

**FEDERAL COURT OF APPEAL**

**BETWEEN:**

**DR. GÁBOR LUKÁCS**

**Applicant**

**- and -**

**CANADIAN TRANSPORTATION AGENCY and  
BRITISH AIRWAYS PLC**

**Respondents**

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

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**COURT OF APPEAL FOR ONTARIO**

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**TABLE OF CONTENTS**

	<b>PAGE</b>
PART I - STATEMENT OF FACTS	1
PART II - POINTS IN ISSUE	7
PART III - SUBMISSIONS	7
PART IV - ORDER SOUGHT	10
PART V - LIST OF AUTHORITIES	11

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**PART I - STATEMENT OF FACTS**

**OVERVIEW**

1. This is the Memorandum of Fact and Law of the Respondent British Airways PLC ( “British Airways”) in opposition to the application filed by Dr. Gábor Lukács ( “Lukács”) for leave to appeal from Decision No. 201-C-A-2014 (the “Final Decision”) of the Canadian Transportation Agency (the “Agency”). The applicant claims that the Final Decision creates a legal loophole that undermines the ability of passengers bumped from British Airways flights to Canada to commence an action for denied boarding compensation in Canada.

2. The applicant’s primary ground for the proposed appeal is that the Agency erred in law and rendered an unreasonable decision that is inconsistent with the requirements set out in subsection 122(c)(iii) of the *Air Transportation Regulations*.

3. The applicant's ground for the proposed appeal is that the Agency breached its duty to observe procedural fairness by ordering the applicant in Decision No. LET-C-A-25-2014 to delete the vast majority of his submissions to the Agency (the "Procedural Decisions").

4. 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 compensation payable to passengers who are denied boarding on oversold flights ("denied boarding compensation").

**Decision No. 10-C-A-2014, para. 1 - Applicant's Motion Record – Tab 3, p. 8**

5. On January 17, 2014, the Agency issued Decision No. 10-C-A-2014, which resolved with finality all but one issue in the complaint of Lukács with respect to the issue of denied boarding compensation. The Agency provided 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:

- (a) The regime applicable in the United States of America;
- (b) The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
- (c) The regime proposed by Air Canada during the proceedings related to Decision No. 442 C-A-2013; or

(d) Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

**Decision No. 10-C-A-2014, paras. 140, 144 - Applicant's Motion Record – Tab 3, p. 31**

6. In his submissions to the Agency Lukács argued that British Airways' Tariff should reflect British Airways' legal obligation under Regulation (EC) No. 261/2004 and noted that this regulation applies to every flight departing from an airport in the United Kingdom. British Airways asserted that it was inappropriate for the Agency to enforce foreign laws, either directly or indirectly, by requiring carriers to include provisions of a European regulation in a carrier's Canadian contract of carriage. The Agency decided 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. The applicant did not file any application for leave to appeal from this decision.

**Decision No. 10-C-A-2014, paras. 140, 144 - Applicant's Motion Record – Tab 3, pp. 24-27**

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

from Canada to the United Kingdom. The proposed wording set out in Decision No. 442-C-A-2013 was as follows:

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

British Airways proposed to apply the identical wording with only the “European Union” changed to the “United Kingdom” to reflect that all British Airways’ flights operate from Canada to London, United Kingdom.

**Submissions of British Airways, March 17, 2014 - Applicant’s Motion Record – Tab 5, pp. 40-41**

8. On March 26, 2014, Lukács filed his reply, and made submissions that were unrelated to British Airways’ submissions of March 17, 2014 and substantially reargued the basis of the Agency’s Decision No. 10-C-A-2014. He submitted that:

- (a) the tariff wording proposed by British Airways did not reflect the regime proposed by Air Canada, and it was inconsistent with the obligation to provide denied boarding compensation on all flights to and from Canada;
- (b) the regime of Air Canada was not reasonable in the case of British Airways, whose statutory and commercial environment substantially differs from Air Canada’s; and

(c) there had been significant material changes since the proposal of Air Canada was put forward, and it would be unreasonable for British Airways to apply that regime.

**Reply of Lukács, March 26, 2014 - Applicant's Motion Record – Tab 6, p. 43**

9. On March 28, 2014, British Airways made additional submissions in response to the lengthy reply made by Lukács and submitted that Lukács' submissions went beyond appropriate reply and raised issues that had either already been decided by the Agency in Decision No. 10-C-A-2014 or raised fresh issues that were totally unrelated to the submission made by British Airways in response to the show cause order of the Agency.

**Additional Submissions of British Airways, March 28, 2014 – Applicant's Motion Record – Tab 7, p.77**

10. On April 1, 2014, Lukács asked the Agency for permission to respond to British Airways' submissions.

**Letter of Lukács to the Agency – Applicant's Motion Record – Tab 8, p.79**

11. On April 16, 2014, in Decision No. LET-C-A-25-2014, the Agency struck out the additional submissions of British Airways and ordered Lukács to refile his reply "with all submissions that are unrelated to the specific matter of denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted".

**Decision No. LET-C-A-25-2014 – Applicant's Motion Record – Tab 9, p.83**

12. On April 23, 2014, Lukács made a motion to the Agency to reconsider Decision No. LET-C-A-25-2014.

**Motion of Lukács to reconsider Decision No. LET-C-A-25-2014 – Applicant’s Motion Record – Tab 10, p.84**

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

**Decision No. LET-C-A-29-2014 – Applicant’s Motion Record – Tab 11, p.91**

14. On May 8, 2014, Lukács filed his revised reply as per the Agency’s decisions, under protest.

**Revised (under protest) Reply of Lukács – Applicant’s Motion Record – Tab 12, p.92**

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

(a) referred in error to Decision No. 227-C-A-2013 (*Lukács v. WestJet*) instead of Decision No. 442-C-A-2013 (*Azar v. Air Canada*) at paragraphs 10-11, but it is clear that the intent of the Agency was to refer to Decision No. 442-C-A-2013;

(b) found that the tariff language proposed by British Airways was unreasonable, because it did not apply to all travel from Canada to the European Union, but only to the United Kingdom; and



- (c) ordered British Airways to amend its proposed tariff rule by extending its application to all travel from Canada to the European Union (at paragraph 12).

**Decision No. 201-C-A-2014 – Applicant’s Motion Record – Tab 1, p.1**

## **PART II - POINTS IN ISSUE**

16. The question to be decided on this motion is whether this Honourable Court should grant Lukács leave to appeal. The applicant’s Memorandum of Fact and Law raises the following issues:

- (a) Whether the Agency erred in law in ordering that British Airways file the proposed Rule for travel from Canada to the European Union; and
- (b) Whether the Agency erred in law in deciding that Lukács was to refile his reply with all unrelated submissions deleted.

## **PART III - SUBMISSIONS**

17. British Airways submits that the applicant requesting leave to appeal decisions of the Agency to this Honourable Court must establish “some arguable ground upon which the appeal might succeed”.

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

18. Under section 41 of the *Canada Transportation Act* there is a limited scope of appeals and the court cannot interfere with a decision of the Agency in the absence of an error of law or jurisdiction. British Airways submits that the appropriate standard of

review for a decision of the Agency when the Agency is interpreting its home statute is reasonableness and the question to be addressed is whether the Agency acted reasonably when making the decisions in respect of which the applicant is seeking leave to appeal.

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

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

20. As the aeronautical authority for Canada it takes part in the negotiation of bilateral air services agreements between Canada and other countries that formalize the rights allowing international air carriers to carry passengers and cargo between Canada and other countries.

21. Pursuant to international air services agreements and the regulatory structure implemented by the Agency, international air carriers licensed by the Agency to operate air services must publish tariffs applicable to their air services. Under section 55(1) of the *Canada Transportation Act* a tariff is “a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services”.

***Canada Transportation Act*, s.55(1) - Applicant's Motion Record, Appendix  
A, p. 133**

22. Pursuant to subsection 111(1) of the *Air Transportation Regulations*, the terms and conditions of international carriage established by an air carrier “shall be just and reasonable”.

*Air Transportation Regulations, s. 111(1) - Applicant’s Motion Record, Appendix A, p.139*

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

24. British Airways submits that the Agency made reasonable decisions and properly determined the issues raised by the applicant in his leave to appeal motion and applied its extensive experience and expertise to analysing the proposal by British Airways to file a denied boarding compensation tariff revision with the same wording as the Agency decided was acceptable as clear and reasonable in its Decision No.10-C-A-2014 in respect of which decision the applicant has not sought leave to appeal.

25. The applicant is seeking to do indirectly what he is time-barred from doing directly, namely seeking leave to appeal from Agency Decision No. 10-C-A-2014.

26. British Airways submits that the Agency made reasonable decisions and did not err in law in deciding either Decision No. 201-C-A-2014 or procedural Decisions No. LET-C-A-25-2014 and LET-C-A-29-2014.

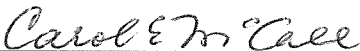
**PART IV - ORDER SOUGHT**

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

28. Therefore, British Airways respectfully requests that this Honourable Court dismiss the applicant's application for leave to appeal Agency Decision No. 201-C-A-2014 and procedural Decisions No. LET-C-A-25-2014 and LET-C-A-29-2014.

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2014.

  
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Carol E. McCall  
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PLC

**PART V - LIST OF AUTHORITIES**

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

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Respondents

Court File No. 14-A-37

**FEDERAL COURT OF APPEAL**

Proceeding commenced at Halifax

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