

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

**CANADIAN TRANSPORTATION AGENCY and
AIR TRANSAT A.T. INC.**

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

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: December 29, 2017

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
Tel: (819) 997 9325
Fax: (819) 997 0099

AND TO: **AIR TRANSAT A.T. INC.**
5959 Boulevard de la Cote-Vertu Ouest
Montreal, QC H4S 2E6

APPLICATION

This is an application for judicial review in respect of the “Cover letter and notice of violation” issued by a Designated Enforcement Officer of the Canadian Transportation Agency on November 30, 2017, imposing an administrative monetary penalty of \$295,000 on Air Transat A.T. Inc. [Air Transat] and at the same time allowing Air Transat to reduce the amount of the penalty owed by the amount of compensation paid to passengers.

The Applicant makes application for:

1. an Order setting aside the amount of the penalty, and remitting the violations to the Canadian Transportation Agency [the Agency] for the penalties to be reassessed by a Designated Enforcement Officer;
2. a declaration that the Agency and/or the Designated Enforcement Officer of the Agency have no jurisdiction to directly or indirectly:
 - (a) reduce the amount of a penalty after it has been assessed in a notice of violation; and
 - (b) divert to private recipients, such as passengers, statutory penalties owed and payable to the Receiver General of Canada;
3. an Order setting aside the portion of the “Cover letter and notice of violation” purporting to reduce the amount of penalty payable by Air Transat A.T. Inc.;
4. costs and/or reasonable out-of-pocket expenses of this application; and
5. 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 concerns a “Cover letter and notice of violation” that simultaneously:
 - (a) imposes an administrative monetary penalty of \$295,000 on Air Transat A.T. Inc. [Air Transat], being a mere 5% of the maximum statutory penalty available, despite having found that Air Transat committed 590 violations that captured international attention;
 - (b) thereafter relieves Air Transat from the obligation to pay the penalty in part or in whole; and
 - (c) diverts statutory penalties, which are “public money” owed to the Receiver General of Canada, to passengers as compensation.

A. Background

2. On July 31, 2017, Air Transat Flight Nos. 157 (340 passengers) and 507 (250 passengers) from Europe were diverted to the Ottawa Airport. The flights were delayed on the tarmac for approximately 5 and 6 hours, respectively [the Incident]. During the Incident:
 - (a) Air Transat failed to permit or consider to permit passengers to disembark after 90 minutes of being stranded on the tarmac.
 - (b) Air Transat failed to provide basic necessities to passengers on board: it offered either no beverages or snacks at all or did not offer beverages and snacks to a reasonable degree given the high temperature in the cabin and the length of time.
 - (c) As a result of Air Transat’s actions and omissions, the conditions onboard the flights were poor, described as “close to a riot breaking out,” and prompted passengers on one of the flights to call emergency services (911).

**Canadian Transportation Agency, Determination No. A-2017-194
paras. 11, 16, 88-93, 116-117, and 121**

3. Air Transat's Tariff Rule 5.2(d) provides, among other things:

If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so. If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.

Tariff Rule 21(3)(c) imposes a similar obligation on Air Transat.

4. On August 2, 2017, the Canadian Transportation Agency [the Agency] launched an inquiry into, among other things, whether Air Transat properly applied its Tariff during the Incident, as required by subsection 110(4) of the *Air Transportation Regulations*.
5. On or about August 11, 2017, Air Transat announced that it would make a \$400 "goodwill gesture" payment to the passengers on Air Transat Flight No. 157.
6. On November 30, 2017, in Determination No. A-2017-194, the Agency found that Air Transat failed to properly apply the terms and conditions set out in Air Transat's Tariff, and thus contravened subsection 110(4) of the *Air Transportation Regulations*.
7. In Determination No. A-2017-194, the Agency concluded that it had no statutory authority to award compensation to passengers for inconvenience or pain and suffering:

[145] [...] The Agency does not have the statutory authority to award compensation for the inconvenience that passengers experienced (though such compensation may be payable under European Union rules applicable to Flight Nos. 157 and 507), nor for pain and suffering.
8. The Agency's findings of fact set out in Determination No. A-2017-194 are not disputed.

B. The “Cover letter and notice of violation”

9. On November 30, 2017, concurrently with the issuing of Determination No. A-2017-194, a Designated Enforcement Officer of the Agency issued the impugned “Cover letter and notice of violation,” imposing on Air Transat an administrative monetary penalty of \$295,000, pursuant to s. 180 of the *Canada Transportation Act*, for the following violations:

(A) On July 31, 2017, while it experienced a tarmac delay of five hours and 51 minutes during its operation of flight No.TSC157 using an Airbus A330-200-type aircraft with C-GTIS registration with 340 passengers on board, Air Transat failed to properly apply the terms and conditions of Rules 5.2d) and 21.3 c) of its tariff in respect of both offering passengers drinks and snacks and disembarking thereby violating subsection 110(4) of the Air Transportation Regulations.

(B) On July 31, 2017, while it experienced a tarmac delay of four hours and 47 minutes during its operation of flight No.TSC507 using an Airbus A310-300-type aircraft with C-GPAT registration with 250 passengers on board, Air Transat failed to properly apply the terms and conditions of Rules 5.2d) and 21.3 c) of its tariff in respect of both offering passengers drinks and snacks and disembarking thereby violating subsection 110(4) of the Air Transportation Regulations.

The same document also states that:

A credit up to the amount of the penalty will be applied and accepted as payment in lieu upon provision of evidence, to the satisfaction of the Chief Compliance Officer, of the amount of compensation provided to passengers on the affected flights, excluding the refund of out of pocket expenses.

[Emphasis added.]

10. No reason or basis for the “credit” was provided in the “Cover letter and notice of violation.”

11. In a December 5, 2017 email, the Secretary of the Agency stated that:

In determining the penalty of \$295,000, the Designated Enforcement Officer (DEO) took into consideration the Designated Provisions Regulation under the Canada Transportation Act, the CTA framework for the issuance of such penalties, the number of violations (considered one violation per passenger) and the severity of the situation.

The CTA has discretion in deciding whether to use the mechanism provided at law for collection of penalties following a notice of violation. In this case, it was deemed appropriate to exercise this discretion so as not to pursue collection action in proportion to the amounts paid to passengers themselves.

12. In a December 11, 2017 email, the Secretary of the Agency stated that:

Sections 180.4 and 180.7 provide the mechanism to be used by the Agency to collect the amount of a penalty imposed in a Notice of Violation (or the penalty revised by the Transportation Appeal Tribunal). The use of any such mechanism is discretionary. By indicating its intent to reduce the amount of the penalty by the amount paid to the passenger themselves, the Agency indicated its intention to exercise its discretion not to use these mechanism in proportion to the amounts paid to passengers themselves.

C. Agency withholding reasons (Investigation Report)

13. In a December 21, 2017 email, the Secretary of the Agency stated that:

1. In addition to the Notice of Violation and accompanying cover letter, as posted on the Agency website, the Designated Enforcement Officer produced an Investigation Report which serves as the basis for the action taken. It will be made available to Air Transat should it seek review of the Designated Enforcement Officer's Notice of Violation at the Transportation Appeal Tribunal of Canada. It will also be posted on the Agency's public website once the period for Air Transat to seek review at TATC has expired and therefore will be available to you at that time; [...]

14. On December 21, 2017, the Applicant requested the Agency to comply with section 22 of the *Act*, and to provide him with a copy of the Investigative Report prior to the expiry of the 30-day deadline for making an application for judicial review prescribed by subsection 18.1(2) of the *Federal Courts Act*.
15. In a December 29, 2017 email, the Secretary of the Agency responded that:

As you know, the report of the Designated Enforcement Officer (DEO) was produced in regards to a matter dealing with Air Transat, directly. Accordingly - and as indicated previously - the DEO report will be made available to Air Transat should it seek a review of the Notice of Violation (NOV) at the Transportation Appeal Tribunal of Canada (TATC).

It will also be posted on the Agency's public website on or as soon as possible after January 3rd, once the period for Air Transat to seek review of the NOV at TATC has expired. It will be available to you at that time.

D. Legislative framework

16. Section 110 of the *Regulations*, promulgated pursuant to s. 86(1) of the *Canada Transportation Act* [the *Act*], requires air carriers operating international service in Canada to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is a binding contract of adhesion between the carrier and its passengers.
17. Subsection 110(4) of the *Regulations* further imposes a statutory duty on air carriers to "apply the terms and conditions of carriage specified in the tariff."
18. Pursuant to section 177 of the *Act*, the Agency has designated s. 110(4) of the *Regulations* as a provision the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180 of the *Act*, and carries a penalty of up to \$10,000 for corporations.

19. Subsection 179(1) of the *Act* provides that:

179 (1) Every person who contravenes a provision, requirement or condition designated under section 177 commits a violation and is liable to a penalty fixed pursuant to that section.

20. Pursuant to paragraph 178(1)(a) of the *Act*, the Agency may designate a person as an enforcement officer authorized to issue notices of violation.

21. Pursuant to section 180 of the *Act*, a Designated Enforcement Officer who believes that a person committed a violation may issue and serve on the person a notice of violation identifying the violation and setting out the penalty, established in accordance with the regulations made under section 177, and the time and manner of paying the penalty.

22. According to the Agency's Enforcement Manual:

(a) violation of subsection 110(4) of the *Regulations* is a "Level 3" violation; and

(b) Level 3 violations by a corporation carry the penalty of:

(1) warning for the 1st violation;

(2) \$2,500 for the 2nd violation;

(3) \$5,000 for the 3rd violation; and

(4) \$10,000 for the 4th and subsequent violations.

23. Under sections 176.1 and 180.1-180.8 of the *Act*, a person who was served with a notice of violation may seek review by the Transportation Appeal Tribunal of Canada of the facts of the alleged contravention or the amount of the penalty.

24. Section 180.1 of the *Act* provides that:

180.1 A person who has been served with a notice of violation must either pay the amount of the penalty specified in the notice or file with the Tribunal a written request for a review of the facts of the alleged contravention or of the amount of the penalty. [Emphasis Added.]

25. Penalty payments are “public money” within the meaning of the *Financial Administration Act* [the *FAA*].
26. Section 23 of the *FAA* is a complete code for waiver of any penalties owing to the Federal Government; subsection 23(2) provides that:
 - 23 (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.
27. Neither the *Financial Administration Act* nor the *Canada Transportation Act* confer on the Agency or its Designated Enforcement Officer the power to remit penalties.

E. The “Cover letter and notice of violation” is unlawful and/or unreasonable

28. The penalty of \$295,000 is a mere 5% of the maximum statutory penalty that is available, based on the Designated Enforcement Officer’s finding that each affected passenger constitutes a violation, and hence Air Transat committed 590 violations.
29. The penalty is unfit and unreasonable in light of the seriousness of the violations, the extreme suffering they have caused to passengers, the number of violations (590), the need for deterrence, the Agency’s Enforcement Manual, and Air Transat’s parent company’s annual revenue of approximately **\$3 billion**.
30. The *Act* does not authorize the Designated Enforcement Officer and/or the Agency to relieve a person from the obligation to pay a penalty set out in a notice of violation once the notice of violation has been issued.
31. The *Act* does not authorize the Designated Enforcement Officer and/or the Agency to directly or indirectly divert to private recipients the penalty funds, which are owed to the Receiver General of Canada.

32. Even if the Designated Enforcement Officer and/or the Agency had jurisdiction to relieve Air Transat from paying the penalty in part or in whole (which is denied), doing so is an abuse of discretion, contrary to the purpose of the *Act* and the public interest, and unreasonable in the circumstances of the present case.
33. To permit the “Cover letter and notice of violation” to stand would undermine the desired effect of the administrative monetary penalties regime created by the *Act*, which is to foster compliance of air carriers with their legal obligations, and deter potential wrongdoers.
34. The Agency and/or the Designated Enforcement Officer acted for the improper purposes of creating the public image of the Agency being “tough” with enforcement, while relieving Air Transat from any real obligation to pay the penalty, and thereby conferring unlawful financial benefits on Air Transat.

F. The Applicant

35. Dr. Gábor Lukács, 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 (Transport, Infrastructure and Communities)*, 2015 FCA 269, at para. 43; and
 - (c) *Lukács v. Canada (Transportation Agency)*, 2016 FCA 174, at para. 6.
36. Dr. Lukács’s experience and expertise in consumer advocacy and air passenger rights has also been recognized by the transportation law bar and the legislature.

G. Statutory provisions

37. The Applicant will also rely on the following statutory provisions:
- (a) *Canada Transportation Act*, S.C. 1996, c. 10, and in particular, sections 7, 19, 22, 31, 86, 176.1, 177-180, and 180.1-180.8.
 - (b) *Air Transportation Regulations*, S.O.R./88-58, and in particular, sections 110, 113, and 122.
 - (c) *Canadian Transportation Agency Designated Provisions Regulations*, SOR/99-244.
 - (d) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1 and 28;
 - (e) *Federal Court Rules*, S.O.R./98-106, and in particular, Rules 300 and 317; and
 - (f) *Financial Administration Act*, R.S.C. 1985, c. F-11, and in particular, sections 17, 23, and 26.
38. 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 “Investigation Report which serves as the basis for the action taken” identified in the December 21, 2017 email of the Secretary of the Canadian Transportation Agency to Dr. Gábor Lukács;
2. all documents (including but not limited to emails, notes, memos, agendas, and calendar entries) relating to the Designated Enforcement Officer’s consultations and discussions with “management” or any other person with respect to the action taken;
3. all policy manuals and/or guidelines relating to the Designated Enforcement Officer’s exercise of their purported discretion to reduce or waive statutory penalties and/or provide a “credit” in lieu of statutory penalties;
4. all documents (including but not limited to emails, notes, memos, agendas, and calendar entries) relating to communications between Air Transat and staff and/or members of the Canadian Transportation Agency concerning the penalty and/or “credit” to the penalty and/or payment of the penalty and/or review or appeal of the penalty; and
5. all documents (including but not limited to emails, notes, memos, agendas, and calendar entries) relating to the Agency’s refusal to provide, prior to January 3, 2018, the “Investigation Report which serves as the basis for the action taken,” identified in the December 21, 2017 email of the Secretary of the Canadian Transportation Agency to Dr. Gábor Lukács.

December 29, 2017

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Applicant