

Halifax, NS  
lukacs@AirPassengerRights.ca



March 23, 2013

**VIA EMAIL**

The Secretary  
Canadian Transportation Agency  
Ottawa, Ontario, K1A 0N9

Attention: Ms. Judy O’Heare, Senior Analyst

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. British Airways**  
**Complaint about rules governing liability and denied boarding compensation**  
**File No.: M 4120/13-00661**  
**Motion to stay the proceeding until final disposition of FCA File No. A-460-12**

Please accept the following motion pursuant to Rule 32 of the *Canadian Transportation Agency General Rules* to stay the present proceeding and hold it in abeyance pending the Federal Court of Appeal decision in File No. A-460-12, as suggested by the Agency on February 7, 2013.

**BACKGROUND**

**(a) Federal Court of Appeal File No. A-460-12 and the “Internal Procedure”**

Section 16(1) of the enabling statute of the Agency, the *Canada Transportation Act*, states that:

Subject to the Agency’s rules, two members constitute a quorum.

The *Canadian Transportation Agency General Rules*, S.O.R./2005-35, which are the current rules of the Agency that were approved by the Governor in Council, contain no provisions to alter the statutory quorum requirement of at least two Members. Consequently, at least two Members of the Agency are required to form a quorum (see *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2005 FCA 79, para. 8).

Starting in 2011, the Agency engaged in review and revision of its rules, and it has been planning to reduce the said quorum to one Member. In late 2012, the Agency held a public consultation about its Draft Revised General Rules; however, to this date, the Revised General Rules have not been promulgated, and have not been approved by the Governor in Council, as required by section 36 of the *Canada Transportation Act*.

Nevertheless, starting sometime in 2012, the Agency began to apply portions of its Draft Revised General Rules, and began to issue decisions by sole Members of the Agency instead of two Members, contrary to s. 16(1) of the *Canada Transportation Act*. The Agency claims that it has issued an “Internal Policy” that enables it to do so notwithstanding the fact that it was never approved by the Governor in Council.

In 2012, the Applicant challenged the validity and application of the “Internal Policy” before the Federal Court of Appeal both by way of an application for judicial review (FCA File No.: A-386-12) and a motion for leave to appeal (FCA File No.: 12-A-38).

On October 19, 2012, the Applicant was granted leave to appeal by the Federal Court of Appeal (Noël, Nadon, and Trudel, JJ.A.):

The motion is allowed. Leave is therefore granted to Mr. Lukacs to appeal the Agency’s decision no. LET-C-A-126-2012, dated August 9, 2012. More specifically, Mr. Lukacs is granted leave to appeal the Agency’s decision in order to determine the following issue, namely, whether the Agency exceeded its jurisdiction and/or erred in law by making its decision without a quorum of at least two members, as required by subsection 16(1) of the *Canada Transportation Act*, S.C. 1996, c. 10.

This appeal is currently pending before the Federal Court of Appeal (FCA File No.: A-460-12), and is awaiting a hearing date to be set.

On November 30, 2012, the Federal Court of Appeal stayed the Applicant’s application for judicial review (FCA File No.: A-386-12) pending the disposition of the appeal in A-460-12. Trudel, J.A. wrote in the order that the validity of the “Internal Procedure” will be “squarely addressed in the appeal.”

It is trite law that in order to be granted leave to appeal by the Federal Court of Appeal, the moving party must present, at the very least, an arguable case. Thus, it is submitted that the fact that the Federal Court of Appeal granted the Applicant leave to appeal on the issue of whether the Agency exceeded its jurisdiction and/or erred in law by making its decision without a quorum of at least two Members demonstrates that the Applicant has raised a genuine issue and has an arguable case.

It is further submitted that the Agency should give significant weight to this decision of the Federal Court of Appeal until the appeal in File No. A-460-12 is heard and determined on its merits.

**(b) The present proceeding**

The present proceeding was commenced by an application of the Applicant dated January 30, 2013. On February 6, 2013, the Agency opened pleadings, and chose to do so by way of issuing Decision No. LET-C-A-32-2013. Unfortunately, in spite of the pending appeal before the Federal Court of Appeal concerning the validity and application of the “Internal Procedure,” Decision No. LET-C-A-32-2013 was signed by a sole Member of the Agency.

On February 6, 2013, the Applicant protested against the Agency having issued Decision No. LET-C-A-32-2013 without a quorum of at least two Members:

Unfortunately, the attachment was signed only by a single Member of the Agency, contrary to s. 16(1) of the Canada Transportation Act.

As you know, the Federal Court of Appeal has granted me leave to appeal in relation to this issue, and the matter is currently pending before the court (File No.: A-460-12).

Therefore, in order to avoid any concern as to the validity and integrity of the proceeding, I am requesting that you have the attachment signed by a second Member of the Agency.

On February 7, 2013, Ms. Cathy Murphy, the Secretary of the Agency, wrote to the Applicant:

The Agency maintains its position that the One Member Panel policy whereby one Member, assigned at the outset of a dispute proceeding case, may make decisions on preliminary non-substantive procedural issues before the close of pleadings in a matter, at which time a full Panel will be assigned to adjudicate the merits of the complaint, is valid.

The Agency will continue to process your complaint pursuant to its established process unless you advise the Agency that you wish to have your case held in abeyance pending the Federal Court of Appeal decision in File No. A-460-12.

On February 7, 2013, the Applicant wrote to Ms. Murphy:

I do not wish to have the present case held at abeyance, but rather I am asking that the Agency hear and determine the application within 120 days, as required by the Canada Transportation Act.

I am sure you are aware of the possibility that the Federal Court of Appeal may disagree with the Agency’s position in File No. A-460-12, and may find that the Agency’s “Internal Procedure” is invalid.

Thus, in order to avoid any doubt about the validity of any of the decisions made in the present case, I have requested and I am requesting that at least two Members of the Agency be making every decision in the present case.

On February 11, 2013, Ms. Murphy wrote to the Applicant:

As indicated in my e-mail of February 7, 2013, the Agency will continue to process your complaint pursuant to its established process.

In regards to your request that the Agency hear and determine your application within 120 days, it was noted in Agency Decision No. LET-C-A-32-2013 that the Agency strives to deal with all of its cases within 120 days.

On February 11, 2013, the Applicant replied to Ms. Murphy: "I believe I have stated my position abundantly clear."

Rule 36 of the Agency's (current) General Rules state that:

**36.** The Agency shall give oral or written reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed.

In the present case, the Applicant requested on February 7, 2013 that two Members of the Agency be making every decision in the present case. The Agency has clearly *de facto* refused this request. Indeed, on March 13, 2013, the Agency issued Decision No. LET-C-A-51-2013, which was again signed only by a sole Member of the Agency, contrary to the Applicant's request.

Nevertheless, the Agency has never issued a decision dismissing the Applicant's February 7, 2013 request; furthermore, the Agency provided neither oral nor written reasons for its refusal of the Applicant's February 7, 2013 request. This state of affairs deprives the Applicant from challenging the Agency's conduct in the present case by seeking leave to appeal to the Federal Court of Appeal.

## CONCLUSIONS

The Applicant maintains that the Agency has been acting without jurisdiction in the present case by repeatedly issuing decisions without a quorum of two Members, contrary to s. 16(1) of the *Canada Transportation Act*, and hereby reiterates his protest against the Agency's conduct. The Applicant also protests against the Agency's failure to issue a decision, including reasons, in response to the Applicant's February 7, 2013 request that two Members of the Agency be making every decision in the present case.

Since there is already an appeal pending before the Federal Court of Appeal that is aimed to determine the validity of the "Internal Procedure" and the Agency's new practice of issuing decisions by a sole Member (namely, appeal A-460-12), it is submitted that the best course of action would be to await disposition of the said appeal.

Indeed, it would not be a good use of the valuable judicial resources of the Federal Court of Appeal to have two appeals about the same issue.

Therefore, the Applicant requests that the Agency stay the present case and hold it in abeyance pending the Federal Court of Appeal decision in File No. A-460-12, as was proposed by the Agency on February 7, 2013.

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways