

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

**APPLICANT'S WRITTEN REPRESENTATIONS ON COSTS OF THE
INTERLOCUTORY INJUNCTIONS MOTION**

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**Counsel for the Applicant,
Air Passenger Rights**

TO : CANADIAN TRANSPORTATION AGENCY

PART I – OVERVIEW

1. This Honourable Court granted leave for the Applicant to make submissions on costs after rendering its decision on interlocutory injunctions motion.¹
2. The Agency has not requested costs and, as such, there is no dispute that the Agency would not be entitled to costs on the motion.²
3. Although the Applicant was not granted the injunctions, the Applicant secured some change to the Agency's conduct and clear judicial pronouncements on pertinent matters. The Applicant relies on two bases for costs, payable forthwith:
 - a. Costs thrown away for the cross-examination (including preparation thereof) that the Agency consciously failed to attend; and
 - b. Costs for the motion as there was partial success in securing some behavioural modification on the part of the Agency.
4. The Applicant submits that it will be just to award lump sum costs, inclusive of disbursements, in the amount of \$600 for costs thrown away on the cross-examination and a further \$2,000 for the motion, for a total of \$2,600.

PART II – AGENCY'S FAILURE TO ATTEND CROSS-EXAMINATION

5. On April 16, 2020, this Court found that it was in the interest of justice that the Applicant's motion proceed on an expedited basis despite the COVID-19 suspension period.³
6. On April 17, 2020, the Applicant promptly contacted the Agency to canvass dates for cross-examinations on the affidavits, including cross-examination of the Applicant's affiant should the Agency wish to examine Dr. Lukacs.⁴
7. On April 22, 2020, the Agency, through their counsel Mr. Allan Matte, stated that the Agency did not intend to cross-examine the Applicant's affiant.⁵

¹ [Air Passengers Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 92 at para. 39

² [Balogun v. Canada](#), 2005 FCA 350 at para. 2; [Exeter v. Canada \(AG\)](#), 2013 FCA 134 at paras. 12 and 17; [Chen v. Canada \(Public Safety and Emergency Preparedness\)](#), 2019 FCA 170 at para. 60

³ Order of Locke JA on April 16, 2020

⁴ see Applicant's letter to the Agency dated April 17, 2020 (appended to Applicant's Letter submitted to the Court on April 30, 2020 in response to the Agency's request for directions)

⁵ E-mail from Mr. Matte to Applicant's counsel dated April 22, 2020 at 3:30PM (see page 8 of Appendix A in the Agency's letter to the Court on April 30, 2020 seeking directions [**April 30 Agency Letter**])

8. On April 23, 2020, Mr. Matte confirmed May 1, 2020 at 1:00PM for cross-examination of the Agency's affiant:⁶

"I agree to tentatively booking May 1st at 1:00 pm for the cross-examination of our affiant, if you wish to do so."

"If you do cross-examine our affiant we reserve the right to ask the Court for leave to file submissions addressing this evidence once we have the transcript. We understand that you object."

9. On April 27, 2020, Mr. Matte reneged on the cross-examination:⁷

Please cancel the appointment for May 1, we will not be appearing.

10. Then, Mr. Matte again stated to the Court that the Agency refuses to attend the cross-examination that was already agreed upon:⁸

We can confirm for Counsel that, as previously indicated, we will not be attending the cross-examination tomorrow.

11. On the eve of the scheduled cross-examination, on April 30, 2020, the Agency wrote to this Honourable Court requesting directions to "reschedule" the expedited timetable ordered by Locke J.A., including relief from even attending the cross-examination the Agency agreed to attend. However, this Court did not issue any directions or order relieving the Agency from attending the cross-examination.

12. The Applicant has filed a certificate of non-attendance for the cross-examination.⁹

13. Rule 97(e) provides that if an affiant fails to attend a cross-examination, the Court may order the party on whose behalf the person is being examined to pay costs.¹⁰ The applicable disbursement was \$105.66¹¹ and the Applicant submits that \$500 for preparation is modest for a half-day cross examination, for a lump sum of \$600.

14. Considering the Agency consciously failed to attend the cross-examination, it may also be open for this Honourable Court to award increased costs.

⁶ see pages 5-6 of Appendix A in the April 30 Agency Letter

⁷ see page 2 of Appendix A in the April 30 Agency Letter

⁸ April 30 Agency Letter, page 3

⁹ Applicant's letter to the Court on May 1, 2020, appending the certificate of non-attendance

¹⁰ *Figgie Int. Inc. v. Citywide Machine Wholesale Inc.* (1995), 60 C.P.R. (3d) 496 (Proth.) at para. 8

¹¹ Invoice enclosed as Appendix A

PART III – COST OF THE MOTION FOR PUBLIC INTEREST REASONS

15. Although the Applicant was not successful in obtaining the injunctions at this time, this Honourable Court recognized that the Applicant raised a serious issue to be tried for enjoining the Agency’s members from dealing with passenger complaints.¹² That is, the Applicant’s position that the Statement on Vouchers may demonstrate a reasonable apprehension of bias was not frivolous or vexatious.
16. Similarly, although this Honourable Court stated that the Applicant did not meet the strong *prima facie* case standard for the administrative action (i.e. posting the Statement on Vouchers) being judicially reviewable under the *Federal Courts Act*, the Court gave a clear judicial pronouncement that the Statement is not binding on the passengers and cannot deprive the passengers of their legal rights.¹³
17. There was a clear public benefit in having the motion swiftly heard. The advancement of the motion has led to partial success in securing some behavioural modification on the part of the Agency, in the form of some clarification “FAQ” on April 22, 2020.
18. It is apparent that the Applicant’s motion was the impetus of some Agency action that would not have occurred but for this motion being brought. Part of the Applicant’s motion sought a “clarification message” be included in the Statement on Vouchers to indicate that it was not a binding decision or order.¹⁴
19. Although the Agency did not provide any explanation, two weeks *after* being served with the Applicant’s motion and one week after this Court ordered the Applicant’s motion be heard on an expedited basis, the Agency posted a “FAQ” in its website stating that the Statement on Vouchers is “*not a binding decision.*”¹⁵ Prior to the posting of the “FAQ”, the Agency has refused to officially state its position on whether the Statement is, or is not, a binding decision or order.¹⁶
20. Although the Statement on Vouchers will remain on the Agency’s website at this time, the Agency’s late clarification that it is “not binding” could, theoretically,

¹² [Air Passengers Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 92 at para. 17

¹³ [Air Passengers Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 92 at paras. 20 and 26-27

¹⁴ Applicant’s Notice of Motion, para. 1(a) and 2(a) of the orders being sought.

¹⁵ Applicant’s Reply Submissions on the Motion filed May 7, 2020 at paras. 43-44.

¹⁶ See Applicant’s letter to the Court on April 15, 2020, the paragraph starting with “*Secondly..*”

provide minimal support for persistent and savvy passengers' in the hopes of potentially overcoming airlines' reliance on the Statement to categorically deny refund requests.¹⁷ Whether the clarifications are sufficient remains to be seen, but it bears noting that misinformation and misquoting of any publications relating to the Statement on Vouchers continues even after this Court's judgment.¹⁸

21. The Agency's own late-arriving clarifications, and most importantly this Court's judgment, would not have resulted but-for the Applicant bringing this motion swiftly and defending the Agency's "non-availability" excuse for not hearing this motion,¹⁹ and the National Airlines Council of Canada's motion to intervene.²⁰
22. Accordingly, and in any event, it is within this Court's discretion to award costs, including reasonable disbursements and/or allowances, taking into account public interest in advancing the motion and also other relevant factors.²¹
23. It would be appropriate in these circumstances to grant the Applicant a moderate lump sum award of \$2,000 to reflect the public interest nature of the motion, the amount of work, and the depth of the legal research undertaken in the in-chief submissions (32 judicial decisions in total), and the reply (48 judicial decisions in total). The Applicant's comprehensive review of the case law across Canada, detailed submissions, and thorough analysis of various arguments assisted the Court in rendering a swift decision on the motion during these difficult times.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, Province of British Columbia, June 1, 2020



Signature of counsel for the Applicant
Simon Lin

¹⁷ See Applicant's Motion Record pages 86-7, 118, 120-121, 123-6, 129-133, 135, 140, and 143; some corrections and changes appears to have been made after the Applicant's motion and this Court's judgment; [Air Passengers Rights v. Canada \(Transportation Agency\)](#), 2020 FCA 92 at para. 37

¹⁸ See article enclosed as Appendix B

¹⁹ Order of Locke J.A. on April 16, 2020

²⁰ Order of Boivin J.A. on May 1, 2020

²¹ Rule 400(3)(h) and (o) - [Lukacs v. Canada \(Transportation Agency\)](#), 2016 FCA 202 at para. 45 [Lukács v. Canada \(Canadian Transportation Agency\)](#), 2018 FCA 92 at para. 20; [Lukács v. Canada \(Transportation Agency\)](#), 2014 FCA 76 at para. 62



Appendix A

Invoice

Your Meeting Space Since 1960

Gabor Lukacs
6507 Roslyn Road
Halifax, Nova Scotia
B3L 2M8



Invoice No. 2200371
Date 2020-05-04
GRS File No. 20-0256
Terms Due on receipt
HST No. 106590243

ATTENTION: G. LUKACS

Court File No. A-102-20			
SERVICES	QUANTITY	RATE	AMOUNT
Cross-Examination Scheduled for May 1st, 2020 - 1:00 p.m. AIR PASSENGER RIGHTS & CTA			
Reporting - Hourly Rate	1	70.00	70.00
Witness: DESNOYERS, MEREDITH	1	0.00	0.00
Certificate of Non-Attendance	1	18.00	18.00
Handling Charge	1	5.50	5.50
HST (ON) on sales		13.00%	12.16
	Sales Tax		CAD 12.16
	Payments/Credits		CAD -105.66
	TOTAL		CAD 105.66

Appendix B

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Federal Court Rejects Cash Refunds For Cancelled Travel

Anna Kroupina, Open Jaw
26.05.20



Please [click here \(https://www.openjaw.com/newsroom/article/14523/federal-court-rejects-motion-to-amend-ct-vouchers\)](https://www.openjaw.com/newsroom/article/14523/federal-court-rejects-motion-to-amend-ct-vouchers) to view the most recent version of this article.

AMENDMENT:

Open Jaw would like to clarify that despite the challenge by the Air Passenger Rights group, spearheaded by Gabor Luk has deferred a decision on the airlines' obligations to customers during COVID-19.

For reference, here is point [39] in the court order: "Because it says that APR's application for judicial review does not r is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismi however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to b of judges, rather than a single judge. Consequently, I decline to make the order sought."

Open Jaw regrets any confusion as to the Justice's ruling.

Open Jaw would also like to confirm that, as we previously published, according to the official court documents, these s attributed to Justice Mactavish [1]: "The airline industry and airline passengers have been seriously affected by the Covi International borders have been closed, travel advisories and bans have been instituted, people are not travelling for n and airlines have cancelled numerous flights."

Finally, the comment by the Court has been attributed to the Canadian Transportation Agency.

The court order in its entirety can be found [here \(https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/479531/inde](https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/479531/inde)

Canada's Federal Court of Appeal has dismissed a consumer group's lawsuit demanding that airlines refund tra were cancelled due to the COVID-19 pandemic.

"The airline industry and airline passengers have been seriously affected by the Covid-19 pandemic," wrote Justi "International borders have been closed, travel advisories and bans have been instituted, people are not travelli reasons and airlines have cancelled numerous flights."

The group Air Passenger Rights of Halifax challenged the Canadian Transportation Agency's [statement on 25MA cta.gc.ca/eng/statement-vouchers?wbdisable=true](https://www.cta.gc.ca/eng/statement-vouchers?wbdisable=true)) that airlines "should not be expected to take steps that coul economic viability", and allowed carriers to refund pre-paid tickets through travel vouchers. On 24APR, Canada's regulator [clarified its earlier statement \(https://www.openjaw.com/newsroom/article/14357/cta-backpedals-on-l-saying-decision-is-not-binding\)](https://www.openjaw.com/newsroom/article/14357/cta-backpedals-on-l-saying-decision-is-not-binding), saying airlines' right to issue travel credits instead of a refund for cancelled trips decision" but would not say that refunds were encouraged.

Quoting the Canadian Transportation Agency, the Court stated: "Having airlines provide affected passengers wit for future travel 'could be' an appropriate approach in the present context as long as these vouchers or credits c unreasonably short period of time."

Parliament in 2018 passed Bill C-49 An Act To Amend The Canada Transportation Act that mandated cash comp \$1,000 for cancelled flights, but only in circumstances within an airline's control.

In 2019, the CTA said it favoured cash refunds under normal circumstances, but waived the rule as a pandemic r

"The proposal reflects consumer views that it is important to be offered compensation in the form of cash," staff regulatory notice at the time. "It also provides the flexibility, supported by carriers and consumers, to offer other compensation, e.g. travel vouchers, seat upgrades and points towards loyalty programs."



Anna Kroupina Journalist

Anna is OJ's newest member and she joins the team as a writer/reporter. She covers events. Although she's new to the industry, pursuing a career path in journalism has been a goal since her first family road trip to the Florida Keys sparked a desire to work in this exhilarating, fast-paced industry.

Comments

nathalie - May 27, 2020 @ 09:29

allo

Gabor Lukacs - May 27, 2020 @ 00:21

The report misrepresents the Federal Court of Appeal's decision, which is actually found here: <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/479531/index.do>

A. The judge REFUSED to dismiss the case:

[39] Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges. Consequently, I ***decline*** to make the order sought.

2. The article erroneously attributes to the judge the statements of the CTA. For example:

[25] [...] the statements simply suggest that having airlines provide affected passengers with vouchers or credits "could be" an appropriate approach in the present context, as long as these vouchers or credits do not expire in a short period of time.

The judge did not agree or disagree with this statement, but summarized what the CTA stated.

3. For a balanced and factual report, check City News:

<https://toronto.citynews.ca/2020/05/22/airline-passenger-refund-feud-reaches-new-heights/>

Teodor Tanase - May 26, 2020 @ 22:15

The new AC "goodwill policy" is a bit more flexible. Hopefully from now on they'll consider travel agencies and other business partners. By the way, no offence, Mr Pelletier, are you really holding an OPC permit? Mr Clark, chape

DAVID CHIN - May 26, 2020 @ 20:38

In a force majeure (unforeseeable circumstance that prevents someone from fulfilling a contract) neither party is at fault. If carriers are allowed to maintain current ruling then passengers bear the liability of not having access to their funds. A compromise should be offered

1. Refund or
2. Carriage to contracted destination with no additional cost within 1 year or
3. A Transportation credit to be used within 2 years

ray - May 26, 2020 @ 17:34

When you purchase a ticket. It's in the contract of carriage that you will receive a refund to the original form of payment if the flight is cancelled. This has nothing to do with the passenger bill of rights that was thrown out the window. This has to do with the original agreement made by the passenger and the airline at the time of purchase.

Bill Clark - May 26, 2020 @ 17:31

Pelletier's comment is equally incorrect. Airlines, being federally regulated, do not operate under any of the three industry acts-which is where trust funding is required to ensure the travel agent pays the end supplier.

Steve Pelletier - May 26, 2020 @ 17:09

This is a ridiculous decision from someone who does not know how it works. The money of customer (in Quebec trust account) to be used only for the travel not other airline expenses according to the law of travel !!! Steve Pell Voyages Culturels Plus 514-842-4139

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Email *

 (will not be published)

Comment *

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1V6V

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