boarding against their will.
- (12) The trouble and inconvenience to passengers caused by cancellation of flights should also be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
- (13) Passengers whose flights are cancelled should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight.
- (14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.
- (15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.
- (16) In cases where a package tour is cancelled for reasons other than the flight being cancelled, this Regulation should not apply.
- (17) Passengers whose flights are delayed for a specified time should be adequately cared for and should be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions.
- (18) Care for passengers awaiting an alternative or a delayed flight may be limited or declined if the provision of the care would itself cause further delay.
- (19) Operating air carriers should meet the special needs of persons with reduced mobility and any persons accompanying them.
- (20) Passengers should be fully informed of their rights in the event of denied boarding and of cancellation or long delay of flights, so that they can effectively exercise their rights.
- (21) Member States should lay down rules on sanctions applicable to infringements of the provisions of this Regulation and ensure that these sanctions are applied. The sanctions should be effective, proportionate and dissuasive.
- (22) Member States should ensure and supervise general compliance by their air carriers with this Regulation and designate an appropriate body to carry out such enforcement tasks. The supervision should not affect the rights of passengers and air carriers to seek legal redress from courts under procedures of national law.
- (23) The Commission should analyse the application of this Regulation and should assess in particular the opportunity of extending its scope to all passengers having a contract with a tour operator or with a Community carrier, when departing from a third country airport to an airport in a Member State.
- (24) Arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the Ministers of Foreign Affairs of the two countries. Such arrangements have yet to enter into operation.
- (25) Regulation (EEC) No 295/91 should accordingly be repealed,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject

1. This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

- (a) they are denied boarding against their will;
- (b) their flight is cancelled;
- (c) their flight is delayed.

2. Application of this Regulation to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

3. Application of this Regulation to Gibraltar airport shall be suspended until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 enter into operation. The Governments of Spain and the United Kingdom will inform the Council of such date of entry into operation.

Article 2

Definitions

For the purposes of this Regulation:

- (a) 'air carrier' means an air transport undertaking with a valid operating licence;
- (b) 'operating air carrier' means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;
- (c) 'Community carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ⁽¹⁾;
- (d) 'tour operator' means, with the exception of an air carrier, an organiser within the meaning of Article 2, point 2, of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ⁽²⁾;
- (e) 'package' means those services defined in Article 2, point 1, of Directive 90/314/EEC;
- (f) 'ticket' means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorised by the air carrier or its authorised agent;
- (g) 'reservation' means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;
- (h) 'final destination' means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;
- (i) 'person with reduced mobility' means any person whose mobility is reduced when using transport because of any physical disability (sensory or locomotory, permanent or temporary), intellectual impairment, age or any other cause

⁽¹⁾ OJ L 240, 24.8.1992, p. 1.

⁽²⁾ OJ L 158, 23.6.1990, p. 59.

of disability, and whose situation needs special attention and adaptation to the person's needs of the services made available to all passengers;

- (j) 'denied boarding' means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;
- (k) 'volunteer' means a person who has presented himself for boarding under the conditions laid down in Article 3(2) and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits.
- (l) 'cancellation' means the non-operation of a flight which was previously planned and on which at least one place was reserved.

Article 3

Scope

1. This Regulation shall apply:
 - (a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;
 - (b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.
2. Paragraph 1 shall apply on the condition that passengers:
 - (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,
 - as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,
 - or, if no time is indicated,
 - not later than 45 minutes before the published departure time; or
 - (b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.
3. This Regulation shall not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. However, it shall apply to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air carrier or tour operator.

4. This Regulation shall only apply to passengers transported by motorised fixed wing aircraft.

5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.

6. This Regulation shall not affect the rights of passengers under Directive 90/314/EEC. This Regulation shall not apply in cases where a package tour is cancelled for reasons other than cancellation of the flight.

Article 4

Denied boarding

1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.

Article 5

Cancellation

1. In case of cancellation of a flight, the passengers concerned shall:

- (a) be offered assistance by the operating air carrier in accordance with Article 8; and
- (b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and
- (c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
 - (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

- (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

- (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.

Article 6

Delay

1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

- (a) for two hours or more in the case of flights of 1 500 kilometres or less; or
- (b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or
- (c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

- (i) the assistance specified in Article 9(1)(a) and 9(2); and
- (ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and
- (iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.

*Article 7***Right to compensation**

1. Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1 500 kilometres or less;
- (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;
- (c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked

- (a) by two hours, in respect of all flights of 1 500 kilometres or less; or
- (b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or
- (c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.

*Article 8***Right to reimbursement or re-routing**

1. Where reference is made to this Article, passengers shall be offered the choice between:

- (a) — reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
 - a return flight to the first point of departure, at the earliest opportunity;
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

- (c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.

3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.

*Article 9***Right to care**

1. Where reference is made to this Article, passengers shall be offered free of charge:

- (a) meals and refreshments in a reasonable relation to the waiting time;
- (b) hotel accommodation in cases
 - where a stay of one or more nights becomes necessary, or
 - where a stay additional to that intended by the passenger becomes necessary;
- (c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.

*Article 10***Upgrading and downgrading**

1. If an operating air carrier places a passenger in a class higher than that for which the ticket was purchased, it may not request any supplementary payment.

2. If an operating air carrier places a passenger in a class lower than that for which the ticket was purchased, it shall within seven days, by the means provided for in Article 7(3), reimburse

- (a) 30 % of the price of the ticket for all flights of 1 500 kilometres or less, or

- (b) 50 % of the price of the ticket for all intra-Community flights of more than 1 500 kilometres, except flights between the European territory of the Member States and the French overseas departments, and for all other flights between 1 500 and 3 500 kilometres, or
- (c) 75 % of the price of the ticket for all flights not falling under (a) or (b), including flights between the European territory of the Member States and the French overseas departments.

Article 11

Persons with reduced mobility or special needs

1. Operating air carriers shall give priority to carrying persons with reduced mobility and any persons or certified service dogs accompanying them, as well as unaccompanied children.
2. In cases of denied boarding, cancellation and delays of any length, persons with reduced mobility and any persons accompanying them, as well as unaccompanied children, shall have the right to care in accordance with Article 9 as soon as possible.

Article 12

Further compensation

1. This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.
2. Without prejudice to relevant principles and rules of national law, including case-law, paragraph 1 shall not apply to passengers who have voluntarily surrendered a reservation under Article 4(1).

Article 13

Right of redress

In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.

Article 14

Obligation to inform passengers of their rights

1. The operating air carrier shall ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: 'If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance'.
2. An operating air carrier denying boarding or cancelling a flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation. It shall also provide each passenger affected by a delay of at least two hours with an equivalent notice. The contact details of the national designated body referred to in Article 16 shall also be given to the passenger in written form.
3. In respect of blind and visually impaired persons, the provisions of this Article shall be applied using appropriate alternative means.

Article 15

Exclusion of waiver

1. Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.
2. If, nevertheless, such a derogation or restrictive clause is applied in respect of a passenger, or if the passenger is not correctly informed of his rights and for that reason has accepted compensation which is inferior to that provided for in this Regulation, the passenger shall still be entitled to take the necessary proceedings before the competent courts or bodies in order to obtain additional compensation.

Article 16

Infringements

1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

2. Without prejudice to Article 12, each passenger may complain to any body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.

Article 17

Report

The Commission shall report to the European Parliament and the Council by 1 January 2007 on the operation and the results of this Regulation, in particular regarding:

- the incidence of denied boarding and of cancellation of flights,
- the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a 'package

tour' to which Directive 90/314/EEC applies and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community air carriers,

- the possible revision of the amounts of compensation referred to in Article 7(1).

The report shall be accompanied where necessary by legislative proposals.

Article 18

Repeal

Regulation (EEC) No 295/91 shall be repealed.

Article 19

Entry into force

This Regulation shall enter into force on 17 February 2005.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 11 February 2004.

For the European Parliament

The President

P. COX

For the Council

The President

M. McDOWELL

I

(Actes dont la publication est une condition de leur applicabilité)

RÈGLEMENT (CE) N° 261/2004 DU PARLEMENT EUROPÉEN ET DU CONSEIL

du 11 février 2004

établissant des règles communes en matière d'indemnisation et d'assistance des passagers en cas de refus d'embarquement et d'annulation ou de retard important d'un vol, et abrogeant le règlement (CEE) n° 295/91

(Texte présentant de l'intérêt pour l'EEE)

LE PARLEMENT EUROPÉEN ET LE CONSEIL DE L'UNION EUROPÉENNE,

vu le traité instituant la Communauté européenne, et notamment son article 80, paragraphe 2,

vu la proposition de la Commission ⁽¹⁾,

vu l'avis du Comité économique et social européen ⁽²⁾,

après consultation du Comité des régions,

statuant conformément à la procédure visée à l'article 251 du traité ⁽³⁾, au vu du projet commun approuvé le 1^{er} décembre 2003 par le comité de conciliation,

considérant ce qui suit:

- (1) L'action de la Communauté dans le domaine des transports aériens devrait notamment viser à garantir un niveau élevé de protection des passagers. Il convient en outre de tenir pleinement compte des exigences de protection des consommateurs en général.
- (2) Le refus d'embarquement et l'annulation ou le retard important d'un vol entraînent des difficultés et des désagréments sérieux pour les passagers.
- (3) Bien que le règlement (CEE) n° 295/91 du Conseil du 4 février 1991 établissant des règles communes relatives à un système de compensation pour refus d'embarquement dans les transports aériens réguliers ⁽⁴⁾ ait mis en place une protection de base pour les passagers, le nombre de passagers refusés à l'embarquement contre

leur volonté reste trop élevé, ainsi que le nombre de passagers concernés par des annulations sans avertissement préalable et des retards importants.

- (4) La Communauté devrait, par conséquent, relever les normes de protection fixées par ledit règlement, à la fois pour renforcer les droits des passagers et pour faire en sorte que les transporteurs aériens puissent exercer leurs activités dans des conditions équivalentes sur un marché libéralisé.
- (5) Dans la mesure où la distinction entre services aériens réguliers et non réguliers tend à s'estomper, cette protection devrait s'appliquer non seulement aux passagers des vols réguliers, mais aussi à ceux des vols non réguliers, y compris les vols faisant partie de circuits à forfait.
- (6) La protection accordée aux passagers partant d'un aéroport situé dans un État membre devrait être étendue à ceux qui quittent un aéroport situé dans un pays tiers à destination d'un aéroport situé dans un État membre, lorsque le vol est assuré par un transporteur communautaire.
- (7) Afin de garantir l'application effective du présent règlement, les obligations qui en découlent devraient incomber au transporteur aérien effectif qui réalise ou a l'intention de réaliser un vol, indépendamment du fait qu'il soit propriétaire de l'avion, que l'avion fasse l'objet d'un contrat de location coque nue (dry lease) ou avec équipage (wet lease), ou s'inscrive dans le cadre de tout autre régime.
- (8) Le présent règlement ne devrait pas limiter le droit du transporteur aérien effectif de demander réparation à toute personne, y compris un tiers, conformément à la législation applicable.
- (9) Il convient de réduire le nombre de passagers refusés à l'embarquement contre leur volonté en exigeant des transporteurs aériens qu'ils fassent appel à des volontaires acceptant de renoncer à leur réservation en contrepartie de certains avantages, au lieu de refuser des passagers à l'embarquement, et en assurant l'indemnisation complète des passagers finalement refusés à l'embarquement.

⁽¹⁾ JO C 103 E du 30.4.2002, p. 225 et JO C 71 E du 25.3.2003, p. 188.

⁽²⁾ JO C 241 du 7.10.2002, p. 29.

⁽³⁾ Avis du Parlement européen du 24 octobre 2002 (JO C 300 E du 11.12.2003, p. 443), position commune du Conseil du 18 mars 2003 (JO C 125 E du 27.5.2003, p. 63) et position du Parlement européen du 3 juillet 2003 (non encore parue au Journal officiel). Résolution législative du Parlement européen du 18 décembre 2003 et décision du Conseil du 26 janvier 2004.

⁽⁴⁾ JO L 36 du 8.2.1991, p. 5.

- (10) Les passagers refusés à l'embarquement contre leur volonté devraient avoir la possibilité d'annuler leur vol et de se faire rembourser leur billet ou de le poursuivre dans des conditions satisfaisantes, et devraient bénéficier d'une prise en charge adéquate durant l'attente d'un vol ultérieur.
- (11) Les volontaires devraient également avoir la possibilité d'annuler leur vol, ou de le poursuivre dans des conditions satisfaisantes, puisqu'ils se trouvent confrontés aux mêmes difficultés de déplacement que les passagers refusés à l'embarquement contre leur volonté.
- (12) Il convient également d'atténuer les difficultés et les désagréments pour les passagers, occasionnés par les annulations de vols. Il y a lieu à cet effet d'inciter les transporteurs à informer les passagers des annulations avant l'heure de départ prévue et en outre, leur proposer un réacheminement raisonnable, de sorte que les passagers puissent prendre d'autres dispositions. S'ils n'y parviennent pas, les transporteurs aériens devraient indemniser les passagers, sauf lorsque l'annulation est due à des circonstances extraordinaires qui n'auraient pas pu être évitées même si toutes les mesures raisonnables avaient été prises.
- (13) Les passagers dont le vol est annulé devraient avoir la possibilité de se faire rembourser leur billet ou d'obtenir un réacheminement dans des conditions satisfaisantes, et devraient bénéficier d'une prise en charge adéquate durant l'attente d'un vol ultérieur.
- (14) Tout comme dans le cadre de la convention de Montréal, les obligations des transporteurs aériens effectifs devraient être limitées ou leur responsabilité exonérée dans les cas où un événement est dû à des circonstances extraordinaires qui n'auraient pas pu être évitées même si toutes les mesures raisonnables avaient été prises. De telles circonstances peuvent se produire, en particulier, en cas d'instabilité politique, de conditions météorologiques incompatibles avec la réalisation du vol concerné, de risques liés à la sécurité, de défaillances imprévues pouvant affecter la sécurité du vol, ainsi que de grèves ayant une incidence sur les opérations d'un transporteur aérien effectif.
- (15) Il devrait être considéré qu'il y a circonstance extraordinaire, lorsqu'une décision relative à la gestion du trafic aérien concernant un avion précis pour une journée précise génère un retard important, un retard jusqu'au lendemain ou l'annulation d'un ou de plusieurs vols de cet avion, bien que toutes les mesures raisonnables aient été prises par le transporteur aérien afin d'éviter ces retards ou annulations.
- (16) En cas d'annulation d'un voyage à forfait pour des raisons autres que l'annulation d'un vol, le présent règlement ne devrait pas s'appliquer.
- (17) Les passagers dont le vol est retardé d'un laps de temps défini devraient bénéficier d'une prise en charge adéquate et avoir la possibilité d'annuler leur vol et de se faire rembourser le prix de leur billet ou de le poursuivre dans des conditions satisfaisantes.
- (18) La prise en charge des passagers qui attendent un vol de remplacement ou un vol retardé peut être limitée ou refusée si cette prise en charge est susceptible de prolonger le retard.
- (19) Les transporteurs aériens effectifs devraient veiller aux besoins particuliers des passagers à mobilité réduite et toutes personnes qui les accompagnent.
- (20) Les passagers devraient être pleinement informés de leurs droits en cas de refus d'embarquement et d'annulation ou de retard important d'un vol, afin d'être en mesure d'exercer efficacement ces droits.
- (21) Les États membres devraient définir le régime des sanctions applicables en cas de violation du présent règlement et veiller à ce qu'elles soient appliquées. Ces sanctions doivent être efficaces, proportionnées et dissuasives.
- (22) Les États membres devraient veiller à l'application générale par leurs transporteurs aériens du présent règlement, contrôler son application et désigner un organisme approprié chargé de le faire appliquer. Le contrôle ne devrait pas porter atteinte aux droits des passagers et des transporteurs de demander réparation auprès des tribunaux conformément aux procédures prévues par le droit national.
- (23) La Commission devrait analyser l'application du présent règlement et évaluer en particulier l'opportunité d'étendre son champ d'application à tous les passagers liés par contrat à un organisateur de voyages ou un transporteur communautaire, qui partent d'un aéroport situé dans un pays tiers à destination d'un aéroport situé sur le territoire d'un État membre.
- (24) Des arrangements prévoyant une coopération accrue concernant l'utilisation de l'aéroport de Gibraltar ont été conclus le 2 décembre 1987 à Londres par le Royaume d'Espagne et le Royaume-Uni dans une déclaration commune des ministres des affaires étrangères des deux pays. Ces arrangements ne sont toutefois pas encore entrés en vigueur.
- (25) Le règlement (CEE) n° 295/91 devrait être abrogé en conséquence,

ONT ARRÊTÉ LE PRÉSENT RÈGLEMENT:

Article premier

Objet

1. Le présent règlement reconnaît, dans les conditions qui y sont spécifiées, des droits minimum aux passagers dans les situations suivantes:

- a) en cas de refus d'embarquement contre leur volonté;
- b) en cas d'annulation de leur vol;
- c) en cas de vol retardé.

2. L'application du présent règlement à l'aéroport de Gibraltar s'entend sans préjudice des positions juridiques respectives du Royaume d'Espagne et du Royaume-Uni concernant le conflit relatif à la souveraineté sur le territoire sur lequel l'aéroport est situé.

3. L'application du présent règlement à l'aéroport de Gibraltar est différée jusqu'à la mise en application des arrangements convenus dans la déclaration commune, du 2 décembre 1987, faite par les ministres des affaires étrangères du Royaume d'Espagne et du Royaume-Uni. Les gouvernements du Royaume d'Espagne et du Royaume-Uni informeront le Conseil de la date de cette mise en application.

Article 2

Définitions

Aux fins du présent règlement, on entend par:

- a) «transporteur aérien», une entreprise de transport aérien possédant une licence d'exploitation en cours de validité;
- b) «transporteur aérien effectif», un transporteur aérien qui réalise ou a l'intention de réaliser un vol dans le cadre d'un contrat conclu avec un passager, ou au nom d'une autre personne, morale ou physique, qui a conclu un contrat avec ce passager;
- c) «transporteur communautaire», un transporteur aérien possédant une licence d'exploitation en cours de validité, délivrée par un État membre conformément aux dispositions du règlement (CEE) n° 2407/92 du Conseil du 23 juillet 1992 concernant les licences des transporteurs aériens ⁽¹⁾;
- d) «organisateur de voyages», à l'exclusion d'un transporteur aérien, un organisateur au sens de l'article 2, point 2, de la directive 90/314/CEE du Conseil du 13 juin 1990 concernant les voyages, vacances et circuits à forfait ⁽²⁾;
- e) «forfait», les services définis à l'article 2, point 1, de la directive 90/314/CEE;
- f) «billet», un document en cours de validité établissant le droit au transport, ou quelque chose d'équivalent sous forme immatérielle, y compris électronique, délivré ou autorisé par le transporteur aérien ou son agent agréé;
- g) «réservation», le fait pour un passager d'être en possession d'un billet, ou d'une autre preuve, indiquant que la réservation a été acceptée et enregistrée par le transporteur aérien ou l'organisateur de voyages;
- h) «destination finale», la destination figurant sur le billet présenté au comptoir d'enregistrement, ou, dans le cas des vols avec correspondances, la destination du dernier vol; les vols avec correspondances disponibles comme solution de remplacement ne sont pas pris en compte si l'heure d'arrivée initialement prévue est respectée;
- i) «personne à mobilité réduite», toute personne dont la mobilité est réduite lorsqu'elle utilise un moyen de transport en raison d'un handicap physique (sensoriel ou locomoteur, permanent ou temporaire), d'une déficience intellectuelle, de

son âge ou de tout autre cause de handicap et dont la situation exige une attention spéciale et l'adaptation à ses besoins des services mis à la disposition de tous les passagers;

- j) «refus d'embarquement», le refus de transporter des passagers sur un vol, bien qu'ils se soient présentés à l'embarquement dans les conditions fixées à l'article 3, paragraphe 2, sauf s'il est raisonnablement justifié de refuser l'embarquement, notamment pour des raisons de santé, de sûreté ou de sécurité, ou de documents de voyages inadéquats;
- k) «volontaire», une personne qui s'est présentée à l'embarquement dans les conditions fixées à l'article 3, paragraphe 2, et qui est prête à céder, à la demande du transporteur aérien, sa réservation confirmée, en échange de prestations;
- l) «annulation», le fait qu'un vol qui était prévu initialement et sur lequel au moins une place était réservée n'a pas été effectué.

Article 3

Champ d'application

1. Le présent règlement s'applique:
 - a) aux passagers au départ d'un aéroport situé sur le territoire d'un État membre soumis aux dispositions du traité;
 - b) aux passagers au départ d'un aéroport situé dans un pays tiers et à destination d'un aéroport situé sur le territoire d'un État membre soumis aux dispositions du traité, à moins que ces passagers ne bénéficient de prestations ou d'une indemnisation et d'une assistance dans ce pays tiers, si le transporteur aérien effectif qui réalise le vol est un transporteur communautaire.
2. Le paragraphe 1 s'applique à condition que les passagers:
 - a) disposent d'une réservation confirmée pour le vol concerné et se présentent, sauf en cas d'annulation visée à l'article 5, à l'enregistrement:
 - comme spécifié et à l'heure indiquée à l'avance et par écrit (y compris par voie électronique) par le transporteur aérien, l'organisateur de voyages ou un agent de voyages autorisé,
 - ou, en l'absence d'indication d'heure,
 - au plus tard quarante-cinq minutes avant l'heure de départ publiée, ou
 - b) aient été transférés par le transporteur aérien ou l'organisateur de voyages, du vol pour lequel ils possédaient une réservation vers un autre vol, quelle qu'en soit la raison.
3. Le présent règlement ne s'applique pas aux passagers qui voyagent gratuitement ou à un tarif réduit non directement ou indirectement accessible au public. Toutefois, il s'applique aux passagers en possession d'un billet émis par un transporteur aérien ou un organisateur de voyages dans le cadre d'un programme de fidélisation ou d'autres programmes commerciaux.

⁽¹⁾ JO L 240 du 24.8.1992, p. 1.

⁽²⁾ JO L 158 du 23.6.1990, p. 59.

4. Le présent règlement ne s'applique qu'aux passagers transportés sur des avions motorisés à ailes fixes.

5. Le présent règlement s'applique à tout transporteur aérien effectif assurant le transport des passagers visés aux paragraphes 1 et 2. Lorsqu'un transporteur aérien effectif qui n'a pas conclu de contrat avec le passager remplit des obligations découlant du présent règlement, il est réputé agir au nom de la personne qui a conclu le contrat avec le passager concerné.

6. Le présent règlement ne porte pas atteinte aux droits des passagers établis par la directive 90/314/CEE. Le présent règlement ne s'applique pas lorsqu'un voyage à forfait est annulé pour des raisons autres que l'annulation du vol.

Article 4

Refus d'embarquement

1. Lorsqu'un transporteur aérien effectif prévoit raisonnablement de refuser l'embarquement sur un vol, il fait d'abord appel aux volontaires acceptant de renoncer à leur réservation en échange de certaines prestations, suivant des modalités à convenir entre les passagers concernés et le transporteur aérien effectif. Les volontaires bénéficient, en plus des prestations mentionnées au présent paragraphe, d'une assistance conformément à l'article 8.

2. Lorsque le nombre de volontaires n'est pas suffisant pour permettre l'embarquement des autres passagers disposant d'une réservation, le transporteur aérien effectif peut refuser l'embarquement de passagers contre leur volonté.

3. S'il refuse des passagers à l'embarquement contre leur volonté, le transporteur aérien effectif indemnise immédiatement ces derniers conformément à l'article 7, et leur offre une assistance conformément aux articles 8 et 9.

Article 5

Annulations

1. En cas d'annulation d'un vol, les passagers concernés:

- a) se voient offrir par le transporteur aérien effectif une assistance conformément à l'article 8;
- b) se voient offrir par le transporteur aérien effectif une assistance conformément à l'article 9, paragraphe 1, point a), et paragraphe 2, de même que, dans le cas d'un réacheminement lorsque l'heure de départ raisonnablement attendue du nouveau vol est au moins le jour suivant le départ planifié pour le vol annulé, l'assistance prévue à l'article 9, paragraphe 1, points b) et c), et
- c) ont droit à une indemnisation du transporteur aérien effectif conformément à l'article 7, à moins qu'ils soient informés de l'annulation du vol:
 - i) au moins deux semaines avant l'heure de départ prévue, ou

- ii) de deux semaines à sept jours avant l'heure de départ prévue si on leur offre un réacheminement leur permettant de partir au plus tôt deux heures avant l'heure de départ prévue et d'atteindre leur destination finale moins de quatre heures après l'heure d'arrivée prévue, ou

- iii) moins de sept jours avant l'heure de départ prévue si on leur offre un réacheminement leur permettant de partir au plus tôt une heure avant l'heure de départ prévue et d'atteindre leur destination finale moins de deux heures après l'heure prévue d'arrivée.

2. Lorsque les passagers sont informés de l'annulation d'un vol, des renseignements leur sont fournis concernant d'autres transports possibles.

3. Un transporteur aérien effectif n'est pas tenu de verser l'indemnisation prévue à l'article 7 s'il est en mesure de prouver que l'annulation est due à des circonstances extraordinaires qui n'auraient pas pu être évitées même si toutes les mesures raisonnables avaient été prises.

4. Il incombe au transporteur aérien effectif de prouver qu'il a informé les passagers de l'annulation d'un vol ainsi que le délai dans lequel il l'a fait.

Article 6

Retards

1. Lorsqu'un transporteur aérien effectif prévoit raisonnablement qu'un vol sera retardé par rapport à l'heure de départ prévue:

- a) de deux heures ou plus pour tous les vols de 1 500 kilomètres ou moins, ou
- b) de trois heures ou plus pour tous les vols intracommunautaires de plus de 1 500 km et pour tous les autres vols de 1 500 à 3 500 km, ou
- c) de quatre heures ou plus pour tous les vols qui ne relèvent pas des points a) ou b),

les passagers se voient proposer par le transporteur aérien effectif:

- i) l'assistance prévue à l'article 9, paragraphe 1, point a), et paragraphe 2, et
- ii) lorsque l'heure de départ raisonnablement attendue est au moins le jour suivant l'heure de départ initialement annoncée, l'assistance prévue à l'article 9, paragraphe 1, points b) et c), et
- iii) lorsque le retard est d'au moins cinq heures, l'assistance prévue à l'article 8, paragraphe 1, point a).

2. En tout état de cause, cette assistance est proposée dans les limites fixées ci-dessus compte tenu de la distance du vol.

Article 7

Droit à indemnisation

1. Lorsqu'il est fait référence au présent article, les passagers reçoivent une indemnisation dont le montant est fixé à:

- a) 250 euros pour tous les vols de 1 500 kilomètres ou moins;
- b) 400 euros pour tous les vols intracommunautaires de plus de 1 500 kilomètres et pour tous les autres vols de 1 500 à 3 500 kilomètres;
- c) 600 euros pour tous les vols qui ne relèvent pas des points a) ou b).

Pour déterminer la distance à prendre en considération, il est tenu compte de la dernière destination où le passager arrivera après l'heure prévue du fait du refus d'embarquement ou de l'annulation.

2. Lorsque, en application de l'article 8, un passager se voit proposer un réacheminement vers sa destination finale sur un autre vol dont l'heure d'arrivée ne dépasse pas l'heure d'arrivée prévue du vol initialement réservé:

- a) de deux heures pour tous les vols de 1 500 kilomètres ou moins, ou
- b) de trois heures pour tous les vols intracommunautaires de plus de 1 500 kilomètres et pour tous les autres vols de 1 500 à 3 500 kilomètres, ou
- c) de quatre heures pour tous les vols ne relevant pas des points a) ou b),

le transporteur aérien effectif peut réduire de 50 % le montant de l'indemnisation prévue au paragraphe 1.

3. L'indemnisation visée au paragraphe 1 est payée en espèces, par virement bancaire électronique, par virement bancaire ou par chèque, ou, avec l'accord signé du passager, sous forme de bons de voyage et/ou d'autres services.

4. Les distances indiquées aux paragraphes 1 et 2 sont mesurées selon la méthode de la route orthodromique.

Article 8

Assistance: droit au remboursement ou au réacheminement

1. Lorsqu'il est fait référence au présent article, les passagers se voient proposer le choix entre:

- a) — le remboursement du billet, dans un délai de sept jours, selon les modalités visées à l'article 7, paragraphe 3, au prix auquel il a été acheté, pour la ou les parties du voyage non effectuées et pour la ou les parties du voyage déjà effectuées et devenues inutiles par rapport à leur plan de voyage initial, ainsi que, le cas échéant, — un vol retour vers leur point de départ initial dans les meilleurs délais;
- b) un réacheminement vers leur destination finale, dans des conditions de transport comparables et dans les meilleurs délais, ou

c) un réacheminement vers leur destination finale dans des conditions de transport comparables à une date ultérieure, à leur convenance, sous réserve de la disponibilité de sièges.

2. Le paragraphe 1, point a), s'applique également aux passagers dont le vol fait partie d'un voyage à forfait hormis en ce qui concerne le droit au remboursement si un tel droit découle de la directive 90/314/CEE.

3. Dans le cas d'une ville, d'une agglomération ou d'une région desservie par plusieurs aéroports, si le transporteur aérien effectif propose au passager un vol à destination d'un aéroport autre que celui qui était initialement prévu, le transporteur aérien effectif prend à sa charge les frais de transfert des passagers entre l'aéroport d'arrivée et l'aéroport initialement prévu ou une autre destination proche convenue avec le passager.

Article 9

Droit à une prise en charge

1. Lorsqu'il est fait référence au présent article, les passagers se voient offrir gratuitement:

- a) des rafraîchissements et des possibilités de se restaurer en suffisance compte tenu du délai d'attente;
- b) un hébergement à l'hôtel aux cas où:
 - un séjour d'attente d'une ou plusieurs nuits est nécessaire, ou
 - lorsqu'un séjour s'ajoutant à celui prévu par le passager est nécessaire;
- c) le transport depuis l'aéroport jusqu'au lieu d'hébergement (hôtel ou autre).

2. En outre, le passager se voit proposer la possibilité d'effectuer gratuitement deux appels téléphoniques ou d'envoyer gratuitement deux télex, deux télécopies ou deux messages électroniques.

3. En appliquant le présent article, le transporteur aérien effectif veille tout particulièrement aux besoins des personnes à mobilité réduite ou de toutes les personnes qui les accompagnent, ainsi qu'aux besoins des enfants non accompagnés.

Article 10

Surclassement et déclassement

1. Si un transporteur aérien effectif place un passager dans une classe supérieure à celle pour laquelle le billet a été acheté, il ne peut réclamer aucun supplément.

2. Si un transporteur aérien effectif place un passager dans une classe inférieure à celle pour laquelle le billet a été acheté, il rembourse, dans un délai de sept jours et selon les modalités visées à l'article 7, paragraphe 3:

- a) 30 % du prix du billet pour tous les vols de 1 500 kilomètres ou moins, ou

- b) 50 % du prix du billet pour tous les vols intracommunautaires de plus de 1 500 kilomètres, à l'exception des vols entre le territoire européen des États membres et les départements français d'outre-mer, ainsi que pour tous les autres vols de 1 500 kilomètres à 3 500 kilomètres, ou
- c) 75 % du prix du billet pour tous les vols ne relevant pas des points a) ou b), y compris les vols entre le territoire européen des États membres et les départements français d'outre-mer.

Article 11

Personnes à mobilité réduite et autres personnes ayant des besoins particuliers

1. Les transporteurs aériens effectifs donnent la priorité aux personnes à mobilité réduite et à toutes les personnes ou les chiens guides certifiés qui les accompagnent ainsi qu'aux enfants non accompagnés.
2. En cas de refus d'embarquement, d'annulation ou de retard, quelle que soit la durée de celui-ci, les personnes à mobilité réduite et toutes les personnes qui les accompagnent, ainsi que les enfants non accompagnés, ont droit à une prise en charge prévue à l'article 9, qui leur est fournie dès que possible.

Article 12

Indemnisation complémentaire

1. Le présent règlement s'applique sans préjudice du droit d'un passager à une indemnisation complémentaire. L'indemnisation accordée en vertu du présent règlement peut être déduite d'une telle indemnisation.
2. Sans préjudice des principes et règles pertinents du droit national, y compris la jurisprudence, le paragraphe 1 ne s'applique pas aux passagers qui ont volontairement renoncé à leur réservation conformément à l'article 4, paragraphe 1.

Article 13

Droit à la réparation des dommages

Lorsqu'un transporteur aérien effectif verse une indemnité ou s'acquitte d'autres obligations lui incombant en vertu du présent règlement, aucune disposition de ce dernier ne peut être interprétée comme limitant son droit à demander réparation à toute personne, y compris des tiers, conformément au droit national applicable. En particulier, le présent règlement ne limite aucunement le droit du transporteur aérien effectif de demander réparation à un organisateur de voyages ou une autre personne avec laquelle le transporteur aérien effectif a conclu un contrat. De même, aucune disposition du présent règlement ne peut être interprétée comme limitant le droit d'un organisateur de voyages ou d'un tiers, autre que le passager avec lequel un transporteur aérien effectif a conclu un contrat, de demander réparation au transporteur aérien effectif conformément aux lois pertinentes applicables.

Article 14

Obligation d'informer les passagers de leurs droits

1. Le transporteur aérien effectif veille à ce qu'un avis reprenant le texte suivant, imprimé en caractères bien lisibles, soit affiché bien en vue dans la zone d'enregistrement: «Si vous êtes refusé à l'embarquement ou si votre vol est annulé ou retardé d'au moins deux heures, demandez au comptoir d'enregistrement ou à la porte d'embarquement le texte énonçant vos droits, notamment en matière d'indemnisation et d'assistance.»
2. Le transporteur aérien effectif qui refuse l'embarquement ou qui annule un vol présente à chaque passager concerné une notice écrite reprenant les règles d'indemnisation et d'assistance conformément aux dispositions du présent règlement. Il présente également cette notice à tout passager subissant un retard d'au moins deux heures. Les coordonnées de l'organisme national désigné visé à l'article 16 sont également fournies par écrit au passager.
3. En ce qui concerne les non-voyants et les malvoyants, les dispositions du présent article s'appliquent avec d'autres moyens appropriés.

Article 15

Irrecevabilité des dérogations

1. Les obligations envers les passagers qui sont énoncées par le présent règlement ne peuvent être limitées ou levées, notamment par une dérogation ou une clause restrictive figurant dans le contrat de transport.
2. Si toutefois une telle dérogation ou une telle clause restrictive est appliquée à l'égard d'un passager, ou si un passager n'est pas dûment informé de ses droits et accepte, par conséquent, une indemnisation inférieure à celle prévue par le présent règlement, ce passager a le droit d'entreprendre les démarches nécessaires auprès des tribunaux ou des organismes compétents en vue d'obtenir une indemnisation complémentaire.

Article 16

Violations

1. Chaque État membre désigne un organisme chargé de l'application du présent règlement en ce qui concerne les vols au départ d'aéroports situés sur son territoire ainsi que les vols à destination de ces mêmes aéroports et provenant d'un pays tiers. Le cas échéant, cet organisme prend les mesures nécessaires au respect des droits des passagers. Les États membres notifient à la Commission l'organisme qui a été désigné en application du présent paragraphe.

2. Sans préjudice de l'article 12, tout passager peut saisir tout organisme désigné en application du paragraphe 1, ou tout autre organisme compétent désigné par un État membre, d'une plainte concernant une violation du présent règlement survenue dans tout aéroport situé sur le territoire d'un État membre ou concernant tout vol à destination d'un aéroport situé sur ce territoire et provenant d'un pays tiers.

3. Les sanctions établies par les États membres pour les violations du présent règlement sont efficaces, proportionnées et dissuasives.

Article 17

Rapports

La Commission fait rapport au Parlement européen et au Conseil, au plus tard le 1^{er} janvier 2007, sur le fonctionnement et les résultats du présent règlement, en particulier en ce qui concerne:

- l'incidence des refus d'embarquement et des annulations de vols,
- l'extension éventuelle du champ d'application du présent règlement aux passagers liés par contrat à un transporteur communautaire ou ayant réservé un vol qui fait partie d'un

«circuit à forfait» relevant de la directive 90/314/CEE, qui partent d'un aéroport situé dans un pays tiers à destination d'un aéroport situé dans un État membre, sur des vols qui ne sont pas assurés par des transporteurs aériens communautaires,

- la révision éventuelle des montants des indemnisations mentionnés à l'article 7, paragraphe 1.

Ce rapport est au besoin accompagné de propositions législatives.

Article 18

Abrogation

Le règlement (CEE) n° 295/91 est abrogé.

Article 19

Entrée en vigueur

Le présent règlement entre en vigueur le 17 février 2005.

Le présent règlement est obligatoire dans tous ses éléments et directement applicable dans tout État membre.

Fait à Strasbourg, le 11 février 2004.

Par le Parlement européen

Le président

P. COX

Par le Conseil

Le président

M. McDOWELL

Appendix B

Case Law

Case Name:
Air Canada v. Greenglass

Between
Air Canada, Appellant, and
Marley Greenglass and Canadian Transportation
Agency, Respondents

[2014] F.C.J. No. 1286

2014 FCA 288

Docket: A-405-13

Federal Court of Appeal
Montréal, Quebec

Nadon, Gauthier and Scott JJ.A.

Heard: October 7, 2014.
Judgment: December 9, 2014.

(50 paras.)

Administrative law -- Natural justice -- Hearings -- Procedural rights and requirements -- Right to be heard -- Responses and submissions -- Appeal by Air Canada from the ruling rendered by Canadian Transportation Agency allowed -- Respondent suffered allergic reaction to dog in cabin on passenger flight and applied to Agency challenging Air Canada's policy of allowing dogs in cabin -- Agency ordered Air Canada to develop and implement policies and procedures necessary to comply with series of accommodation measures -- Decision breached procedural fairness by misleading directions in two opening pleading decisions causing Air Canada to fail in making submissions regarding alternative accommodation, undue obstacle and undue hardship -- Matter remitted for reconsideration.

Transportation law -- Air transportation -- Regulation -- Federal -- Persons with disabilities -- Canadian Transportation Agency -- Appeal by Air Canada from the ruling rendered by Canadian Transportation Agency allowed -- Respondent suffered allergic reaction to dog in cabin on passenger flight and applied to Agency challenging Air Canada's policy of allowing dogs in cabin -- Agency ordered Air Canada to develop and implement policies and procedures necessary to comply

with series of accommodation measures -- Decision breached procedural fairness by misleading directions in two opening pleading decisions causing Air Canada to fail in making submissions regarding alternative accommodation, undue obstacle and undue hardship -- Matter remitted for reconsideration.

Appeal by Air Canada from a decision by the Canadian Transportation Agency (CTA) in favour of the respondent, Greenglass. The respondent was allergic to dogs. She was seated on a flight directly behind a passenger accompanied by a dog. The respondent experienced an allergic reaction that caused her flight to be delayed and required several days of recovery. She applied to the CTA, challenging Air Canada's policy allowing the carriage of pet dogs in aircraft cabins. The CTA ordered Air Canada to develop and implement policies and procedures necessary to comply with a series of accommodation measures, including seating separation requirements, booking priority rules, and, in some instances, a ban on dogs in the cabin in certain circumstances. Air Canada appealed.

HELD: Appeal allowed. Air Canada was denied procedural fairness in the course of two opening pleading decisions in which the CTA attempted to set the ground rules for adjudication of the respondent's application. Due to conflicting and misleading directions in the decisions regarding evidence and submissions, Air Canada was prevented from submitting evidence on a number of crucial issues, such as obstacle and appropriate accommodation for individuals with a dog allergy disability. In the absence of evidence from Air Canada, the CTA concluded that accommodation measures ordered in a cat allergy decision were appropriate to address the needs of individuals who were allergic to dogs. Fairness and justice required that Air Canada be given the opportunity to make submissions with regard to alternative accommodation, undue obstacle, and undue hardship. The CTA's final decision was set aside and returned for reconsideration.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 172(1)

Counsel:

Patrick Girard, Patrick Désalliers, for the Appellant.

Andray Renaud, Simon-Pierre Lessard, for the Respondent Canadian Transportation Agency.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 NADON J.A.:-- On August 2, 2013, the Canadian Transportation Agency (the Agency) rendered its Final Decision (Decision No. 303-AT-A-2013 or the "Final Decision") concerning the application of Mrs. Marley Greenglass (the applicant) made pursuant to subsection 172(1) of the *Canada Transportation Act*, S.C. 1996, c.10 (the *Act*) against Air Canada's policy which allows the carriage of pet dogs in aircraft cabins particularly as it affects individuals, such as the applicant, who have an allergy to dogs. At paragraphs 62 to 68 of the Final Decision, the Agency ordered Air Canada to comply with the following accommodation measures:

CONCLUSION

[62] The Agency therefore orders Air Canada to develop and implement the policies and procedures necessary to provide the following appropriate accommodation and to provide the requisite training to its staff to ensure the provision of the appropriate accommodation.

With respect to dogs carried as pets

[63] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:

- * a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and pet dogs, including during boarding and deplaning and between their seat and a washroom; or
- * a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.

[64] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:

- * a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.

[65] When advance notification of less than 48 hours is provided by persons with

a dog allergy disability, a ban on pet dogs is to be provided if no person travelling with a pet dog has already booked their travel on the selected flight. If a person travelling with a pet dog has already been booked on the flight, persons with a dog allergy disability must be provided with the same flight ban accommodation within 48 hours on the next flight available on which there is no person with a pet dog already booked. If the next available flight is beyond the 48-hour period, persons with a dog allergy disability must be given priority and provided with the accommodation measures applicable when the 48-hour advance notice is given by the person with a dog allergy disability.

With respect to service dogs

[66] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:

- * a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and service dogs, including during boarding and deplaning and between their seat and a washroom.

[67] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:

- * give the booking priority to whoever of the person with a dog allergy disability and the person travelling with a service dog first completed their booking. A person with a dog allergy disability and a person travelling with a service dog will not be accepted on the same flight using an aircraft that does not have HEPA filters or which does not provide 100 percent unrecirculated fresh air.

[68] Air Canada has until September 16, 2013 to comply with this order.

2 On October 10, 2013, Pelletier J.A. granted leave to Air Canada to appeal the Agency's Final Decision and on November 29, 2013, Air Canada filed its Notice of Appeal.

3 The facts underlying this appeal are simple. In short, on a flight from Toronto to Phoenix, Arizona, the applicant was seated in a row directly behind a passenger accompanied by a dog. The

presence of the dog caused "health issues" for the applicant, resulting in her flight being delayed. She took medication and put on a charcoal filter mask to prevent things from getting worse. Ultimately, the dog was moved, but by that time the applicant was feeling unwell and had to increase her medication throughout the flight. During the flight, the applicant had a second "attack" and it took her several days to recover.

4 On February 7, 2012, the applicant filed her application against Air Canada's policy providing for the carriage of pets in aircraft cabins as it relates to her dog allergy.

5 On March 6, 2012, the Agency adjourned her application pending the adjudication of a decision in an investigation into WestJet, Air Canada and Air Canada Jazz's policies with respect to persons whose allergy to cats results in a disability for the purposes of the *Act*.

6 On June 14, 2012, the Agency issued its final decision regarding cat allergies (the "Cat Allergy Decision"). As part of this decision, the Agency determined the appropriate accommodation measures that the airlines had to adopt for persons allergic to cats (Decision No. 227-AT-A-2012).

I. The Decision under Review

7 In addition to its Final Decision, the Agency made three other decisions which are relevant to this appeal as they form part and parcel of the Final Decision. These decisions are referred to as: the Initial Opening Pleading Decision, rendered on January 16, 2013; the Second Opening Pleading Decision, given on March 7, 2013; and the Show Cause Decision, rendered on June 5, 2013. A brief review of these decisions is necessary to fully understand the Final Decision and the issues which arise in this appeal.

A. The Initial and Second Opening Pleading Decisions

8 On January 16, 2013, the Agency opened pleadings in the applicant's application and gave her an opportunity to complete her application following which Air Canada would have the opportunity to file a response.

9 The Initial Opening Pleading Decision (this decision is numbered No. LET-AT-A-10-2013) set out a three step process for resolving applications through formal adjudication: first, the applicant would have to establish that she was a person with a disability for the purposes of the *Act*; second, the applicant would have to establish that she had encountered an "obstacle", i.e. that she needed, and was not provided with, accommodation; third, the Agency would determine whether the obstacle was an undue obstacle and whether corrective measures were therefore required to eliminate it.

10 With respect to the third step, the Agency explained that an obstacle will not be considered "undue" if the service provider can justify its existence by showing that the removal of the obstacle would be unreasonable, impractical or impossible, such that any formal accommodation would

cause the service provider undue hardship.

11 The Initial Opening Pleading Decision found, on a preliminary basis, that the accommodation measures ordered by the Agency in the Cat Allergy Decision constituted the appropriate accommodation needed to meet the disability-related needs of persons who are disabled by an allergy to dogs.

12 The Agency asked the applicant to provide a letter or medical certificate from a physician or allergist giving answers to a number of questions posed by the Agency. The Agency also requested that the applicant describe in detail how Air Canada's policy to allow the carriage of pets in the aircraft cabin affected her ability to engage in air travel.

13 The applicant did not respond to the Initial Opening Pleading Decision as required. Consequently, the Agency closed her file (this decision is numbered No. LET-AT-A-28-2013).

14 On February 21, 2013, the applicant resubmitted her application and informed the Agency that she was seeking the same accommodation which the Agency provided for those suffering from cat allergies in its Cat Allergy Decision.

15 On March 7, 2013, the Agency reopened the applicant's file and sent the Second Opening Pleading Decision to the parties (this decision is numbered No. LET-AT-A-46-2013). In this decision, the Agency again set out the findings in the Cat Allergy Decision and noted the applicant's request that the accommodation measures adopted in that decision be provided to individuals with a dog allergy disability.

16 On April 4, 2013, Air Canada filed its response to the Second Opening Pleading Decision in which it raised the issue of its obligations with respect to service dogs. On April 7, 2013, the applicant filed a reply to Air Canada's submissions and pleadings were considered closed.

B. *Show Cause Decision*

17 On June 5, 2013, the Agency issued its Show Cause Decision (this decision is numbered No. LET-AT-A-82-2013) in which it made three final determinations and one preliminary determination.

18 First, the Agency determined that the applicant was a person with a disability within the meaning of the *Act*. Second, it determined that the same accommodation which it provided to individuals in the Cat Allergy Decision was appropriate in this case. The Agency noted that Air Canada had submitted an internet article from the website "My Health News Daily" (published on July 26, 2012) which indicated that there were differences between cat and dog dander. More particularly, the article indicated that cat protein was so small and light that it could remain airborne for many hours. The article then quoted Dr. Mark Larche, Immunology Professor at McMaster University, to the effect that dog allergens do not remain airborne in the same way that cat allergens

do. Based on this article, Air Canada submitted that the five row seating separation between cats and individuals with an allergy to cats, as recommended in the Cat Allergy Decision, may not be necessary for persons with a dog allergy.

19 The Agency dismissed this argument in the following terms at paragraph 46 of the Show Cause Decision:

Although the article submitted by Air Canada states that dog allergens are different than cat allergens in terms of the manner that they stay airborne, Air Canada did not file any evidence that specifies how the airborne features of dog allergens differ from those of cat allergens and the implications of any differences for persons with a dog allergy disability. Air Canada has not filed reasons that would support a finding that different measures are required to meet the needs of persons with a dog allergy disability as compared to those with a cat allergy disability based on differences in the manner in which the allergens stay airborne. Moreover, Air Canada provided no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent fresh air would not rid the cabin of such particles.

20 The Agency therefore concluded that, when at least 48 hours advance notification was provided by persons with a dog allergy disability (or best efforts were made when less than 48 hours notice is given), the appropriate accommodation with respect to service dogs was a seating separation of a minimum five rows between dogs and individuals with a dog allergy on aircraft with either High Efficiency Particulate Air (HEPA) filters or which provide for 100 percent unrecirculated fresh air. For non-HEPA or unrecirculated fresh air aircraft (such as Bombardier Dash 8's), the appropriate accommodation was to provide the booking priority to whomever completed their booking first, whether it be the individual with the service dog or the person suffering from a dog allergy.

21 Third, the Agency concluded that Air Canada's current policy with respect to the carriage of dogs in aircraft cabins constituted an obstacle to the mobility of individuals with a dog allergy, including the applicant.

22 Lastly, the Agency preliminarily concluded that Air Canada's policy relating to the carriage of dogs in the aircraft cabin constituted an undue obstacle to the applicant's mobility and that of other individuals suffering from a dog allergy. The Agency requested that Air Canada show cause why this preliminary finding should not be finalized and the applicant was provided with the opportunity to reply to any submissions made in that regard by Air Canada.

C. Final Decision

23 In its Final Decision, the Agency finalized its preliminary finding from the Show Cause Decision with respect to Air Canada's policy constituting an undue obstacle to the applicant's

mobility and that of other persons with a dog allergy. Before reaching its conclusion, the Agency refused to consider the additional submissions made by Air Canada with respect to the Agency's determination in the Show Cause Decision concerning the appropriate accommodation in this case. In brief, Air Canada argued that a key report, namely that of Dr. Sussman entitled "Report Addendum: Cat and Dog Dander in the Aircraft Cabin, May 23, 2008" referred to in both the Show Cause Decision and the Cat Allergy Decision, needed to be amended in order to take account of the specific situation of individuals with a dog allergy. Similarly, the Agency refused to consider further submissions made by the applicant concerning the need to amend Dr. Sussman's report.

24 The main part of the Final Decision addressed the interpretation and application of a set of regulations from the United States Department of Transportation entitled *Nondiscrimination on the Basis of Disability in Air Travel*, 14 C.F.R. § 382 (2008) (the "U.S. Regulations"). Because of the conclusion which I have reached with regard to Air Canada's arguments on procedural fairness, I need not address nor discuss the Agency's findings on specific components of the U.S. Regulations.

II. Appellant's Submissions

25 Air Canada makes a number of submissions as to why this appeal should be allowed. It says that the Agency reversed the burden of proof and made a decision in the absence of evidence, thus violating procedural fairness. It also argues that the Agency's refusal to consider its arguments regarding alternative appropriate accommodation violated procedural fairness. Lastly, it argues that the decision is unreasonable in that the effect of the Final Decision is that Air Canada will be forced to discriminate against people requiring service dogs in a manner that is specifically prohibited by the U.S. Regulations. Again, because of the conclusion that I have reached on the procedural fairness issue, I need not address Air Canada's last submission.

III. Standard of Review

26 As indicated above, I intend to restrict my analysis to the procedural fairness issues raised by Air Canada. In this respect, there can be no doubt that these issues must be assessed against a standard of correctness (See *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paragraphs 79 and 83).

IV. Analysis

27 In my view, the procedural fairness issues which Air Canada raises stem mainly from the wording of the Initial and Second Opening Pleading Decisions by which the Agency attempted to set the 'ground rules' pursuant to which it would adjudicate the applicant's application. As it turned out, the process resulted in a denial of procedural fairness to Air Canada. It goes without saying that this result was not intentional. However, in the end, it appears that form took over substance and the process became rigid and inflexible. Air Canada was prevented from submitting evidence on a number of crucial issues such as obstacle and appropriate accommodation. This situation occurred by reason of the approach taken by the Agency and the manner in which it communicated its 'game

plan' to the parties.

28 Because I conclude that in the particular circumstances of this case Air Canada was deprived of procedural fairness, I would allow this appeal. My reasons for so concluding are as follows.

29 I begin with page 10 of Appendix A of the Initial Opening Pleading Decision where the Agency informed the parties that it was the applicant's burden to establish her need for accommodation and that her need was not met by Air Canada's policy. The text found at page 10 of Appendix A is as follows:

It is the Applicant's responsibility to provide sufficiently persuasive evidence to establish their need for accommodation and to prove that this need was not met. The standard of evidence that applies to this burden of proof is the balance of probabilities.

30 The Agency repeated this statement at paragraph 37 of the Show Cause Decision.

31 This theme was reiterated by the Agency in a decision (Decision No. 430-AT-A-2011) rendered on December 15, 2011, which forms part and parcel of its Cat Allergy Decision where, at paragraph 225, it said that "the Applicants have not provided persuasive evidence that seat row separation is ineffective and the burden, at the obstacle phase, lies upon them to show that this is the case".

32 The above language suggests that it was up to the applicant to prove her need for accommodation and that her need had not been met by Air Canada. However, at page six of the Initial Opening Pleading Decision, the Agency appears to be saying something different. There it states that the applicant must establish her need for accommodation if that need differs from the Agency's preliminary finding of appropriate accommodation in the Cat Allergy Decision. In other words, the Agency seems to be saying that the applicant need not do anything unless she wants accommodation other than what the Agency found in the Cat Allergy Decision. The relevant passages read as follows:

- The applicant will have until February 6, 2013 to establish that she is a person with a disability, and that she requires an accommodation measure that is different from the Agency's preliminary finding of appropriate accommodation to meet her disability-related needs and those of persons with a disability as a result of their allergies to dogs, should this be her view;

- The respondent will have until February 20, 2013 to respond to the applicant's submissions on disability and obstacle/appropriate accommodation, and to file undue hardship arguments with respect to the

Agency's preliminary finding of appropriate accommodation and any other alternative suggested by the applicant and to propose another form of accommodation;

- The applicant will then have until February 25, 2013 to file a reply.

33 To make matters slightly more complicated, at page two of the Second Opening Pleading Decision, which allowed the applicant to reinstitute her application, after indicating that the applicant was requesting the same accommodation provided in the Cat Allergy Decision, the Agency proceeded to inform Air Canada that it had until March 28, 2013 (this date was extended to April 4, 2013) to file submissions in response to the applicant's submissions on disability and obstacle/appropriate accommodation and to file undue hardship arguments. The relevant passages read as follows:

On February 21, 2013, Mrs. Greenglass filed the attached application and Disability Assessment Form in regards to her allergy to dogs. Mrs. Greenglass requests that the aforementioned accommodation determined by the Agency for persons with a cat allergy disability be provided by Air Canada to persons with a dog allergy disability.

The respondent has until March 28, 2013 to respond to the applicant's submissions on disability and obstacle/ appropriate accommodation, and to file undue hardship arguments with respect to the Agency's preliminary finding of appropriate accommodation and to propose another form of accommodation, following which the applicant will have until April 4, 2013 to file a reply.

34 The difference in substance between the two texts reproduced immediately above is that, at the time of the Initial Opening Pleading Decision, the applicant had not indicated that she was adopting the accommodation described by the Agency in the Cat Allergy Decision, whereas at the time of the Second Opening Pleading Decision, she had done so.

35 Air Canada argues that the Agency reversed the burden of proof when it allowed the applicant to import the Cat Allergy Decision without any supporting arguments or evidence. It submits a number of legal arguments in support of this position. I am far from convinced, on the authorities, that Air Canada's assertion is correct. However, I am satisfied that Air Canada was misled by the two opening pleading decisions, the relevant passages of which I have already reproduced. More particularly, the implication of the Agency's direction to Air Canada that it would have to respond to the applicant's submissions by March 28, 2013 is that there would actually be submissions made by the applicant on the questions of obstacle/appropriate accommodation.

36 With hindsight, it is clear to me that the Agency considered that the applicant had already

made her submissions when she adopted the accommodation determined in the Cat Allergy Decision. Therefore, Air Canada should not have waited for the applicant's submissions, but should have responded to the accommodation measures determined by the Agency in the Cat Allergy Decision on the understanding that those measures had been put forward by the applicant and that they would be adopted by the Agency unless rebutted.

37 However, also with the benefit of hindsight, it is obvious to me that Air Canada plainly misunderstood the Agency's opening pleading decisions and did not, prior to the rendering of the Show Cause Decision, adduce any evidence concerning obstacle/appropriate accommodation other than the internet article described above.

38 I am satisfied that Air Canada understood that the applicant was obliged to demonstrate why she required the measures prescribed by the Agency in the Cat Allergy Decision, i.e. a seat separation of at least five rows on planes with HEPA filters or with systems which provide 100 percent unrecirculated fresh air and the exclusion of all dogs from the planes without such systems, and not a different form of accommodation. As the applicant adduced no evidence, Air Canada did not adduce the evidence which it says it could have produced to counter the importation of the Cat Allergy Decision. In particular, Air Canada argues that it would have submitted evidence to the effect that less disruptive measures could be implemented to accommodate both those travelling with dogs and those suffering from dog allergies. However, as events unfolded, that evidence was not submitted because of the Agency's refusal to entertain it.

39 The only evidence which Air Canada did adduce was the internet article. In the Show Cause Decision, the Agency considered that article and held that it did not explain how the airborne features of dog allergens differed from those of cat allergens and the consequences or implications of any difference for persons such as the applicant. Therefore, there was no evidence to support the view that different measures of accommodation would suffice to meet the needs of persons with a dog allergy disability. The Agency further held that there was also no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent unrecirculated fresh air would not rid the cabin of such particles.

40 In the absence of any evidence on the part of Air Canada, the Agency concluded that the accommodation measures which it had ordered in the Cat Allergy Decision constituted the appropriate accommodation needed to address the needs of persons who were disabled by reason of an allergy to dogs, whether they be service dogs or pets.

41 After finding that Air Canada's policy with respect to the carriage of dogs in an aircraft cabin constituted an obstacle to the applicant's mobility and that of other persons with a dog allergy, the Agency turned to the question of whether the obstacle was undue. To this question, it gave a preliminary answer which was that Air Canada's policy constituted an undue obstacle to the mobility of the applicant and of other persons with a dog allergy disability. Consequently, at paragraph 89 of the Show Cause Decision, the Agency indicated that it would provide Air Canada

with an opportunity to submit evidence with regard to this preliminary finding. It stated, at paragraph 90, that "Air Canada is required to show cause why the Agency should not finalize its preliminary finding with respect to undue obstacle regarding the appropriate accommodation to be provided to persons with a disability due to an allergy to dogs".

42 In response, Air Canada made detailed submissions regarding the operational conflict that the Agency's proposed accommodation created with the U.S. Regulations and further argued that the burden created by those measures was undue since less intrusive measures could be put in place while still fulfilling the needs of persons such as the applicant. More particularly, Air Canada argued that as its goal was to minimize situations where it would have to displace or remove a passenger from a flight, particularly where that person was a person with a disability, it intended to propose alternatives with regard to the carriage of dogs on board aircrafts that were not equipped with HEPA-type filters.

43 Air Canada concluded its submissions by requesting that the Agency remove its conclusion in the Show Cause Decision that a person with a dog allergy disability and a service dog could not be accepted on the same aircraft if that aircraft did not have HEPA filters or did not provide 100 percent unrecirculated fresh air.

44 However, in its Final Decision, the Agency refused to consider the above submissions on the ground that they had not been filed within the time given to Air Canada to do so. The Agency explained that it had given Air Canada an opportunity to provide evidence and submissions regarding the question of obstacle and appropriate accommodation when it rendered its Second Opening Pleading Decision, adding that the purpose of the Show Cause Decision was not to give Air Canada a second chance to address the same question, but rather to allow it to comment on the Agency's preliminary finding of undue obstacle. Consequently, Air Canada's submissions, as well as those made by the applicant on the same topic, were deemed out of time and, as a result, not considered.

45 Thus Air Canada was unable, for all intents and purposes, to either adduce evidence or provide submissions with regard to the important questions of obstacle and appropriate accommodation. Air Canada argues, and I agree entirely, that the Agency's rationale seems to have been that the undue character of the proposed accommodation could be examined in a vacuum independent of the existence of other possibly less intrusive remedies.

46 It appears to me that in the grander scheme of things, fairness required that Air Canada be given the opportunity to make submissions with regard to alternative accommodation, even at the "undue obstacle" stage of the Agency's inquiry. It is safe to say that had the Agency allowed Air Canada to make these submissions, they would not have had any impact on the applicant's application other than to the extent that different measures of accommodation might have been found.

47 It is clear that there was a breakdown in communications between Air Canada and the

Agency. Air Canada understood from the two opening pleading decisions that it was to respond to the applicant's submissions on, *inter alia*, obstacle and appropriate accommodation. When the applicant made no submissions, Air Canada believed that it had nothing to which it needed to respond. This explains why it submitted practically no evidence other than an internet article. This, in due course, led to further procedural problems.

48 I have no hesitation in saying that common sense has not prevailed in the present matter. The Agency determined important issues, not only for the applicant and all those having dog allergies, but also for Air Canada. It did so without the benefit of any real evidence being adduced by the parties and, more particularly, by Air Canada. This was the result of Air Canada's apparent difficulty in fully understanding the meaning of the various directions given by the Agency in its opening pleading decisions.

49 Had common sense prevailed, one would have expected the Agency, at some point in time, to realize that it was disposing of these important issues without, in effect, the full participation of Air Canada. I concede, as I must, that the Agency is entitled to establish its rules and procedures. However, in the end, the rules and procedures are there to serve the interests of justice. In my view, justice in this case required that Air Canada be given the opportunity of adducing evidence on the issues of obstacle, appropriate accommodation and undue hardship. That has not really taken place in this case.

V. Disposition

50 Consequently, I would allow the appeal, set aside the Final Decision, rendered by the Agency on August 2, 2013 and return the matter to the Agency for reconsideration in the light of these reasons. In view of the particular circumstances of this case, I would not make any order as to costs.

NADON J.A.

GAUTHIER J.A.:-- I agree.

SCOTT J.A.:-- I agree.

JUDGMENT OF THE COURT (Third Chamber)

4 October 2012 (*)

(Air transport – Regulation (EC) No 261/2004 – Compensation for passengers in the event of denied boarding – Concept of ‘denied boarding’ – Exclusion from characterisation as ‘denied boarding’ – Cancellation of a flight caused by a strike at the airport of departure – Rescheduling of flights after the cancelled flight – Right to compensation of the passengers on those flights)

In Case C-22/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Finland), made by decision of 13 January 2011, received at the Court on 17 January 2011, in the proceedings

Finnair Oyj

v

Timy Lassooy,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, E. Juhász, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2012,

after considering the observations submitted on behalf of:

- Finnair Oyj, by T. Väätäinen, asianajaja,
- Mr Lassooy, by M. Wilska, kuluttaja-asiamies, and P. Hannula and J. Suurla, lakimiehet,
- the Finnish Government, by H. Leppo, acting as Agent,
- the French Government, by G. de Bergues and M. Perrot, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello, avvocato dello Stato,
- the Austrian Government, by A. Posch, acting as Agent,
- the Polish Government, by M. Szpunar, acting as Agent,

- the European Commission, by I. Koskinen and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2012,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 2(j), 4 and 5 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).
- 2 The reference has been made in proceedings between, on the one hand, the airline Finnair Oyj ('Finnair') and, on the other, Mr Lassooy, following Finnair's refusal to compensate Mr Lassooy for not allowing him to board a flight from Barcelona (Spain) to Helsinki (Finland) on 30 July 2006.

Legal framework

Regulation (EEC) No 295/91

- 3 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5), which was in force until 16 February 2005, provided at Article 1:

'This Regulation establishes common minimum rules applicable where passengers are denied access to an overbooked scheduled flight for which they have a valid ticket and a confirmed reservation departing from an airport located in the territory of a Member State to which the [EC] Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger and the point of destination.'

Regulation No 261/2004

- 4 Recitals 1, 3, 4, 9, 10, 14 and 15 in the preamble to Regulation No 261/2004 state:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

...

- (3) While [Regulation No 295/91] created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as

does that affected by cancellations without prior warning and that affected by long delays.

- (4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

...

- (9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

- (10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

...

- (14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

- (15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

5 Article 2 of Regulation No 261/2004, entitled 'Definitions', provides:

'For the purposes of this Regulation:

...

- (j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

...'

6 Article 3 of that regulation, entitled 'Scope', provides in paragraph 2:

'Paragraph 1 shall apply on the condition that passengers:

(a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in:

- as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,

or, if no time is indicated,

- not later than 45 minutes before the published departure time; or

...'

7 Article 4 of Regulation No 261/2004, entitled 'Denied boarding', reads as follows:

'1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.'

8 Article 5 of Regulation No 261/2004, entitled 'Cancellation', provides in paragraph 3:

'An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

9 Article 7 of Regulation No 261/2004, entitled 'Right to compensation', provides in paragraph 1:

'Where reference is made to this Article, passengers shall receive compensation amounting to:

...

(b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;

...'

10 Articles 8 and 9 of that regulation, read in conjunction with Article 4 thereof,

provide a right to reimbursement or re-routing and a right to care for passengers who are denied boarding.

- 11 Article 13 of Regulation No 261/2004, entitled 'Right of redress', provides:

'In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 12 Following a strike by staff at Barcelona Airport on 28 July 2006, the scheduled 11.40 flight from Barcelona to Helsinki operated by Finnair had to be cancelled. In order that the passengers on that flight should not have too long a waiting time, Finnair decided to reschedule subsequent flights.
- 13 Accordingly, those passengers from the flight in question were taken to Helsinki on the 11.40 flight the following day, 29 July 2006, and also on a specially arranged flight departing later that day at 21.40. The consequence of that rescheduling was that some of the passengers who had bought their tickets for the 11.40 flight on 29 July 2006 had to wait until 30 July 2006 to go to Helsinki on the scheduled 11.40 flight and on a 21.40 flight specially arranged for the occasion. Similarly, some passengers, like Mr Lassooy, who had bought their tickets for the 11.40 flight on 30 July 2006 and who had duly presented themselves for boarding, went to Helsinki on the special 21.40 flight later that day.
- 14 Taking the view that Finnair had for no valid reason denied him boarding, within the meaning of Article 4 of Regulation No 261/2004, Mr Lassooy brought an action before the Helsingin käräjäoikeus (Helsinki District Court) for an order against Finnair to pay him the compensation provided for in Article 7(1)(b) of that regulation. By decision of 19 December 2008, the Helsingin käräjäoikeus dismissed Mr Lassooy's application for compensation on the ground that the regulation only concerned compensation where boarding is denied as a result of overbooking for economic reasons. That court held that Article 4 of Regulation No 261/2004 did not apply in this case, since the airline company had rescheduled its flights as a result of a strike at Barcelona airport and that strike amounted to an extraordinary circumstance in respect of which Finnair had taken all the measures that could be required of it.
- 15 By a judgment of 31 August 2009, the Helsingin hovioikeus (Helsinki Court of Appeal) set aside the judgment of the Helsingin käräjäoikeus and ordered Finnair to pay Mr Lassooy the sum of EUR 400. To that effect, the Helsingin hovioikeus

held that Regulation No 261/2004 applies not only to overbooking but also in some instances to operational reasons for denying boarding, and thus prevents an air carrier from being exempted, for reasons connected with a strike, from its obligation to pay compensation.

- 16 In the context of Finnair's appeal to the Korkein oikeus (Supreme Court), that court relates its doubts concerning the scope of the obligation to compensate passengers who have been 'denied boarding', as referred to in Article 4 of Regulation No 261/2004, the grounds that may justify 'denied boarding' within the meaning of Article 2(j) of that regulation, and whether an air carrier may rely on the extraordinary circumstances referred to in Article 5(3) of that same regulation, with respect to flights after the flight which was cancelled because of those circumstances.
- 17 In that context, the Korkein oikeus decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Is Regulation No 261/2004 and in particular Article 4 thereof to be interpreted as meaning that its application is limited only to cases where boarding is denied because of overbooking by [an] air carrier for economic reasons, or is [that] regulation applicable also to situations in which boarding is denied for other reasons, such as operational reasons?
 2. Is Article 2(j) of [Regulation No 261/2004] to be interpreted as meaning that the reasonable grounds laid down therein are limited only to factors relating to passengers, or may a denial of boarding be reasonable on other grounds? If the regulation is to be interpreted as meaning that a denial of boarding may be reasonable on grounds other than those relating to passengers, is it to be interpreted as meaning that such a denial may also be reasonable on the grounds of the rescheduling of flights as a result of the extraordinary circumstances mentioned in recitals 14 and 15?
 3. Is [Regulation No 261/2004] to be interpreted as meaning that an air carrier may be exempted from liability under Article 5(3) in extraordinary circumstances not only with respect to a flight which it cancelled, but also with respect to passengers on later flights, on the ground that by its actions it attempts to spread the negative effects of the extraordinary circumstances it encounters in its operations, such as a strike, among a wider class of passengers than the cancelled flight's passengers by rescheduling its later flights so that no passenger's journey was unreasonably delayed? In other words, may an air carrier rely on extraordinary circumstances also with respect to a passenger on a later flight whose journey was not directly affected by that factor? Does it make a significant difference whether the passenger's situation and right to compensation are assessed in accordance with Article 4 of the regulation, which concerns denied boarding, or with Article 5, which relates to flight cancellation?

Consideration of the questions referred

The first question

- 18 By its first question the referring court asks, in essence, whether the concept of

'denied boarding', within the meaning of Articles 2(j) and 4 of Regulation No 261/2004, must be interpreted as relating exclusively to cases where boarding is denied because of overbooking or whether it applies also to cases where boarding is denied on other grounds, such as operational reasons.

- 19 It should be noted that the wording of Article 2(j) of Regulation No 261/2004, which defines the concept of 'denied boarding', does not link that concept to an air carrier's 'overbooking' the flight concerned for economic reasons.
- 20 As regards the context of that provision and the objectives pursued by the legislation of which it is part, it is apparent not only from recitals 3, 4, 9 and 10 of Regulation No 261/2004, but also from the *travaux préparatoires* for that regulation – and in particular from the Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, presented by the Commission of the European Communities on 21 December 2001 (COM(2001) 784 final) – that the European Union ('EU') legislature sought, by the adoption of that regulation, to reduce the number of passengers denied boarding against their will, which was too high at that time. This would be achieved by filling the gaps in Regulation No 295/91 which confined itself to establishing, in accordance with Article 1 thereof, common minimum rules applicable where passengers are denied access to an overbooked scheduled flight.
- 21 It is in that context that by means of Article 2(j) of Regulation No 261/2004 the EU legislature removed from the definition of 'denied boarding' any reference to the ground on which an air carrier refuses to carry a passenger.
- 22 In so doing, the EU legislature expanded the scope of the definition of 'denied boarding' beyond merely situations where boarding is denied on account of overbooking referred to previously in Article 1 of Regulation No 295/91, and construed 'denied boarding' broadly as covering all circumstances in which an air carrier might refuse to carry a passenger.
- 23 That interpretation is supported by the finding that limiting the scope of 'denied boarding' exclusively to cases of overbooking would have the practical effect of substantially reducing the protection afforded to passengers under Regulation No 261/2004 and would therefore be contrary to the aim of that regulation – referred to in recital 1 in the preamble thereto – of ensuring a high level of protection for passengers. Consequently, a broad interpretation of the rights granted to passengers is justified (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69, and C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 18).
- 24 As the Advocate General observed in point 37 of his Opinion, to accept that only situations of overbooking are covered by the concept of 'denied boarding' would have the effect of denying all protection to passengers who, like the applicant in the main proceedings, find themselves in a situation for which, as in the case of overbooking for economic reasons, they are not responsible, by precluding them from relying on Article 4 of Regulation No 261/2004; paragraph 3 of that article refers to the provisions of that regulation relating to rights to compensation, reimbursement or re-routing and to care, as laid down in Articles 7 to 9 of that

regulation.

25 Consequently, an air carrier's refusal to allow the boarding of a passenger who has presented himself for boarding in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004, on the basis that the flights arranged by that carrier have been rescheduled, must be characterised as 'denied boarding' within the meaning of Article 2(j) of that regulation.

26 In the light of the foregoing, the answer to the first question is that the concept of 'denied boarding', within the meaning of Articles 2(j) and 4 of Regulation No 261/2004, must be interpreted as relating not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds, such as operational reasons.

The second and third questions

27 By its second and third questions, which should be examined together, the referring court asks, in essence, whether the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances occurred can give grounds for denying boarding to a passenger on one of those later flights and for exempting that carrier from its obligation, under Article 4(3) of Regulation No 261/2004, to compensate a passenger to whom it denies boarding on such a flight.

28 In the first place, the referring court seeks to establish whether characterisation as 'denied boarding', within the meaning of Article 2(j) of Regulation No 261/2004, may be precluded solely on grounds relating to passengers as such, or whether grounds unrelated to them and, in particular, relating to an air carrier's rescheduling of its flights as a result of 'extraordinary circumstances' which affected it, may also preclude such characterisation.

29 In that connection, it should be noted that the wording of Article 2(j) of Regulation No 261/2004 precludes characterisation as 'denied boarding' on two sets of grounds. The first relates to the failure of the passenger presenting himself for boarding to comply with the conditions laid down in Article 3(2) of that regulation. The second concerns cases where there are reasonable grounds to deny boarding 'such as reasons of health, safety or security, or inadequate travel documentation'.

30 The first set of grounds does not apply to the case in the main proceedings. As regards the second set of grounds, it must be noted that none of the reasons specifically referred to in Article 2(j) is relevant to the main proceedings. However, in using the expression 'such as', the EU legislature intended to provide a non-exhaustive list of the situations in which there are reasonable grounds for denying boarding.

31 None the less, it cannot be inferred from such wording that there are reasonable grounds to deny boarding on the basis of an operational reason such as that in question in the main proceedings.

32 The situation in question in the main proceedings is comparable to cases where boarding is denied because of 'initial' overbooking, since the air carrier had reallocated the applicant's seat in order to transport other passengers, and it

therefore chose itself between several passengers to be transported.

- 33 Admittedly, that reallocation was done in order to avoid the passengers affected by flights cancelled on account of extraordinary circumstances having excessively long waiting times. However, that ground is not comparable to those specifically mentioned in Article 2(j) of Regulation No 261/2004, since it is in no way attributable to the passenger to whom boarding is denied.
- 34 It cannot be accepted that an air carrier may, relying on the interest of other passengers in being transported within a reasonable time, increase considerably the situations in which it would have reasonable grounds for denying a passenger boarding. That would necessarily have the consequence of depriving such a passenger of all protection, which would be contrary to the objective of Regulation No 261/2004 which seeks to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them.
- 35 In the second place, the referring court asks the Court of Justice whether an air carrier may be exempted from its obligation to compensate a passenger for 'denied boarding', laid down in Articles 4(3) and 7 of Regulation No 261/2004, on the ground that boarding is denied due to the rescheduling of that carrier's flights as a result of 'extraordinary circumstances'.
- 36 In that connection, it is to be noted that, unlike Article 5(3) of Regulation No 261/2004, Articles 2(j) and 4 of that regulation do not provide that, in the event of 'denied boarding' owing to 'extraordinary circumstances' which could not have been avoided even if all reasonable measures had been taken, an air carrier is exempted from its obligation to compensate passengers denied boarding against their will (see, by analogy, *IATA and ELFAA*, paragraph 37). It follows that the EU legislature did not intend that compensation may be precluded on grounds relating to the occurrence of 'extraordinary circumstances'.
- 37 In addition, it is apparent from recital 15 in the preamble to Regulation No 261/2004 that 'extraordinary circumstances' may relate only to 'a particular aircraft on a particular day', which cannot apply to a passenger denied boarding because of the rescheduling of flights as a result of extraordinary circumstances affecting an earlier flight. The concept of 'extraordinary circumstances' is intended to limit the obligations of an air carrier - or even exempt it from those obligations - when the event in question could not have been avoided even if all reasonable measures had been taken. As the Advocate General observed in point 53 of his Opinion, if such a carrier is obliged to cancel a scheduled flight on the day of a strike by airport staff and then takes the decision to reschedule its later flights, that carrier cannot in any way be considered to be constrained by that strike to deny boarding to a passenger who has duly presented himself for boarding two days after the flight's cancellation.
- 38 Consequently, having regard to the requirement to interpret strictly the derogations from provisions granting rights to passengers, which follows from the settled case-law of the Court (see, to that effect, *Wallentin-Hermann*, paragraph 17 and the case-law cited), an air carrier cannot be exempted from its obligation to pay compensation in the event of 'denied boarding' on the ground that its flights were rescheduled as a result of 'extraordinary circumstances'.

39 Furthermore, it must be reiterated that the discharge of obligations by air carriers pursuant to Regulation No 261/2004 is without prejudice to their rights to seek compensation from any person who has caused the 'denied boarding', including third parties, as Article 13 of the regulation provides. Such compensation accordingly may reduce or even remove the financial burden borne by the air carriers in consequence of those obligations (*IATA and ELFAA*, paragraph 90).

40 In the light of the foregoing considerations, the answer to the second and third questions is that Articles 2(j) and 4(3) of Regulation No 261/2004 must be interpreted as meaning that the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances arose cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation, under Article 4(3) of that regulation, to compensate a passenger to whom it denies boarding on such a flight.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

- 1. The concept of 'denied boarding', within the meaning of Articles 2(j) and 4 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as relating not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds, such as operational reasons.**
- 2. Articles 2(j) and 4(3) of Regulation No 261/2004 must be interpreted as meaning that the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances arose cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation, under Article 4(3) of that regulation, to compensate a passenger to whom it denies boarding on such a flight.**

[Signatures]

* Language of the case: Finnish.

DECISION NO. 204-C-A-2013

May 27, 2013

COMPLAINT by Gábor Lukács against Air Canada.

File No. M4120-3/11-06673

INTRODUCTION

- [1] On December 12, 2011, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that Air Canada's current practice of overselling domestic flights and certain domestic tariff provisions governing denied boarding compensation appearing in Air Canada's *Canadian Domestic General Rules Tariff No. CDGR-1* (Tariff) are unreasonable. He requests that the Agency:
- direct Air Canada to cease and desist from overselling domestic flights;
 - pursuant to subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), disallow Rule 245(E)(1)(b)(iv) of the Tariff. This provision relieves Air Canada from compensating a passenger if, for operational and safety reasons, the aircraft on which the passenger had a confirmed reservation has been substituted with an aircraft of lesser capacity, thereby preventing Air Canada from accommodating the passenger on that aircraft; and,
 - pursuant to subsection 67.2(1) of the CTA, disallow Rule 245(E)(2) of the Tariff, which governs the amount of denied boarding compensation tendered to affected passengers. Rule 245(E)(2) provides that, subject to certain conditions, and at the passenger's option, Air Canada will tender liquidated damages in the amount of \$100, or will offer a travel voucher in the amount of \$200 for travel within Canada, the United States of America or Mexico.
- [2] Air Canada's answer of January 16, 2012 was combined with a preliminary motion to dismiss. Mr. Lukács responded to the motion, characterizing it as an abuse of process, and he requested an award of costs against Air Canada. The Agency denied the preliminary motion in Decision No. LET-C-A-47-2012. The Agency also stated in that Decision that the issue of costs would be determined at the conclusion of its investigation of Mr. Lukács' complaint.

ISSUES

1. Is Air Canada's practice of overselling domestic flights unreasonable?
2. Is Air Canada's Rule 245(E)(1)(b)(iv) unreasonable?

3. Is Air Canada's Rule 245(E)(2) unreasonable?
4. Should costs be awarded against Air Canada respecting its preliminary motion, which was included in Air Canada's answer dated January 16, 2012?

RELEVANT STATUTORY AND TARIFF EXTRACTS

- [3] The extracts relevant to this Decision are set out in the Appendix.

TEST FOR UNREASONABLENESS

- [4] To assess whether a term or condition of carriage is "unreasonable", the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), and was most recently applied in Decision No. 150-C-A-2013 (*Forsythe v. Air Canada*).
- [5] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.
- [6] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

ISSUE 1: IS AIR CANADA'S PRACTICE OF OVERSELLING DOMESTIC FLIGHTS UNREASONABLE?

Positions of the parties

Mr. Lukács

- [7] Mr. Lukács submits that he is not aware of any of Air Canada's statutory or operational obligations that would be adversely affected by Air Canada discontinuing the practice of overbooking. He claims that while overselling may have been an industry standard in the 20th Century, it is no longer so today.
- [8] Mr. Lukács notes that Air Canada's main domestic competitor, WestJet, does not oversell its flights, and that WestJet nevertheless remains profitable. Mr. Lukács adds that, to his knowledge, Air Canada is the only Canadian domestic carrier that engages in the practice of overselling flights and that, therefore, Air Canada would not be subject to any competitive disadvantage should it discontinue that practice.

- [9] Mr. Lukács states that overbooking causes damage to passengers, as recognized by subparagraph 107(1)(n)(iii) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), which requires carriers to include terms regarding compensation for overbooking. He maintains that overbooking flights is antithetical to Air Canada's contractual duty to transport passengers, and that such practice renders the contract meaningless.

Air Canada

- [10] Air Canada submits that overbooking is a common practice in the air transport industry. Air Canada adds that it is recognized as being reasonable in light of a carrier's operational and commercial obligations, and that it is the counterpart of flexible fares that allow passengers to change itineraries at the last minute, resulting in "no-shows" for a flight. Air Canada maintains that it applies its overbooking practice in a reasonable manner, employing sophisticated systems to analyze "no-shows" and booking patterns. Air Canada notes that its overbooking levels are half of what they are, on average, for American carriers, and that the Agency has previously recognized the reasonableness and validity of Air Canada's overbooking practices in Decision No. 666-C-A-2001, Decision No. 180-C-A-2005 (*B.J. Simcock v. Air Canada*) and Decision No. 181-C-A-2005 (*Kathleen Simcock v. Air Canada*).
- [11] Air Canada claims that the Agency also recognized the reasonableness of overbooking in the Agency's Fly Smart publication, and cites U.S. Supreme Court case law which states that overbooking is a "common industry practice" (ref: *Nader v. Allegheny Airlines Inc.*, US 290 [1976]). Air Canada further notes that the U.S. Department of Transportation (DoT) has acknowledged the legitimacy of a well-controlled oversale system.
- [12] Air Canada indicates that, unlike WestJet, whose fares are non-refundable, Air Canada offers certain fares that are fully refundable, and that the different business models of Air Canada and WestJet do not allow for their respective oversale practices to be compared. Air Canada asserts that airline customers place a high value on refundable tickets and flexibility, and that, given its fare practices, Air Canada is exposed to additional risk that certain passengers will not show up for travel. Air Canada also notes that, as an international carrier involved in a global alliance, it has much more connecting traffic, and is therefore exposed to misconnections, which result in additional "no-shows". Air Canada submits that it engages in overbooking to absorb some of the risk and, in turn, to benefit customers.

Mr. Lukács

- [13] Mr. Lukács argues that Air Canada's reference to Decision Nos. 180-C-A-2005 and 181-C-A-2005 does not assist Air Canada's position that overselling flights is not unreasonable because those Decisions, in fact, did not address the issue of the reasonableness of overselling, and concerned international itineraries.
- [14] Mr. Lukács maintains that the relevance of the U.S. DoT's comments regarding overselling is diminished given the uniqueness of the Canadian market, where Air Canada's main competitor, WestJet, does not oversell its flights.

- [15] Mr. Lukács asserts that the Agency's Fly Smart publication is not an authority, as the Agency has stated, in Decision No. LET-C-A-29-2011 (*Lukács v. Air Canada*), that material appearing on the Agency's Web site is provided solely for information purposes.
- [16] Mr. Lukács maintains that Air Canada has failed to provide evidence to demonstrate how the discontinuation of overselling domestic flights would impact Air Canada's ability to meet its statutory, commercial and operational obligations.
- [17] Mr. Lukács submits that Air Canada's claim that all of WestJet's fares are non-refundable is misleading given that WestJet's tariff provides for the application of unused transportation credits. He maintains that Air Canada's submission fails to substantiate claims that Air Canada's overbooking levels are half of those, on average, for American carriers, and that Air Canada engages in overbooking to absorb some of the risk and, in turn, to benefit customers.

Analysis and findings

- [18] Mr. Lukács asserts that WestJet, Air Canada's main domestic competitor, does not overbook its flights and that, nevertheless, WestJet remains profitable. He adds that, to his knowledge, Air Canada is unique among carriers operating in Canada to engage in overbooking. He argues that Air Canada's overbooking of flights conflicts with its contractual duty to transport passengers.
- [19] Air Canada notes that overbooking is common throughout the air transport industry, and that it is the counterpart to flexible fares that allow passengers to change itineraries at the last moment, resulting in "no-shows". Air Canada maintains that it applies the practice in a reasonable manner. Air Canada also submits that the different business models followed by Air Canada and WestJet do not allow the carriers' practices to be compared.
- [20] The Agency notes, as it did previously in Decision Nos. 180-C-A-2005 and 181-C-A-2005, that overbooking is commonplace among air carriers. The Agency is of the opinion that, in general, the practice serves the interests of both the carriers and the travelling public because carriers are able to operate at maximum capacity, which should result in reduced fares. The systems employed by carriers to forecast the number of reservations for particular flights, and the potential number of "no-shows" for those flights, allow carriers to maximize the use of aircraft, and also allow passengers to utilize a booking regime with the flexibility to alter or cancel reservations without notice and possibly without charge depending on the type of air fare purchased.
- [21] The Agency is also of the opinion, as correctly pointed out by Air Canada, that it is inappropriate to compare the overbooking practices of carriers, for example, those of Air Canada and WestJet, given the different business models that those carriers employ.
- [22] The Agency therefore finds that Air Canada's submissions respecting the matter of overselling flights are more compelling than those made by Mr. Lukács. The Agency finds that the practice of overselling domestic flights strikes a reasonable balance between Air Canada's statutory, commercial and operational obligations and the passengers' rights to be subject to reasonable terms and conditions of carriage.

ISSUE 2: IS AIR CANADA'S RULE 245(E)(1)(B)(IV) UNREASONABLE?**Positions of the parties****Mr. Lukács**

- [23] Mr. Lukács argues that Rule 245(E)(1)(b)(iv) is effectively a blanket exclusion from liability. He asserts that the tariff provision exonerates Air Canada from compensating passengers who are denied boarding because of Air Canada's poor planning and/or inadequate maintenance of its equipment. Mr. Lukács acknowledges that Air Canada should not imperil the safety of passengers; however, he submits that the phrase "operational and safety reasons", appearing in the tariff provision, can be "arbitrarily stretched", only reflects Air Canada's interests, and fails to strike a balance between Air Canada's statutory, commercial and operational obligations and the passengers' rights to be subject to reasonable terms and conditions of carriage.

Air Canada

- [24] Air Canada points out that the U.S. DoT does not require carriers to tender compensation to passengers who are denied boarding when, for operational and safety reasons, the passenger's aircraft has been substituted by an aircraft of lesser capacity, otherwise referred to as a "downgauge". Air Canada maintains that it is of utmost importance that Air Canada be able to decide, for operational and safety reasons, when an aircraft should be substituted, and that such a decision should not have negative commercial repercussions on Air Canada nor entail payment of compensation.
- [25] Air Canada submits that a downgauge due to safety reasons may be associated with, among other reasons, weather conditions; for example, in the absence of Instrument Landing Systems for specific runways at certain airports, an aircraft not equipped with a Global Positioning System (GPS) may be unable to safely land in certain weather conditions. Air Canada also notes that a downgauge due to safety reasons may be linked to an unplanned mechanical issue with the aircraft scheduled to operate the flight. Air Canada indicates that unplanned mechanical issues usually occur within 48 hours of the departure time; for example, if a bird strikes an Air Canada aircraft on landing, the aircraft will be subject to unplanned maintenance procedures and may not be able to operate a subsequent flight, which may require substitution of the aircraft. Air Canada maintains that it is not possible to take into account such unplanned problems or to consistently have a same-capacity aircraft available to operate a flight. Air Canada adds that given the extensiveness of its network, when planning aircraft movements, it cannot foresee such considerations as it does not have sufficient aircraft to have back-up aircraft available at each airport from which it operates.
- [26] Air Canada states that a downgauge due to purely operational reasons may be associated with, for example, noise curfews, such as the one in Montréal between midnight and 7 a.m., which would require the use of an aircraft that can be operated 24 hours a day due to its weight and noise profiles. Air Canada notes that a downgauge due to operational reasons is commonly related to and a consequence of an upline safety reason; for example, substitution may occur because of a delayed inbound flight, which may also be caused by an upline safety-related reason

such as an unplanned mechanical or weather issue. Air Canada notes that a downgauge associated with uniquely commercial concerns would not be included in this exception. Air Canada submits that commercially-driven downgauges only occur in exceptional circumstances where flight capacity is at a low for reasons beyond Air Canada's control, such as during the 2003 SARS epidemic in Toronto. Air Canada further submits that commercially-driven downgauges may also happen in limited circumstances where a route requires an aircraft of greater capacity which, in turn, would require that the larger aircraft be taken from another route that will consequently be subject to a downgauge. Air Canada points out that in such circumstances, the exchange will not occur if it creates a situation of denied boarding on the downgauged route.

Mr. Lukács

- [27] Mr. Lukács states that Air Canada has merely declared that its tariff provision is preferable, which is not sufficient to support its reasonableness. He submits that the phrase “operational and safety reasons” is vague, may be used as a “catch-all excuse” not to pay any denied boarding compensation, and mixes two reasons that may be substantially different, namely, operational reasons and safety reasons. He asserts that Air Canada should assume the financial consequences associated with the substitution of aircraft for safety reasons because Air Canada can reasonably be expected to maintain its fleet, and take into consideration the possibility of mechanical failures. Mr. Lukács states that his position is consistent with the judgments rendered in *Quesnel v. Voyages Bernard Gendron inc.* [1997] J.Q. No. 5555, *D’Onofrio v. Air Transat A.T. inc.* [2000] J.Q. No. 2332, and *Lukacs v. United Airlines*, 2009 MBQB 29. Mr. Lukács maintains that the term “operational reasons” creates a “back door” for the overselling of flights, namely, by advertising and selling tickets for a flight on a particular aircraft, and then substituting that aircraft with a smaller one.
- [28] According to Mr. Lukács, the denied boarding regime adopted by the U.S. DoT includes language created and promoted by the International Air Transport Association (IATA), which represents the interests of carriers, and that the Canadian jurisprudence (e.g. *Lukács v. United Airlines*) is more onerous for carriers than the American one.
- [29] Mr. Lukács states that he is aware of the presence in the U.S. legislation of the phrase “operational or safety reasons” in a provision governing exceptions to eligibility for denied boarding compensation. He submits that there is no evidence before the Agency concerning the interpretation of this phrase by American courts or the U.S. DoT, and that it is therefore not possible to conclude that the U.S. legislation supports Air Canada's position.
- [30] Mr. Lukács contends that the very narrow and strict manner in which the European Court of Justice interpreted Article 5(3) of Regulation (EC) 261/2004 concerning “extraordinary circumstances” relieving an air carrier from payment of denied boarding compensation, in *Wallentin-Hermann v. Alitalia*, Case C-549/07, is consistent with his position in this matter.
- [31] In response to Air Canada's submission that downgauging due to the inability of an aircraft lacking GPS to land in adverse weather conditions is an event outside of Air Canada's control, Mr. Lukács argues that while Air Canada has no control over the weather, it does have full

control over its fleet and the equipment it chooses to install in its aircraft. He submits that operating aircraft that are not equipped with GPS and/or failing to upgrade an aircraft's avionic systems is Air Canada's choice, and that this choice apparently has an impact on its passengers, who may consequently be denied boarding. Mr. Lukács therefore argues that Air Canada should bear the costs of the consequences of such choices.

- [32] With respect to Air Canada's submission relating to an "unplanned mechanical issue", Mr. Lukács submits that the approach of the European Court of Justice in *Wallentin-Hermann v. Alitalia* represents an adequate balance between the rights of passengers for performance of the contract of carriage in a timely manner and the operational needs of air carriers. This approach holds that while technical or mechanical problems, on their own, are not extraordinary circumstances that relieve the carrier from the obligation of paying denied boarding compensation, if such problems arise from causes that are entirely outside of the carrier's control, such as sabotage, acts of terrorism, or a hidden manufacturing defect (which affects all aircraft of a particular model), then the carrier should not be required to pay denied boarding compensation.
- [33] Mr. Lukács asserts that the approach of the European Court of Justice is consistent with the Canadian jurisprudence (i.e., *Quesnel v. Voyages Bernard Gendron inc.*, *Lukács v. United Airlines* [leave to appeal denied; 2009 MBCA 111], *Lambert v. Minerve Canada*, 1998 CanLII 12973 (QC C.A.), and *Elharradji v. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11). He submits that it is therefore unreasonable for Air Canada to relieve itself from the obligation of paying denied boarding compensation in situations where the downgauging is necessitated by mechanical problems, unless the problems themselves were caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
- [34] As to the matter of noise curfews, Mr. Lukács states that he disagrees with Air Canada's submission that those curfews are unexpected events that justify not paying denied boarding compensation in the case of downgauging of equipment. He maintains that, with respect to the case of the Montréal Pierre Elliott Trudeau International Airport to which Air Canada refers, the curfew is part of the standard airport information periodically published together with the various procedural charts related to the airport, and that this information is publicly available on the Internet. Mr. Lukács submits that he fails to see how a restriction that is widely known and published months in advance of the flight can be considered by Air Canada as an operational reason that warrants depriving passengers of denied boarding compensation.
- [35] Concerning Air Canada's submission regarding delayed inbound flights, Mr. Lukács states that the common consequence of a delayed inbound flight is that the outbound flight is also delayed. He argues that a delay of the inbound flight does not exempt a carrier from compensating passengers for the delay under the principles of Article 19 of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Montreal Convention). Mr. Lukács maintains that downgauging an aircraft to resolve the problem of a delayed inbound flight is a deliberate operational decision, and that although the downgauging may save the carrier the cost of compensating all passengers for the delay, it is done at the cost of denied boarding of some of the passengers due to the smaller capacity of the substitute aircraft.

- [36] Mr. Lukács submits that the mere fact that an inbound flight is delayed does not mean that it is not possible for the carrier, with some effort, and perhaps cost, to arrange for another aircraft of the same or higher capacity to transport the passengers. Mr. Lukács contends that downgauging is an “airline-centred approach”, which fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and Air Canada’s statutory, commercial and operational obligations.
- [37] Mr. Lukács asserts that Air Canada’s submission regarding the 2003 SARS epidemic is not relevant to this case.
- [38] Mr. Lukács claims that the decision rendered by the European Court of Justice in *Finnair Oyj v. Timy Lassooy*, Case C-22/11, is relevant to this matter. He explains that this case concerned the obligation of a carrier to pay compensation in cases where a passenger is denied boarding for operational reasons. Mr. Lukács adds that the Court noted that under Regulation (EC) No. 261/2004, a carrier cannot rely on “extraordinary circumstances” to relieve itself from the obligation to pay denied boarding compensation.

Analysis and findings

- [39] Air Canada argues that it is of utmost importance that it be allowed to determine when an aircraft should be substituted for operational and safety reasons, and that Air Canada should not be financially penalized for that determination. Air Canada submits that downgauges for safety reasons may be related, for example, to weather conditions, under which an aircraft not equipped with a GPS may not be able to land safely, or to unplanned mechanical issues. Air Canada maintains that it is not possible to foresee unplanned problems or, on a consistent basis, to have available same-capacity aircraft for a flight. Air Canada points out that downgauges for operational reasons may be the result of noise curfews applied by airports, or the consequence of upline safety reasons. Air Canada also points out that commercially-driven downgauges are exceptional.
- [40] Mr. Lukács submits that Rule 245(E)(1)(b)(iv) represents a blanket exclusion from liability, exonerating Air Canada from compensating passengers who are denied boarding due to Air Canada’s poor planning and/or inadequate maintenance of its fleet. He asserts that the phrase “operational and safety reasons” may be used as a “catch-all excuse”. Mr. Lukács maintains that “operational reasons” may allow Air Canada to advertise and sell tickets for a flight, the aircraft for which is then substituted with a smaller one. With respect to downgauges because of delayed inbound flights, Mr. Lukács contends that those downgauges represent a deliberate operational decision, and that it is possible for Air Canada to arrange for another aircraft of a similar or higher capacity to carry the passengers affected by the substitution of aircraft.
- [41] The Agency is of the opinion that Air Canada should have the flexibility to control its fleet and determine when an aircraft should be substituted for operational and safety reasons, provided that Air Canada is able to demonstrate that the events prompting the substitution were beyond Air Canada’s control.

[42] The determination as to what may be within or outside a carrier's control is made on a case-by-case basis. In this regard, the Agency refers to Decision No. 250-C-A-2012 (*Lukács v. Air Canada*), in which the Agency, in addressing liability under the Montreal Convention in situations of overbooking or flight cancellation, stated:

[31] In the Show Cause Decision, the Agency recognized that there may be limited situations where overbooking and cancellation do not constitute delay but, in fact, constitute non-performance of the contract and thus would not be subject to the limits of liability set out in the Convention. The Agency at paragraph 42 of the Show Cause Decision recognized that as further complaints, with different fact situations, are brought before the Agency, the Agency will be able to clarify the conditions that constitute non-performance. The Agency adds that there may be situations in which overbooking or cancellation will not cause a passenger any delay at all, for example where the passenger arrives at their destination within the intended timeframe.

[32] Air Canada emphasizes the fact that the drafters of the Convention were aware of the difficulty of defining what constitutes delay and that the courts themselves have had difficulties drawing the line between delay and non-performance of a contract of carriage. This points to the fact that cases where delay might be at issue must be assessed on a case-by-case basis and are dependent on the facts. Accordingly, Air Canada argues that it would be inconsistent for the Agency to assume that situations of overbooking and cancellation are presumed to be a delay and cause damages under the Convention. It is important to note that the Agency did not preliminarily find that Air Canada's Tariff must always assume that overbooking and cancellation constitute delay. However, the Agency is of the opinion that situations of overbooking or cancellation may fall within the definition of delay in Article 19 of the Convention, and that in many cases such situations will constitute delay. Accordingly, Air Canada's Tariff should allow for this where appropriate.

[33] The Agency is also of the opinion that there may be situations where, for example, overbooking does not necessarily constitute delay, such as when no delay occurs or when an event is characterized by non-performance.

[43] The Agency's position in this matter corresponds to that taken by the European Court of Justice in *Wallentin-Hermann v. Alitalia*, in which the Court concluded that, with reference to European Union Regulation (EC) No. 261/2004, the responsibility rests with the carrier to establish whether events were beyond its control, and ultimately with the court to determine whether those events existed.

[44] The Agency is also of the opinion that the burden must rest with Air Canada to establish that the events prompting the substitution were beyond Air Canada's control and that it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures. Air Canada should not be expected to tender compensation when it has demonstrated that substitution occurred for operational and safety reasons beyond its control, and

that it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures. In the event that Air Canada fails to so demonstrate, compensation should be due to the affected passengers.

- [45] In light of the foregoing, the Agency finds that, in the absence of specific language that establishes context or qualifies Air Canada's exemption from paying compensation, Rule 245(E)(1)(b)(iv) is unreasonable.

ISSUE 3: IS AIR CANADA'S RULE 245(E)(2) UNREASONABLE?

Positions of the parties

Mr. Lukács

- [46] Mr. Lukács argues that the amount of Air Canada's denied boarding compensation has never been updated to reflect inflation and/or an increase in the consumer price index. He points out that the compensation of \$100 tendered by Air Canada for denied boarding is significantly lower than the regime mandated by the United States of America, which provides for compensation up to a maximum amount of \$1,300 under certain circumstances, and by the European Union, which requires compensation up to a maximum amount of 600 euros under certain circumstances. Mr. Lukács maintains that the American and European standards represent reasonable compensation for denied boarding without being punitive to carriers. He further argues that those standards adequately consider the lengths of the delay and trip that are affected by the denied boarding.

Air Canada

- [47] Air Canada argues that in Decision No. 666-C-A-2001, the Agency recognized the reasonable nature of Rule 245(E)(2).
- [48] Air Canada indicates that, contrary to the American environment, Air Canada's overbooking practice is applied in a reasonable and well-controlled manner. Air Canada points out that only 0.09 percent of its domestic passengers are subject to denied boarding, including passengers who volunteer to surrender their seats. Air Canada argues that denied boarding amounts were increased in the United States of America for reasons not considered related to Air Canada's denied boarding policies.
- [49] As for the denied boarding regime applied by the European Union, Air Canada submits that it is subject to that regime for the applicable flights and that, as such, it is not at a competitive disadvantage given that other carriers are also so subject. Air Canada argues that if it were required to apply the same regime to its domestic flights, it would be at a significant competitive disadvantage relative to other domestic carriers that are not subject to that regime. Air Canada also points out that the compensation levels required by the European Union are based on distance of flights in a geography where the countries are small and in close proximity, and are also based on the particular imperatives of the European economy and political framework.

[50] Air Canada submits that its level of denied boarding compensation was determined by various factors, one of which is the benchmark to the average Air Canada domestic economy cabin fare, the amount of which remains fairly stable and within the range of the compensation offered. Air Canada calculated the average fares by dividing the total passenger revenue for domestic segments by the number of total revenue passengers on those segments. These calculations produced the following yearly averages:

- 2004: \$159
- 2005: \$173
- 2006: \$176
- 2007: \$182
- 2008: \$189
- 2009: \$175
- 2010: \$181
- 2011: \$181
- 2012: \$189

[51] Air Canada states that another factor in determining the level of compensation is the benchmark against Air Canada's competitors. Air Canada identifies some of those competitors and specified the compensation they tender. Air Canada argues that its denied boarding compensation amounts are in line with those competitors.

[52] Air Canada submits that its extensive domestic network allows for the fast re-protection of passengers on subsequent flights, and, as a result of the principles set out in Decision No. 251-C-A-2012 (*Lukács v. Air Canada*), more re-protection options are now available. According to Air Canada, it is often able to re-protect passengers within narrow time frames, and both the United States of America and the European Union's denied boarding legislation waives or reduces the requirement to pay denied boarding compensation when re-protection occurs within a certain timeline. Air Canada contends that its domestic competitors do not have such an extensive network, and that the more limited re-protection options available for those competitors would necessarily entail a higher compensation level due to passenger inconvenience.

[53] Air Canada points out that in the event that a customer is denied boarding, Air Canada not only provides an alternate flight to the customer, but is also responsible for providing hotel accommodation, meal vouchers and compensation for other incidental costs (transportation for the customer, phone calls, reasonable costs claimed, etc.) Air Canada maintains that, as a result, its denied boarding compensation is above and beyond the actual damage caused to the passenger due to the denied boarding.

Mr. Lukács

[54] Mr. Lukács maintains that Air Canada's statements on compensation levels in the European Union and Canada are contradictory, and that Air Canada's arguments concerning the competitive disadvantage it would face in offering higher denied boarding compensation are absurd given that Air Canada's main domestic competitor, WestJet, does not oversell its flights.

- [55] Mr. Lukács argues that Decision No. 666-C-A-2001 is distinguishable from this case as that Decision addressed the egalitarian nature of the compensation provided for under the tariff provision at issue, and not the reasonableness of the amount of compensation in relation to current industry standards. Mr. Lukács agrees with the egalitarian principle formulated in that Decision that the amount of denied boarding compensation should not depend on the fare paid by the individual passenger. He submits, however, that a single rate of compensation that is independent of the length of the delay caused by the denied boarding does not serve the purpose of encouraging air carriers to mitigate the inconvenience experienced by persons who are denied boarding.
- [56] Mr. Lukács maintains that there is no evidence on record to support the contention that the air carriers cited by Air Canada in its submission, other than WestJet and Porter Airlines Inc. (Porter), are competitors of Air Canada. He submits that, as the Agency noted in Decision Nos. LET-C-A-129-2011 and 251-C-A-2012, “an industry practice does not, in itself, mean that the practice is reasonable”.
- [57] With respect to Air Canada’s submission regarding its extensive network, Mr. Lukács agrees that Air Canada’s new denied boarding compensation rules should include a provision similar to the European Union’s Article 7(2), Regulation (EC) 261/2004, or the DoT’s 14 CFR 250.5(a)(2), both of which allow the carrier to reduce the amount of compensation payable by 50 percent if the passengers reach their destinations within less than, for example, two hours after their originally booked arrival time. Mr. Lukács suggests that such a provision would create an incentive for Air Canada to reroute passengers as quickly as possible, which clearly benefits passengers, and would relieve Air Canada from part of the financial burden.
- [58] Mr. Lukács disagrees with Air Canada’s submission that an extensive network, on its own, justifies paying less denied boarding compensation, because the size of the network does not necessarily correlate to availabilities and efficiency of its use. He argues that Air Canada should not be “rewarded” for its extensive network alone, but rather, the denied boarding compensation policy should reward Air Canada for using its network well, to the benefit of the passengers, by ensuring that they reach their final destinations within two hours of the originally booked arrival time.
- [59] Mr. Lukács points out that Air Canada is not the only air carrier that has an extensive network in a particular region. He submits that although a number of American carriers have as extensive, or even larger, networks than Air Canada and, similarly, Deutsche Lufthansa Aktiengesellschaft (Lufthansa German Airlines) and Société Air France carrying on business as Air France have vast networks in Europe, authorities chose to impose on these carriers the same rules concerning denied boarding compensation as on smaller carriers.
- [60] Mr. Lukács maintains that there is no evidence that Air Canada would suffer a competitive disadvantage if it increased the amount of denied boarding compensation that it pays. He submits that, based on Air Canada’s submissions, it is possible to determine with great certainty that Air Canada would not suffer such a disadvantage at all, and the impact on Air Canada would be negligible.

- [61] Mr. Lukács contends that the fare dataset submitted by Air Canada, which was used for calculating the average one-way domestic economy cabin fare, is unreliable because that dataset corresponds to single domestic flight segments. He submits that this explains the low averages that Air Canada provided to the Agency. Mr. Lukács argues that Air Canada's dataset significantly distorts statistical quantities that rely on the number of observations (data entries), because it artificially increases the number of data entries (by counting flight segments instead of one-way trips), and thus unrealistically deflates the resulting averages. While also noting that the dataset includes portions of international itineraries and certain anomalous amounts, Mr. Lukács argues that the Agency should reject the averages that were provided by Air Canada because they do not reflect the average one-way domestic economy fare between two places in Canada.
- [62] Mr. Lukács submits that if the Agency were to find Air Canada's dataset reliable, a consolidation of the segments on the same ticket and the same day into a single one-way itinerary would mitigate the problem he views as associated with the dataset. He maintains that a consolidation in this manner represents a good approximation of reality given the very limited information in the dataset. Based on his consolidation of the dataset, and on Air Canada's own premise that reasonable compensation should be at parity with the fares purchased by passengers, Mr. Lukács submits that more than 80 percent of passengers are "shortchanged" by Air Canada's current denied boarding compensation of \$100.
- [63] Mr. Lukács maintains that a reasonable denied boarding compensation policy ought to distinguish between those cases where stranded passengers are quickly rerouted and reach their final destinations within a short time (less than two hours) after the originally booked time, and those cases where the delay is more significant. He submits that, furthermore, those passengers who experience very significant delays (over six hours) in reaching their final destinations ought to be very substantially compensated.
- [64] Mr. Lukács points out that, according to Air Canada's own submissions, Air Canada has a very extensive network and is able to reroute stranded passengers rather quickly. He claims, therefore, that a delay-based compensation scheme would be favourable to Air Canada, and at the same time would provide substantial compensation to those passengers who are exceptionally affected by the denied boarding incident.
- [65] Mr. Lukács submits that, based on his calculations, \$400, in cash, would be a reasonable base amount for denied boarding compensation, and proposes the following regime:
- Length of delay: Less than 2 hours
Compensation: 50% of the base amount
 - Length of delay: 2 hours or more, but less than 6 hours
Compensation: 100% of the base amount
 - Length of delay: 6 hours or more
Compensation: 200% of the base amount

Analysis and findings

- [66] Air Canada asserts that its overbooking system is applied reasonably and in a well-controlled manner, noting that only 0.09 percent of its domestic passengers are affected by denied boarding, and that its compensation amounts are consistent with its domestic competitors. Air Canada submits that if it were required to apply the European Union regime to its domestic carriage, it would be at a competitive disadvantage relative to other domestic carriers that do not apply the same regime. Air Canada submits that its average domestic economy cabin fare has remained stable and within the range of its denied boarding compensation. Air Canada adds that its extensive domestic network often enables Air Canada, in a timely manner, to reprotect passengers who are denied boarding, and that the regimes applied by both the United States of America and the European Union allow for the waiving or reduction of the requirement to tender compensation when re-protection occurs within a certain period.
- [67] Mr. Lukács submits that the denied boarding compensation tendered by Air Canada is significantly lower than the compensation required under the respective regimes administered by the United States of America and the European Union. He argues that there is no evidence on file to support Air Canada's contention that the air carriers to which Air Canada refers, other than WestJet and Porter, and with which Air Canada submits that it compares favourably in respect of denied boarding compensation, are competitors of Air Canada. He adds that an extensive network does not justify paying less denied boarding compensation because the size of the network does not correspond with availabilities and efficiency of use. Mr. Lukács asserts that no evidence has been presented to indicate that Air Canada would suffer a competitive disadvantage should it introduce higher levels of denied boarding compensation. Mr. Lukács indicates that a single rate of compensation, independent of the length of delay caused by denied boarding, does not encourage air carriers to mitigate the inconveniences experienced by affected passengers. He maintains that a delay-based regime is reasonable, and proposes such a regime.
- [68] The Agency has considered the submissions of the parties respecting this matter, and finds that Mr. Lukács has presented a more compelling case that Air Canada's statutory, commercial and operational obligations fail to outweigh the rights of passengers to be subject to reasonable terms and conditions of carriage.
- [69] Although it is true that the Agency determined in Decision No. 666-C-A-2001 that Rule 245(E)(2) was reasonable, that Decision was rendered nearly 12 years ago. Today, prices of air carrier tickets, accommodation, and other incidental expenses are not the same. Air Canada has not demonstrated to the Agency's satisfaction that Air Canada's denied boarding compensation is still reasonable.
- [70] As noted by Mr. Lukács, Air Canada's submission that, based on the levels of compensation offered by certain competitors, Air Canada's compensation is reasonable, is not persuasive. As pointed out in previous Agency decisions, the mere fact that a carrier's term and condition of carriage is comparable to that applicable to other carriers does not render that term and condition reasonable.

- [71] The Agency is also of the opinion that Air Canada has failed to demonstrate how a higher level of compensation would place it in a disadvantageous position relative to other domestic air carriers. Also, Air Canada's submission that Air Canada's extensive network allows for the timely re-protection of passengers who are denied boarding does not justify the current level of compensation tendered by Air Canada, particularly for those passengers who, because of the time or date of their scheduled flight, are inconvenienced to the extent, for example, of having to travel on another day. In this regard, Air Canada's argument that its actions, including arranging alternate transportation or hotel accommodations, exceed the damage experienced by a passenger affected by denied boarding is not persuasive. Such actions may not, in fact, entirely or sufficiently mitigate the damages experienced by that passenger.
- [72] In light of the foregoing, the Agency finds that Rule 245(E)(2) is unreasonable.
- [73] Having determined that Air Canada's current level of \$100, in cash, for denied boarding compensation is unreasonable, the question now arises as to what may constitute a reasonable compensation regime. Mr. Lukács submits that the regime existing in the United States of America or the European Union is a reasonable alternative to that of Air Canada's. He also proposes his own regime, based on the consolidation of the fare data filed by Air Canada, and his calculations relating to that consolidation.
- [74] The American regime and the regime proposed by Mr. Lukács feature compensation based on the length of time an affected passenger is delayed, while the European Union regime involves compensation based on both time and the distance of the passenger's air travel. The Agency is not convinced that an approach that includes a distance component correlates with the inconvenience that may be experienced by a passenger who is denied boarding. Rather, compensation based on the length of time by which a passenger is delayed more accurately reflects the damage which may be experienced. As such, the Agency is of the opinion that the regime applied by the United States of America and that proposed by Mr. Lukács represent reasonable options, while that applied by the European Union does not.

ISSUE 4: SHOULD COSTS BE AWARDED AGAINST AIR CANADA RESPECTING ITS PRELIMINARY MOTION, WHICH WAS INCLUDED IN AIR CANADA'S ANSWER DATED JANUARY 16, 2012?

Positions of the parties

- [75] Mr. Lukács submits that a preliminary motion filed by Air Canada to dismiss his complaint on the basis of it being abstract was merely an attempt to derail and/or delay the proceedings. He maintains that the issue raised by Air Canada has already been determined by the Agency in previous decisions, and that Air Canada's attempt to relitigate the matter constitutes abuse of process. Mr. Lukács therefore argues that the unique circumstances of this case warrant an award of costs against Air Canada with respect to the preliminary motion.

Analysis and findings

- [76] In Decision No. LET-C-A-47-2012, the Agency noted that costs are generally compensatory in nature and are awarded at the end of the proceeding, and that although the Agency was not prepared to issue an interim order on costs, it would consider the issue of costs at the conclusion of its investigation of Mr. Lukács' complaint.
- [77] The Agency's practice has been to award costs only in special or exceptional circumstances. In making such a determination, the Agency considers a combination of factors such as the nature of the application, the length and complexity of the proceeding, whether the Agency held an oral hearing, whether parties have acted efficiently and in good faith or if a party has incurred extraordinary costs to prepare and defend its application. The Agency notes that notwithstanding the preliminary motion filed by Air Canada on January 16, 2012, Air Canada also filed its answer to the complaint as it had been directed to by the Agency. In other words, Air Canada's preliminary motion did not delay the proceedings in this case.
- [78] The Agency has considered the above factors, and finds that the circumstances of the preliminary motion do not warrant an award of costs against Air Canada.

CONCLUSION

- [79] The Agency makes the following final determinations:
- Issue 1: The practice of overbooking is reasonable.
 - Issue 2: Rule 245(E)(1)(b)(iv) of the Tariff is unreasonable.
 - Issue 3: Rule 245(E)(2) of the Tariff is unreasonable.
 - Issue 4: The motion to award costs against Air Canada following a preliminary motion filed on January 16, 2012 is denied.

ORDER

- [80] The Agency, pursuant to subsection 67.2(1) of the CTA, disallows the following provisions of the Tariff:
- Rule 245(E)(1)(b)(iv); and,
 - Rule 245(E)(2).
- [81] Further, the Agency provides Air Canada with an opportunity to show cause, within 30 days from the date of this Decision, why:
1. with respect to Rule 245(E)(1)(b)(iv), the revised provision should not contain language consistent with the finding in this Decision that, in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers; and,

2. with respect to the disallowed Rule 245(E)(2), Air Canada should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács.

[82] Air Canada's response must also be served on Mr. Lukács, who will have 10 days from receipt of that response to file comments, if any, with a copy to Air Canada.

[83] Pursuant to paragraph 28(1)(b) of the CTA, the disallowance of Rules 245(E)(1)(b)(iv) and 245(E)(2) shall come into force when Air Canada includes provisions in its Tariff that are determined to be reasonable by the Agency.

(signed)

J. Mark MacKeigan
Member

(signed)

Geoffrey C. Hare
Member

Canada Transportation Act, S.C., 1996, c. 10, as amended

67.2(1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

European Union – Regulation (EC) No. 261/2004**Article 7 – Right to compensation**

1. Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1 500 kilometres or less;
- (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;
- (c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked

- (a) by two hours, in respect of all flights of 1 500 kilometres or less; or
- (b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or
- (c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.

United States Department of Transportation**14 CFR 250.5 – Amount of denied boarding compensation for passengers denied boarding involuntarily.**

[...]

(1) No compensation is required if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination not later than one hour after the planned arrival time of the passenger's original flight;

(2) Compensation shall be 200% of the fare to the passenger's destination or first stopover, with a maximum of \$650, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination more than one hour but less than two hours after the planned arrival time of the passenger's original flight; and

(3) Compensation shall be 400% of the fare to the passenger's destination or first stopover, with a maximum of \$1,300, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination less than two hours after the planned arrival time of the passenger's original flight.

[...]

14 CFR 250.6 – Exceptions to eligibility for denied boarding compensation.

A passenger denied boarding involuntarily from an oversold flight shall not be eligible for denied boarding compensation if:

(a) The passenger does not comply fully with the carrier's contract of carriage or tariff provisions regarding ticketing, reconfirmation, check-in, and acceptability for transportation;

(b) The flight for which the passenger holds confirmed reserved space is unable to accommodate that passenger because of substitution of equipment of lesser capacity when required by operational or safety reasons; or, on an aircraft with a designed passenger capacity of 60 or fewer seats, the flight for which the passenger holds confirmed reserved space is unable to accommodate that passenger due to weight/balance restrictions when required by operational or safety reasons;

(c) The passenger is offered accommodations or is seated in a section of the aircraft other than that specified on the ticket at no extra charge, except that a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund; or

(d) The carrier arranges comparable air transportation, or other transportation used by the passenger at no extra cost to the passenger, that at the time such arrangements are made is planned to arrive at the airport of the passenger's next stopover or, if none, at the airport of the final destination not later than 1 hour after the planned arrival time of the passenger's original flight or flights.

Air Canada's Canadian Domestic General Rules Tariff No. CDGR-1

Rule 245 Denied Boarding Compensation

[...]

(E) COMPENSATION

Unless passenger chooses option (D)(3) above, in addition to providing transportation in accordance with (D)(1) or (2), a passenger who has been denied boarding will be compensated by AC as follows:

(1) Conditions for Payment

[...]

(b) It must not have been possible to accommodate the passenger on the flight on which he held confirmed reservations and the flight must have departed without him.

EXCEPTION: The passenger will not be eligible for compensation:

[...]

(iv) if, for operational and safety reasons, his aircraft has been substituted with one having lesser capacity.

[...]

(2) Amount of Compensation

Subject to the provisions of (E)(1), AC will tender liquidated damages in the amount of \$100.00 cash or a Credit Voucher or MCO (good for future travel on Air Canada) in the amount of \$200.00, to the passenger's option for travel within Canada or to the USA and Mexico. If accepted by the passenger, such tender will constitute full compensation for all actual or anticipatory damages, incurred or to be incurred.