Court File No.: 16-A-15

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and BRITISH AIRWAYS PLC

Respondents

REPLY OF THE MOVING PARTY

(Motion for Leave to Appeal)

Dated: May 11, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Allan Matte

Tel: (819) 994 2226
Fax: (819) 953 9269

Solicitor for the Respondent,
Canadian Transportation Agency

AND TO: **PATERSON MACDOUGALL LLP**
1 Queen Street East Suite 900
Toronto, ON M5C 2W5

Carol McCall

Tel: (416) 643 3309
Fax: (416) 366 3743

Counsel for the Respondent,
British Airways Plc

Court File No.: 16-A-15

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and BRITISH AIRWAYS PLC

Respondents

REPLY OF THE MOVING PARTY

1. British Airways conflates in its submissions several separate matters:

(a) the Agency's order with respect to British Airways' tariff rule on denied boarding compensation on flights from Canada to the EU;

Decision No. 201-C-A-2014, para. 14 **Moving Party Rec'd, Tab 3, p. 11**

(b) British Airways' International Tariff Rule 87(B)(3)(B), governing denied boarding compensation on flights from Canada to the EU;

(c) the Agency's order with respect to British Airways' tariff rule on denied boarding compensation on flights from the EU to Canada (the **"Redetermination Decision"**); and

Decision No. 49-C-A-2016, para. 18 **Moving Party Rec'd, Tab 5, p. 31**

(d) the Agency's decision on whether British Airways' new International Tariff Rule 87(B)(3)(C), governing denied boarding compensation on flights from the EU to Canada, complies with the Redetermination Decision.

Decision No. 91-C-A-2016 **Moving Party Rec'd, Tab 1, p. 1**

2. The matter before this Honourable Court is confined to item (d): should Lukács be granted leave to appeal Decision No. 91-C-A-2016 of the Agency (the **"Impugned Decision"**)?

3. British Airways' submissions at paragraph 13, to the effect that Lukács did not challenge the revised International Tariff Rule 87(B)(3)(B) on a previous appeal, are irrelevant to the Impugned Decision and are misguided. First, Rule 87(B)(3)(B) concerns item (b), that is, flights from Canada to the EU, while the proposed appeal stems from the newly added Rule 87(B)(3)(C), governing flights from the EU to Canada. Second, a tariff revision of an airline in and on its own cannot be appealed to this Honourable Court. Only a decision or order of the Agency, purporting to find the revision to be compliant, can be appealed. It is for this reason that Lukács is seeking leave to appeal the Impugned Decision.

A. PROCEDURAL FAIRNESS

4. The primary ground for the proposed appeal is that the Agency made the Impugned Decision based on ex-parte communications of British Airways, and contrary to both the Agency's own rules of procedure and the principle of *audi alteram partem*. This proposed ground is addressed only at paragraphs 21 and 33 of British Airways' memorandum.

(i) Paragraph 21: "standard practice"

5. British Airways argues that submitting a proposed tariff wording to the Agency ex-parte, without providing a copy to the opposing party, is a "standard practice" and that it is "not a step that involves submissions by complainants." There are several difficulties with the position of British Airways:

(a) Exhibit "D" to the Lukács Affidavit, cited by British Airways as the basis for its argument, is not evidence for the alleged fact that ex-parte communications are a "standard practice."

(b) In the cases cited by British Airways, the Agency received submissions from both parties, and it did not issue any decisions purporting to confirm compliance based on ex-parte submissions.

(c) The past unfair practices of the Agency, if they exist, do not justify continuing the same practice—two wrongs do not make a right.

(d) If receiving ex-parte submissions are a "standard practice" at the Agency and not merely an isolated incident, then this provides further support to the need for the appellate intervention of this Honourable Court by way of putting an end to this impermissible practice, which undermines public confidence in the Agency and its impartiality.

(ii) Paragraph 33: "full opportunity to provide extensive submission"

6. British Airways' statement that Lukács "had full opportunity to provide extensive submissions [...] prior to Decision No. 49-C-A-2016 and Decision No. 91-C-A-20166" is at best misleading, and is an attempt to sidestep the issue:

(a) Lukács does not seek leave to appeal Decision No. 49-C-A-2016 (the "Redetermination Decision"), and is content with it.

(b) Decision No. 91-C-A-2016 (the "Impugned Decision"), which Lukács seeks leave to appeal, dealt with a new question, namely, whether British Airways complied with the Redetermination Decision. This question arose on or around March 9, 2016, when British Airways ex-parte submitted to the Agency its proposed tariff amendments.

(c) Lukács had no opportunity to make submissions about the question of compliance because British Airways and the Agency concealed their communications from him. These ex-parte communications were disclosed to Lukács only on March 24, 2016, one day after the Impugned Decision was rendered.

B. REASONABLENESS OF THE IMPUGNED DECISION

7. The second ground for the proposed appeal is that the Impugned Decision is unreasonable. British Airways addressed this issue in paragraphs 30-32 of its memorandum.

(i) Paragraph 30: the Agency's order in the Redetermination Decision

8. British Airways' submissions at paragraph 30 are an attempt to create a strawman. As the record shows, Lukács never suggested that the airline was required to "include Regulation (EC) 261/2004 in its entirety" into its tariff. Indeed, *Regulation (EC) 261/2004* contains a number of provisions unrelated to denied boarding compensation, which are obviously not required to be included.

9. Instead, Lukács submits that in the Redetermination Decision, the Agency ordered British Airways to mimic the denied boarding compensation regime of Air Canada, "including the incorporation by reference of Regulation (EC) 261/2004." Therefore, British Airways was required to amend its tariff by including the obligation to pay denied boarding compensation on flights from the EU to Canada in accordance with *Regulation (EC) 261/2004* the same way as Air Canada did. Alas, British Airways did something entirely different.

Lukács v. British Airways, Decision No. 49-C-A-2016, para. 18 — **Moving Party Rec'd, Tab 5, p. 31**

Lukács Affidavit, Exhibit "A" — **Tab 7A, p. 43**

(ii) Paragraph 31: collateral attack on the Redetermination Decision

10. British Airways' submissions that its Proposed Rule 87(B)(3)(C) is allegedly better than what the Agency ordered British Airways to do are an impermissible collateral attack on the order of the Agency in the Redetermination Decision, which British Airways chose not to appeal, and with respect to which it withdrew the request for reconsideration.

Lukács Affidavit, Exhibit "B" **Moving Party Rec'd, Tab 7B, p. 47**

11. These submissions are also misguided in that Air Canada's tariff rule, which British Airways was required to mimic, incorporates *Regulation (EC) 261/2004* by reference, but British Airways provided no authority to suggest that Air Canada's tariff rule is lacking clarity or is not enforceable in Canada.

Lukács Affidavit, Exhibit "A" **Tab 7A, p. 43**

(iii) Paragraph 32: "clear, reasonable and enforceable in Canada"

12. British Airways' submissions that its Proposed Rule 87(B)(3)(C) is "clear, reasonable and enforceable in Canada" misstates and sidesteps the narrow issue that was before the Agency in the Impugned Decision, namely:

> 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?
>
> [Emphasis added.]

Decision No. 91-C-A-2016 **Moving Party Rec'd, Tab 1, p. 1**

13. It is this question that the Agency answered unreasonably, because Rule 87(B)(3)(C) makes no reference to *Regulation (EC) 261/2004* and does not mimic Air Canada's denied boarding compensation policy for flights from the EU to Canada, contrary to the order in Decision No. 49-C-A-2016.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 11, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party