

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court of Appeal in **Halifax, Nova Scotia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the applicant is self-represented, on the Applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

Date: January 22, 2016

Issued by: _____

Address of

local office: Federal Court of Appeal
1801 Hollis Street
Halifax, Nova Scotia

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

Ms. Liz Baker, General Counsel and Secretary
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APPLICATION

This is an application for judicial review in respect of the ongoing “Consultation on the requirement to hold a licence” of the Canadian Transportation Agency (“Agency”) and specifically the “Approach under consideration” that purports to exclude Indirect Air Service Providers (“IASP”) from the statutory requirement of holding a license.

The Applicant makes application for:

1. a declaration that:
 - (a) the Canadian Transportation Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding Indirect Air Service Providers from the statutory requirement of holding a license; and
 - (b) Indirect Air Service Providers can be excluded from the statutory requirement to hold a license only:
 - i. if the Canadian Transportation Agency makes regulations to that effect and obtains the approval of the Governor in Council as per ss. 86 and 36(1) of the Act; or
 - ii. if Parliament amends the *Canada Transportation Act*, S.C. 1996, c. 10.
2. an interim and permanent prohibition, enjoining the Canadian Transportation Agency from making a decision or order that purports to exempt and/or exclude Indirect Air Service Providers from the statutory requirement of holding a license;
3. costs and/or reasonable out-of-pocket expenses of this application; and
4. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

The grounds for the application are as follows:

1. The present application challenges the attempt of the Canadian Transportation Agency (“Agency”) to circumvent the will of Parliament and engage in a legislative exercise under the guise of decision-making.

A. Licensing requirements under the CTA

2. In enacting the *Canada Transportation Act*, S.C. 1996, c. 10 (“CTA”), Parliament chose to impose a regulatory scheme on air transportation to establish commercial standards and consumer protection measures:
 - (a) Operating an air service requires having:
 - i. a license issued under the CTA (s. 57(a));
 - ii. a Canadian aviation document (s. 57(b)); and
 - iii. prescribed liability insurance coverage (s. 57(c)).
 - (b) A person seeking a license to operate air service within Canada (“domestic service”) must meet additional conditions, including:
 - i. being a Canadian (s. 61(a)(i)); and
 - ii. prescribed financial fitness requirements (s. 61(a)(iv)).
 - (c) A domestic license holder is required to establish and publish a Tariff setting out its terms and conditions with respect to a prescribed list of issues. The Tariff is the contract of carriage between the consumers and the licence holder, and can be enforced and reviewed by the Agency (ss. 67, 67.1, and 67.2).
 - (d) A license to operate air service is not transferable (s. 58).
3. The *Air Transportation Regulations*, S.O.R./88-58 (“ATR”), promulgated pursuant to s. 86 of the CTA and with the approval of the Governor in Council, prescribes the liability insurance coverage (s. 7) and financial fitness (s. 8.1) requirements for licences, as well as the content of the domestic Tariff (s. 107).

4. Any contravention of the regulatory scheme is an offence punishable on summary conviction (s. 174 of the *CTA*). This legislative choice underscores the significant societal interest in ensuring full compliance.

B. The decision-making powers of the Agency

5. The decision-making powers of the Agency under the *CTA* include:
 - (a) issuing licences (ss. 61 and 69);
 - (b) granting exemptions, by way of orders, from certain licensing requirements on a case-by-case basis (s. 80); and
 - (c) ensuring compliance with licensing requirements (s. 81).
6. Subsection 80(2) of the *CTA* prohibits the Agency from granting an exemption that has the effect of relieving a person from any of the following core requirements:
 - (a) being a Canadian;
 - (b) having a Canadian aviation document; and
 - (c) having prescribed liability insurance coverage.

C. The regulation-making powers of the Agency

7. Section 86 of the *CTA* permits the Agency to make regulations:
 - (a) defining words and expressions for the purposes of Part II of the *CTA* (s. 86(1)(k)); and
 - (b) excluding a person from any of the requirements of Part II of the *CTA* (s. 86(1)(l)).
8. Pursuant to subsection 36(1) of the *CTA*, the Agency can exercise its regulation-making powers only after it has sought and obtained the approval of the Governor in Council.

D. Indirect Air Service Providers are required to hold a license

9. An “Indirect Air Service Provider” (IASP) is a person who has commercial control over an air service, but does not operate aircraft.
10. In practical terms, an IASP rents the aircraft and its crew from another person or bulk purchases all seats on the aircraft, and then (re)sells the seats to the public. Travel agents are distinguished from an IASP by the following:
 - (a) an IASP contracts to transport passengers in its own name, while travel agents are not parties to the contract of carriage; and
 - (b) travel agents do not have commercial control over the air service.
11. In 1996, the case of WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd. (“1996 Greyhound Decision”), the National Transportation Agency determined that a person with commercial control over an air service “operates” the air service, and as such must hold a licence, irrespective of whether the person operates any aircraft.
12. Up until recently, the Agency has been following the 1996 Greyhound Decision to determine who is required to hold a domestic license.
13. As of December 1, 2015, sixteen (16) persons that did not operate any aircraft held licences allowing them operate domestic air services.
14. Since the purpose of the *CTA* and the mandate of the Agency is economic regulation, the Applicant submits that the 1996 Greyhound Decision correctly interprets the licensing requirements for IASPs.

E. The “Consultation on the requirement to hold a license” and the “Approach under consideration”

15. On December 23, 2015, just one day before Christmas Eve, the Agency announced that it would conduct a public consultation on the requirement for Indirect Air Service Providers to hold a license.

16. The Agency's announcement stated that the Agency was considering implementing the following "Approach under consideration":

Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.

[Emphasis added.]

17. The Agency's "Approach under consideration" allows Indirect Air Service Providers to circumvent the will of Parliament, and exposes the public to significant risk from which Parliament intended to protect the public:

- (a) Without the financial fitness requirements, there is a risk that the IASP lacks the financial means necessary to operate the flights on which it sold tickets.
- (b) Without the insurance coverage requirements, there is a risk that the IASP is unable to meet its liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster).
- (c) Without the minimal protection that the terms of a tariff may offer, there is a risk that passengers are left with no effective remedy if their flight is overbooked, delayed, or cancelled, or if their baggage is damaged.

Since carriage by air within Canada is not subject to the protection that the liability regime of the *Montreal Convention* offers, these risks are significantly higher in the case of domestic air service.

18. The Applicant submits that the "Approach under consideration" is inconsistent with the intent of Parliament to impose a regulatory scheme on air transportation by enacting the *CTA*, and the unambiguous wording of s. 57 of the *CTA*.

F. The “Approach under consideration” requires legislation

19. Subsection 80(1) of the *CTA* permits the Agency to make orders exempting a person from requirements only on a case-by-case basis, based on the specific circumstances of the case. It does not authorize the Agency to make a blanket exemption order for a business model without examining the facts specific to the person being exempted.
20. The “Approach under consideration” cannot reasonably meet the requirements set out in paragraphs 80(1)(a)-(c) of the *CTA*.
21. Pursuant to subsection 80(2) of the *CTA*, the Agency cannot exempt a person from certain core licensing requirements:
 - (2) No exemption shall be granted under subsection (1) 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.

[Emphasis added.]
22. The “Approach under consideration” to not require IASPs to hold a license has the effect of relieving Indirect Air Service Providers from the requirement of being a Canadian and holding a prescribed liability insurance coverage.
23. Therefore, the Agency cannot lawfully make a decision or order purporting to exempt and/or exclude Indirect Air Services Providers from the statutory requirement to hold a license.
24. Hence, implementing the “Approach under consideration” requires legislation: either by Parliament amending the *CTA* or by the Agency making regulations. Pursuant to s. 36(1) of the *CTA*, the latter requires the approval of the Governor in Council.

G. The Honourable Court's intervention is needed due to the ongoing unlawful conduct of the Agency and/or its Chair

25. On October 29, 2015, almost two months before the "Consultation on the requirement to hold a license" was announced, the Chair of the Agency instructed the staff of the Agency not to require Indirect Air Service Providers to hold a license pending the outcome of the "consultation."
- (a) No order or decision was made to reflect the Chair's instructions.
 - (b) The Chair's instructions were made orally.
 - (c) No minutes were taken for the meeting in question.
26. The Applicant submits that the Agency's Chair acted unlawfully, and his action resulted in an ongoing unlawful conduct of the Agency with respect to the licensing of Indirect Air Service Providers.
27. The Applicant further submits that these circumstances lend further support to the need for this Honourable Court to provide guidance to the Agency by way of the sought declarations and prohibition.

H. The Applicant

28. The Applicant is a Canadian air passenger rights advocate, whose work and public interest litigation has been recognized by this Honourable Court 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.

I. Statutory provisions

29. The Applicant will also rely on the following statutory provisions:
- (a) *Canada Transportation Act*, S.C. 1996, c. 10;
 - (b) *Carriage by Air Act*, R.S.C. 1985, c C-26;
 - (c) *Statutory Instruments Act*, R.S.C. 1985, c. S-22;
 - (d) *Air Transportation Regulations*, S.O.R./88-58;
 - (e) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1 and 28; and
 - (f) *Federal Court Rules*, S.O.R./98-106, and in particular, Rules 300 and 317.
30. Such further and other grounds as the Applicant may advise and this Honourable Court permits.

This application will be supported by the following material:

- 1. Affidavit of Dr. Gábor Lukács, to be served.
- 2. Such further and additional materials as the Applicant may advise and this Honourable Court may allow.

The Applicant requests the Canadian Transportation Agency to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Canadian Transportation Agency to the Applicant and to the Registry:

1. the complete, unredacted version of the “detailed reasons for the Agency decision” in the case of WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd. (Docket No. 960315, File M4205/K14/6052), which were provided in confidence to Greyhound and Kelowna on or around April 16, 1996.

January 22, 2016

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Applicant