

Court File No.:

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Moving Party

– and –

**CANADIAN TRANSPORTATION AGENCY and  
BRITISH AIRWAYS PLC**

Respondents

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**MOTION RECORD OF THE MOVING PARTY**  
**(Motion for Leave to Appeal, Rule 352)**

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Dated: June 25, 2014

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DECISION NO. 201-C-A-2014

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May 26, 2014

**RESPONSE BY British Airways Plc carrying on business as British Airways to the show cause direction set out in Decision No. 10-C-A-2014.**

**File No. M4120-3/14-00909**

**BACKGROUND**

- [1] In Decision No. 10-C-A-2014, the Canadian Transportation Agency (Agency), among other matters, directed British Airways Plc carrying on business as British Airways (British Airways) to show cause why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 (Tariff), to apply either:
1. The regime applicable in the United States of America;
  2. The regime proposed by Gábor Lukács in the proceedings related to Decision No. 342-C-A-2013 (*Lukács v. Air Canada*);
  3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
  4. 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 *Air Transportation Regulations*, SOR/88-58, as amended.
- [2] The Decision provided Mr. Lukács with the opportunity to comment on British Airways' submission.
- [3] On March 17, 2014, British Airways filed its answer, which includes a Proposed Rule, and on March 26, 2014, Mr. Lukács filed his reply.

**ISSUE**

- [4] Does British Airways' Proposed Rule comply with the show cause direction set out in Decision No. 10-C-A-2014?

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**POSITIONS OF THE PARTIES****British Airways**

[5] British Airways proposes to apply the regime proposed by Air Canada set out in Decision No. 442-C-A-2013, which provides for compensation in cash or the equivalent of CAD\$400 for delays of zero to four hours, and CAD\$800 for delays in excess of four hours, for travel from Canada to the European Union.

[6] British Airways proposes to amend Rule 87(B)(3)(B) of the Tariff to read:

Amount of compensation payable for flights from Canada to the United Kingdom

- (I) Subject to the provisions of paragraph (B)(3)(A) of this Rule, carrier will tender liquidated damages for delay at arrival at point of destination caused by involuntary denied boarding cash or equivalent in the amount of CAD 400 for delay of 0 to 4 hours and in the amount of CAD 800 for delay over 4 hours.
- (II) Said tender will be made by carrier on the day and at the place where the failure occurs, and if accepted will be receipted for by the passenger. Provided, however, that when carrier arranges for the passenger's convenience, alternate means of transportation which departs prior to the time such tender can be made to the passenger, tender shall be made by mail or other means within 24 hours after the time the failure occurs.

**Mr. Lukács**

[7] Mr. Lukács submits that the Agency held in Decision No. 227-C-A-2013 (*Lukács v. WestJet*) that:

The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable. [Emphasis added by Mr. Lukács]

[8] Mr. Lukács contends that British Airways' Proposed Rule fails to establish conditions governing denied boarding compensation for flights to Canada, and from Canada to points within the "European Community" that are outside the United Kingdom, and requires British Airways to pay denied boarding compensation only "for flights from Canada to the United Kingdom." (Emphasis added by Mr. Lukács).

[9] Mr. Lukács concludes that based on the principles set out in Decision No. 227-C-A-2013, the Proposed Rule is unreasonable.

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**ANALYSIS AND FINDINGS**

- [10] British Airways' Proposed Rule provides that cash or equivalent in the amount of CAD\$400 for delay of zero to four hours, and CAD\$800 for delay over 4 hours will be tendered as compensation for denied boarding. The Agency finds that this is consistent with the compensation proposed by Air Canada during the proceedings relating to Decision No. 227-C-A-2013.
- [11] With respect to the carriage to which British Airways' Proposed Rule applies, the Agency notes that the application of the Proposed Rule is restricted to flights from Canada to the United Kingdom. This application is inconsistent with what Air Canada proposed during the proceedings relating to Decision No. 227-C-A-2013, which proposal applied to travel from Canada to the European Union. Given this inconsistency, the Agency finds that British Airways' Proposed Rule is unreasonable, and that, therefore, British Airways has failed to show cause in respect of this matter.

**ORDER**

- [12] In light of the foregoing, the Agency orders British Airways, by no later than June 9, 2014, to file with the Agency the Proposed Rule, with the application of that Proposed Rule being for travel from Canada to the European Union, as reflected in the proposal made by Air Canada during the proceedings related to Decision No. 442-C-A-2013.

(signed)

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Sam Barone  
Member

(signed)

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Geoffrey C. Hare  
Member

Court File No.:

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Moving Party

– and –

**CANADIAN TRANSPORTATION AGENCY and  
BRITISH AIRWAYS PLC**

Respondents

**NOTICE OF MOTION**

**TAKE NOTICE THAT THE MOVING PARTY** will make a motion in writing to the Court under Rules 352 and 369 of the *Federal Court Rules*, S.O.R./98-106.

**THE MOTION IS FOR:**

1. An Order pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, granting the Moving Party leave to appeal:
  - (a) a decision made by the Canadian Transportation Agency (the “Agency”) dated May 26, 2014 and bearing decision no. 201-C-A-2014 (the “Final Decision”); and if and to the extent necessary,
  - (b) decisions made by the Agency dated April 16, 2014 and bearing decision no. LET-C-A-25-2014, and dated May 2, 2014 and bearing decision no. LET-C-A-29-2014 (the “Procedural Decisions”).
2. Costs and/or reasonable out-of-pocket expenses of this motion; and
3. Such further and other relief or directions as the Moving Party may request and this Honourable Court deems just.



**THE GROUNDS FOR THE MOTION ARE:**

1. 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* (the “*ATR*”), because:
  - (a) pursuant to subsection 122(c)(iii) of the *ATR*, carriers must clearly state their policies with respect to denied boarding compensation in their tariff;
  - (b) thus, the tariff must address denied boarding compensation for:
    - i. flights departing from Canada to destinations abroad; and
    - ii. flights departing from abroad to Canada.
  - (c) the Final Decision imposes on British Airways a tariff rule that is confined to denied boarding compensation on flights from Canada to the European Union, but it is silent about all other flights, including flights from the European Union to Canada.
2. The Final Decision creates a legal loophole that undermines the ability of passengers bumped from British Airways flights departing from abroad to Canada to commence an action for denied boarding compensation in Canada.
3. The Agency breached its duty to observe procedural fairness by making Procedural Decisions that ordered the Moving Party to delete the vast majority of his submissions to the Agency.

**Statutes and regulations relied on**

4. Sections 108, 110, 111, 113, and 122 of the *Air Transportation Regulations*, S.O.R./88-58.
5. Sections 41, 55, and 86 of the *Canada Transportation Act*, S.C. 1996, c. 10.
6. Rules 352 and 369 of the *Federal Court Rules*, S.O.R./98-106.
7. Such further and other grounds as the Moving Party may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used for the motion:

1. Affidavit of Ms. Karen Kipper, affirmed on June 24, 2014.
2. Such further and additional materials as counsel may advise and this Honourable Court may allow.

June 25, 2014

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DECISION NO. 10-C-A-2014

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January 17, 2014

**COMPLAINT by Gábor Lukács against British Airways Plc carrying  
on business as British Airways.**

**File No. M4120-3/13-00661**

**INTRODUCTION**

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) dated January 30, 2013 alleging that certain provisions relating to liability and denied boarding compensation appearing in the tariff applicable to British Airways Plc carrying on business as British Airways (British Airways), International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 (Tariff), are unclear and/or unreasonable. Specifically, Mr. Lukács submits that:

- The introductory text to Rule 55(C) is unclear, contrary to paragraph 122(c) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(7) is inconsistent with the Convention for the Unification of Certain Rules for International Carriage by Air - Montreal Convention (Montreal Convention), and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(6) contradicts Article 22(5) of the Montreal Convention, and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(8) is inconsistent with the Montreal Convention, and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(10) and the portions of Rules 115(N) and 116(N) that govern liability are inconsistent with Articles 17(2) and 19 of the Montreal Convention, and with the *Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929* (Warsaw Convention), and are therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rules 85(A) and 85(B)(2) are inconsistent with Article 19 of the Montreal Convention, and are therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 87(B)(3)(B) is unreasonable within the meaning of subsection 111(1) of the ATR; and,
- Rules 115(H) and 116 (H) misstate the liability caps under the Montreal Convention and are unreasonable within the meaning of subsection 111(1) of the ATR.

[2] Mr. Lukács requests the Agency to:

- Disallow Rule 55(C), and in particular, Rules 55(C)(1), 55(C)(4), 55(C)(6), 55(C)(7), 55(C)(8) and 55(C)(10);
- Direct British Airways to amend Rules 115(H) and 116(H) to reflect the updated liability caps under the Montreal Convention;
- Disallow portions of Rules 115(N) and 116(N) that concern liability;
- Disallow Rules 85(A) and 85(B)(2), in part, and direct British Airways to incorporate into its rules the obligation to notify passengers about schedule changes; and
- Disallow Rule 87(B)(3)(B), and direct British Airways to incorporate into its rules the obligations set out in Regulation (EC) No. 261/2004.

### PRELIMINARY MATTERS

[3] In his complaint, Mr. Lukács also alleges that Rule 55(C)(6) is misleading, contrary to paragraph 18(b) of the ATR; however, he did not make any arguments to that effect. British Airways did not address this matter in its answer. In the absence of any arguments respecting this issue, the Agency will not consider it.

[4] Further, in his complaint, Mr. Lukács requests the Agency to disallow Rule 55(C)(4). Mr. Lukács has neglected to file any submissions regarding this matter, and British Airways has not addressed it in its submissions. As such, the Agency will not consider the matter.

[5] Mr. Lukács' submissions of January 30, 2013 related to Rules 115 and 116 were based on information available to him at that time. The Agency notes that British Airways filed revisions to those Rules effective February 1, 2011 and January 13, 2012. Rule 116 was deleted and changes were made to Rule 115. However, British Airways did not, in its answer, advise Mr. Lukács that there had been revisions to its Tariff.

### ISSUES

1. Is the introductory text to Rule 55(C) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable within the meaning of subsection 111(1) of the ATR?
2. Is Rule 55(C)(6) inconsistent with Article 22(5) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
3. Is Rule 55(C)(7) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
4. Is Rule 55(C)(8) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
5. Are Rule 55(C)(10) and the portion of Rule 115(N) that governs liability inconsistent with the Montreal Convention, and with the Warsaw Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

6. Is Rule 115(H) inconsistent with Article 22(2) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
7. Are Rules 85(A) and 85(B)(2) inconsistent with Article 19 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR? and,
8. Is Rule 87(B)(3)(B) unreasonable within the meaning of subsection 111(1) of the ATR?

## RELEVANT STATUTORY AND TARIFF EXTRACTS

- [6] The legislation, Tariff provisions and provisions of the Montreal Convention relevant to this matter are set out in the Appendix.

## CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

### Clarity

- [7] In Decision No. 2-C-A-2001 (*Mr. H. v. Air Canada*), the Agency formulated the test respecting the carrier's obligation of tariff clarity as follows:

[...] the Agency is of the opinion that an air carrier's tariff meets its obligations of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

### Reasonableness

- [8] To assess whether a term or condition of carriage is "unreasonable," the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).
- [9] The terms and conditions of carriage are set out by an air carrier unilaterally without input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its interests and commercial requirements.
- [10] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

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## ISSUES

### **Issue 1: Is the introductory text to Rule 55(C) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable within the meaning of subsection 111(1) of the ATR?**

#### **Positions of the parties - Clarity of Rule 55(C)**

##### Mr. Lukács

- [11] Mr. Lukács submits that the preamble to Rule 55(C), which states “[e]xcept as the convention or other applicable law may require,” is unclear because it suggests that the provisions are the general rule and only in exceptional circumstances do they not apply. He notes that in Decision No. LET-C-A-29-2011 (*Lukács v. Air Canada*), the Agency considered the phrase “Subject to the Convention, where applicable,” stating that:

The substantive wording of Rule 55(C)(7), on its face, indicates that Air Canada has no liability for loss, damage or delay of baggage and only in exceptional situations (i.e.. “Subject to the Convention”) will some other provisions concerning Air Canada liability apply and provide compensation rights to passengers. In fact, it is the reverse which applies, namely Air Canada does have liability for loss, damage or delay of baggage and only in exceptional circumstances is Air Canada able to raise a defence to a claim for liability or invoke damage limitations. The wording of the existing and proposed Rule 55(C)(7) is more likely to confuse passengers, rather than clearly inform passengers, regarding the applicability of Air Canada’s limit of liability. Accordingly, the Agency finds that Rule 55(C)(7) in itself is unclear and that the phrase “Subject to the Convention where applicable” renders the application of Rule 55(C)(7) unclear.

- [12] Mr. Lukács also notes that in Decision No. 16-C-A-2013 (*Lukács v. Porter Airlines*), the Agency found that the phrase “[s]ubject to the Warsaw Convention or the Montreal Convention” was unclear and contrary to section 122 of the ATR.
- [13] Mr. Lukács asserts that the Agency’s findings in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013 equally apply to Rule 55(C).

##### British Airways

- [14] British Airways submits that the intent of the preamble is to make it clear that British Airways will comply with the Montreal Convention, otherwise the general provisions of common law apply, and that the wording of the Rule is clear.

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Mr. Lukács

- [15] Mr. Lukács points out that at least 152 states are parties to the Warsaw Convention, and over 100 states are parties to the Montreal Convention. He submits that in Decision Nos. 328-C-A-2007 (*Balakrishnan v. Aeroflot*) and 434-C-A-2007 (*Thakkar v. Aeroflot*), among others, the Agency found that the Montreal Convention applied to round-trip travel originating and ending in Canada. Mr. Lukács therefore contends that the Warsaw Convention or the Montreal Convention applies to a vast majority of carriage by air to and from Canada. Mr. Lukács maintains that the wording in Rule 55(C) suggests that the provisions are the general rule and only in exceptional circumstances do they not apply.
- [16] Mr. Lukács submits that the substantive wording of the Rule is substantially different from the liability regime of the Montreal Convention or the Warsaw Convention, and therefore, the Rule is misleading and confusing. He notes that British Airways did not provide any arguments as to why the Agency's conclusions in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013 were incorrect.
- [17] Mr. Lukács submits that as per Decision No. 291-C-A-2011 (*Lukács v. Air Canada*), the Agency could address his concerns about clarity by replacing “[e]xcept as the convention or other applicable law may require” with “[f]or the exceptional international itineraries where no Convention applies.”

**Analysis and findings**

- [18] The Agency agrees with Mr. Lukács' submission that the wording at issue in Rule 55(C) provides a wrong impression that the application of the Warsaw Convention or the Montreal Convention to air travel is the exception, and that such wording is equivalent to that considered by the Agency in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013. The Agency therefore concludes that the wording at issue “Except as the convention or other applicable law may otherwise require.” creates a reasonable doubt, ambiguity or uncertain meaning regarding the rights and obligations of both the carrier and the passengers, and that the introductory text to Rule 55(C) is unclear, contrary to paragraph 122(c) of the ATR.

**Positions of the parties - Reasonableness of Rule 55(C)**Mr. Lukács

- [19] Mr. Lukács submits that in Decision No. 291-C-A-2011, which dealt, in part, with a tariff provision that stated: “[s]ubject to the Convention, where applicable, carrier is not liable for loss, damage to, or delay in delivery of [...],” the Agency held that passengers ought to be afforded the same protection against loss, damage or delay of baggage as in the Montreal Convention, regardless of whether the Montreal Convention applies, and disallowed the provisions as unreasonable.



- [20] Mr. Lukács points out that Article 17(2) of the Montreal Convention provides that the carrier is liable for destruction or loss of, or damage to, checked baggage in the charge of the carrier except to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. He notes that Article 19 of the Montreal Convention provides that a carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo, except when the carrier can prove that it took all reasonably required measures to avoid the damage or that it was impossible to take such measures. Mr. Lukács further notes that Article 20 of the Montreal Convention deals with the carrier's ability to exonerate itself in the case where the damage was caused, or contributed to, by the person claiming compensation; however, the burden of proof is on the carrier.
- [21] Mr. Lukács contends that Rule 55(C) results in British Airways being excluded from damages when the Montreal Convention does not apply, and that the Rule exonerates British Airways from liabilities, except in the case when the damage is due to British Airways' negligence or wilful misconduct. He also argues that the Rule appears to be placing the burden of proof on the passenger, which is contrary to Article 20.
- [22] Mr. Lukács therefore concludes that Rule 55(C) is inconsistent with the principles in the Montreal Convention, and therefore is unreasonable.

#### British Airways

- [23] British Airways submits that the intent of the phrase at issue is to make it clear that British Airways will fully comply with the Montreal Convention, otherwise the general provisions of common law apply. British Airways maintains that the liability provisions of the Montreal Convention do not need to apply to all circumstances for the Rule to be reasonable, and that Parliament has not enacted that the provisions of the Montreal Convention be applicable to all international carriage by air.

#### Mr. Lukács

- [24] Mr. Lukács argues that Rule 55(C) does not set out the general provisions of common law, and that in fact, to a great extent, it is the Montreal Convention that does this. He submits that at common law, the carrier is responsible for the safety of the goods entrusted to it in all events, except for specific perils, such as acts of God and the Queen's enemies, and there does not need to be a contract for this to hold between the common carrier and the owner of goods.
- [25] Mr. Lukács notes that in Decision No. LET-C-A-29-2011, the Agency found that it is reasonable to apply the principles of the Montreal Convention to carriage where neither the Montreal Convention nor the Warsaw Convention applies, and that British Airways did not provide any arguments as to why the Agency's conclusions in that Decision were wrong. Mr. Lukács also submits that British Airways has not provided any arguments or evidence related to the commercial or operational factors that the Agency should take into account to offset the rights of passengers.

- [26] Mr. Lukács maintains that there is no reason why British Airways should not apply the liability principles of the Montreal Convention, even when it does not apply, and that British Airways does not need to apply the entire Montreal Convention on all international carriage; it should apply some of the principles related to liability.

### **Analysis and findings**

- [27] The Agency finds that the submissions by Mr. Lukács respecting this matter are more compelling than those by British Airways.
- [28] In Decision No. 291-C-A-2011, the Agency, in addressing the question of whether it was reasonable for Air Canada to exempt itself from liability on itineraries to which neither the Montreal Convention nor Warsaw Convention applies, found that “the right of all international passengers to have an accepted international standard for baggage liability protection is reasonable.” The Agency remains of the same opinion, and is also of the opinion that applying the principles of the Montreal Convention to carriage that is not subject to the Montreal Convention or the Warsaw Convention achieves a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage, and British Airways’ statutory, commercial and operational obligations. As such, the Agency concludes that the introductory text to Rule 55(C) is unreasonable within the meaning of subsection 111(1) of the ATR.

### **Issue 2: Is Rule 55(C)(6) inconsistent with Article 22(5) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

#### **Positions of the parties**

##### Mr. Lukács

- [29] Mr. Lukács submits that Rule 55(C)(6) states that British Airways’ liability shall not exceed the limitation set out in the Montreal Convention, and that this Rule contradicts and/or misrepresents British Airways’ obligations under Article 22(5) of the Montreal Convention, which allows for exceeding the limit in certain cases. He contends that, as such, the Rule is unreasonable and should be disallowed.

##### British Airways

- [30] British Airways submits that Rule 55(C)(6) is not intended to overrule Article 22(5) of the Montreal Convention; it is intended to clarify that the liability of the carrier for delay shall be the liability provided for under the Montreal Convention and no more.

##### Mr. Lukács

- [31] Mr. Lukács maintains that the wording of Rule 55(C)(6), when read with Rule 55(C), does not clearly reflect British Airways’ submitted intentions. He submits that the Rule does not specify to which convention the Rule is referring, and that the Montreal Convention and Warsaw Convention differ substantially on liability caps.

- [32] Mr. Lukács concludes that Rule 55(C)(6) is not clear, and should be substituted with, “In any event, liability of Carrier for delay of passenger shall not exceed the limitation set forth in Article 22 of the *Montreal Convention*.”

### **Analysis and findings**

- [33] Article 22(5) of the Montreal Convention provides that:

The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

- [34] The Agency notes that Articles 22(1) and (2) set out, respectively, the limit of liability for the delay in the carriage of passengers, and for the destruction, loss, damage or delay in the carriage of baggage.

- [35] The Agency finds that the submissions respecting this matter by Mr. Lukács are more compelling than those by British Airways. The Agency agrees with Mr. Lukács’ submission that Rule 55(C)(6), when read in tandem with Rule 55(C), restricts British Airways’ liability in a manner that is inconsistent with Article 22(5) of the Montreal Convention. More particularly, the limits provided for in the Montreal Convention are not absolute as these can be excluded if it is proved that the damage resulted from an act or omission of the carrier, its servants and agents, with the intent to cause the damage or recklessly and with knowledge of what the result would be. As noted above, the Agency has determined in previous decisions that tariff provisions that relate to travel to which neither the Montreal Convention nor Warsaw Convention applies, and that are inconsistent with the principles of the Montreal Convention, are unreasonable.

- [36] Therefore, the Agency finds that Rule 55(C)(6) fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage, and British Airways’ statutory, commercial and operational obligations.

- [37] The Agency finds that Rule 55(C)(6) is unreasonable within the meaning of subsection 111(1) of the ATR.

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**Issue 3: Is Rule 55(C)(7) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**

Mr. Lukács

- [38] Mr. Lukács submits that Rule 55(C)(7) states that British Airways' limit of liability is \$20 per kg for checked baggage, and \$400 per passenger for unchecked baggage. He submits that these limits appear to reflect the limits set out in the Warsaw Convention, the predecessor of the Montreal Convention, and are inconsistent with the Montreal Convention because they are unreasonably low.

British Airways

- [39] British Airways submits that to the extent that Rule 55(C)(7) may no longer be applicable under the Montreal Convention, British Airways does not apply it in determining baggage claims under the Montreal Convention; however, it continues to apply it to international carriage governed by the Warsaw Convention. British Airways concludes that the Rule is clear and reasonable.

Mr. Lukács

- [40] Mr. Lukács argues that the liability caps, when applied to itineraries where neither the Montreal Convention nor Warsaw Convention applies, are unreasonably low. He notes that under Rule 55(C)(7), liability caps of CAD\$460 and \$640 would apply to baggage weighing 23 kg and 32 kg, respectively. Mr. Lukács submits that in Decision No. 483-C-A-2010 (*Lukács v. WestJet*), the Agency found that a liability cap of \$1,000 was unreasonable.
- [41] Mr. Lukács submits that British Airways has not justified why it applies these liability caps on carriage not subject to the Warsaw Convention, and did not provide evidence to demonstrate how altering this provision would impact its ability to meet its commercial obligations.
- [42] Mr. Lukács maintains that Rule 55(C)(7) is unreasonable, and should be disallowed and substituted with a rule that sets out liability caps identical to what is in the Montreal Convention on itineraries where no convention applies.

**Analysis and findings**

- [43] The Agency finds that Mr. Lukács' submissions respecting this matter are more compelling than those by British Airways. As correctly noted by Mr. Lukács, Rule 55(C)(7) sets out the limits of baggage liability established by the Warsaw Convention; however, for itineraries where neither the Warsaw Convention nor the Montreal Convention applies, this Rule is inconsistent with the Montreal Convention as it does not reflect the baggage liability under the Montreal Convention, and involves limits that are lower than those required under the Montreal Convention.

- [44] Rule 55(C)(7) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations.
- [45] The Agency finds that Rule 55(C)(7) is unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 4: Is Rule 55(C)(8) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**

Mr. Lukács

- [46] Mr. Lukács notes that Rule 55(C)(8) states that in the event where a part, but not all, of a passenger's checked baggage is delivered, British Airways' liability will be reduced proportionally on the basis of weight, notwithstanding the value of any part of the baggage or its contents. He submits that British Airways may be confusing the Articles in the Montreal Convention that apply to baggage with those that apply to cargo. Mr. Lukács observes that the limits of liability for baggage under the Montreal Convention are no longer based on weight but rather on liability per passenger.
- [47] Mr. Lukács concludes that Rule 55(C)(8) is inconsistent with the Montreal Convention, and is unreasonable and should be disallowed.

British Airways

- [48] British Airways submits that to the extent that Rule 55(C)(8) may no longer apply under the Montreal Convention, it is not applied in the determination of baggage claims under that Convention; however, the Rule applies to international carriage governed by the Warsaw Convention.
- [49] British Airways maintains that Rule 55(C)(8) is reasonable and clear.

Mr. Lukács

- [50] Mr. Lukács argues that the liability caps, when applied to itineraries where neither the Montreal Convention nor Warsaw Convention applies, are unreasonably low. He submits that British Airways has not submitted any reasons for applying the over 80-year old regime on itineraries where it is not applicable given that the Montreal Convention is considered the current standard, and that the value or importance of items need not be proportionate to their weight, which is reflected in the Montreal Convention.
- [51] Mr. Lukács asserts that Rule 55(C)(8) is unreasonable in cases where it applies to non-Warsaw Convention itineraries, and should be disallowed and/or substituted.

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**Analysis and findings**

- [52] The Agency agrees with Mr. Lukács' submission that Rule 55(C)(8) does not set out the limits of baggage liability under the Montreal Convention, and that the limits established under the Rule are lower than those required by the Montreal Convention. With respect to the application of the principles of the Montreal Convention relating to baggage liability to itineraries to which the Warsaw Convention does not apply, the Agency has determined, as noted above, that passengers ought to be afforded the same protection against loss and damage or delay of baggage as in the Montreal Convention, regardless of whether that Convention applies.
- [53] The Agency finds that Mr. Lukács' submissions regarding this matter are more compelling than those by British Airways, and that Rule 55(C)(8) does not strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. As such, the Agency finds that Rule 55(C)(8) is unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 5: Are Rule 55(C)(10) and the portion of Rule 115(N) that governs liability inconsistent with the Montreal Convention, and the Warsaw Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**Mr. Lukács

- [54] Mr. Lukács submits that Rule 55(C)(10) states that British Airways is not liable for loss, damage or delay of items in the passenger's checked baggage. He notes that these items include: fragile or perishable items, money, jewelry, silverware, negotiable papers, securities or other valuables, business documents or samples. Mr. Lukács further notes that Rule 115(N) states that these types of items must not be included in checked baggage, and if they are, British Airways will not be liable for loss of or damage to them.

Loss

- [55] Mr. Lukács submits that Article 17(2) of the Montreal Convention does not relieve the carrier from liability, except in the case when damage results from the "inherent defect, quality or vice of the baggage." He also submits that Article 17(3) of the Montreal Convention provides that once the loss of baggage is established, the passenger is entitled to "enforce against the carrier the rights which flow from the contract of carriage."
- [56] Mr. Lukács maintains that the carrier's liability for loss of checked baggage is absolute, and the carrier cannot exonerate itself from that liability.

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Destruction and damage

- [57] Mr. Lukács notes that Article 17(2) of the Montreal Convention also provides that in order for the carrier to exonerate itself from liability for damage, that carrier must prove that the baggage had a particular inherent defect, quality or vice, and that such defect was the cause of the damage.

Delay

- [58] Mr. Lukács submits that Article 19 of the Montreal Convention provides that the carrier is liable for damage due to delay except if the carrier can prove that it took all reasonably required measures to avoid the damages or that those measures were impossible. He asserts that the burden of proof resides with the carrier, and the fact that baggage contains excluded items is not relevant to the matter of liability due to delay; what is relevant is if the carrier took all reasonably required measures to avoid the delay.
- [59] Mr. Lukács submits that in Decision No. 227-C-A-2008 (*McCabe v. Air Canada*), the Agency found that if a carrier accepts checked baggage, and that baggage is under the care and control of the carrier, then the carrier assumes liability for that baggage in the event of loss and damage, notwithstanding the baggage contains items the carrier has not agreed to carry. He notes that in Decision No. 208-C-A-2009 (*Lukács v. Air Canada*), the Agency found that, to exempt a carrier for damage under Article 17(2) of the Montreal Convention, there must be a causal relationship between the damage and an inherent defect, quality or vice of the baggage. Mr. Lukács submits that this principle was reaffirmed in Decision Nos. 309-C-A-2010 (*Kipper v. WestJet*), 477-C-A-2010 (*Lukács v. WestJet*) and 99-C-A-2011 (*Kouznetchik v. American Airlines*).
- [60] Mr. Lukács argues that Rules 55(C)(10), 115(N) and 116(N) are blanket exclusions from liability based solely on whether the baggage contains excluded items, and not based on any causal relationship between the damage and any inherent defects, quality or vice of the baggage. He submits that these Rules are inconsistent with the Montreal Convention, are therefore unreasonable, and should be disallowed.

British Airways

- [61] British Airways submits that Rules 55(C)(10) and 115(N) apply to non-Montreal Convention international carriage, and are clear and reasonable.

Mr. Lukács

- [62] Mr. Lukács submits that the legal principles related to baggage liability in the Montreal Convention are the same as those in the Warsaw Convention. Therefore, Rules 55(C)(10) and 115(N) are also unreasonable when applied to itineraries subject to the Warsaw Convention. He further notes that, in Decision Nos. LET-C-A-29-2011 and 291-C-A-2011, the Agency found that tariff provisions like Rules 55(C)(10) and 115(N) on itineraries where no convention applies do not provide passengers with reasonable liability coverage.

- [63] Mr. Lukács submits that British Airways has not provided arguments as to why the same conclusions should not be made in the present case, and further, that as British Airways' primary competitor, Air Canada, was ordered to substitute its rule with language that reflects the principles of the Montreal Convention, British Airways will not suffer a competitive disadvantage if required to do the same.
- [64] Mr. Lukács concludes that Rule 55(C)(10), and the portion of Rule 115(N) that governs liability should be disallowed and substituted, as in the case with Air Canada.

### **Analysis and findings**

- [65] The Agency agrees with Mr. Lukács' submission that Rule 55(C)(10) is inconsistent with Articles 17(2) and 19 of the Montreal Convention because that Rule excludes British Airways from liability, irrespective of whether the damage to baggage was related to the inherent defect, quality or vice of that baggage, or in respect of delay, all reasonable measures were taken to avoid that delay.
- [66] The Agency notes that Rule 115(N) was revised effective January 13, 2012, prior to Mr. Lukács' complaint dated January 30, 2013, to provide, in part:
- In accordance with the British Airways conditions of carriage, items that are fragile, perishable or of special value must not be included in checked baggage. If any of these items, or any other items forbidden under the British Airways conditions of carriage, are included in checked baggage, British Airways will not be liable for any loss or damage to them except as provided for by the Montreal Convention. [...]
- [67] The Agency finds that Rule 115(N), as currently filed, is consistent with Articles 17(2) and 19 of the Montreal Convention.
- [68] With respect to travel to which the Warsaw Convention applies, the Agency agrees with Mr. Lukács' submission that Rules 55(C)(10) and 115(N) are inconsistent with that Convention.
- [69] Concerning the application of the principles of Articles 17(2) and 19 to carriage where neither the Montreal Convention nor Warsaw Convention applies, in Decision Nos. LET-C-A-29-2011 and 291-C-A-2011, the Agency found that tariff provisions similar to Rules 55(C)(10) and 115(N) on itineraries where no convention applies do not provide passengers with reasonable liability coverage, and that it is reasonable for the principles related to baggage liability established by the Montreal Convention for international carriage to be applied to an itinerary where neither the Montreal Convention nor the Warsaw Convention applies.



- [70] The Agency finds that Mr. Lukács' submissions regarding this matter are more compelling than those by British Airways, and that Rules 55(C)(10) and 115(N) fail to strike a balance between the passenger's rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. The Agency therefore finds that Rule 55(C)(10), and the portion of Rules 115(N) that governs liability are unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 6: Is Rule 115(H) inconsistent with Article 22(2) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR)?**

**Positions of the parties**

Mr. Lukács

- [71] Mr. Lukács submits that Rule 115(H) provides that British Airways' liability limit is set at 1,000 Special Drawing Rights (SDR) for destruction, loss, damage or delay of baggage. He notes that the current limit of liability is actually 1,131 SDR, and that Rule 115(H) therefore misstates British Airways' obligation under the Montreal Convention.

British Airways

- [72] British Airways submits that Rule 115(H) sets out the original limit of liability of 1,000 SDR for baggage under the Montreal Convention, and that British Airways complies with the current applicable limit.

Mr. Lukács

- [73] Mr. Lukács maintains that there is no reason for retaining an outdated liability limit, and that British Airways should be directed to revise the Rules to reflect the current baggage liability limit set out in the Montreal Convention.

**Analysis and findings**

- [74] Mr. Lukács argues that Rule 115(H) does not reflect the current limit of baggage liability established by the Montreal Convention.
- [75] British Airways submits that it complies with the liability limit set by the Montreal Convention.
- [76] The Agency notes that British Airways revised Rule 115(H) prior to Mr. Lukács' complaint dated January 30, 2013, to provide, in part, that "[t]he Montreal Convention limits British Airways' liability for lost, damaged or delayed baggage to 1,131 Special Drawing Rights (SDRS)." The Agency finds, therefore, that Rule 115(H) is consistent with Article 22(2) of the Montreal Convention, and is reasonable within the meaning of subsection 111(1) of the ATR.

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**Issue 7: Are Rules 85(A) and 85(B)(2) inconsistent with Article 19 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**

Mr. Lukács

- [77] Mr. Lukács notes that Rules 85(A) and 85(B)(2) state, among other things, that schedules are subject to change without notice. British Airways assumes no responsibility for making connections, and the carrier is not liable except to refund, in accordance with British Airways' Tariff, the fare and baggage charges for any unused portion of the ticket when a passenger is delayed.

Notice of schedule change

- [78] Mr. Lukács submits that in Decision No. 16-C-A-2013, the Agency found that it is reasonable for carriers to have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes and the reasons for them.
- [79] Mr. Lukács argues that the words "without notice" should be removed from Rule 85(A), and substituted with a provision requiring British Airways to provide passengers with notice about schedule changes.

Liability for delay

- [80] Mr. Lukács points out that in Decision No. 16-C-A-2013, the Agency provided its interpretation of Article 19 of the Montreal Convention, which was that the carrier is liable for delay, and that the liability can be avoided when the carrier has proved that all reasonably required measures were taken to avoid damages or that it was impossible to take such measures. He further notes that the Agency stated that, in terms of avoiding liability for delay, the issue is not who caused the delay but how the carrier reacts to the delay, that is, did the carrier take all reasonable required measures.
- [81] Mr. Lukács maintains that by limiting liability to a refund of the unused portion of the ticket in certain cases, regardless of the manner in which British Airways reacts to the delay caused, and whether British Airways took all measures that could be reasonably required to avoid the damage, Rule 85(B)(2) lowers British Airways' liability or exonerates British Airways of its liability under Article 19 of the Montreal Convention.
- [82] Mr. Lukács concludes that Rule 85(B)(2) is therefore unreasonable, and should be disallowed.

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Making connections

- [83] Mr. Lukács submits that the most obvious and immediate result of missing a connection is delay, for which British Airways is liable under Article 19 of the Montreal Convention. He notes that in Decision No.16-C-A-2013, the Agency found that a similar provision was unreasonable because it was silent on the carrier's liability when the carrier is unable to provide the proof required under Article 19 of the Montreal Convention to relieve the carrier of liability for delay.
- [84] Mr. Lukács argues that the same reasons apply to Rule 85(A), and that although British Airways may exonerate itself from liability under Article 19 of the Montreal Convention, it does not mean that British Airways can exonerate itself from liability for delay due to missing a connection in every case. He further submits that the question is about whether passengers suffered a delay, whereas a missed connection is just a possible cause of a delay.
- [85] Mr. Lukács submits that the words, "carrier assumes no responsibility for making connections," appearing in Rule 85(A), should be disallowed.

British Airways

- [86] British Airways maintains that Rules 85(A) and 85(B)(2) are clear and reasonable, and are virtually the same wording that is in Air Canada's Rules 85(A) and 85(B)(2).

Mr. Lukács

- [87] Mr. Lukács submits that Air Canada's Rules have not been challenged before the Agency and deemed reasonable, and that in fact, Air Canada's Rules are equally unreasonable.
- [88] He asserts that based on Decision Nos. 16-C-A-2013 and 344-C-A-2013 (*Lukács v. Porter*), where the Agency found, respectively, that the words "without notice" and "carrier assumes no responsibility for making connections" should be disallowed in Rule 85(A) and the phrase "without liability except to refund" should be disallowed in Rule 85(B)(2).

**Analysis and findings**

- [89] With respect to the provision in Rule 85(A) that British Airways' schedules may be changed without notice, in Decision No. 16-C-A-2013, the Agency noted that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that reasonable efforts must be made to inform passengers of delays and schedule changes, and the reasons for them. The Agency found that such provisions are reasonable, and that, in this matter, the rights of passengers to be subject to reasonable terms and conditions of carriage outweigh the carrier's statutory, commercial or operational obligations. This finding was affirmed in Decision No. 344-C-A-2013. The Agency is of the opinion that the same reasoning applies here.

- [90] As for the provision in Rule 85(A) that provides that British Airways assumes no responsibility for the passenger making connections, the Agency agrees with Mr. Lukács' submission that that provision is inconsistent with Article 19 of the Montreal Convention to the extent that the Rule does not set out British Airways' liability when British Airways is unable to provide the proof required under Article 19 to escape liability for delay.
- [91] Rule 85(B)(2) provides, in part, that British Airways may, without notice, delay any flight without any liability except to refund the fare and baggage charges for any unused portion(s) of the ticket, in accordance with British Airways' Tariff. Article 19 of the Montreal Convention states that the carrier is liable for damage due to delay unless the carrier can prove that it took all reasonable measures to avoid the damage or that those measures were impossible to take.
- [92] In Decision No. 16-C-A-2013, the Agency considered a provision appearing in Porter Airlines' international scheduled service tariff, which stated that subject to the Montreal Convention and Warsaw Convention, Porter Airlines will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights. The Agency found that, consistent with its finding in Decision No. 291-C-A-2011 on baggage liability, the provision created a blanket exclusion of liability and therefore the provision was inconsistent with the principles of the Montreal Convention; thus the Rule was unreasonable within the meaning of subsection 111(1) of the ATR.
- [93] Similarly, the Agency finds that Rule 85(B)(2) represents a blanket exclusion of liability and is inconsistent with Article 19 of the Montreal Convention.
- [94] The Agency finds that the submissions by Mr. Lukács respecting this matter are more compelling than those by British Airways, and that Rules 85(A) and 85(B)(2) fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. The Agency therefore finds that Rules 85(A) and 85(B)(2) are unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 8: Is Rule 87(B)(3)(B) unreasonable within the meaning of subsection 111(1) of the ATR?**

Regulation (EC) No. 261/2004

Mr. Lukács

- [95] Mr. Lukács argues that British Airways' Tariff should reflect British Airways' legal obligation under Regulation (EC) No. 261/2004.
- [96] Mr. Lukács submits that one of the three factors in the balancing test used by the Agency to determine if a tariff provision is reasonable is the carrier's ability to meet its commercial obligations. As such, he claims that the policies of British Airways' competitors "may be of some relevance."

- [97] Mr. Lukács notes that Regulation (EC) No. 261/2004 applies to every flight departing from an airport in the United Kingdom, and every flight operated by European Union carriers with a destination in the United Kingdom. He further notes that Société Air France carrying on business as Air France, and Deutsche Lufthansa Aktiengesellschaft's tariff rules are consistent with the regulation, and that both carriers remain profitable.
- [98] Mr. Lukács argues that Rule 87(B)(3)(B) should be replaced with a provision similar to Air France and Lufthansa's, which therefore would not adversely affect British Airways' ability to meet its commercial obligations.

#### British Airways

- [99] British Airways asserts that it is inappropriate for the Agency to enforce foreign laws, either directly or indirectly, by requiring carriers to include provisions of a European regulation in the carriers' Canadian contract of carriage. British Airways submits that by requiring the incorporation of the rights in Regulation (EC) No. 261/2004 as terms in British Airways' contract of carriage, it changes the very nature of the effect of the regulation by creating contractual rights, and therefore contractual remedies that can be exercised before the courts. British Airways maintains that this would, in a way, change the effect of foreign law in a manner that does not respect the European Parliament, and that if it had intended the rights set out in Regulation (EC) No. 261/2004 to be contractual rights, it would have so legislated.
- [100] British Airways maintains that the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), does not grant the Agency power to enforce foreign laws, and that it is a general principle of law that what is not permissible directly cannot be done indirectly. British Airways argues that the Agency therefore cannot enforce foreign statutes by requiring carriers to incorporate the statutes into their tariffs based on the Agency's jurisdiction to receive and decide on consumers' complaints, and does not have jurisdiction to require a carrier to include any reference, directly or indirectly, to the regulation in the carrier's tariff rules.
- [101] British Airways submits that member states of the European Union are responsible for the enforcement of Regulation (EC) No. 261/2004, and that the regulation does not provide passengers with any contractual rights and does not provide for the enforcement of those rights under the regulation by legal proceedings before the general courts of law.
- [102] British Airways notes that it complies with Regulation (EC) No. 261/2004.

#### Mr. Lukács

- [103] With respect to British Airways' submission that Air Canada is British Airways' main competitor on Canada – United Kingdom routes, Mr. Lukács notes that, during proceedings relating to Decision No. 264-C-A-2013 (*Azar v. Air Canada*), Air Canada indicated that it intends to adopt denied boarding compensation amounts similar to what it is in Regulation (EC) No. 261/2004. He submits, therefore, that any competitive disadvantage will disappear when the Agency renders its decision on that case.

- [104] Mr. Lukács also argues that there is no evidence to support the claim that Air Canada is British Airways' primary competitor. He maintains that British Airways' competitors are Lufthansa and Air France (via their hubs), both of which pay denied boarding compensation for passengers departing from Canada and arriving in Europe according to Regulation (EC) No. 261/2004. Mr. Lukács submits that British Airways has not argued that it would suffer a competitive disadvantage in relation to Lufthansa and Air France if it substituted its Rule to match the amounts in Regulation (EC) No. 261/2004.
- [105] Mr. Lukács also contends that based on information submitted by British Airways relating to denied boarding compensation actually tendered to passengers by British Airways, it will not suffer any disadvantage if it were to amend Rule 87(B)(3)(B) to reflect Regulation (EC) No. 261/2004.
- [106] With regard to the Agency's jurisdiction, Mr. Lukács points out that section 113 of the ATR empowers the Agency to disallow and/or establish and substitute any tariff provision that the Agency finds to be contrary to subsection 111(1) of the ATR. He adds that the Agency's power to substitute and establish tariff provisions is broad and unrestricted, and that the Agency can impose any provision it finds appropriate.
- [107] Mr. Lukács submits that among the matters listed in paragraph 122(c) of the ATR that a carrier must set out in its tariff is compensation for denial of boarding. He therefore maintains that the Agency has jurisdiction over denied boarding compensation with respect to section 110 and subsections 111(1) and 113 of the ATR, and that denied boarding compensation is subject to the Agency's review, disallowance, and substitution powers.
- [108] Mr. Lukács asserts that in determining if a provision is reasonable and what is an appropriate substitute provision, the Agency may consider not only Canadian legislation but foreign legislation and international instruments. He observes that the Agency has done so in the past, such as in Decision No. 483-C-A-2010, where the Agency applied the Montreal Convention to domestic carriage, and Decision No. 204-C-A-2013, where the Agency considered the denied boarding compensation regime in the European Union and the United States. Mr. Lukács submits that the Agency's consideration of foreign legislation does not result in enforcing that legislation, but only using it as a source of inspiration with respect to what is reasonable.
- [109] Mr. Lukács provided submissions related to judgments of foreign courts in support of his position.
- [110] Mr. Lukács acknowledges that British Airways is complying with section 1(a) of Article 3 of Regulation (EC) No. 261/2004 relating to denied boarding compensation that must be tendered to passengers travelling from the United Kingdom to Canada, but notes that British Airways did not comment on its failure to comply with section 1(b) of Article 3 respecting compensation provided to passengers carried from Canada to the United Kingdom. He maintains that British Airways has failed to comply with its obligation, as a European Union carrier, to pay denied boarding compensation to passengers departing from Canada and arriving in the United Kingdom, according to Regulation (EC) No. 261/2004.

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- [111] Mr. Lukács submits that the Agency is not being asked to enforce Regulation (EC) No. 261/2004, but to consider the obligations in determining the reasonableness of Rule 87(B)(3)(B) and an appropriate substitute.

**Analysis and findings**

- [112] In Decision No. 432-C-A-2013, the Agency addressed a submission that Sunwing's tariff neglected to reflect Sunwing's obligations relating to denied boarding as imposed by Regulation (EC) No. 261/2004. In that Decision, the Agency stated:

[103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

- [113] The Agency will not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.

**Positions of the parties - Denied boarding compensation set out in Rule 87(B)(3)(B)**

Mr. Lukács

- [114] Mr. Lukács notes that Rule 87(B)(3)(B), which governs denied boarding compensation with respect to flights between points in Canada and points in the United Kingdom, states that if a passenger is denied boarding, then the carrier will pay 100 percent of the value of the passenger's remaining ticket to the passenger's next stopover, but not less than \$50 and not more than \$200. He submits that the rule is inconsistent with the principle of a flat rate of denied boarding compensation, which is equal for all passengers, regardless of the fare paid.
- [115] Mr. Lukács argues that Rule 87(B)(3)(B) is inconsistent with the principle of a flat rate of denied boarding compensation.
- [116] Mr. Lukács submits that in response to a question he posed, British Airways filed a list of the denied boarding compensation amounts tendered to passengers departing from Canada to the United Kingdom during the years 2010, 2011 and 2012, and that this list confirms that British Airways paid GBP125 or GBP250 to each passenger. He further submits that such compensation is more than double the maximum amount of CAD\$200 stipulated in Rule 87(B)(3)(B), and that, therefore, Rule 87(B)(3)(B) does not reflect British Airways' current practices related to denied boarding compensation.
- [117] Mr. Lukács contends that British Airways did not provide any explanation or rationale how denied boarding compensation amounts of GBP125 or GBP250 were established, and made no submissions as to why these amounts are reasonable within the meaning of the ATR.

- [118] Mr. Lukács requests the Agency to make a finding that Rule 87(B)(3)(B) is unreasonable as the Agency did in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*) respecting Air Canada's denied boarding compensation tariff provisions, and in Decision No. 227-C-A-2013 (*Lukács v. WestJet*). He also requests the Agency to impose on British Airways a new, reasonable denied boarding compensation policy in the same fashion, albeit with different parameters, as the Agency did in Decision No. 342-C-A-2013 (*Lukács v. Air Canada*).

#### British Airways

- [119] British Airways notes that Air Canada is British Airways' sole competitor on Canada – United Kingdom routes, and that Air Canada only pays \$200 cash or \$500 voucher for passengers departing from Canada to the United Kingdom. British Airways submits, therefore, that it would suffer a competitive disadvantage if required to replace Rule 87(B)(3)(B) with the provisions set out in Regulation (EC) No. 261/2004.
- [120] British Airways submits that Rule 87(B)(3)(B) only relates to denied boarding compensation to which Regulation (EC) No. 261/2004 does not apply, and that the Rule is clear and reasonable.

#### **Analysis and findings**

- [121] With respect to the current levels of denied boarding compensation appearing in British Airways' Tariff, the Agency notes that British Airways did not make any submissions on those levels, other than declaring that they are reasonable. There is no presumption that a tariff is reasonable. A mere statement by a carrier that a tariff provision is reasonable does not render that provision so.
- [122] In Decision No. 204-C-A-2013, the Agency determined that Air Canada's amounts for denied boarding compensation of \$100 cash or \$200 voucher for domestic carriage were unreasonable. Following this, the Agency determined in Decision No. 342-C-A-2013, that both the denied boarding regime existing in the United States of America, and that proposed by Mr. Lukács during the course of proceedings relating to that Decision, were reasonable. The Agency, in considering which of the two regimes the Agency would require Air Canada to apply, concluded that the regime proposed by Mr. Lukács was the preferable option, and consequently ordered Air Canada to incorporate into its tariff that regime.
- [123] The Agency also notes that in Decision No. 442-C-A-2013, the Agency determined that the existing denied boarding compensation amounts of \$200 cash or \$500 voucher were unreasonable. The Agency also determined that a denied boarding compensation regime proposed by Air Canada for international carriage of \$400 or \$800 depending on the delay on arrival at destination, was reasonable.
- [124] In both situations, Air Canada had not demonstrated how it would be at a competitive disadvantage if it were to raise the amounts of denied boarding compensation and amend its tariff rules accordingly.



[125] The Agency finds that Mr. Lukács' submissions respecting this matter are more compelling than those by British Airways. British Airways has not demonstrated that it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation, and amend Rule 87(B)(3)(B). It has simply argued that Air Canada only pays denied boarding compensation of \$200 in cash, or \$500 in voucher, for passengers departing from Canada to the United Kingdom, which is no longer the case, as mentioned above, and that it would suffer a competitive disadvantage if required to replace Rule 87(B)(3)(B) with the provisions set out in Regulation (EC) No. 261/2004. Accordingly, Rule 87(B)(3)(B), as it relates to the denied boarding compensation tendered by British Airways, fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. As such, Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Positions of the parties - Sole remedy**

##### Mr. Lukács

[126] Mr. Lukács observes that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under any other law, including the Montreal Convention. He points out that the Rule refers to "full compensation for all actual or anticipatory damages." He submits that in Decision No. 249-C-A-2012 (*Lukács v. WestJet*), the Agency found that a tariff provision with the identical effect as Rule 87(B)(3)(B) was unreasonable as it does not provide passengers with a reasonable opportunity to fully assess their options, and that in such situations, the rights of a passenger established by the Montreal Convention should remain available.

[127] Mr. Lukács also asserts that this finding is consistent with Article 12 of Regulation (EC) No. 261/2004, which states that the regulation shall apply without prejudice to a passenger's rights to further compensation.

##### British Airways

[128] British Airways did not address this issue in its submission.

#### **Analysis and findings**

[129] As correctly noted by Mr. Lukács, the Agency, in Decision No. 249-C-A-2012, found that a rule similar to that of Rule 87(B)(3)(B) was unreasonable for failing to provide passengers with a reasonable opportunity to fully assess their options, and that in such situations, the rights of a passenger established by the Montreal Convention should remain available. The Agency finds that the same finding applies to the present matter, and that Rule 87(B)(3)(B) does not strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations.

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[130] The Agency finds that Rule 87(B)(3)(B), insofar as it relates to the issue of sole remedy, is unreasonable within the meaning of subsection 111(1) of the ATR.

### **SUMMARY OF CONCLUSIONS**

#### **Issue 1**

[131] The introductory text to Rule 55(C) is unclear contrary to paragraph 122(c) of the ATR and unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 2**

[132] Rule 55(C)(6) is unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 3**

[133] Rule 55(C)(7) is unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 4**

[134] Rule 55(C)(8) is unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 5**

[135] Rules 55(C)(10), and the portion of Rule 115(N) that governs liability are unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 6**

[136] Rule 115(H) is consistent with Article 22(2) of the Montreal Convention and is reasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 7**

[137] Rules 85(A) and 85(B)2 are unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 8**

[138] Rule 87(B)(3)(B) is unreasonable within the meaning of subsection 111(1) of the ATR.

[139] The Agency will not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.

[140] Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the ATR.

[141] Rule 87(B)(3)(B), insofar as it relates to the issue of sole remedy, is unreasonable within the meaning of subsection 111(1) of the ATR.

### ORDER

[142] The Agency, pursuant to paragraph 113(a) of the ATR, disallows the following provisions of British Airways' Tariff:

- The introductory text to Rule 55(C);
- Rule 55(C)(6);
- Rule 55(C)(7);
- Rule 55(C)(8);
- Rule 55(C)(10) and the portion of Rule 115(N) that governs liability;
- Rules 85(A) and 85(B)2; and
- Rule 87(B)(3)(B) in respect of sole remedy.

[143] The Agency orders British Airways, by no later than February 17, 2014, to amend its Tariff and conform to this Order and the Agency's findings set out in this Decision.

[144] Further, the Agency provides 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:

1. The regime applicable in the United States of America;
2. The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or
4. 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.

[145] Pursuant to paragraph 28(1)(b) of the CTA, the disallowance of the above Rules shall come into force when British Airways complies with the above or on February 17, 2014, whichever is sooner.

(signed)

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Geoffrey C. Hare

Member

(signed)

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Sam Barone

Member

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APPENDIX TO DECISION NO. 10-C-A-2014

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**British Airways' International Passenger Rules and Fares Tariff No. BA-1, NTA(A)  
No. 306**

**Rule 55**

[...]

(C) LIMITATION OF LIABILITY

Except as the convention or other applicable law may otherwise require:

[...]

- (6) In any event liability of carrier for delay of passenger shall not exceed the limitation set forth in the convention.
- (7) Any liability of carrier is limited to 250 French gold francs, USD 20.00, CAD 20.00, per kilogram in the case of checked baggage, and 5,000 French gold francs, USD 400.00, CAD 400.00, per passenger in the case of unchecked baggage or other property, unless higher value is declared in advance and additional charges are paid pursuant to carrier's tariff. In that event, the liability of carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.
- (8) In the event of delivery to the passenger of part but not all of his checked baggage (or in the event of damage to part but not all of such baggage) the liability of the carrier with respect to the not delivered (or damaged) portion shall be reduced proportionately on the basis of weight, notwithstanding the value of any part of the baggage or contents thereof.

[..]

(10) LIABILITY FOR FRAGILE, IRREPLACEABLE OR PERISHABLE ARTICLES

Carrier is not liable for loss, damage to or delay in the delivery of fragile or perishable articles, money, jewelry, silverware, negotiable papers, securities or other valuables, business documents or samples which are included in the passengers' checked baggage, whether with or without the knowledge of carrier.

**Rule 85**

## SCHEDULES, DELAYS AND CANCELLATIONS

## (A) SCHEDULES

The times shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract of carriage. Schedules are subject to change without notice and carrier assumes no responsibility for making connections. Carrier will not be responsible for errors or omissions either in timetables or other representations of schedules. No employee, agent or representative of carrier is authorized to bind carrier as to the dates or times of departure or arrival or the operation of any flight.

## (B) CANCELLATIONS

[...]

(2) Carrier may, without notice cancel, terminate, divert, postpone or delay any flight or the further right of carriage or reservation of traffic accommodations and determine if any departure or landing should be made, without any liability except to refund in accordance with its tariffs the fare and baggage charges for any unused portion of the ticket if it would be advisable to do so:

- (A) Because of any fact beyond its control (including, but without limitation, meteorological conditions, acts of God, force majeure, strikes, riots, civil commotions, embargoes, wars, hostilities, disturbances, or unsettled international conditions) actual, threatened or reported or because of delay demand conditions circumstance or requirement due, directly or indirectly, to such fact; or
  - (B) Because of any fact not to be foreseen, anticipated or predicted; or
  - (C) Because of any government regulation, demand or requirement; or
  - (D) Because of shortage of labor, fuel or facilities, or labor difficulties of carrier or others.
- (3) Carrier will cancel the right or further right of carriage of the passenger and his baggage upon the refusal of the passenger, after demand by carrier, to pay the fare or the portion thereof so demanded, or to pay any charge so demanded and assessable with respect to the baggage of the passenger without being subject to any liability therefore except to refund, in accordance herewith, the unused portion of the fare and baggage charge(s) previously paid, if any.

[...]

**Rule 87**

## DENIED BOARDING COMPENSATION

[...]

**(B) APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE UNITED KINGDOM SERVED BY BRITISH AIRWAYS**

When carrier is unable to provide previously confirmed space due to more passengers holding confirmed reservations and tickets on flight than there are available seats on that flight, such carrier will:

- (1) Transport persons who are denied confirmed reserved space, whether voluntarily or involuntarily, on its next flight on which space is available, at no additional cost to the passenger regardless of class of service, or;
- (2) If the carrier causing such delay is unable to provide onward transportation acceptable to the passenger, the carrier will provide such transportation on the service of any other carrier or combination of carriers in the same class of service as passenger's outbound flight or in different class of service at no additional cost to the passenger and subject to the availability of space and acceptability of the passenger providing such flights will be used without stopover and will provide an earlier arrival time at the passenger's destination or next point of stopover or transfer points; and
- (3) Carrier causing such delay will compensate such passenger for carrier's failure to provide confirmed space as follows:

**(A) CONDITIONS FOR PAYMENT OF COMPENSATION**

Subject to the exceptions in this subparagraph, carrier will tender to the passenger the amount of compensation specified in subparagraph (B) when:

(I) Passenger holding ticket for confirmed reserved space presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedure, and being acceptable for transportation under carrier's tariff; and

(II) The flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

Exception 1: The passenger will not be eligible for compensation if the flight on which the passenger holds confirmed reserved space is unable to accommodate him because of:

(AA) Government requisition of space, or

(BB) Substitution of equipment of lesser capacity when required by operational or safety reasons.

Exception 2: The passenger will not be eligible for compensation if he is offered accommodations or is seated in section of the aircraft other than that specified on his ticket at no extra charge, except that passenger seated in section for which lower fare applies shall be entitled to an appropriate refund.

**(B) AMOUNT OF COMPENSATION PAYABLE**

(I) Subject to the provisions of paragraph (B)(3)(A) of this rule, carrier will tender liquidated damages in the amount of 100 percent of the sum of the values of the passenger's remaining flight coupons of the ticket to the passenger's next stopover, or if none to his destination, but not less than \$50.00 and not more than \$200.00 provided that if the passenger is denied boarding in the United Kingdom, the amount of compensation in this subparagraph will read not less than UKL 10.00 nor more than UKL 100.00. Such tender if accepted by the passenger and paid by carrier, will constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger as result of carrier's failure to provide passenger with confirmed reserved space.

(II) For the purpose of this rule, the value of the remaining flight coupons of the ticket shall be the sum of the applicable one-way fares or fifty percent of the applicable round trip fares, as the case may be, including any surcharges and air transportation taxes, less any applicable discount.

(III) Said tender will be made by carrier on the day and at the place where the failure occurs, and if accepted will be receipted for by the passenger. Provided, however, that when carrier arranges, for the passenger's convenience, alternate means of transportation which departs prior to the time such tender can be made to the passenger, tender shall be made by mail or other means within 24 hours after the time the failure occurs.

**Rule 115**

[...]

**(H) SPECIAL DECLARATION AND EXCESS VALUE CHARGE**

The Montreal Convention limits British Airways' liability for lost, damaged or delayed baggage to 1,131 Special Drawing Rights (SDRs). If the passenger has more valuable baggage, the passenger can make special declaration of interest and pay supplementary charge to have the limit of British Airways' liability raised up to 2,000 SDRs. This

charge is known as the “Excess Value Charge” or “Special Declaration Charge”. This charge is not an insurance premium since the airline will meet claims only if legally liable under the Montreal Convention. This excess value charge relates to the additional costs involved in transporting and insuring the baggage concerned over and above those for baggage valued at or below the liability limit. The tariff shall be made available to passengers on request.

[...]

(N) EXCLUDED ITEMS

In accordance with the British Airways conditions of carriage, items that are fragile, perishable or of special value must not be included in checked baggage. If any of these items, or any other items forbidden under the British Airways conditions of carriage, are included in checked baggage, British Airways will not be liable for any loss or damage to them except as provided for by the Montreal Convention. These items include money, jewellery, precious metals, computers, personal electronic devices, share certificate, bonds and other valuable documents, business documents or passports and other identification documents. In the event of any claim for damage, delay or loss, British Airways may avail itself of all defenses, including the defense of contributory negligence, specified in Article 20 of the Convention.

***Air Transportation Regulations, SOR/88-58, as amended***

111(1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

122. Every tariff shall contain

[...]

(c) the terms and conditions of carriage, clearly stating the air carrier’s policy in respect of at least the following matters, namely,

- (i) the carriage of persons with disabilities,
- (ii) acceptance of children for travel,
- (iii) compensation for denial of boarding as a result of overbooking,
- (iv) passenger re-routing,



- (v) failure to operate the service or failure to operate on schedule,
- (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
- (vii) ticket reservation, cancellation, confirmation, validity and loss,
- (viii) refusal to transport passengers or goods,
- (ix) method of calculation of charges not specifically set out in the tariff,
- (x) limits of liability respecting passengers and goods,
- (xi) exclusions from liability respecting passengers and goods, and
- (xii) procedures to be followed, and time limitations, respecting claims.

***Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention***

**Article 17 - Death and injury of passengers - damage to baggage**

[...]

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. [...]

**Article 19 – Delay**

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

**Article 20 – Exoneration**

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its

liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

**Article 22 - Limits of liability in relation to delay, baggage and cargo**

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

[...]

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

**Article 26 – Invalidity of contractual provisions**

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

***Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 (Warsaw Convention)***

**Article 19**

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo.

**Article 20**

The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.



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ERRATUM

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January 21, 2014

**Decision No. 10-C-A-2014 dated January 17, 2014 – Gábor Lukács  
against British Airways Plc carrying on business as British Airways.**

**File No. M4120-3/13-00661**

The following paragraph was inadvertently omitted from the above Decision and is now added after paragraph 144 of that Decision:

British Airways' response to the show cause direction must also be served on Mr. Lukács, who will have 10 days from receipt of that response to file comments, if any, with a copy to British Airways.

(signed)

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Cathy Murphy  
Secretary

**Canada**



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March 17, 2014

**Via E-mail: mike.redmond @otc-cta.gc.ca**

Canadian Transportation Agency  
Ottawa, Ontario  
K1A 0N9

Attention: Mike Redmond, Chief, Tariff Investigations

Dear Sirs/Mesdames:

**RE: Decision No. 10 –C-A-2014  
Dr. Gabor Lukacs v. British Airways Plc  
Submissions on Denied Boarding Compensation  
in answer to the Show Cause order of the Agency**

On behalf of British Airways, we express its recognition of the accommodation made by the Canadian Transportation Agency in providing British Airways with the opportunity to show cause 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:

1. The regime applicable in the United States of America,
2. The regime proposed by the complainant as set out in Decision No. 342-C-A- 2013,
3. The regime proposed by Air Canada as set out in Decision No. 442-C-A-2013, or
4. Any other regime that British Airways may propose that the Agency may consider to be reasonable.

British Airways proposes to apply the regime proposed by Air Canada as set out in Decision No.442-C-A-2014.

| <b>Proposed denied boarding compensation amounts for travel from Canada to the European Union</b> |                           |
|---|---------------------------|
| <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 proposes amending the text of its Rule 87(B)(3)(B) as follows:

**RULE 87(B)(3)(B)**

**AMOUNT OF COMPENSATION PAYABLE FOR FLIGHTS FROM CANADA TO THE UNITED KINGDOM**

(I) SUBJECT TO THE PROVISIONS OF PARAGRAPH (B)(3)(A) OF THIS RULE, CARRIER WILL

TENDER LIQUIDATED DAMAGES FOR DELAY AT ARRIVAL AT POINT OF DESTINATION CAUSED BY INVOLUNTARY DENIED BOARDING CASH OR EQUIVALENT IN THE AMOUNT OF CAD 400 FOR DELAY OF 0 TO 4 HOURS AND IN THE AMOUNT OF CAD 800 FOR DELAY OVER 4 HOURS.

(II) SAID TENDER WILL BE MADE BY CARRIER ON THE DAY AND AT THE PLACE WHERE THE FAILURE OCCURS, AND IF ACCEPTED WILL BE RECEIPTED FOR BY THE PASSENGER.

PROVIDED, HOWEVER, THAT WHEN CARRIER ARRANGES, FOR THE PASSENGER'S CONVENIENCE, ALTERNATE MEANS OF TRANSPORTATION WHICH DEPARTS PRIOR TO THE TIME SUCH TENDER CAN BE MADE TO THE PASSENGER, TENDER SHALL BE MADE BY MAIL OR OTHER MEANS WITHIN 24 HOURS AFTER THE TIME THE FAILURE OCCURS.

British Airways is fully committed to complying with the orders and directions of the Canadian Transportation Agency in as timely a manner as reasonably possible and to keeping the Agency informed with respect to timelines of implementation of the Denied Boarding Compensation regime set out above.

Respectfully submitted,



Carol E. McCall

Solicitor for British Airways Plc

c.c Dr. Gabor Lukacs: email to [Lukacs@AirPassengerRights.ca](mailto:Lukacs@AirPassengerRights.ca)

Halifax, NS

lukacs@AirPassengerRights.ca

March 26, 2014

## VIA EMAIL

The Secretary  
Canadian Transportation Agency  
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. British Airways**  
**Reply to British Airways' submissions dated March 17, 2014 relating to the**  
**Agency's show cause order with respect to denied boarding compensation amounts**

Please accept the following submissions as a reply, pursuant to Decision No. 10-C-A-2014 of the Agency, to British Airways' submissions dated March 17, 2014, relating to denied boarding compensation amounts.

## BACKGROUND

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency held that British Airways' International Tariff Rule Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*.

Thus, the Agency issued a show cause order, providing British Airways with an opportunity to demonstrate why the Agency should not substitute Rule 87(B)(3)(B) with another regime for determining the amount of compensation payable to victims of denied boarding.

2. On March 17, 2014, British Airways proposed a new denied boarding compensation policy (the "Proposed Rule") to replace the Existing Rule 87(B)(3)(B). As explained below, British Airways incorrectly claimed that the Proposed Rule is the same as the regime set out in Decision No. 442-C-A-2013.

## ISSUES

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## ARGUMENT

### **I. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points outside the United Kingdom**

The Agency held in *Lukács v. WestJet*, 227-C-A-2013 (at para. 39) that:

The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[Emphasis added.]

The Proposed Rule fails to establish conditions governing denied boarding compensation for flights to Canada. The Proposed Rule also fails to establish conditions governing denied boarding compensation for flights from Canada to points within the European Community that are outside the United Kingdom. Indeed, the Proposed Rule requires British Airways to pay denied boarding compensation only “for flights from Canada to the United Kingdom” (emphasis added).

Therefore, based on the principles set out in Decision No. 227-C-A-2013, the Proposed Rule is unreasonable.

### **II. Substantial difference compared to Air Canada’s denied boarding compensation policy and Decision No. 442-C-A-2013**

Air Canada’s International Tariff Rule 90(A) incorporates by reference *Regulation (EC) 261/2004* as the rule governing the amount of denied boarding compensation tendered with respect to flights departing from the European Union and Switzerland to Canada (see Exhibit “A”). Consequently, Air Canada’s denied boarding compensation policy with respect to flights departing from the European Union to Canada was not an issue in Decision No. 442-C-A-2013.

Since Air Canada already had in place a reasonable policy with respect to flights departing from the European Community to Canada, the purpose and scope of Air Canada’s proposal in Decision No. 442-C-A-2013 was to address the rights of passengers on flights in the other direction, from Canada to the European Community. Its purpose was not to exempt Air Canada from the obligation to pay denied boarding compensation on flights to Canada, as British Airways’ Proposed Rule purports to do implicitly.

Thus, the Proposed Rule substantially differs from the purpose and scope of Air Canada’s proposal in Decision No. 442-C-A-2013.

### III. Unreasonableness with respect to flights from Canada to the United Kingdom

#### (a) Applicable legal principles: no presumption of reasonableness

Section 111(1) of the *ATR* provides that:

All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

Since neither the *Canada Transportation Act* (the “*CTA*”) nor the *Air Transportation Regulations* (the “*ATR*”) define the meaning of the phrase “unreasonable,” a term appearing both in s. 67.2(1) of the *CTA* and in s. 111(1) of the *ATR*, the Agency defined it in *Anderson v. Air Canada*, 666-C-A-2001, as follows:

The Agency is, therefore, of the opinion that, in order to determine whether a term or condition of carriage applied by a domestic carrier is “unreasonable” within the meaning of subsection 67.2(1) of the *CTA*, a balance must be struck between the rights of the passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier’s statutory, commercial and operational obligations.

The balancing test was strongly endorsed by the Federal Court of Appeal in *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95. Application of the balancing test requires thorough analysis of the airline’s statutory, commercial, and operational obligations, as the Agency did, for example, in *Lukács v. Air Canada*, 250-C-A-2012 (paras. 66-89).

A key element of the balancing test is that tariffs are not presumed to be reasonable, because tariffs are established by airlines unilaterally, and not through free contractual negotiations with passengers. In *Griffiths v. Air Canada*, 287-C-A-2009, the Agency underscored this crucial element of the balancing test:

[25] The terms and conditions of carriage are set by an air carrier unilaterally without any input from future passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in statutory or purely commercial requirements. There is no presumption that a tariff is reasonable. Therefore, a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition of carriage is reasonable.

[Emphasis added.]

Since tariffs are not presumed to be reasonable, the failure of an airline to lead evidence to substantiate that amending its tariff would have negative financial consequences for the airline, or would

otherwise affect the airline's ability to meet its statutory, commercial, and operational obligations, will lead to a finding that the tariff or tariff provision is unreasonable (see, for example, *Lukács v. WestJet*, 313-C-A-2010, paras. 37-38).

The Agency applied these principles in *Lukács v. WestJet*, 483-C-A-2010 (leave to appeal denied by the Federal Court of Appeal; 10-A-42) and *Lukács v. Air Canada*, 291-C-A-2011, and more recently in *Lukács v. Air Canada*, 251-C-A-2012, *Lukács v. Air Canada*, 204-C-A-2013, *Lukács v. WestJet*, 227-C-A-2013, and *Lukács v. Porter Airlines*, 344-C-A-2013.

**(b) British Airways' main competitors and their denied boarding compensation policies**

**(i) No submissions or evidence tendered by British Airways**

British Airways has been fully aware of the Applicant's position that Air Canada is not British Airways' main competitor (para. 104 of Decision No. 10-C-A-2014). Nevertheless, British Airways has chosen to make no submissions nor to tender any evidence that would address the question of which airlines are British Airways' main competitors.

In particular, the record contains no evidence to support a finding that Air Canada is British Airways' main competitor.

**(ii) British Airways admitted that it was a "European 'community carrier'"**

In its February 27, 2014 submissions to the Agency, British Airways admitted that:

As you are aware, as a European 'community carrier', British Airways is required to comply with (EC) No. 261/2004 which in Articles 3, 4 and 7 deals with flights operated by community carriers departing from airports in Canada for airports in the UK.

Thus, British Airways' main competitors are other airlines who fall in the same category of "European 'community carrier'" and which are subject to the same regulatory constraints as British Airways.

The Applicant submits that comparing British Airways to Air Canada, which is not a European 'community carrier' and thus is not subject to the same regulatory constraints, would be unreasonable. Furthermore, doing so would provide British Airways with an unfair competitive advantage over its main competitors.

Therefore, it is submitted that British Airways' main competitors are large airlines that fall within the definition of a European 'community carrier,' such as Lufthansa and Air France.

**(iii) British Airways ought not be given an unfair competitive advantage**

British Airways' main competitors, Lufthansa and Air France, provide denied boarding compensation in the amount of 300.00 EUR or 600.00 EUR on flights between Canada and the European Community, depending on the length of the delay caused (see Exhibits "B" and "C").

As explained below, allowing British Airways to tender denied boarding compensation only in the amount of CAD\$400.00 or CAD\$800.00 (depending on the length of the delay caused) would give British Airways an unfair competitive advantage over its main competitors, Lufthansa and Air France.

The Applicant submits that providing British Airways with an unfair competitive advantage over its main competitors, or allowing British Airways to maintain such an unfair advantage, would be unreasonable.

There is no justification for British Airways to pay less compensation to victims of denied boarding than its main competitors, Lufthansa and Air France.

**(c) Material changes since Air Canada's proposal in Decision No. 442-C-A-2013**

The Applicant submits that there have been material changes since Air Canada's proposal was put forward in Decision No. 442-C-A-2013 that would make it unreasonable to apply the same denied boarding compensation amounts in the case of British Airways.

**(i) Extreme changes in exchange rates**

Air Canada made its proposal cited in Decision No. 442-C-A-2013 on September 18, 2013, at which time 1 EUR was equal to CAD\$1.3767. The submissions of the complainant in that case were made only 5 days later, on September 23, 2013, when 1 EUR was equal to CAD\$1.3874.

Thus, at the time the parties in that proceeding made their submissions, 300.00 EUR was equal to approximately CAD\$416.00 and 600.00 EUR was equal to approximately CAD\$832.00. Based on these exchange rates, the Agency made the following findings in Decision No. 442-C-A-2013:

[51] The Agency agrees with the parties that four hours is a reasonable division mark to determine the denied boarding compensation amounts for travel from Canada to the EU. The Agency finds that Air Canada's proposed denied boarding compensation amounts are reasonable, as they are of similar amounts to what is offered under Regulation (EC) No. 261/2004 for flights from the EU to Canada.

[52] The Agency disagrees with Dr. Azar's argument that the mere difference of CAD\$16 in terms of the "0-4 hours" time period and the difference of CAD\$32 regarding the "over 4 hours" time period (as a result of the exchange rate between the

European and Canadian currency) render Air Canada's proposed denied boarding compensation amounts unreasonable.

[53] The Agency finds that it is not unreasonable for Air Canada to set the amounts of compensation in Canadian dollars and, furthermore, that the current exchange rate between the euro and the Canadian dollar results in an insignificant difference in the amounts of denied boarding compensation proposed by Air Canada, in comparison to what is offered in the EU. In addition, the Agency agrees with Air Canada that the proposed denied boarding compensation regime is understandable and would be easy to implement.

[Emphasis added.]

These findings of the Agency are important and relevant to the present case for two reasons. First, the Agency acknowledged the importance of offering "similar amounts to what is offered under Regulation (EC) No. 261/2004 for flights from the EU to Canada" as a basis for the finding that the amounts were reasonable. Second, the Agency recognized the relevance and importance of the exchange rates between the Euro and Canadian Dollars in determining the reasonableness of the denied boarding compensation amounts.

Since September 2013, the exchange rates have changed by more than 11%:

### CAD per 1 EUR

18 Sep 2013 00:00 UTC - 25 Mar 2014 16:38 UTC

EUR/CAD close: **1.53984**, low: **1.38214**, high: **1.55797**



As of March 25, 2014, 1 EUR is equal to CAD\$1.5460. This means that 300.00 EUR is equal to CAD\$463.80 and 600.00 EUR is equal to CAD\$927.60.

This means that the difference between British Airways' Proposed Rule and the European amounts is CAD\$63.80 in the case of delay of less than 4 hours, and CAD\$127.60 in the case of delay of more than 4 hours.

As noted earlier, this is a difference of 11%. This begs the question of how big of a difference is "significant." The Applicant proposes to resort to the *Montreal Convention* as a persuasive authority for the proposition that a difference of 10% or more is significant.

Article 24 of the *Montreal Convention* contains provisions governing revisions of the liability limits set out in the convention. Article 24(2) of the *Montreal Convention* provides 10% as the threshold for revising limits of liability.

Thus, based on the revision mechanism established for the limits in the *Montreal Convention*, the Applicant submits that the 11% difference between the amounts proposed by British Airways and those offered in the EU is significant to the point that it renders the Proposed Rule unreasonable.

**(ii) Most major Canadian airlines adopted the US compensation regime**

Since September 2013, when Air Canada and the complainant made submissions to the Agency in the proceeding that resulted in Decision No 442-C-A-2013, most Canadian airlines have adopted the US compensation regime for determining the amount to be tendered to victims of denied boarding:

1. WestJet finalized its international tariff provisions governing denied boarding compensation, and has adopted the US regime (see Exhibit "D");
2. Sunwing finalized its international tariff provisions governing denied boarding compensation, and has adopted the US regime (see Exhibit "E");
3. Porter Airlines finalized its international tariff provisions governing denied boarding compensation, and has adopted the US regime (see Exhibit "F").

The Applicant submits that these changes in the Canadian competitive environment ought to be also taken into account in considering British Airways' Proposed Rule, which provides in most cases significantly lower denied boarding compensation amounts than the regimes adopted by WestJet, Sunwing, or Porter Airlines.

**(d) Conclusions**

British Airways has made no submissions nor tendered any evidence with respect to its competitors or the competitive environment in which it operates. It did admit, however, that it is a European 'community carrier'. In these circumstances, British Airways' main competitors are other large European 'community carriers' and not Air Canada.

The denied boarding compensation amounts proposed by British Airways with respect to flights from Canada to the United Kingdom are 11% lower than what is provided by British Airways' main competitors, Lufthansa and Air France; they are also 11% lower than the amounts tendered in the European Community in general.

The 11% is a significant difference, which exceeds the 10% threshold for revising liability limits set out in Article 24(2) of the *Montreal Convention*.

There is no evidence on the record to support a finding that British Airways would suffer any disadvantage by tendering denied boarding compensation in the same amount as its main competitors, Lufthansa and Air France, do.

The recent changes in the Canadian competitive environment would also justify imposing the US compensation regime on British Airways.

Hence, British Airways' Proposed Rule fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and British Airways' statutory, commercial, and operational obligations. As such, the Proposed Rule is unreasonable.

#### **IV. What should British Airways' new denied boarding compensation policy be?**

The Proposed Rule contains no provisions at all governing the amount of denied boarding compensation on flights to Canada or flights from Canada to points in the European Community outside the United Kingdom, which renders it unreasonable. The Proposed Rule also provides for unreasonably low denied boarding compensation on flights from Canada to the United Kingdom.

These circumstances beg the question of how much denied boarding compensation British Airways should be required to tender.

The Applicant agrees with the Agency's findings in Decision No. 442-C-A-2013 at paragraph 51 that "four hours is a reasonable division mark to determine the denied boarding compensation amounts for travel from Canada to the EU."

Thus, the only questions are the amounts of denied boarding compensation for delays of less than 4 hours and for delays of 4 hours or more.

##### **(a) Flights from the European Community to Canada: incorporate the existing practice into the tariff**

In response to question Q2 directed to British Airways by the Applicant, British Airways provided a list of the amounts of denied boarding compensation it paid to passengers departing from the United Kingdom to Canada in the years 2010, 2011, and 2012. Although the amounts listed are in GBP, it is clear that in practice, British Airways has been paying denied boarding compensation in amounts that are equivalent to 300.00 EUR or 600.00 EUR, depending on the length of the delay.

**British Airways' submissions (August 23, 2013), pp. 4-9**

The Applicant submits that these amounts are reasonable, and that British Airways would not suffer any disadvantage by putting its current practice into writing, and incorporating it into its tariff.

Furthermore, it is submitted that it would be unreasonable and contrary to s. 122 of the *Air Transportation Regulations* to allow British Airways to maintain a tariff provision that does not match its actual policy and practice.

Therefore, the Applicant submits that British Airways' denied boarding compensation amounts for flights from the European Community to Canada ought to be:

- (i) 300.00 EUR for delays of less than 4 hours;
- (ii) 600.00 EUR for delays of 4 hours or more.

The Applicant further submits that in light of the policies of British Airways' competitors and British Airways' own admission that it is a European 'community carrier', these amounts ought to be set out in Euros (although British Airways ought to be entitled to pay them in GBP or any other local currency).



**(b) Flights from Canada to the European Community**

The most logical and simple regime would be a symmetric one: the same amounts of denied boarding compensation between Canada and the European Community, regardless of the direction of travel.

Thus, it would be the most logical and reasonable to require British Airways to tender denied boarding compensation on flights from Canada to the European Community as follows:

- (i) 300.00 EUR for delays of less than 4 hours;
- (ii) 600.00 EUR for delays of 4 hours or more.

In the alternative, if the Agency finds that the denied boarding compensation amounts ought to be set out in Canadian Dollars, then the Applicant proposes the following amounts:

- (i) CAD\$450.00 for delays of less than 4 hours;
- (ii) CAD\$900.00 for delays of 4 hours or more.

These amounts are consistent with the underlying principles articulated by the Agency in Decision No. 442-C-A-2013 at paragraphs 51-53, and they take into account minor fluctuations of the exchange rates between the Euro and Canadian Dollars.

In the further alternative, the Applicant submits that British Airways ought to be required to apply the US regime for calculation of the amount of denied boarding compensation, which has been adopted by most Canadian airlines.

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways

## LIST OF AUTHORITIES

### Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

### International instruments

4. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

### Case law

5. *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95.
6. *Anderson v. Air Canada*, Canadian Transportation Agency, 666-C-A-2001.
7. *Dr. Azar v. Air Canada*, Canadian Transportation Agency, 442-C-A-2013.
8. *Griffiths v. Air Canada*, Canadian Transportation Agency, 287-C-A-2009.
9. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.
10. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.
11. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.
12. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
13. *Lukács v. WestJet*, Canadian Transportation Agency, 313-C-A-2010.
14. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
15. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
16. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2013.
17. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 344-C-A-2013.

No Substantive Change on this Page NTA(A) No. 458 T.C.A.B. No. 696

Airline Tariff Publishing Company, Agent  
**INTERNATIONAL PASSENGER RULES AND FARES TARIFF**  
NO. AC-2

17th Revised Page AC-19-A  
Cancels 16th Revised Page AC-19-A

| RULE | AIR CANADA<br>SECTION I - GENERAL RULES  |
|------|--|
| 90   | <p><b><u>DENIED BOARDING</u></b></p> <p>(A) When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule, except for employee and industry discounted travel, unless applicable local law provides otherwise. In particular, for flights departing from the following countries, Air Canada will apply the provisions of the following legislations:<br/>                     United States: US 14 CFR part 250;<br/>                     European Union and Switzerland: EC regulation No. 261/2004;<br/>                     Andean community countries: Decision 619;<br/>                     Argentina: Administrative Order PRE-CJU-002-05 (18 November 2004)<br/>                     Israel: Aviation Services Law (Compensation and Assistance for flight cancellation or change of conditions), 5772-2012.<br/>                     Turkey: Regulations on Air Passenger Rights (SHY-Passenger)</p> <p>(B) <b><u>REQUEST FOR VOLUNTEERS</u></b><br/>                     (1) AC will request volunteers from among the confirmed passengers to relinquish their seats in exchange for compensation, the amount and form of which will be at Air Canada's discretion.<br/>                     (2) Once a passenger has voluntarily relinquished his seat, he will not later be involuntarily denied boarding unless he was advised at the time he volunteered of such possibility and the amount of compensation to which he would be entitled.<br/>                     (3) The request for volunteers and the selection of passengers to be denied boarding shall be in a manner solely determined by AC.</p> <p>(C) <b><u>BOARDING PRIORITIES</u></b><br/>                     (1) If a flight is oversold, no passenger may be involuntarily denied boarding until AC has first requested volunteers to relinquish their seats.<br/>                     (2) In the event there are not enough volunteers, other passengers may be involuntarily denied boarding in accordance with AC boarding priority policy. Passengers with confirmed reservations, will be permitted to board in the following order until all available seats are occupied:<br/>                     (a) Disabled passengers, unaccompanied children under 12 years of age and others for whom, in AC'S assessment, failure to carry would cause severe hardship.<br/>                     (b) Passengers paying Executive (J cabin) or Premium Economy (O Cabin).<br/>                     (c) All other passengers, based on itinerary, fare paid status of loyalty program membership and the time in which the passenger presents herself for check in without advance seat assignment.</p> <p>(D) <b><u>TRANSPORTATION FOR PASSENGERS DENIED BOARDING</u></b><br/>                     When A passenger has been denied boarding, either voluntarily or involuntarily,<br/>                     (1) A passenger will be considered to have been denied boarding when<br/>                     (a) The passenger presented himself for carriage in accordance with this tariff: Having complied fully with AC applicable reservation, ticketing, Immigration formalities, check-in and boarding within the time limits and at the location set out in Rule 70; and,<br/>                     (b) It must not have been possible to accommodate the passenger on the flight on which he held confirmed reservations and the flight must have departed without him.<br/>                     (2) In such instances, carrier will:<br/>                     (a) Carry the passenger on another of its passenger aircraft or class of service on which space is available without additional charge regardless of the class of service; or, at carrier's option;<br/>                     (b) Endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or at carrier's option;<br/>                     (c) Reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower; or,<br/>                     (d) If the passenger chooses to no longer travel or if carrier is unable to perform the option stated in (a) thru (c) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D), or upon request, for denied boardings within Air Canada's control, return passenger to point of origin and refund in accordance with Rule 90(D)(2)(a), as if no portion of the trip had been made (irrespective of applicable fare rules), or subject to passenger's agreement, offer a travel voucher for future travel in the same amount; or, (e) upon passenger's request, for denied boardings within Air Canada's control, if passenger provides credible verbal assurance to Air Canada of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (a) thru (c) above, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account and subject to availability, buy passenger seat on another carrier whose flight is scheduled to arrive appreciably earlier than the options proposed in (a) thru (c) above.</p> |

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: October 17, 2013

EFFECTIVE: December 1, 2013

CREDIT FOR FUTURE TRANSPORTATION ON LH IN LIEU OF MONETARY COMPENSATION. THE AMOUNT OF THE TRANSPORTATION CREDIT OFFERED SHALL BE EQUAL TO OR GREATER THAN THE MONETARY COMPENSATION DUE THE PASSENGER. THE CREDIT VOUCHER SHALL BE VALID FOR TRAVEL ON LH ONLY WITHIN 365 DAYS FROM THE DATE OF ISSUE, AND SHALL BE NON-REFUNDABLE AND NON-TRANSFERABLE.

(E) METHOD OF PAYMENT

THE AIRLINE WILL GIVE TO EACH PASSENGER, WHO QUALIFIES FOR DENIED BOARDING COMPENSATION, A PAYMENT BY CHECK, OR CASH, OR MCO, OR VOUCHER FOR THE AMOUNT SPECIFIED, ON THE DAY AND PLACE THE INVOLUNTARY DENIED BOARDING OCCURS. HOWEVER, IF THE AIRLINE ARRANGES ALTERNATE TRANSPORTATION FOR THE PASSENGER'S CONVENIENCE THAT DEPARTS BEFORE THE PAYMENT CAN BE MADE, THE PAYMENT WILL BE SENT TO THE PASSENGER WITHIN 24 HOURS. THE AIR CARRIER MAY OFFER FREE TICKETS IN PLACE OF THE CASH PAYMENT. THE PASSENGER, MAY, HOWEVER, INSIST ON THE CASH PAYMENT, OR REFUSE ALL COMPENSATION AND BRING PRIVATE LEGAL ACTION.

(F) PASSENGER'S OPTIONS

ACCEPTANCE OF THE COMPENSATION (BY ENDORSING THE CHECK OR DRAFT WITHIN 30 DAYS) RELIEVES THE CARRIER FROM ANY FURTHER LIABILITY TO THE PASSENGER CAUSED BY ITS FAILURE TO HONOR THE CONFIRMED RESERVATIONS. HOWEVER, THE PASSENGER MAY DECLINE THE PAYMENT AND SEEK TO RECOVER DAMAGES IN A COURT OF LAW OR IN SOME OTHER MANNER.

DENIED BOARDING COMPENSATION

APPLICABLE ONLY TO FLIGHTS OR PORTIONS OF FLIGHTS  
ORIGINATING AND/OR TERMINATING IN CANADA

(A) APPLICABILITY

THE FOLLOWING RULES SHALL APPLY:

- (1) IN RESPECT OF FLIGHTS DEPARTING FROM AN AIRPORT IN THE EUROPEAN UNION (EU) AND FLIGHTS DEPARTING FROM AN AIRPORT IN A THIRD COUNTRY BOUND TO AN AIRPORT IN THE EU UNLESS PASSENGER RECEIVED BENEFITS OR COMPENSATION AND WERE GIVEN ASSISTANCE IN THAT THIRD COUNTRY;
- (2) ON CONDITION THAT PASSENGERS HAVE A CONFIRMED RESERVATION ON THE FLIGHT CONCERNED AND PRESENTS HIMSELF/HERSELF FOR CHECK-IN AT THE TIME INDICATED IN ADVANCE AND IN WRITING OR ELECTRONICALLY; OR; IF NO TIME IS INDICATED; NOT LATER THAN 60 MINUTES BEFORE THE PUBLISHED DEPARTURE TIME;
- (3) ONLY TO THE PASSENGER TRAVELING WITH A VALID TICKET INCLUDING TICKETS ISSUED UNDER A FREQUENT FLYER OR OTHER COMMERCIAL PROGRAMME WITH CONFIRMED

AREA: ZZ TARIFF: IPRG CXR: LH RULE: 0089

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TITLE/APPLICATION - 70 (CONT)

## RESERVATIONS AND

- (A) PRESENTS HIMSELF AT THE APPROPRIATE PLACE AND HAS OBSERVED PUBLISHED MINIMUM CHECK-IN TIMES
- (B) HAS COMPLIED WITH LUFTHANSA'S TICKETING AND RECONFIRMATION PROCEDURES
- (C) IS ACCEPTABLE FOR TRANSPORTATION UNDER THE CARRIER'S TARIFF AND THE FLIGHT FOR WHICH THE PASSENGER HOLDS CONFIRMED RESERVATIONS IS UNABLE TO ACCOMMODATE THE PASSENGER AND DEPARTS WITHOUT HIM/HER

## (4) WHERE LH IS THE OPERATING CARRIER OF THE FLIGHT EXCEPTIONS:

THE FOLLOWING PASSENGERS WILL NOT BE ENTITLED TO COMPENSATION:

- (A) PASSENGERS TRAVELLING TO EU WHO HAVE RECEIVED BENEFITS OR COMPENSATION IN A THIRD COUNTRY
- (B) PASSENGERS TRAVELLING BETWEEN TWO AIRPORTS OUTSIDE THE EU UNLESS THE SECTOR IS PART OF A FLIGHT (SAME FLIGHT NUMBER) THAT ORIGINATED IN THE EU
- (C) PASSENGERS WITHOUT CONFIRMED RESERVATIONS
- (D) PASSENGERS WHO HAVE NOT PRESENTED THEMSELVES FOR CHECK-IN ON TIME
- (E) PASSENGERS ON FREE OR REDUCED FARES NOT DIRECTLY OR INDIRECTLY AVAILABLE TO THE PUBLIC, E.G. ID AND AD TICKETS

## (5) THE PASSENGER IS ACCOMMODATED ON THE FLIGHT FOR WHICH HE/SHE HOLD'S CONFIRMED RESERVATIONS, BUT IS SEATED IN A COMPARTMENT OF THE AIRCRAFT OTHER THAN THAT RESERVED, PROVIDED THAT WHEN THE PASSENGER IS ACCOMMODATED IN A CLASS OF SERVICE FOR WHICH A LOWER FARE IS CHARGED, THE PASSENGER WILL BE ENTITLED TO THE APPROPRIATE REFUND.

## (B) PASSENGER RIGHTS

## (1) DENIED BOARDING

## VOLUNTEERS

VOLUNTEERS HAVE THE RIGHT OF MUTUALLY AGREED BENEFITS PLUS THE RIGHT TO CHOOSE BETWEEN REIMBURSEMENT AND REROUTING WITH THE FOLLOWING OPTIONS:

- (A) REIMBURSEMENT WITHIN 7 DAYS OF COUPONS NOT USED OR
- (B) REROUTING TO FINAL DESTINATION AT THE EARLIEST OPPORTUNITY UNDER COMPARABLE TRANSPORT CONDITIONS OR
- (C) REROUTING TO FINAL DESTINATION AT A LATER DATE ACCORDING TO PASSENGER'S CONVENIENCE BUT SUBJECT TO AVAILABILITY OF SPACE. VOLUNTEERS ARE NOT ENTITLED TO CARE, SUCH AS PHONE CALLS, FOOD, ACCOMMODATION ETC.

## (2) INVOLUNTARY DENIED BOARDING

IN CASE OF INVOLUNTARY DENIED BOARDING THE PASSENGERS ARE ENTITLED TO THE FOLLOWING:

- (A) RIGHT TO COMPENSATION ACCORDING TO PARAGRAOH  
(C) AND
- (B) RIGHT TO CHOOSE BETWEEN  
REIMBURSEMENT/REROUTING WITH THE SAME OPTIONS  
AS MENTIONED UNDER (A)(1) ABOVE AND
- (C) RIGHT TO CARE INCLUDING  
- MEALS AND REFRESHMENTS, REASONABLY RELATED  
TO THE WAITING TIME  
- 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX  
- IF NECESSARY, HOTEL ACCOMODATION PLUS  
TRANSFER BETWEEN AIRPORT AND HOTEL
- (3) AMOUNT OF COMPENSATION PAYABLE
- (A) THE AMOUNT OF COMPENSATION DEPENDS ON THE  
DISTANCE OF THE SCHEDULED FLIGHT OR THE  
ALTERNATIVE FLIGHT PROPOSED.  
COMPENSATION AMOUNTS IN EUR/CAD:
- | FLIGHT KM BETWEEN AND | AMOUNT IN |     |
|-----------------------|-----------|-----|
| EUR                   | EUR       | CAD |
| 0-1500                | 250       | 400 |
| 1500 - 3500           | 400       | 645 |
| INTRA EU FLIGHTS OF   |           |     |
| MORE THAN 1500        | 400       | 645 |
| GREATER THAN 3500     | 600       | 965 |
- (B) IF AN ALTERNATIVE FLIGHT IS OFFERED AND THE  
NEW SCHEDULED ARRIVAL TIME DOES NOT EXCEED 2  
HOURS VERSUS THE ORIGINALLY PLANNED, THE  
COMPENSATION AMOUNTS SHOWN UNDER (1) ABOVE  
CAN BE REDUCED BY 50 PERCENT:
- | FLIGHT KM BETWEEN AND | AMOUNT IN |     |
|-----------------------|-----------|-----|
|                       | EUR       | CAD |
| 0-1500                | 125       | 200 |
| 1500-3500             | 200       | 320 |
| INTRA EU FLIGHTS OF   |           |     |
| MORE THAN 1500        | 200       | 320 |
| GREATER THAN 3500     | 300       | 485 |
- (C) IN LIEU OF CASH PAYMENT OF THE AMOUNTS MENTIONED  
IN (B)(1) AND (B)(2) THE PASSENGER MAY CHOOSE  
COMPENSATION IN THE FORM OF A VOUCHER VALID FOR  
FURTHER TRAVEL ON THE SERVICES OF LUFTHANSA, THEN  
THE COMPENSATION AMOUNT WILL BE 150 PERCENT OF THE  
AMOUNT MENTIONED IN (B)(1) AND (B)(2). FOLLOWING  
CONDITIONS SHALL APPLY TO SUCH VOUCHERS:
- VALIDITY IS 1 YEAR FROM THE DATE OF ISSUE
  - IF, AFTER ONE YEAR THE VOUCHER HAS NOT BEEN  
USED, IT WILL BE REFUNDED BUT ONLY AT THE  
CASH VALUES AS APPLICABLE IN (B)(1) AND  
(B)(2).
  - LOST VOUCHERS WILL NOT BE REPLACED
  - A TICKET MAY ONLY BE ISSUED IN EXCHANGE FOR  
THE VOUCHER IN THE SAME NAME AS THAT ON THE  
VOUCHER
  - IF THE VALUE OF A DESIRED TICKET EXCEEDS THE  
VALUE OF THE VOUCHER, THE PASSENGER SHALL PAY  
THE APPLICABLE DIFFERENCE
  - IF THE VALUE OF THE VOUCHER EXCEEDS THE VALUE  
OF A DESIRED TICKET, THE DIFFERENCE WILL NOT

BE REFUNDED.

- (4) CANCELLATION OF FLIGHTS
  - (A) IN CASE OF CANCELLATION OF A FLIGHT THE PASSENGERS WILL BE ENTITLED TO THE FOLLOWING:
    - (1) RIGHT TO COMPENSATION ACCORDING TO PARAGRAPH (C) AND
    - (2) RIGHT TO CHOOSE BETWEEN REIMBURSEMENT/REROUTING WITH THE SAME OPTIONS AS MENTIONED UNDER (A)(1) ABOVE AND
    - (3) RIGHT TO CARE INCLUDING
      - MEALS AND REFRESHMENTS, REASONABLY RELATED TO THE WAITING TIME
      - 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
      - IF NECESSARY, HOTEL ACCOMODATION PLUS TRANSFER BETWEEN AIRPORT AND HOTEL

- (B) AMOUNT OF COMPENSATION PAYABLE
  - (1) THE AMOUNT OF COMPENSATION DEPENDS ON THE DISTANCE OF THE SCHEDULED FLIGHT OR THE ALTERNATIVE FLIGHT PROPOSED.

COMPENSATION AMOUNTS IN EUR/CAD:

| FLIGHT KM BETWEEN AND              | AMOUNT IN |     |
|------------------------------------|-----------|-----|
|                                    | EUR       | CAD |
| 0-1500                             | 250       | 400 |
| 1500 - 3500                        | 400       | 645 |
| INTRA EU FLIGHTS OF MORE THAN 1500 | 400       | 645 |
| GREATER THAN 3500                  | 600       | 965 |

- (2) IF AN ALTERNATIVE FLIGHT IS OFFERED AND THE NEW SCHEDULED ARRIVAL TIME DOES NOT EXCEED 2 HOURS VERSUS THE ORIGINALLY PLANNED, THE COMPENSATION AMOUNTS SHOWN UNDER (1) ABOVE CAN BE REDUCED BY 50 PERCENT:

| FLIGHT KM BETWEEN AND              | AMOUNT IN |     |
|------------------------------------|-----------|-----|
|                                    | EUR       | CAD |
| 0-1500                             | 125       | 200 |
| 1500-3500                          | 200       | 320 |
| INTRA EU FLIGHTS OF MORE THAN 1500 | 200       | 320 |
| GREATER THAN 3500                  | 300       | 485 |

- (3) IN LIEU OF CASH PAYMENT OF THE AMOUNTS MENTIONED IN (B)(1) AND (B)(2) THE PASSENGER MAY CHOOSE COMPENSATION IN THE FORM OF A VOUCHER VALID FOR FURTHER TRAVEL ON THE SERVICES OF LUFTHANSA, THEN THE COMPENSATION AMOUNT WILL BE 150 PERCENT OF THE AMOUNT MENTIONED IN (B)(1) AND (B)(2). FOLLOWING CONDITIONS SHALL APPLY TO SUCH VOUCHERS:
  - VALIDITY IS 1 YEAR FROM THE DATE OF ISSUE
  - IF, AFTER ONE YEAR THE VOUCHER HAS NOT BEEN USED, IT WILL BE REFUNDED BUT ONLY AT THE CASH VALUES AS APPLICABLE IN (B)(1) AND (B)(2).
  - LOST VOUCHERS WILL NOT BE REPLACED
  - A TICKET MAY ONLY BE ISSUED IN EXCHANGE FOR THE VOUCHER IN THE SAME NAME AS THAT ON THE VOUCHER
  - IF THE VALUE OF A DESIRED TICKET EXCEEDS THE VALUE OF THE VOUCHER, THE PASSENGER SHALL PAY

## THE APPLICABLE DIFFERENCE

- IF THE VALUE OF THE VOUCHER EXCEEDS THE VALUE OF A DESIRED TICKET, THE DIFFERENCE WILL NOT BE REFUNDED.

## (C) LONG DELAY

THIS RULE IS ONLY APPLICABLE WHEN A FLIGHT IS DELAYED AT DEPARTURE, NOT WHEN A FLIGHT LEAVES ON TIME AND IS SUBSEQUENTLY DELAYED. A LONG DELAY IS CONSIDERED A FLIGHT THAT IS DELAYED ACCORDING TO THE FOLLOWING PARAMETERS:

|   |                   |
|---|-------------------|
| TRIPS LESS THAN 1,500 KM  | MORE THAN 2 HOURS |
| TRIPS BETWEEN 1,500-3,500 KM & ALL INTRA EU FLIGHTS IN EXCESS OF 1,500 KM | MORE THAN 3 HOURS |
| TRIPS MORE THAN 3,500 KM (NON INTRA EU)                                   | MORE THAN 4 HOURS |

IN THIS CASE THE PASSENGERS ARE ENTITLED TO THE FOLLOWING

- (1) RIGHT TO CARE PROVIDED THIS DOES NOT RESULT IN A FURTHER DELAY OF THE FLIGHT INCLUDING
  - MEALS AND REFRESHMENTS, REASONABLY RELATED TO THE WAITING TIME
  - 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
  - IF NECESSARY, HOTEL ACCOMMODATION PLUS TRANSFER BETWEEN AIRPORT AND HOTEL; IN CASE THE FLIGHT IS DELAYED UNTIL THE NEXT DAY HOTEL ACCOMMODATION AND TRANSFER ARE MANDATORY.
- (2) IF FLIGHT IS DELAYED MORE THAN 5 HOURS RIGHT TO BE REIMBURSED WITHIN 7 DAYS:
  - (A) OUTBOUND PASSENGER: COST OF TICKET
  - (B) INBOUND PASSENGER: COST OF NON-USED COUPON
  - (C) TRANSIT PASSENGER: COST OF NON-USED COUPON, IF THE FLIGHT NO LONGER SERVES ANY PURPOSE; ALSO COST OF THE TICKETS FOR PARTS OF THE JOURNEY ALREADY MADE AND IF RELEVANT RETURN FLIGHT TO THE FIRST POINT OF DEPARTURE
  - (D) FOR PACKAGE TOUR PASSENGERS THE VALUE OF REIMBURSEMENT WILL HAVE TO BE ASSIGNED TO UNUSED FLIGHT COUPON(S)
- (3) DOWNGRADING OF PASSENGERS
 

IN CASE OF INVOLUNTARY DOWNGRADING TO A LOWER CLASS OF SERVICE PASSENGERS WILL BE ENTITLED TO THE FOLLOWING REIMBURSEMENT WITHIN 7 DAYS

  - (A) 30 PERCENT OF THE TICKET PRICE FOR TRIPS LESS THAN 1,500 KM
  - (B) 50 PERCENT OF THE TICKET PRICE FOR TRIPS BETWEEN 1,500 AND 3,500 KM & ALL INTRA EU FLIGHTS IN EXCESS OF 1,500 KM
  - (C) 75 PERCENT OF THE TICKET PRICE FOR ALL OTHER TRIPS MORE THAN 3,500 KM

## NOTE:

IN ALL CASES THE RELEVANT DISTANCE IS UNDERSTOOD TO BE THE SECTOR ON WHICH THE PASSENGER IS DOWNGRADED. THE TICKET PRICE IS UNDERSTOOD TO BE THE ONEWAY COUPON VALUE FOR THE SECTOR ON WHICH THE PASSENGER IS



- DOWNGRADED.
- (D) BOARDING PRIORITY  
PASSENGERS HOLDING CONFIRMED RESERVATIONS WILL BE  
BOARDED BEFORE:
- (1) ANY PASSENGERS NOT HOLDING CONFIRMED RESERVATIONS.
  - (2) ANY WHO ARE NOT ENTITLED TO CONFIRMED  
RESERVATIONS.
- PASSENGERS HOLDING CONFIRMED RESERVATIONS AND A VALID  
TICKET FOR THE FLIGHT IN QUESTION WILL BE BOARDED IN  
THE SEQUENCE IN WHICH THEY HAVE PRESENTED THEMSELVES  
FOR CHECK-IN.
- EXCEPTIONS:  
THE FOLLOWING PASSENGERS CANNOT BE LEFT BEHIND:
- LUFTHANSA CREW MEMBERS TRAVELLING WITH CONFIRMED  
RESERVATIONS
  - LUFTHANSA EMPLOYEES ON DUTY TRAVEL HOLDING CONFIRMED  
RESERVATIONS
  - SICK AND/OR HANDICAPPED PASSENGERS
  - UNACCOMPANIED CHILDREN (12 YEARS AND UNDER)
  - HEADS OF STATE AND OTHER LEADING STATESMEN, OFFICIAL  
GOVERNMENT DELEGATIONS, DIPLOMATIC COURIERS
  - HARDSHIP CASES AS DETERMINED BY THE MANAGER ON DUTY

AREA: ZZ TARIFF: IPRG CXR: LH RULE: 0090

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TITLE/APPLICATION - 70

REFUNDS

(A) GENERAL

- (1) IN CASE OF REFUND, WHETHER DUE TO FAILURE OF  
CARRIER TO PROVIDE THE ACCOMMODATION CALLED FOR BY  
THE TICKET, OR TO VOLUNTARY CHANGE OF ARRANGEMENTS  
BY THE PASSENGER, THE CONDITIONS AND AMOUNT OF  
REFUND WILL BE GOVERNED BY CARRIER'S TARIFFS.
- (2) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPH (F) OF  
THIS RULE, REFUND BY CARRIER FOR AN UNUSED TICKET  
OR PORTION THEREOF OR MISCELLANEOUS CHARGES ORDER  
WILL BE MADE TO THE PERSON NAMED AS THE PASSENGER  
IN SUCH TICKET OR MISCELLANEOUS CHARGES ORDER  
UNLESS AT THE TIME OF PURCHASE THE PURCHASER  
DESIGNATES ON THE TICKET OR MISCELLANEOUS CHARGES  
ORDER ANOTHER PERSON TO WHOM REFUND SHALL BE MADE  
IN WHICH EVENT REFUND WILL BE MADE TO PERSONS SO  
DESIGNATED, AND ONLY UPON DELIVERY OF THE  
PASSENGER COUPON AND ALL UNUSED FLIGHT COUPONS OF  
THE TICKET OF MISCELLANEOUS CHARGES ORDER. A  
REFUND MADE IN ACCORDANCE WITH THIS PROCEDURE TO A  
PERSON REPRESENTING HIM AS THE PERSON NAMED OR  
DESIGNATED IN THE TICKET OR MISCELLANEOUS CHARGES  
ORDER WILL BE CONSIDERED A VALID REFUND AND  
CARRIER WILL NOT BE LIABLE TO THE TRUE PASSENGER  
FOR ANOTHER REFUND.

EXCEPTION 1: REFUND IN ACCORDANCE WITH PARAGRAPH  
(E) BELOW OF TICKETS FOR  
TRANSPORTATION WHICH HAVE BEEN  
ISSUED AGAINST A CREDIT CARD WILL

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RULE SECTION I - GENERAL RULES

C87 †[C]PART II DENIED BOARDING COMPENSATION (Applicable to flights or portions to flight originating in Canada)

(A) **APPLICABILITY**  
The following rules shall apply:

- (1) In respect of flights departing from an airport in the European Union (EU) and flights departing from an airport in a third country bound to an airport in the EU unless passenger received benefits or compensation and were given assistance in that third country;
- (2) On condition that passengers have a confirmed reservation on the flight concerned and presents himself/herself for check-in at the time indicated in advance and in writing or electronically; or; if no time is indicated; not later than 60 minutes before the published departure time;
- (3) Only to the passenger travelling with a valid ticket including tickets issued under a frequent flyer or other commercial programme with confirmed reservations and
  - (a) Presents himself at the appropriate place and has observed published minimum check-in times
  - (b) Has complied with Air France's ticketing and reconfirmation procedures
  - (c) Is acceptable for transportation under the carrier's tariff and the flight for which the passenger holds confirmed reservations is unable to accommodate the passenger and departs without him/her
- (4) Where AF is the operating carrier of the flight  
**EXCEPTIONS:** The following passengers will not be entitled to compensations;
  - (a) Passengers travelling to EU who have received benefits or compensation in a third country.
  - (b) Passengers travelling between two airports outside the EU unless the sector is part of a flight (same flight number) that originated in the EU.
  - (c) Passengers without confirmed reservation.
  - (d) Passengers who have not presented themselves for check-in on time
  - (e) Passengers on free or reduced fares not directly or indirectly available to the public, e.g. ID and AD tickets
- (5) The passenger is accommodated on the flight for which he/she hold's confirmed reservations, but is seated in a compartment of the aircraft other than that reserved, provided that when the passenger is accommodated in a class of service for which a lower fare is charged, the passenger will be entitled to the appropriate refund.

(B) **PASSENGER RIGHTS**

- (1) **Denied Boarding**  
**Volunteers**  
Volunteers have the right of mutually agreed benefits plus the right to choose between reimbursement and rerouting with the following options:
  - (a) Reimbursement within 7 days of coupons not used or
  - (b) Rerouting to final destination at the earliest opportunity under comparable transport conditions or
  - (c) Rerouting to final destination at a later date according to passenger's convenience but subject to availability of space. Volunteers are not entitled to care, such as phone calls, foods, accommodation etc.
- (2) **Involuntary Denied Boarding**  
In case of Involuntary Denied Boarding the passengers are entitled to the following:
  - (a) Right to compensation according to paragraph (C) and
  - (b) Right to choose between reimbursement/rerouting with the same options as mentioned under (A)(1) above and
  - (c) Right to care including
    - Meals and refreshments, reasonably related to the waiting time
    - 2 telephone calls or telex, e-mails, fax
    - if necessary, hotel accommodation plus transfer between airport and hotel
- (3) **Amount of Compensation Payable**
  - (a) The amount of compensation depends on the distance of the scheduled flight or the alternative flight proposed.  
Compensation Amounts in EUR/CAD:

| Flight KM between And              | Amount in |     |
|------------------------------------|-----------|-----|
|                                    | EUR       | CAD |
| 0-1500                             | 250       | 400 |
| 1500-3500                          | 400       | 645 |
| Intra EU flights of more than 1500 | 400       | 645 |
| greater than 3500                  | 600       | 965 |

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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|      |                           |
|------|---------------------------|
| RULE | SECTION I - GENERAL RULES |
|------|---------------------------|

C87 †ICPART II DENIED BOARDING COMPENSATION (Continued)

(B) PASSENGER RIGHTS (Continued)

(3) Amount of Compensation Payable (Continued)

(b) If an alternative flight is offered and the new scheduled arrival time does not exceed 2 hours versus the originally planned, the compensation amounts shown under (1) above can be reduced by 50 percent:

| Flight KM between And              | EUR | CAD |
|------------------------------------|-----|-----|
| 0-1500                             | 125 | 200 |
| 1500-3500                          | 200 | 320 |
| Intra EU flights of more than 1500 | 200 | 320 |
| greater than 3500                  | 300 | 485 |

(c) In lieu of cash payment of the amount mentioned in (B)(1) and (B)(2) the passenger may choose compensation in the form of a voucher valid for further travel on the services of Air France, then the compensation amount will be 150 percent of the amount mentioned in (B)(1) and (B)(2). Following conditions shall apply to such vouchers:

- validity is 1 year from the date of issue
- if, after one year the voucher has not been used, it will be refunded but only at the cash values as applicable in (B)(1) and (B)(2).
- lost vouchers will not be replaced
- a ticket may only be issued in exchange for the voucher in the same name as that on the voucher
- if the value of a desired ticket exceeds the value of the voucher, the passenger shall pay the applicable difference
- if the value of the voucher exceeds the value of a desired ticket, the difference will not be refunded.

(4) Cancellation of Flights

(a) In case of cancellation of a flight the passengers will be entitled to the following:

- (1) Right to compensation according to paragraph (C) and
- (2) Right to choose between reimbursement/rerouting with the same options as mentioned under (A)(1) above and
- (3) Right to care including
  - Meals and refreshments, reasonably related to the waiting time
  - 2 telephone calls or telex, e-mails, fax
  - If necessary, hotel accommodation plus transfer between airport and hotel

(b) Amount of Compensation Payable

(1) The amount of compensation depends on the distance of the scheduled flight or the alternative flight proposed.

Compensation Amounts in EUR/CAD:

| Flight KM between And              | EUR | CAD |
|------------------------------------|-----|-----|
| 0-1500                             | 250 | 400 |
| 1500-3500                          | 400 | 645 |
| Intra EU flights of more than 1500 | 400 | 645 |
| greater than 3500                  | 600 | 965 |

(2) If an alternative flight is offered and the new scheduled arrival time does not exceed 2 hours versus the originally planned, the compensation amounts shown under (1) above can be reduced by 50 percent:

| Flight KM between And              | EUR | CAD |
|------------------------------------|-----|-----|
| 0-1500                             | 125 | 200 |
| 1500-3500                          | 200 | 320 |
| Intra EU flights of more than 1500 | 200 | 320 |
| greater than 3500                  | 300 | 485 |

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For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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| RULE  | SECTION I - GENERAL RULES  |                          |                   |   |                   |   |                   |
|---|--|--------------------------|-------------------|---|-------------------|---|-------------------|
| C87   | <p>+ [C] PART II DENIED BOARDING COMPENSATION (Continued)</p> <p>(B) PASSENGER RIGHTS (Continued)</p> <p>(4) Cancellation of Flights (Continued)</p> <p>(b) Amount of Compensation Payable (Continued)</p> <p>(3) In lieu of cash payment of the amount mentioned in (B)(1) and (B)(2) the passenger may choose compensation in the form of a voucher valid for further travel on the services of Air France, then the compensation amount will be 150 percent of the amount mentioned in (B)(1) and (B)(2). Following conditions shall apply to such vouchers:</p> <ul style="list-style-type: none"> <li>- validity is 1 year from the date of issue</li> <li>- if, after one year the voucher has not been used, it will be refunded but only at the cash values as applicable in (B)(1) and (B)(2).</li> <li>- lost vouchers will not be replaced</li> <li>- a ticket may only be issued in exchange for the voucher in the same name as that on the voucher</li> <li>- if the value of a desired ticket exceeds the value of the voucher, the passenger shall pay the applicable difference</li> <li>- if the value of the voucher exceeds the value of a desired ticket, the difference will not be refunded.</li> </ul> <p>(C) LONG DELAY</p> <p>This rule is only applicable when a flight is delayed at departure, not when a flight leaves on time and is subsequently delayed. A long delay is considered a flight that is delayed according to the following parameters:</p> <table border="0"> <tr> <td>Trips less than 1,500 KM</td> <td>More than 2 hours</td> </tr> <tr> <td>Trips between 1,500-3,500 KM and all intra EU flights in excess of 1,500 KM</td> <td>More than 3 hours</td> </tr> <tr> <td>Trips more than 3,500 KM (non intra EU)</td> <td>More than 4 hours</td> </tr> </table> <p>In this case the passengers are entitled to the following</p> <p>(1) Right to care provided this does not result in a further delay of the flight including</p> <ul style="list-style-type: none"> <li>- Meals and refreshments, reasonably related to the waiting time</li> <li>- 2 telephone calls or telex, e-mails, fax</li> <li>- If necessary, hotel accommodation plus transfer between airport and hotel; in case the flight is delayed until the next day hotel accommodation and transfer are mandatory.</li> </ul> <p>(2) If flight is delayed more than 5 hours right to be reimbursed within 7 days:</p> <p>(a) Outbound passenger: Cost of ticket</p> <p>(b) Inbound passenger: Cost of Non-used coupon</p> <p>(c) Transit Passenger: Cost of Non-used coupon, if the flight no longer serves any purpose; also cost of the tickets for parts of the journey already made and if relevant return flight to the first point of departure</p> <p>(d) For package tour passengers the value of reimbursement will have to be assigned to unused flight coupon(s)</p> <p>(3) Downgrading of Passengers</p> <p>In case of involuntary downgrading to a lower class of service passengers will be entitled to the following reimbursement within 7 days</p> <p>(a) 30 percent of the ticket price for trips less than 1,500 KM</p> <p>(b) 50 percent of the ticket price for trips between 1,500 and 3,500 KM and all intra EU flights in excess of 1,500 KM</p> <p>(c) 75 percent of the ticket price for all other trips more than 3,500 KM</p> <p>NOTES: In all cases the relevant distance is understood to be the sector on which the passenger is downgraded. The ticket price is understood to be the one-way coupon value for the sector on which the passenger is downgraded.</p> | Trips less than 1,500 KM | More than 2 hours | Trips between 1,500-3,500 KM and all intra EU flights in excess of 1,500 KM | More than 3 hours | Trips more than 3,500 KM (non intra EU) | More than 4 hours |
| Trips less than 1,500 KM  | More than 2 hours  |                          |                   |   |                   |   |                   |
| Trips between 1,500-3,500 KM and all intra EU flights in excess of 1,500 KM | More than 3 hours  |                          |                   |   |                   |   |                   |
| Trips more than 3,500 KM (non intra EU)                                     | More than 4 hours  |                          |                   |   |                   |   |                   |

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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| RULE | SECTION I - GENERAL RULES |
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|    |  |
|----|--|
| 87 | <p><u>PART II DENIED BOARDING COMPENSATION (Continued)</u></p> <p>(D) <u>BOARDING PRIORITY</u></p> <p>(1) Crew Members positioning in preparation for a flight and ground personnel needed for emergency repairs on an aircraft grounded at a station.</p> <p>(2) Transit passengers continuing on the same flight</p> <p>(3) Unaccompanied children (under +[C]15 years of age)</p> <p>(4) Stretcher and wheelchair cases</p> <p>(5) Hardship cases as determined by the manager on duty</p> <p>(6) Transit passengers continuing on the same flight</p> <p>(7) Connecting passengers</p> <p>(8) Passengers holding confirmed reservations will be boarded before any passengers not holding confirmed reservations or any who are not entitled to confirmed reservations.</p> <p>(9) Passengers holding confirmed reservations and a valid ticket for the flight</p> <p>(10) Local passengers in the order their boarding card has been issued excluding passengers who volunteered for denied boarding.</p> <p>(11) Passengers having volunteered for denied boarding compensation in the order they volunteered.</p> <p>(E) <u>DEFINITIONS</u></p> <p>For the purpose of this rule, except as otherwise specifically provided herein: the following definitions shall apply:</p> <p><b>Airport</b> means the airport at which the direct or connecting flight, on which the passenger holds confirmed reserved space, is planned to arrive or some other airport serving the same metropolitan area, provided that transportation to the other airport is accepted (i.e. used) by the passenger.</p> <p><b>Alternate Transportation</b> is air transportation provided by a carrier or other transportation used by the passenger which, at the time the arrangement are made, will provided for arrival at the passenger's destinations or next point of stopover, within four hours of his originally scheduled arrival time.</p> <p><b>Carrier</b> means an carrier, except a helicopter operator, holding a commercial air service licence authorizing the transportation of persons.</p> <p><b>Comparable Air Transportation</b> is provided by air carrier to the passengers at no extra cost.</p> <p><b>Confirmed Space (reservation)</b> is that which applies to a specific AF flight, date and fare type as requested by the passenger and which is verified in AF reservations system and is so noted on the ticket.</p> <p><b>Cancellation</b> means the non-operation of a flight which was previously planned and on which at least one place was reserved.</p> <p><b>Ticket</b> means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorized by the air carrier or its authorized agents.</p> <p><b>Stopover</b> is a deliberate interruption of a journey requested by the passenger which is scheduled to exceed four hours at a place between the points of origin and destination.</p> <p><b>Oversold</b> is that condition which is the result of there being more passengers with confirmed reservations and tickets than there are seats available on a flight.</p> <p><b>Volunteer</b> means a person who responds to carrier's request for volunteers and who willingly accepts carrier's offer or compensation, in any amount, in exchange for relinquishing his confirmed reserved space. Any other passenger denied boarding is considered, for the purposes of this rule, to have been denied boarding involuntarily, even if he accepts denied boarding compensation.</p> |
|----|--|

For unexplained abbreviations, reference marks and symbols see IPGT1-1, C.A.B. NO. 581, NTA(A) NO. 373.

|                     |                          |                   |
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AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0105

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TITLE/APPLICATION - 70 (CONT)

CANCELS THE RESERVATION, THE PASSENGER MAY NOT BE ENTITLED TO A REFUND, DEPENDING ON ANY REFUND CONDITION ATTACHED TO THE PARTICULAR FARE.

(B) INVOLUNTARY CANCELLATIONS

IN THE EVENT A REFUND IS REQUIRED BECAUSE OF THE CARRIER'S FAILURE TO OPERATE OR REFUSAL TO TRANSPORT, THE REFUND WILL BE MADE AS FOLLOWS:

IF THE TICKET IS TOTALLY OR PARTIALLY UNUSED, THE TOTAL FARE PAID FOR EACH UNUSED SEGMENT WILL BE REFUNDED.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0110

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TITLE/APPLICATION - 70

K \* DENIED BOARDING COMPENSATION

- (A) IF A FLIGHT IS OVERBOOKED WITH THE RESULT THAT A TICKETED PASSENGER IS NOT TRANSPORTED ON A FLIGHT FOR WHICH THEY HELD CONFIRMED SPACE, THE CARRIER WILL DEFINE A REMEDY OR REMEDIES TO MITIGATE THE IMPACT OF THE OVERBOOKING OR CANCELLATION UPON THE PASSENGER. IN DEFINING THE REMEDY OR REMEDIES APPROPRIATE IN A PARTICULAR CASE, THE CARRIER WILL CONSIDER THE TRANSPORTATION NEEDS OF THE PASSENGER AND ANY DAMAGES THE PASSENGER MAY HAVE SUFFERED BY REASON OF THE OVERBOOKING. IN CASES WHERE THE PASSENGER IS OFFERED ALTERNATIVE REMEDIES, THE CHOICE AMONG THE ALTERNATIVES SHALL REST WITH THE PASSENGER. IN PARTICULAR, THE CARRIER WILL OFFER ONE OR MORE OF THE FOLLOWING REMEDIES:
- (1) TRANSPORTATION, WITHOUT FURTHER CHARGE AND WITHIN A REASONABLE TIME, TO THE PASSENGER'S INTENDED DESTINATION ON A TRANSPORTATION SERVICE WHICH SERVICE WILL BE IDENTIFIED BY THE CARRIER;
  - (2) TRANSPORTATION, WITHOUT FURTHER CHARGE AND WITHIN A REASONABLE TIME, TO THE PASSENGER'S POINT OF ORIGIN ON A TRANSPORTATION SERVICE WHICH SERVICE WILL BE IDENTIFIED BY THE CARRIER;
  - (3) A MONETARY PAYMENT IN AN AMOUNT TO BE DEFINED BY THE CARRIER WHICH SHALL IN NO CASE BE LESS THAN THE VALUE OF THE UNUSED PORTION OF THE PASSENGER'S TICKET;
  - (4) A CREDIT, TO BE DEFINED BY THE CARRIER, TOWARDS THE PURCHASE OF FUTURE TRANSPORTATION ON A SERVICE OPERATED BY THE CARRIER.
- (B) IN IDENTIFYING THE TRANSPORTATION SERVICE TO BE OFFERED TO THE PASSENGER, THE CARRIER WILL NOT LIMIT ITSELF TO CONSIDERING ITS OWN SERVICES OR THE SERVICES OF CARRIERS WITH WHICH IT HAS INTERLINE AGREEMENTS.
- (C) IN DEFINING THE ALTERNATIVE REMEDIES TO BE OFFERED, THE CARRIER WILL CONSIDER, TO THE EXTENT THEY ARE KNOWN TO THE CARRIER, THE CIRCUMSTANCES OF THE PASSENGER AFFECTED BY THE OVERBOOKING, INCLUDING ANY EXPENSES WHICH THE PASSENGER, ACTING REASONABLY,

- MAY HAVE INCURRED AS A RESULT OF THE OVERBOOKING OR CANCELLATION AS, FOR EXAMPLE, COSTS INCURRED FOR ACCOMMODATION, MEALS OR ADDITIONAL TRANSPORTATION.
- (D) IN DEFINING THE ALTERNATIVE REMEDIES TO BE OFFERED, THE CARRIER WILL MAKE A GOOD FAITH EFFORT TO FAIRLY RECOGNIZE, AND APPROPRIATELY MITIGATE THE IMPACT OF THE OVERBOOKING OR CANCELLATION UPON THE PASSENGER.
- (E) VOLUNTEERS AND BOARDING PRIORITIES  
IF A FLIGHT IS OVERSOLD (MORE PASSENGERS HOLD CONFIRMED RESERVATIONS THAN THERE ARE SEATS AVAILABLE), NO ONE MAY BE DENIED BOARDING AGAINST HIS/HER WILL UNTIL AIRLINE PERSONNEL FIRST ASK FOR VOLUNTEERS WHO WILL GIVE UP THEIR RESERVATIONS WILLINGLY, IN EXCHANGE FOR A PAYMENT OF THE CARRIER'S CHOOSING. IF THERE ARE NOT ENOUGH VOLUNTEERS, OTHER PASSENGERS MAY BE DENIED BOARDING INVOLUNTARILY, IN ACCORDANCE WITH THE FOLLOWING

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY  
IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0110

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TITLE/APPLICATION - 70 (CONT)

- BOARDING PRIORITY OF THE CARRIER: THE LAST PASSENGER TO ARRIVE AT THE TICKET LIFT POINT WILL BE THE FIRST TO BE DENIED BOARDING, EXCEPT;
- PASSENGERS TRAVELLING DUE TO DEATH OR ILLNESS OF A MEMBER OF THE PASSENGER'S FAMILY, OR,
  - AGED PASSENGERS, OR
  - UNACCOMPANIED CHILDREN, OR
  - PASSENGERS WITH A DISABILITY
- (F) COMPENSATION FOR INVOLUNTARY DENIED BOARDING  
IF YOU ARE DENIED BOARDING INVOLUNTARILY, YOU ARE ENTITLED TO A PAYMENT OF "DENIED BOARDING COMPENSATION" FROM THE CARRIER UNLESS:
- YOU HAVE NOT FULLY COMPLIED WITH THE CARRIER'S TICKETING, CHECK-IN REQUIREMENTS, OR YOU ARE NOT ACCEPTABLE FOR TRANSPORTATION UNDER THE AIRLINE'S USUAL RULES AND PRACTICES; OR
  - YOU ARE DENIED BOARDING BECAUSE THE FLIGHT IS CANCELLED; OR
  - YOU ARE DENIED BOARDING BECAUSE A SMALLER CAPACITY AIRCRAFT WAS SUBSTITUTED FOR SAFETY OR OPERATIONAL REASONS AND THE CARRIER TOOK ALL REASONABLE MEASURES TO AVOID THE SUBSTITUTION OR THAT IT WAS IMPOSSIBLE FOR THE CARRIER TO TAKE SUCH MEASURES;  
; OR
  - YOU ARE OFFERED ACCOMMODATIONS IN A SECTION OF THE AIRCRAFT OTHER THAN SPECIFIED IN YOUR TICKET, AT NO EXTRA CHARGE, (A PASSENGER SEATED IN A SECTION FOR WHICH A LOWER FARE IS CHARGED MUST BE GIVEN AN APPROPRIATE REFUND); OR

THE CARRIER IS ABLE TO PLACE YOU ON ANOTHER FLIGHT OR  
FLIGHTS THAT ARE PLANNED TO REACH YOUR FINAL

DESTINATION OR YOUR NEXT SCHEDULED STOPOVER WITHIN ONE HOUR OF THE SCHEDULED ARRIVAL OF YOUR ORIGINAL FLIGHT.

- (G) AMOUNT OF DENIED BOARDING COMPENSATION:  
ELIGIBLE PASSENGERS, AS PER PARAGRAPH (F) ABOVE, WHO ARE DENIED BOARDING INVOLUNTARILY FROM AN OVERSOLD FLIGHT ARE ENTITLED TO:
- (1) NO COMPENSATION IF THE CARRIER OFFERS ALTERNATE TRANSPORTATION THAT IS PLANNED TO ARRIVE AT THE PASSENGER'S DESTINATION OR FIRST STOPOVER NOT LATER THAN ONE HOUR AFTER THE PLANNED ARRIVAL TIME OF THE PASSENGER'S ORIGINAL FLIGHT;
  - (2) 200% OF THE TOTAL PRICE TO THE PASSENGER'S DESTINATION OR FIRST STOPOVER, WITH A MAXIMUM OF \$650, IF THE CARRIER OFFERS ALTERNATE TRANSPORTATION THAT IS PLANNED TO ARRIVE AT THE PASSENGER'S DESTINATION OR FIRST STOPOVER MORE THAN ONE HOUR BUT LESS THAN FOUR HOURS AFTER THE PLANNED ARRIVAL TIME OF THE PASSENGER'S ORIGINAL FLIGHT; AND
  - (3) 400% OF THE TOTAL PRICE TO THE PASSENGER'S DESTINATION OR FIRST STOPOVER, WITH A MAXIMUM OF \$1,300, IF THE CARRIER DOES NOT OFFER ALTERNATE TRANSPORTATION THAT IS PLANNED TO ARRIVE AT THE AIRPORT OF THE PASSENGER'S DESTINATION OR FIRST STOPOVER LESS THAN FOUR HOURS AFTER THE PLANNED ARRIVAL TIME OF THE PASSENGER'S ORIGINAL FLIGHT.
  - (4) A TOTAL PRICE MEANS THE TOTAL OF THE AIR TRANSPORTATION CHARGES AND THIRD PARTY CHARGES THAT MUST BE PAID TO OBTAIN THE SERVICE.

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY  
IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0110  
Special Permission No. 91655.

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TITLE/APPLICATION - 70 (CONT)

(H) METHOD OF PAYMENT

- (1) THE CARRIER MUST GIVE EACH PASSENGER WHO QUALIFIES FOR DENIED BOARDING COMPENSATION, A PAYMENT BY CASH OR CASH EQUIVALENT, CHEQUE OR DRAFT FOR THE AMOUNT SPECIFIED ABOVE, OR TRAVEL CREDITS ON THE DAY AND PLACE THE INVOLUNTARY DENIED BOARDING OCCURS. HOWEVER, IF THE CARRIER ARRANGES ALTERNATE TRANSPORTATION FOR THE PASSENGER'S CONVENIENCE THAT DEPARTS BEFORE THE PAYMENT CAN BE MADE, THE PAYMENT WILL BE SENT TO THE PASSENGER WITHIN 24 HOURS.
- (2) THE CARRIER WILL INFORM PASSENGERS OF THE AMOUNT OF CASH COMPENSATION THAT WOULD BE DUE AND THAT THE PASSENGER MAY DECLINE TRAVEL CREDITS AND RECEIVE CASH OR EQUIVALENT



(3) THE CARRIER WILL FULLY DISCLOSE ALL MATERIAL RESTRICTIONS BEFORE THE PASSENGER DECIDES TO GIVE UP THE CASH OR EQUIVALENT PAYMENT IN EXCHANGE FOR TRAVEL CREDIT.

(4) THE CARRIER WILL OBTAIN A SIGNED AGREEMENT OF THE PASSENGER CONFIRMING THAT THE PASSENGER WAS PROVIDED WITH THE AFOREMENTIONED INFORMATION PRIOR TO PROVIDING THE TRAVEL CREDIT IN LIEU OF CASH OR CASH EQUIVALENT COMPENSATION.

(5) THE AMOUNT OF TRAVEL CREDIT WILL NOT BE LESS THAN 300% OF THE AMOUNT OF CASH COMPENSATION THAT WOULD BE DUE.

(6) PASSENGERS WILL BE ENTITLED TO EXCHANGE THE TRAVEL CREDITS TO CASH OR CASH EQUIVALENT AT THE RATE OF \$1 IN CASH BEING EQUIVALENT TO \$3 IN TRAVEL CREDITS WITHIN 1 MONTH OF RECEIPT, NOT TO EXCEED A CASH PAYOUT GREATER THAN THE MAXIMUM AMOUNT AS DEFINED BY THE LENGTH OF THE DELAY.

(7) THE RIGHTS OF A PASSENGER AGAINST THE CARRIER IN THE EVENT OF OVERBOOKING IS, IN MOST CASES OF INTERNATIONAL CARRIAGE, GOVERNED BY AN INTERNATIONAL CONVENTION KNOWN AS THE MONTREAL CONVENTION, 1999. ARTICLE 19 OF THAT CONVENTION PROVIDES THAT AN AIR CARRIER IS LIABLE FOR DAMAGE CAUSED BY DELAY IN THE CARRIAGE OF PASSENGERS AND GOODS UNLESS IT PROVES THAT IT DID EVERYTHING IT COULD BE REASONABLE EXPECTED TO DO TO AVOID THE DAMAGE. THERE ARE SOME EXCEPTIONAL CASES OF INTERNATIONAL CARRIAGE IN WHICH THE RIGHTS OF PASSENGERS ARE NOT GOVERNED BY AN INTERNATIONAL CONVENTION. IN SUCH CASES ONLY A COURT OF COMPETENT JURISDICTION CAN DETERMINE WHICH SYSTEM OF LAWS MUST BE CONSULTED TO DETERMINE WHAT THOSE RIGHTS ARE.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0115

-----  
TITLE/APPLICATION - 70

A CODE-SHARE AND INTERLINE TRAVEL  
FOR TRAFVEL TO OR FROM THE UNITED STATES, WHEN TRAVELLING  
WITH ONE OF THE CARRIER'S CODE-SHARE OR INTERLINE PARTNERS,  
GUEST ARE ENCOURAGED TO FAMILIARIZE THEMSELVES WITH THE  
BAGGAGE ALLOWANCES AND FEES OF THE CODE-SHARE OR INTERLINE

SUNWING AIRLINES INC.

CTA (A) No. 2  
3<sup>rd</sup> Revised Page 38  
Cancels 2<sup>nd</sup> Revised Page 38**SECTION VI - REFUNDS****RULE 18. REFUNDS****(a) Voluntary Cancellations**

If a passenger decides not to use the ticket and cancels the reservation, the passenger may not be entitled to a refund or compensation. (C)

**(b) Involuntary Cancellations**

In the event a refund is required because of the carrier's failure to operate or refusal to transport, the refund will be made as follows:

If the ticket is totally or partially unused, the total fare paid for each unused segment will be refunded.

**(c) A passenger will not be eligible for compensation or refund under the following condition:**

(i) The passenger checked-in or presents himself/herself at the boarding gate after the carrier's minimum check-in time or gate time [Rule 15 (2)] for any reason including being delayed in security or customs.

**(d) Application for refund shall be made to the carrier or its duly authorized Agent.****RULE 19. DENIED BOARDING COMPENSATION (C)**

For the purposes of this Rule 19, "alternate transportation" means air transportation with a confirmed reservation at no additional charge (by a scheduled airline licensed by Canada or another appropriate country), or other transportation accepted and used by the passenger in the case of denied boarding.

**(a) General.** If a passenger has been denied a confirmed seat in the case of an oversold flight of the Carrier, the Carrier will offer the passenger the following options:

(1) refund the total fare paid for each unused segment; or

(2) arrange reasonable alternative transportation on its own services; or

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.  
ISSUE DATE December 20, 2013  
EFFECTIVE DATE December 23, 2013  
Per Decision No. 432-C-A-2013.

SUNWING AIRLINES INC.

CTA (A) No. 2  
Original Page 39

- 
- (3) if reasonable alternate transportation on its own services is not available, the Carrier will make reasonable efforts to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the comparable booking code.
- (b) **Volunteers and Boarding Priorities.** If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his or her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for a payment of the Carrier's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the following boarding priority: the last passenger to arrive at the ticket lift point will be the first to be denied boarding, except:
- passengers travelling due to death or illness of a member of the passenger's family, or
  - unaccompanied minors, or
  - passengers who are disabled, or
  - elderly passengers.
- (c) **Compensation for Involuntary Denied Boarding.** If you are denied boarding involuntarily you are entitled to a payment of denied boarding compensation unless you have not fully complied with the Carrier's ticketing, check-in or reconfirmation requirements, or you are not acceptable for transportation under the Carrier's usual rules or practices, or you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons and the Carrier took all reasonable measures to avoid the substitution or that it was impossible for the Carrier to take such measures, or you are offered accommodations in a section of the Aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund).
- (d) **Amount of Denied Boarding Compensation.** Passengers travelling with a reserved seat on an oversold flight of the Carrier who are denied boarding involuntarily from an oversold flight are entitled to:

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

|                   |                                |
|-------------------|--------------------------------|
| ISSUE DATE        | EFFECTIVE DATE                 |
| December 20, 2013 | December 23, 2013              |
|                   | Per Decision No. 432-C-A-2013. |

SUNWING AIRLINES INC.

CTA (A) No. 2  
Original Page 40

- (i) No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger’s destination or first stopover not later than one hour after the scheduled arrival of the passenger’s original flight;
- (ii) 200% of the total fare to the passenger’s destination or first stopover, with a maximum of \$650 CDN if the Carrier is able to place the passenger on alternate transportation that is planned to arrive at the passenger’s destination or first stopover more than one hour but less than four hours after the scheduled arrival time of the passenger’s original flight; and
- (iii) 400% of the total fare to the passenger’s destination or first stopover, with a maximum of \$1,300 CDN, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger’s destination or first stopover less than four hours after the scheduled arrival time.

|                            |   |
|----------------------------|---|
| 0 to 1 hour delay          | No compensation                                     |
| 1 to 4 hour arrival delay  | 200% of one-way fare (but no more than \$650 CDN)   |
| Over 4 hours arrival delay | 400% of one-way fare (but no more than \$1,300 CDN) |

Passengers travelling with a reserved seat on an oversold flight of the Carrier, where the flight originates in the United States, who are denied boarding involuntarily from an oversold flight are entitled to the same compensation or lack of compensation provisions as set out above with the exception that all dollar amounts will be United States dollar amounts total rather than CDN.

For the purpose of calculating compensation under this Rule 20, the “total fare” is the one-way fare for the flight including the total of the air transportation charges and third party charges that must be paid to obtain a ticket, minus any applicable discounts.

- (f) **Method of Payment.** The Carrier must provide each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger’s convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.  
 ISSUE DATE December 20, 2013  
 EFFECTIVE DATE December 23, 2013  
 Per Decision No. 432-C-A-2013.

**PORTER AIRLINES INC.**

CTA (A) No. 1  
3rd Revised Page 37 Cancels  
2nd Revised Page 37

(b) **Involuntary Cancellations**

Refer to **Rule 15 Carrier Cancellation, Change and Refund Terms** for applicable terms and conditions.

**RULE 20. DENIED BOARDING COMPENSATION**

**General**

If a passenger has been involuntarily denied a reserved seat in case of an oversold flight on Porter Airlines, the Carrier will provide the passenger with:

- (a) a remedy or remedies in accordance with Rule 15 above; and
- (b) denied boarding compensation as set forth in this Rule 20 below.

**Volunteers and Boarding Priorities**

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier's boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger's family, or
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE  
March 20, 2014

EFFECTIVE DATE  
March 21, 2014  
Per SP No. 94823

PORTER AIRLINES INC.

CTA (A) No. 1  
2nd Revised Page 38 Cancels  
1<sup>st</sup> Revised Page 38**Compensation for Involuntary Denied Boarding**

If you are denied boarding involuntarily on a flight, you are entitled to a payment of "denied boarding compensation" from Carrier unless:

- you have not fully complied with the Carrier's ticketing and check-in requirements, or you are not acceptable for transportation under the Carrier's usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons, and the events prompting such substitution were beyond the Carrier's control and the Carrier took all reasonable measures to avoid the substitution or it was impossible for the Carrier to take such measures; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

**Amount of Denied Boarding Compensation**

Passengers with a confirmed seat on Porter Airlines who are denied boarding involuntarily from an oversold flight are entitled to:

- (a) No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight;
- (b) No less than 200% of the fare to the passenger's destination or first stopover, with a maximum of \$650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and
- (c) No less than 400% of the fare to the passenger's destination or first stopover, with a maximum of \$1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE  
March 6, 2014EFFECTIVE DATE  
March 7, 2014  
Per SP No. 99014

**PORTER AIRLINES INC.**CTA (A) No. 1  
2nd Revised Page 39 Cancels  
1st Revised Page 39

|                            |   |
|----------------------------|---|
| 0 to 1 hour arrival delay  | No compensation.  |
| 1 to 4 hour arrival delay  | At least 200% of one-way fare (but no more than \$650 USD).   |
| Over 4 hours arrival delay | At least 400% of one-way fare (but no more than \$1,300 USD). |

For the purpose of calculating compensation under this Rule 20, the "fare" is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

**Method of Payment**

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment, provided:

- (a) The Carrier has informed the passenger of the amount of cash compensation that would be due and that the passenger may decline travel vouchers, and receive cash or equivalent;
- (b) the value of such voucher(s) is no less than 300% of the value of the cash compensation to which the passenger would otherwise have been entitled;
- (c) the Carrier has disclosed to the passenger all material restrictions applicable to the use of such vouchers;
- (d) the Carrier obtains the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of cash or equivalent compensation; and
- (e) The passenger may in any event refuse to accept such vouchers and insist on the cash/cheque payment, including that any passenger who accepts vouchers in lieu of cash or cheque payment at the time of involuntary denied boarding may, within 30 days, elect to exchange such vouchers for the cash or cheque payment she would have been entitled to receive had the passenger not accepted vouchers,

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE  
March 6, 2014EFFECTIVE DATE  
March 7, 2014  
Per SP No. 99014

**PORTER AIRLINES INC.**

CTA (A) No. 1  
4th Revised Page 40 Cancels  
3rd Revised Page 40

provided that the vouchers have not been redeemed by the passenger in whole or in part.

**RULE 21. CHECK-IN REQUIREMENTS**

In addition to any other check in requirements set out in this tariff, the following check-in requirements must be complied with:

- (a) a passenger must have obtained his/her boarding pass and checked any baggage by the check-in deadline below and must be available for boarding at the boarding gate by the deadline shown below. Failure to meet these deadlines may result in the loss of the passenger's assigned seat or the cancellation of the passenger's reservation.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE  
March 12, 2014

EFFECTIVE DATE  
March 13, 2014  
Per SP No. 99314





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March 28, 2014

**Via E-mail: [mike.redmond @otc-cta.gc.ca](mailto:mike.redmond@otc-cta.gc.ca)**

Canadian Transportation Agency  
Ottawa, Ontario  
K1A 0N9

Attention: Mike Redmond, Chief, Tariff Investigations

Dear Sirs/Mesdames:

**RE: Decision No. 10 –C-A-2014  
Dr. Gabor Lukacs v. British Airways Plc  
British Airways Plc. Reply to the Response filed  
by Dr. Lukacs to British Airways Plc. Submissions  
on Denied Boarding Compensation in answer to  
the Show Cause order of the Agency**

On behalf of British Airways Plc. (British Airways), we are replying to the submissions in response filed by Dr. Lukacs by letter dated March 26, 2014. British Airways was provided with the opportunity to show cause 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:

1. The regime applicable in the United States of America,
2. The regime proposed by the complainant as set out in Decision No. 342-C-A- 2013,
3. The regime proposed by Air Canada as set out in Decision No. 442-C-A-2013, or
4. Any other regime that British Airways may propose that the Agency may consider to be reasonable.

British Airways responded and proposed to apply the regime proposed by Air Canada as set out in Decision No.442-C-A-2014.

| <b>Proposed denied boarding compensation amounts for travel from Canada to the European Union</b> |                           |
|---|---------------------------|
| <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                   |

In **Issue 8** of *Decision No.10-C-A-2014*, paragraphs numbered 95 to 113, the Agency dealt with the issue of whether British Airways was required to incorporate the provisions of Regulation (EC) No. 261/2004 into the British Airways' Canadian Tariff or to make any reference to that Regulation. The Agency decided, for the reasons set out in its decision, that it would not require British Airways to do so. Dr. Lukacs is seeking to accomplish the same result that he sought in his submissions that resulted in the initial Decision. Regulation (EC) No. 261/2004 provides denied boarding compensation for passengers departing from the United Kingdom to Canada. Because there is a regulatory scheme clearly applicable and with which British Airways complies, it is not necessary to have a contractual provision in the Canadian Tariffs of air carriers governed by Regulation (EC) No. 261/2004. In the event that the European regulations were repealed, the applicable British Airways Tariff Rule 87(B)(3)(B) could be changed at that time to add the words "to and" to the words "from Canada" in order to provide the same amount of denied boarding compensation to passengers carried in either direction.

Respectfully submitted,



Carol E. McCall

Solicitor for British Airways Plc

c.c Dr. Gabor Lukacs: email to Lukacs@AirPassengerRights.ca

Halifax, NS

lukacs@AirPassengerRights.ca

April 1, 2014

**VIA EMAIL**

The Secretary  
Canadian Transportation Agency  
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. British Airways**  
**British Airways' post-pleading submissions dated March 28, 2014**

I am writing concerning British Airways' March 28, 2014 submissions, which were filed after the closing of pleadings relating to the show cause order. Decision No. 10-C-A-2014 of the Agency did not provide British Airways with the right to file a reply, and thus pleadings closed after the comments of the Applicant:

[145] British Airways' response to the show cause direction must also be served on Mr. Lukács, who will have 10 days from receipt of that response to file comments, if any, with a copy to British Airways.

Normally the appropriate remedy would be striking out British Airways' post-pleading submissions as per the Agency's *Requests for Additional Filings after the Close of Pleadings* practice.

In the present case, however, the Applicant is asking instead to be allowed to make submissions in response to British Airways' March 28, 2014 submissions, because British Airways grossly misstates Decision No. 10-C-A-2014.

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways



April 16, 2014

File No. M4120-3/14-00909

**BY E-MAIL: [cmccall@pmlaw.com](mailto:cmccall@pmlaw.com)**

**BY E-MAIL: [lukacs@AirPassengerRights.ca](mailto:lukacs@AirPassengerRights.ca)**

British Airways  
c/o Paterson MacDougall Law  
Barristers and Solicitors  
1 Queen Street East Suite 900  
Toronto, Ontario  
M5C 2W5

Gábor Lukács  
  
Halifax, Nova Scotia

Attention: Carol McCall

Dear Madam/Sir,

Re: British Airways' response to show cause order in Decision No. 10-C-A-2014

## **BACKGROUND**

In Decision No. 10-C-A-2014 (*Lukács v. British Airways*) dated January 17, 2014, the Canadian Transportation Agency (Agency), among other matters, provided British Airways with the opportunity to show cause why the Agency should not require British Airways to tender denied boarding compensation using:

1. The regime applicable in the United States of America;
2. The regime proposed by Gábor Lukács in the proceedings related to Decision No. 342-C-A-2013;
3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
4. 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 *Air Transportation Regulations* (ATR).

Mr. Lukács was also provided with an opportunity to reply to British Airways' submission.

In its response dated March 17, 2014, British Airways proposes to apply the same regime as that proposed by Air Canada in the course of the proceedings associated with Decision No. 442-C-A-2013, and British Airways provided a tariff amendment applicable to carriage from Canada to the United Kingdom.

Mr. Lukács, in his reply dated March 26, 2014, challenges British Airways' proposal, and puts forward alternative denied boarding compensation amounts.

British Airways subsequently filed an additional submission dated March 28, 2014, addressing Mr. Lukács' reply.

Mr. Lukács then filed a further submission dated April 1, 2014. He maintains that Decision No. 10-C-A-2014 did not provide British Airways with the right to reply to his submission, and requests that he be allowed to respond to British Airways' additional submission.

## **ISSUE**

Should the Agency accept the portions of Mr. Lukács' reply that do not respond directly to the response of British Airways and the subsequent submissions dated March 28 and April 1, 2014 filed by British Airways and Mr. Lukács.

## **SUBMISSIONS**

### **Mr. Lukács' reply dated March 26, 2014**

Mr. Lukács submits that British Airways' proposed tariff provision is unreasonable because it fails to establish conditions governing flights to Canada, and from Canada to points within the European Union. He asserts that given that Air Canada had already incorporated into its tariff the European regulations governing denied boarding compensation, the issue addressed in Decision No. 442-C-A-2013 was not the compensation tendered by Air Canada for flights departing from the European Union, but the compensation offered for flights from Canada to the European Union. Mr. Lukács maintains that the purpose of Decision No. 442-C-A-2013 was not to relieve Air Canada from the obligation to tender denied boarding compensation for flights to Canada, as British Airways' proposed provision implicitly purports to do.

Mr. Lukács argues that British Airways' main competitors in the Canada – European Union market are Lufthansa and Air France, not Air Canada. He opines that if British Airways were permitted to adopt Air Canada's denied boarding compensation regime, British Airways would enjoy a competitive advantage relative to Lufthansa and Air France, which both provide denied boarding compensation of 300 or 600 euros, depending on the length of delay.

Mr. Lukács submits that given a change in the exchange rate between the Canadian dollar and euro since Air Canada's proposal was advanced during the proceedings relating to Decision No. 442-C-A-2013, the regime proposed by British Airways entails levels of compensation that are 11 percent lower than Deutsche Lufthansa Aktiengesellschaft (Lufthansa German Airlines) and Société Air France carrying on business as Air France, and the European Union, in general. He adds that as the evidence on file indicates that British Airways' practice has been to tender compensation in amounts equivalent to 300 or 600 euros, depending on the length of delay, for carriage from the United Kingdom to Canada, it would seem reasonable to require that British Airways compensate passengers who are denied boarding for flights from the European Union to Canada 300 euros for delays of less than 4 hours, and 600 euros for delays exceeding four hours, or the equivalent amounts in British pound sterling or local currency.

With respect to carriage from Canada to the European Union, Mr. Lukács contends that the most logical and simple regime would be one that is symmetric to that applied to travel from the European Union to Canada. He submits that should the Agency determine that denied boarding compensation be tendered in Canadian dollars, it is proposed that the amounts be \$450 for delays of less than 4 hours, and \$900 for delays of more than 4 hours.

Mr. Lukács suggests that, alternatively, in view of WestJet, Sunwing Airlines Inc. and Porter Airlines Inc.'s recent adoption of the denied boarding compensation regime in place in the United States, it may be appropriate to require British Airways to apply that regime.

**British Airways' additional submission dated March 28, 2014**

British Airways submits that in Decision No. 10-C-A-2014, the Agency decided that it would not require British Airways to incorporate by reference the European regulations relating to denied boarding compensation. British Airways argues that in his submission respecting British Airways' proposed denied boarding compensation regime, Mr. Lukács is attempting to accomplish the same result that he sought during proceedings relating to the Decision.

**Mr. Lukács' submission dated April 1, 2014**

Mr. Lukács maintains that Decision No. 10-C-A-2014 did not provide British Airways with the right to respond to his reply. He indicates that, normally, he would request that British Airways' response be struck; however, in this case, given the "gross" misstatements by British Airways respecting Decision No. 10-C-A-2014, he is seeking permission to reply to that response.

**ANALYSIS**

In Decision No. 10-C-A-2014, the Agency provided British Airways with an opportunity to choose from among four options the denied boarding compensation regime that British Airways wishes to apply. In its response, British Airways advises that it proposes to apply the regime proposed by Air Canada during the proceedings respecting Decision No. 442-C-A-2013, and filed a tariff amendment in that regard.

Mr. Lukács' reply dated March 26, 2014 not only addresses British Airways' proposal, but also includes submissions regarding carriage from the European Union to Canada, the denied boarding compensation regimes applied by Lufthansa and Air France, the U.S. regime, and a regime that he proposes that features higher levels of compensation prompted by a change in Canadian dollar – euro exchange rate since Air Canada advanced the aforementioned proposal.

The Agency, in its Decision provided Mr. Lukács with an opportunity to reply to British Airways' response. Mr. Lukács was not granted an opportunity to raise additional arguments unrelated to those raised by British Airways in its response. The Agency finds that parts of Mr. Lukács' reply submissions are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013, and therefore will not accept those unrelated reply submissions. The Agency directs Mr. Lukács, by the close of business on April 23, 2014, to refile his reply dated March 26, 2014 with all submissions that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted.

British Airways' additional submission dated March 28, 2014, and the subsequent April 1, 2014 submission filed by Mr. Lukács will not form part of the record.

Should you have any questions, you may contact Mike Redmond by facsimile at 819-953-7910, or by e-mail at [mike.redmond@otc-cta.gc.ca](mailto:mike.redmond@otc-cta.gc.ca).

**BY THE AGENCY:**

(signed)

---

Sam Barone  
Member

(signed)

---

Geoffrey C. Hare  
Member

Halifax, NS

lukacs@AirPassengerRights.ca

April 23, 2014

**VIA EMAIL**

The Secretary  
Canadian Transportation Agency  
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. British Airways**  
**British Airways' response to show cause order in Decision No. 10-C-A-2014**  
**File No.: M4120-3/14-00909**  
**Motion to reconsider Decision No. LET-C-A-25-2014**

Please accept the following submissions as a motion, pursuant to section 32 of the Agency's *General Rules*, to reconsider Decision No. LET-C-A-25-2014 in part, with respect to the order requiring the Applicant to delete certain, albeit not explicitly identified, submissions from his March 26, 2014 reply.

**PROCEDURAL HISTORY**

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency held that British Airways' International Tariff Rule Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*.

Thus, the Agency issued a show cause order, providing British Airways with an opportunity to demonstrate why the Agency should not substitute Rule 87(B)(3)(B) with another regime for determining the amount of compensation payable to victims of denied boarding.

2. On January 21, 2014, the Agency issued an Erratum to Decision No. 10-C-A-2014, directing British Airways to serve on the Applicant its response to the show cause order, and allowed the Applicant 10 days "to file comments" (emphasis added).



3. On March 17, 2014, British Airways filed its response to the show cause order. The response consisted of two separate statements on two different pages of the same document:
  - (a) On page 1, British Airways stated that “British Airways proposes to apply the regime proposed by Air Canada as set out in Decision No.442-C-A-2014.” [sic]
  - (b) On page 2, British Airways proposed a tariff wording purporting to implement the aforementioned regime.
4. On March 26, 2014, the Applicant filed a reply with respect to British Airways’ submissions in which the Applicant submitted that:
  - (a) the tariff wording proposed on page 2 of British Airways’ March 17, 2014 submissions does not reflect the regime proposed by Air Canada, as set out in Decision No. 442-C-A-2014, and the wording is inconsistent with the obligation to provide denied boarding compensation on all flights to and from Canada;
  - (b) the regime proposed by Air Canada, as set out in Decision No. 442-C-A-2014, is not reasonable in the case of British Airways, because British Airways’ statutory and commercial obligations and environment substantially differ from Air Canada’s;
  - (c) there have been significant material changes since the proposal set out in Decision No. 442-C-A-2014 was put forward, and thus it would be unreasonable for British Airways to apply that regime.
5. On March 28, 2014, British Airways made additional submissions to the Agency, even though Decision No. 10-C-A-2014 did not invite such additional submissions.
6. On April 1, 2014, the Applicant asked the Agency to be allowed to respond to British Airways’ March 28, 2014 submissions.
7. On April 16, 2014, in Decision No. LET-C-A-25-2014, the Agency ordered that:
  - (a) British Airways’ additional submissions dated March 28, 2014 and the Applicant submissions of April 1, 2014 will not form part of the record; and
  - (b) the Applicant is to refile his reply of March 26, 2014 “with all submissions that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted.”
8. In the present motion, the Applicant is asking the Agency to reconsider part (b) of the aforementioned order contained in Decision No. LET-C-A-25-2014.

## ARGUMENT

### I. Lack of procedural fairness in making Decision No. LET-C-A-25-2014

In Decision No. LET-C-A-25-2014, the Agency effectively struck out certain, albeit not explicitly identified, portions of the Applicant's reply dated March 26, 2014. The Agency did so on its own motion; British Airways did not ask the Agency to strike out portions of the Applicant's reply.

The Agency gave no notice to the Applicant of its intention to strike out certain portions of the reply, and thus the Applicant had no opportunity to make submissions to the Agency concerning why portions of his reply ought not be struck out.

Therefore, it is submitted that the process in which Decision No. LET-C-A-25-2014 was made denied the Applicant his right to be heard.

### II. Decision No. LET-C-A-25-2014 deprives the Applicant of his right to make submissions

The principle of *audi alteram partem* requires tribunals to allow both parties to a dispute to make submissions and lead evidence; without these two, a party cannot meaningfully participate in a proceeding. Depriving a party of the right to be heard, that is, to make submissions and lead evidence, amounts to denial of natural justice.

In the present case, the Applicant was entitled to "file comments" with respect to British Airways' response to the show cause order both pursuant to the principle of *audi alteram partem* and in accordance with Decision No. 10-C-A-2014 of the Agency.

As explained below, the Applicant's March 26, 2014 reply falls squarely within the scope of "comments" on British Airways' submissions that the Agency invited in Decision No. 10-C-A-2014; furthermore, with the possible exception of section IV, it does directly respond to British Airways' submissions:

1. British Airways proposed to apply the regime that was proposed by Air Canada during the proceeding leading to Decision No. 442-C-A-2013.

Consequently, the Applicant was entitled to comment on this choice of British Airways. The Applicant did properly exercise his right to comment on this choice of British Airways by making the submission that this choice was unreasonable for British Airways because:

- (a) British Airways' statutory and commercial obligations and environment substantially differ from Air Canada's (section III(b) of the Applicant's reply).
- (b) There have been significant material changes since the proposal set out in Decision No. 442-C-A-2014 was put forward, and these material changes render the regime in question unreasonable in the case of British Airways (section III(c) of the Applicant's reply).

It is impossible to address British Airways' statutory and commercial obligations and environment without mentioning British Airways' competitors, such as Lufthansa and Air France, and the compensation regimes adopted by these competitors.

Similarly, it is impossible to address the material changes that have occurred since the proposal set out in Decision No. 442-C-A-2014 was put forward without mentioning the compensation regime that most major Canadian airlines have adopted, which happens to be the US compensation regime, and the drastic changes in the exchange rates.

2. British Airways did not simply propose to adopt the regime of Air Canada, but also proposed specific tariff wording purporting to implement Air Canada's regime (page 2 of British Airways' March 17, 2014 submissions).

Consequently, the Applicant was entitled to comment on the specific tariff wording proposed by British Airways; and indeed, the Applicant did so, by objecting to the tariff wording proposed by British Airways on the grounds that:

- (a) British Airways' proposed wording does not adequately implement the regime proposed by Air Canada as set out in Decision No. 442-C-A-2013 (section II of the Applicant's reply).
  - (b) British Airways' proposed wording is inconsistent with the obligation (found in subsection 122(c)(iii) of the *Air Transportation Regulations*) to establish denied boarding compensation for flights both from and to Canada (section I of the Applicant's reply).
3. Given that the Applicant submits that both British Airways' choice of regime and proposed tariff wording are unreasonable, the Applicant went on to propose an alternative denied boarding compensation regime as a way of also providing constructive comments (section IV of the Applicant's reply).

While this portion of the Applicant's reply may go beyond a traditional reply, it must be remembered that the Agency invited "comments" from the Applicant and not simply a "reply" in Decision No. 10-C-A-2014. Thus, it is submitted that these submissions were also appropriate.

Therefore, all submissions found in sections I, II, and III of the Applicant's reply directly address either the regime proposed by British Airways or the actual tariff wording proposed by British Airways. Hence, the Applicant submits that deleting any portion of sections I, II, or III of his March 26, 2014 reply would deprive the Applicant of the opportunity to make a meaningful reply to British Airways' response to the show cause order, and would amount to denial of the Applicant's most fundamental procedural rights.

With respect to section IV of the reply, the Applicant submits that it falls within the reasonable limits of "comments" that were invited by the Agency, and that Decision No. 10-C-A-2014 created the legitimate expectation that such comments would be accepted by the Agency.

### **III. Decision No. LET-C-A-25-2014 is unclear and vague**

The Applicant is struggling to understand what portions of sections I, II, and III of his March 26, 2014 reply are unrelated, in the Agency's opinion, to the March 17, 2014 response of British Airways. Indeed, as noted earlier, the Applicant sincerely believes that all his submissions in sections I, II, and III of his reply are directly related and respond to either the regime proposed by British Airways or the actual tariff wording proposed by British Airways.

Thus, the Applicant submits that Decision No. LET-C-A-25-2014 is unclear and vague in that it does not explicitly identify the portions of the Applicant's reply the Agency orders to have struck.

Therefore, the Applicant submits that although he can make a good faith effort to comply with the decision by deleting section IV of his reply, it is unclear whether this is what the Agency expects him to do.

### **IV. Relief sought**

The Applicant is respectfully asking the Agency to reconsider its Decision No. LET-C-A-25-2014 in part, and rescind the order requiring the Applicant to delete portions from his reply.

In the alternative, the Applicant is asking the Agency to clarify Decision No. LET-C-A-25-2014 by confirming that the Applicant is required to delete only section IV of his reply.

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways



May 2, 2014

File No. M4120-3/14-00909

**BY E-MAIL: [lukacs@AirPassengerRights.ca](mailto:lukacs@AirPassengerRights.ca)**

Gábor Lukács

Halifax, Nova Scotia

Dear Sir,

**Re: Motion regarding Decision No. LET-C-A-25-2014**

This refers to your motion dated April 23, 2014, filed pursuant to section 32 of the *Canadian Transportation Agency General Rules*, requesting certain relief respecting Decision No. LET-C-A-25-2014 dated April 16, 2014.

In Decision No. LET-C-A-25-2014, the Canadian Transportation Agency (Agency) ordered you, in part, to refile your reply dated March 26, 2014, relating to the answer dated March 17, 2014 filed by British Airways Plc carrying on business as British Airways (British Airways) respecting Decision No. 10-C-A-2014 dated January 17, 2014, “with all submissions that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 deleted.” In your motion, you request the Agency to reconsider Decision No. LET-C-A-25-2014, and rescind the order to delete portions of your reply, or alternatively, to clarify the Decision by confirming that you are required to delete only section IV of that reply.

### **Submissions**

In support of your motion, you submit that the process relating to Decision No. LET-C-A-25-2014, in failing to provide you with the opportunity to make submissions regarding the portions of your reply that ought to be deleted, deprived you of your right to be heard. You maintain that you were entitled to file comments respecting British Airways’ answer to Decision No. LET-C-A-25-2014 in accordance with the principle of *audi alteram partem* and Decision No. 10-C-A-2014. You submit that your reply “falls squarely” within the scope of comments on British Airways’ answer, and responds directly to that answer, with the possible exception of section IV, in the following manner:

1. You were entitled to comment on British Airways’ choice of a denied boarding compensation regime, and properly exercised this right by making the submission that such choice was unreasonable for the reasons specified in your reply;

2. You were entitled to comment on the specific tariff wording proposed in British Airways' answer, and did so by objecting to that wording for the reasons specified in your reply;
3. Because you found both British Airways' choice of regime and proposed tariff wording to be unreasonable, you proceeded to propose an alternative denied boarding compensation regime as a means of also providing constructive comments.

You also submit that Decision No. LET-C-A-25-2014 is unclear and vague in that it does not explicitly identify the portions of your reply that the Agency ordered to be deleted.

### **Analysis**

With respect to your submission that, as a right, you should have been provided with the opportunity to comment before the Agency issued Decision No. LET-C-A-25-2104, the Agency notes that the principle of *audi alteram partem* does not provide a party, who already has had the opportunity to make submissions on what is at issue, with the right to preview a decision that a decision-maker is about to make. In that sense, as is the case with any other decision-maker, the Agency is not obligated, once a party has had the opportunity to make submissions, to provide prior notice to a party before rendering a decision.

With regard to your right to make submissions on British Airways' answer to Decision No. LET-C-A-25-2014, and your assertion that your reply responds directly to that answer, British Airways proposed to adopt the denied boarding compensation regime proposed by Air Canada during the proceedings relating to Decision No. 442-C-A-2013. Air Canada's proposal provided for compensation of CAD\$400 for a delay of less than four hours, and CAD\$800, for delays in excess of four hours, for carriage from Canada to the European Union. Your reply should have been confined to that answer, yet as noted in Decision No. LET-C-A-25-2014, you elected to make submissions regarding carriage from the European Union to Canada, the denied boarding compensation regimes applied by Deutsche Lufthansa Aktiengesellschaft and Société Air France carrying on business as Air France, the U.S. regime, and a regime that you proposed that features higher levels of compensation prompted by a change in Canadian dollar – euro exchange rate since Air Canada advanced the aforementioned proposal. Your reply, therefore, exceeded the scope of British Airways' proposed adoption of the regime proposed by Air Canada's proposal during the proceedings respecting Decision No. 442-C-A-2013, and effectively, represented rearguments of determinations previously made by the Agency.

With respect to your submission that the Agency's order in Decision No. LET-C-A-25-2014 to delete certain text is unclear and vague, the Agency clearly stated in that Decision that you must delete all of the submissions in your reply that are "unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013." As noted above, Air Canada's proposal sets out specific amounts of compensation, and applied to carriage from Canada to the European Union.

The Agency finds that the only portion of your reply that is relevant to British Airways' answer is that respecting British Airways not establishing conditions for denied boarding compensation for flights from Canada beyond the United Kingdom (on page 3 of your reply, under Argument 1. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points beyond the United Kingdom), and that the remainder of the reply should be deleted.

Your revised reply, with the appropriate deletions, must be filed with the Agency by no later than May 9, 2014.

**BY THE AGENCY:**

(signed)

\_\_\_\_\_  
Sam Barone  
Member

(signed)

\_\_\_\_\_  
Geoffrey C. Hare  
Member

c.c. British Airways  
c/o Carol E. McCall  
E-mail: [cmccall@pmlaw.com](mailto:cmccall@pmlaw.com)



Halifax, NS

lukacs@AirPassengerRights.ca

May 8, 2014

**VIA EMAIL**

The Secretary  
Canadian Transportation Agency  
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. British Airways**  
**British Airways' response to show cause order in Decision No. 10-C-A-2014**  
**File No.: M4120-3/14-00909**  
**Decision No. LET-C-A-29-2014 – Notice of Protest**

I acknowledge the receipt of Decision No. LET-C-A-29-2014 of the Agency, an interlocutory decision that orders me to delete almost the entire contents of my comments on British Airways' submissions of March 17, 2014.

Out of respect to the Agency, I am hereby complying with Decision No. LET-C-A-29-2014, and refiling said reply as ordered; however, I am doing so under protest. Please be advised that I reserve my right to challenge Decision No. LET-C-A-29-2014 as part of an appeal from the final decision of the Agency in the present file.

Dr. Gábor Lukács  
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways



Halifax, NS

lukacs@AirPassengerRights.ca



March 26, 2014

**VIA EMAIL**

The Secretary  
Canadian Transportation Agency  
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. British Airways**  
**Reply to British Airways' submissions dated March 17, 2014 relating to the**  
**Agency's show cause order with respect to denied boarding compensation amounts**

Please accept the following submissions as a reply, pursuant to Decision No. 10-C-A-2014 of the Agency, to British Airways' submissions dated March 17, 2014, relating to denied boarding compensation amounts.

**BACKGROUND**

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency held that British Airways' International Tariff Rule Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*.

Thus, the Agency issued a show cause order, providing British Airways with an opportunity to demonstrate why the Agency should not substitute Rule 87(B)(3)(B) with another regime for determining the amount of compensation payable to victims of denied boarding.

2. On March 17, 2014, British Airways proposed a new denied boarding compensation policy (the "Proposed Rule") to replace the Existing Rule 87(B)(3)(B). As explained below, British Airways incorrectly claimed that the Proposed Rule is the same as the regime set out in Decision No. 442-C-A-2013.

**ISSUES**

I. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points outside the United Kingdom. . . . . 3

II. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 3

III. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 4

(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 4

(b) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 5

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 5

(ii) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 5

(iii) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 6

(c) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 6

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 6

(ii) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 8

(d) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 9

IV. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 10

(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 10

(b) [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 11

**EXHIBITS**

A. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 13

B. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 14

C. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 20

D. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 24

E. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 28

F. [Deleted pursuant to Decision No. LET-C-A-29-2014]. . . . . 31

## **ARGUMENT**

### **I. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points outside the United Kingdom**

The Agency held in *Lukács v. WestJet*, 227-C-A-2013 (at para. 39) that:

The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[Emphasis added.]

The Proposed Rule fails to establish conditions governing denied boarding compensation for flights to Canada. The Proposed Rule also fails to establish conditions governing denied boarding compensation for flights from Canada to points within the European Community that are outside the United Kingdom. Indeed, the Proposed Rule requires British Airways to pay denied boarding compensation only “for flights from Canada to the United Kingdom” (emphasis added).

Therefore, based on the principles set out in Decision No. 227-C-A-2013, the Proposed Rule is unreasonable.

### **II. [Deleted pursuant to Decision No. LET-C-A-29-2014]**

**III. [Deleted pursuant to Decision No. LET-C-A-29-2014]**

**(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]**

(b) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(ii) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(iii) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(c) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]

Revised and refiled on May 8, 2014  
pursuant to Decision No. LET-C-A-29-2014

**UNDER PROTEST**

March 26, 2014  
Page 7 of 34

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(ii) [Deleted pursuant to Decision No. LET-C-A-29-2014]



(d) **[Deleted pursuant to Decision No. LET-C-A-29-2014]**

**IV. [Deleted pursuant to Decision No. LET-C-A-29-2014]**

**(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]**

(b) **[Deleted pursuant to Decision No. LET-C-A-29-2014]**

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways

## **LIST OF AUTHORITIES**

### **Legislation**

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

### **International instruments**

4. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

### **Case law**

5. *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95.
6. *Anderson v. Air Canada*, Canadian Transportation Agency, 666-C-A-2001.
7. *Dr. Azar v. Air Canada*, Canadian Transportation Agency, 442-C-A-2013.
8. *Griffiths v. Air Canada*, Canadian Transportation Agency, 287-C-A-2009.
9. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.
10. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.
11. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.
12. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
13. *Lukács v. WestJet*, Canadian Transportation Agency, 313-C-A-2010.
14. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
15. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
16. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2013.
17. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 344-C-A-2013.

This exhibit was deleted pursuant to  
Decision No. LET-C-A-29-2014

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Decision No. LET-C-A-29-2014

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Decision No. LET-C-A-29-2014

Court File No.:

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Moving Party

– and –

**CANADIAN TRANSPORTATION AGENCY and  
BRITISH AIRWAYS PLC**

Respondents

**AFFIDAVIT OF KAREN KIPPER  
(Affirmed: June 24, 2014)**

I, Karen Kipper, of the City of Halifax in the Regional Municipality of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. I am the common-law partner of Dr. Gábor Lukács, and as such, I have personal knowledge of the matters deposed to.
2. Dr. Lukács is a frequent traveller and an air passenger rights advocate. The activities of Dr. Lukács in the latter capacity include:
  - (a) filing approximately two dozen successful complaints with the Canadian Transportation Agency (the “Agency”), resulting in airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;
  - (b) promoting air passenger rights through the press and social media; and
  - (c) referring passengers mistreated by airlines to legal information and resources.

3. On September 4, 2013, the Consumers' Association of Canada recognized the achievements of Dr. Lukács in the area of air passenger rights by awarding him its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."
4. On January 30, 2013, Dr. Lukács filed a complaint with the Agency concerning, among other things, the policy of British Airways about compensation to passengers who are denied boarding on oversold flights.
5. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency agreed with Dr. Lukács that British Airways' denied boarding compensation policy was unreasonable. The Agency ordered British Airways to either explain why the Agency should not impose on it a new denied boarding compensation policy, or to propose a new policy on its own. The Agency also invited Dr. Lukács to comment on British Airways' submissions.
6. On March 17, 2014, British Airways filed its submissions with the Agency, and on March 26, 2014, Dr. Lukács filed his reply. On March 28, 2014, British Airways made additional submissions to the Agency, and on April 1, 2014, Dr. Lukács sought leave to respond.
7. On April 16, 2014, in Decision No. LET-C-A-25-2014, the Agency struck out the additional submissions of British Airways, and ordered Dr. Lukács to revise his reply by deleting the vast majority of his own submissions; on May 2, 2014, in Decision No. LET-C-A-29-2014, the Agency refused to reconsider its order requiring Dr. Lukács to delete the vast majority of his submissions (the "Procedural Decisions").

8. On May 8, 2014, Dr. Lukács complied with the the Procedural Decisions under protest, and refiled his revised reply.
9. On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the “Final Decision”).
10. I have been advised by Dr. Lukács and I do verily believe that Dr. Lukács is seeking leave to appeal the Final Decision, and if and to the extent necessary, the Procedural Decisions, on the grounds that:
  - (a) 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*; and
  - (b) the Agency breached its duty to observe procedural fairness by making Procedural Decisions that ordered Dr. Lukács to delete the vast majority of his submissions.

**AFFIRMED** before me at the City of Halifax  
in the Regional Municipality of Halifax  
on June 24, 2014.

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Karen Kipper

Halifax, NS

*kipper@AirPassengerRights.ca*

Court File No.:

**FEDERAL COURT OF APPEAL**

BETWEEN:

**DR. GÁBOR LUKÁCS**

Moving Party

– and –

**CANADIAN TRANSPORTATION AGENCY and  
BRITISH AIRWAYS PLC**

Respondents

**MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY**

**PART I – STATEMENT OF FACTS**

**A. OVERVIEW**

1. The Moving Party is seeking leave to appeal from Decision No. 201-C-A-2014 (the “Final Decision”) of the Canadian Transportation Agency (the “Agency”). 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 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 secondary ground for the proposed appeal is that the Agency breached its duty to observe procedural fairness by ordering the Moving Party to delete the vast majority of his submissions to the Agency (the “Procedural Decisions”). If a separate leave is necessary, then the Moving Party is also seeking leave to appeal these Procedural Decisions.

## B. THE STATUTORY SCHEME

4. Airlines operating international flights to and from Canada are required to create and file with the Agency a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and the terms and conditions set out in the tariff are enforceable in Canada.

*Air Transportation Regulations, s. 110(1)* [Appendix “A”, P137]

5. Every tariff must clearly state the airline’s policy with respect to an enumerated list of core areas, including compensation payable to bumped passengers (“compensation for denial of boarding as a result of overbooking”).

*Air Transportation Regulations, s. 122(c)(iii)* [Appendix “A”, P141]

6. All terms and conditions of carriage established by an airline must be “just and reasonable.”

*Air Transportation Regulations, s. 111(1)* [Appendix “A”, P138]

7. The Agency is a quasi-judicial federal regulator created by the *Canada Transportation Act*. Parliament conferred upon the Agency broad regulatory powers with respect to the contractual terms and conditions that are imposed by airlines on passengers travelling internationally, to and from Canada. The Agency may disallow any tariff or tariff rule that fails to be just and reasonable, and then it may substitute the disallowed tariff or tariff rule with another one established by the Agency itself.

*Canada Transportation Act, s. 86(1)(h)* [Appendix “A”, P134]  
*Air Transportation Regulations, s. 113* [Appendix “A”, P139]

## **C. PROCEEDINGS BEFORE THE AGENCY**

8. The Moving Party, Dr. Gábor Lukács, is a Canadian air passenger rights advocate and a frequent traveller. Lukács has a track record of approximately two dozen successful regulatory complaints with the Agency. The Consumers' Association of Canada awarded Lukács its Order of Merit in recognition of his work in the area of air passenger rights.

**Kipper Affidavit , paras. 2-3**

**[Tab 13, P111]**

### **(i) The Show Cause Decision**

9. 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**

**[Tab 3, P8]**

10. 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 agreed with Lukács that British Airways' policy may be unreasonable. The Agency ordered British Airways to either explain why the Agency should not impose on it one of the three denied boarding compensation policies outlined in the decision, or to propose a new policy on its own (the “Show Cause Decision”).

**Decision No. 10-C-A-2014, paras. 140, 144**

**[Tab 3, P31]**

11. The Agency also invited Lukács to comment on British Airways' submissions in response to the Show Cause Decision.

**Erratum to Decision No. 10-C-A-2014**

**[Tab 4, P39]**



(ii) **Submissions in response to the Show Cause Decision**

12. On March 17, 2014, British Airways proposed to implement the denied boarding compensation regime that was “proposed by Air Canada as set out in Decision No. 442-C-A-2014,” and it also proposed a tariff wording purporting to implement this regime, albeit only on flights from Canada to the UK.

**Submissions of British Airways (March 17, 2014)** [Tab 5, P40]

13. On March 26, 2014, Lukács filed his reply, and 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)** [Tab 6, P43]

14. On March 28, 2014, British Airways made addition submissions without being invited to do so by the Agency. On April 1, 2014, Lukács asked the Agency for permission to respond to these additional submissions.

**Additional Submissions of British Airways (March 28, 2014)** [Tab 7, P77]

**Letter of Lukács to the Agency** [Tab 8, P79]

(iii) **The Procedural Decisions**

15. On April 16, 2014, in Decision No. LET-C-A-25-2014, the Agency not only struck out the additional submissions of British Airways, but also 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**

**[Tab 9, P83]**

16. On April 23, 2014, Lukács made a motion to the Agency to reconsider Decision No. LET-C-A-25-2014, because it deprived him of the right to make submissions by ordering him to delete submissions that fell squarely within the scope of comments on British Airways’ submissions, and which directly responded to those submissions.

**Motion of Lukács to reconsider  
Decision No. LET-C-A-25-2014**

**[Tab 10, P84]**

17. 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**

**[Tab 11, P91]**

18. On May 8, 2014, Lukács filed his revised reply as per the Agency’s decisions; however, he did so under protest, and reserved his right to challenge the decision as part of an appeal from the final decision that the Agency would issue in the file.

**Revised (under protest) Reply of Lukács**

**[Tab 12, P92]**

**(iv) The Final Decision**

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

- (a) confused Decision No. 227-C-A-2013 (*Lukács v. WestJet*) with Decision No. 442-C-A-2013 (*Azar v. Air Canada*) at paragraphs 10-11;
- (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; and
- (c) ordered British Airlines 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**

**[Tab 1, P1]**

20. The Final Decision creates a legal loophole and is inconsistent with subsection 122(c)(iii) of the *Air Transportation Regulations* by failing to establish a tariff rule governing denied boarding compensation payable to passengers travelling on British Airways flights from abroad to Canada (e.g., from London Heathrow to Toronto).

**PART II – STATEMENT OF THE POINTS IN ISSUE**

21. The question to be decided on this motion is whether this Honourable Court should grant Lukács leave to appeal.

## PART III – STATEMENT OF SUBMISSIONS

### JURISDICTION OF THIS HONOURABLE COURT

22. Every decision, order, rule or regulation of the Agency may be appealed to this Honourable Court on a question of law or a question of jurisdiction with the leave of the Court.

*Canada Transportation Act, s. 41(1)*

[Appendix “A”, P131]

23. The primary ground for the proposed appeal is that the Agency erred in law by rendering an unreasonable decision that is inconsistent with the applicable legislation. The secondary ground for the proposed appeal is denial of procedural fairness. Both of these grounds are questions of law, and thus this Honourable Court may grant leave to appeal and hear the proposed appeal.

#### A. PRIMARY GROUND: THE FINAL DECISION IS UNREASONABLE

24. The Final Decision imposes a tariff rule on British Airways that governs the payment of denied boarding compensation only on flights departing from Canada to the European Union, but it is silent about the rights of passengers who are bumped from flights departing from the European Union (or elsewhere) to Canada.

25. Lukács submits that this outcome is unreasonable, in the sense that it falls outside the range of possible reasonable outcomes for two reasons:

- (i) it is inconsistent with the requirements of section 122(c)(iii) of the *Air Transportation Regulations*; and
- (ii) it creates a legal loophole.

(i) **The obligation to state denied boarding compensation policy for travel to and from Canada**

26. Subsection 122(c)(iii) of the *Air Transportation Regulations* states that:

122. Every tariff shall contain

⋮

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

⋮

(iii) compensation for denial of boarding as a result of overbooking,

***Air Transportation Regulations*, s. 122(c)(iii) [Appendix "A", P141]**

27. Section 122 is found in Division II of Part V of the *Air Transportation Regulations*, which is applicable to every air carrier that operates "international service" (except certain transborder charter services).

***Air Transportation Regulations*, s. 108 [Appendix "A", P137]**

28. Section 55(1) of the *Canada Transportation Act* states that:

"international service" means an air service between Canada and a point in the territory of another country;

[Emphasis added.]

***Canada Transportation Act*, s. 55(1) [Appendix "A", P133]**

29. Thus, "international service" means both service from Canada to the territory of another country and service from the territory of another country to Canada. In particular, the obligation set out in section 122(c)(iii) of the *Air Transportation Regulations* applies not only to service from Canada to destinations abroad, but also to service from abroad to Canada.

30. Similarly, in *Lukács v. WestJet*, 227-C-A-2013, the Agency held that:

[21] [...] the Agency, in Decision No. 666-C-A-2001, held, in part, that any passenger who is denied boarding is entitled to compensation. Given that Existing Tariff Rule 110(E) does not provide for that compensation for flights to and from Canada, it is inconsistent with Decision No. 666-C-A-2001. The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.

⋮

[39] [...] The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[Emphasis added.]

***Lukács v. WestJet*, CTA, 227-C-A-2013**

**[Appendix “B”, P148]**

**[Appendix “B”, P152]**

31. Therefore, the tariff must address denied boarding compensation for:

- i. flights departing from Canada to destinations abroad; and
- ii. flights departing from abroad to Canada.

32. The Final decision imposes a tariff rule on British Airways that accomplishes (i), but fails to accomplish (ii); indeed, it is silent with respect to denied boarding compensation on flights departing from abroad to Canada.

33. Therefore, the tariff rule imposed by the Agency on British Airways in the Final Decision is unreasonable and inconsistent with the requirements of section 122(c)(iii) of the *Air Transportation Regulations*, because it fails to establish conditions governing denied boarding compensation for flights departing from abroad to Canada.

(ii) **The Final Decision creates a legal loophole**

34. The tariff is the contract of carriage between the passenger and the airline, and the terms and conditions set out in the tariff are enforceable in Canada by way of a complaint to the Agency or commencing an action in Canadian courts.

35. Conversely, terms and conditions that are not contained in the tariff cannot be enforced in Canada, even if the absence of these terms and conditions is contrary to the *Air Transportation Regulations*. Indeed, as noted by the Agency in *Nathanson v. LACSA*:

[26] The Agency notes that, in this case, as stated above, LACSA's Tariff does not set out its policy related to denied boarding compensation. Accordingly, the Agency finds that LACSA has contravened subparagraph 122(c)(iii) of the ATR. In this regard, LACSA should be aware that the Agency considers contraventions of provisions of the CTA or the ATR to be serious and will take appropriate punitive action should any such contraventions occur in the future.

[27] Further, it is important to note that the authority of the Agency in such situations is limited to requiring a carrier to amend its tariff so as to comply with subparagraph 122(c)(iii) of the ATR. The Agency cannot require a carrier to apply a policy if that policy is not reflected in its tariff.

[Emphasis added.]

***Nathanson v. LACSA*, CTA, 201-C-A-2005,  
paras. 26-27**

**[Appendix "B", P162]**

36. Therefore, the Final Decision creates a legal loophole by leaving Canadian passengers who are bumped from British Airways flights from abroad to Canada (e.g., from London Heathrow to Toronto) without any remedy; they will not be able to commence a proceeding to obtain denied boarding compensation before the Agency or any Canadian court.

37. It is submitted that the purpose of subsection 122(c)(iii) of the *Air Transportation Regulations* is precisely to prevent such loopholes. Consequently, the Agency erred in law by imposing a tariff rule on British Airways that is silent with respect to denied boarding compensation payable to passengers bumped from flights from abroad to Canada.

38. Hence, it is submitted that the Final Decision is unreasonable in the sense that it falls outside the range of possible reasonable outcomes.

## **B. SECONDARY GROUND: DENIAL OF PROCEDURAL FAIRNESS**

39. Lukács also submits that he was denied procedural fairness by the Agency making the Procedural Decisions that ordered him to delete the vast majority of his reply to British Airways' response to the Show Cause Decision.

### **(i) Procedure and time to challenge interlocutory decisions**

40. The general rule is that interlocutory, procedural decisions made by a tribunal in the course of a proceeding must be challenged after the final decision has been rendered, as part of the appeal from the final decision. Furthermore, the time period for appealing such interlocutory decisions does not begin until the final decision has been rendered.

***Zündel v. Canada (Human Rights Commission)*, [Appendix "B", P167] [2000] 4 FC 255, paras. 10-13, 17**

41. Thus, the proposed appeal from the Final Decision is the appropriate procedure and time to challenge the Procedural Decisions. Furthermore, in light of the rationale for the aforementioned general rule, the time period to seek leave to appeal from the Procedural Decisions (if a separate leave is necessary) did not begin until the Final Decision was rendered.



(ii) **The Procedural Decisions were unreasonable**

42. In the Show Cause Decision, the Agency invited British Airways to make submissions in relation to a new denied boarding policy for the airline. British Airways could either show cause why the Agency should not impose one of three denied boarding compensation regimes set out in the decision, or propose a policy on its own. The Agency also invited Lukács to “comment” on British Airways’ submissions.

**Decision No. 10-C-A-2014, paras. 140, 144**  
**Erratum to Decision No. 10-C-A-2014**

**[Tab 3, P31]**  
**[Tab 4, P39]**

43. In response to the Show Cause Decision, British Airways proposed to apply the denied boarding compensation regime that was proposed by Air Canada in the *Azar v. Air Canada* proceeding. Lukács, who was not a party to the *Azar* proceeding, opposed this proposal based on the differences in the legal and competitive environment of British Airways and Air Canada, as well as material changes that occurred since Air Canada’s proposal was put forward.

**Reply of Lukács (March 26, 2014)**

**[Tab 6, P43]**

44. Lukács relied in his submissions on the well-established balancing test that was developed by the Agency to decide the reasonableness of tariff rules. This test requires consideration of the carrier’s statutory, commercial, and operational obligations. This is precisely what Lukács did in his submissions: he compared the denied boarding compensation policies of British Airways’ competitors with what British Airways proposed, and argued that the proposal put forward by British Airways would give the airline an unfair competitive advantage. He also pointed out recent changes in the denied boarding compensation rules of Canadian airlines (WestJet, Sunwing, and Porter Airlines).

**Reply of Lukács (March 26, 2014), pp. 5-6**

**[Tab 6, P47]**

45. All of these submissions of Lukács directly addressed the reasonableness of British Airways' proposed denied boarding compensation amounts in accordance with the legal test that was developed by the Agency. Lukács could not have made meaningful submissions without addressing the competitive environment of the airline, which includes its two main competitors, Lufthansa and Air France. Lukács was also entitled to address the (lack of a) proposed rule governing denied boarding compensation for British Airways' flights from the European Union to Canada, and to urge the Agency to establish such a rule to avoid the creation of a legal loophole.

46. The Agency deprived Lukács of the right to have a meaningful opportunity to make submissions by ordering him to delete these submissions, even though they obviously spoke directly to the reasonableness of British Airways' proposal and the final disposition of the proceeding.

47. The Agency could have agreed or disagreed with these submissions of Lukács (and the Agency's reasons would have been entitled to deference); however, in the present case, the Agency misused its powers to strike out documents, and it effectively muzzled Lukács. It is submitted that the Agency's reasons for ordering Lukács to delete the vast majority of his reply submissions are incomprehensible and defy common sense.

48. Therefore, it is submitted that the Procedural Decisions are unreasonable and they deprived Lukács of his procedural right for an opportunity to make meaningful submissions in response to British Airways' proposal.

**PART IV – ORDER SOUGHT**

49. The Moving Party, Dr. Gábor Lukács, is seeking an Order:
- (a) granting Lukács leave to appeal Decision No. 201-C-A-2014 of the Canadian Transportation Agency (the Final Decision);
  - (b) granting Lukács leave to appeal, if a separate leave is necessary, Decision Nos. LET-C-A-25-2014 and LET-C-A-29-2014 of the Canadian Transportation Agency (the Procedural Decisions);
  - (c) granting Lukács costs and/or reasonable out-of-pocket expenses of this motion; and
  - (d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 25, 2014

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**DR. GÁBOR LUKÁCS**

Halifax, NS

*lukacs@AirPassengerRights.ca*

**Moving Party**

**PART V – LIST OF AUTHORITIES****CASES**

*Lukács v. WestJet*, Canadian Transportation Agency,  
227-C-A-2013

*Nathanson v. LACSA*, Canadian Transportation Agency,  
201-C-A-2005

*Zündel v. Canada (Human Rights Commission)*, [2000] 4 FC 255

**STATUTES AND REGULATIONS**

*Canada Transportation Act*, S.C. 1996, c. 10,  
ss. 41, 55, 86

*Air Transportation Regulations*, S.O.R./88-58,  
ss. 108, 110, 111, 113, and 122

**Appendix “A”**  
**Statutes and Regulations**



CANADA

CONSOLIDATION

CODIFICATION

# Canada Transportation Act

# Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to November 26, 2013

À jour au 26 novembre 2013

Last amended on June 26, 2013

Dernière modification le 26 juin 2013

|                        |  |  |                        |
|------------------------|--|--|------------------------|
| Appeal from Agency     | <p><b>41.</b> (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.</p> | <p><b>41.</b> (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.</p> | Appel                  |
| Time for making appeal | <p>(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.</p>   | <p>(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.</p>   | Délai                  |
| Powers of Court        | <p>(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.</p>   | <p>(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.</p>   | Pouvoirs de la cour    |
| Agency may be heard    | <p>(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.</p>  | <p>(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.</p>  | Plaidoirie de l'Office |

*Report of Agency*

*Rapport de l'Office*

|                   |  |  |                      |
|-------------------|--|--|----------------------|
| Agency's report   | <p><b>42.</b> (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,</p> <p>(a) applications to the Agency and the findings on them; and</p> <p>(b) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.</p> | <p><b>42.</b> (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :</p> <p>a) les demandes qui lui ont été présentées et ses conclusions à leur égard;</p> <p>b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.</p> | Rapport de l'Office  |
| Assessment of Act | <p>(2) The Agency shall include in every report referred to in subsection (1) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act.</p>  | <p>(2) L'Office joint à ce rapport son évaluation de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci.</p>   | Évaluation de la loi |
| Tabling of report | <p>(3) The Minister shall have a copy of each report made under this section laid before each House of Parliament on any of the first thirty</p>   | <p>(3) Dans les trente jours de séance de chaque chambre du Parlement suivant la réception du rapport par le ministre, celui-ci le fait déposer devant elle.</p>   | Dépôt                |

1996, ch. 10, art. 42; 2013, ch. 31, art. 2.

Adaptation orders

(2) Wherever by reason of insolvency, sale under mortgage or any other cause, a transportation undertaking or a portion of a transportation undertaking is operated, managed or held otherwise than by the carrier, the Agency or the Minister may make any order it considers proper for adapting and applying the provisions of this Act.

(2) L'Office ou le ministre peut, par arrêté, adapter les dispositions de la présente loi si, notamment pour insolvabilité ou vente hypothécaire, une entreprise de transport échappe, en tout ou en partie, à la gestion, à l'exploitation ou à la possession du transporteur en cause.

Modification

## PART II

## AIR TRANSPORTATION

## INTERPRETATION AND APPLICATION

Definitions

55. (1) In this Part,

“aircraft”  
«aéronef»

“aircraft” has the same meaning as in subsection 3(1) of the *Aeronautics Act*;

“air service”  
«service  
aérien»

“air service” means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both;

“basic fare”  
«prix de base»

“basic fare” means

(a) the fare in the tariff of the holder of a domestic licence that has no restrictions and represents the lowest amount to be paid for one-way air transportation of an adult with reasonable baggage between two points in Canada, or

(b) where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week of travel, or both, the highest of those fares;

“Canadian”  
«Canadien»

“Canadian” means a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians;

“Canadian aviation document”  
«document d'aviation  
canadien»

“Canadian aviation document” has the same meaning as in subsection 3(1) of the *Aeronautics Act*;

## PARTIE II

## TRANSPORT AÉRIEN

## DÉFINITIONS ET CHAMP D'APPLICATION

Définitions

55. (1) Les définitions qui suivent s'appliquent à la présente partie.

«aéronef» S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*.

«aéronef»  
“aircraft”

«Canadien» Citoyen canadien ou résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*; la notion englobe également les administrations publiques du Canada ou leurs mandataires et les personnes ou organismes, constitués au Canada sous le régime de lois fédérales ou provinciales et contrôlés de fait par des Canadiens, dont au moins soixante-quinze pour cent — ou tel pourcentage inférieur désigné par règlement du gouverneur en conseil — des actions assorties du droit de vote sont détenues et contrôlées par des Canadiens.

«Canadien»  
“Canadian”

«document d'aviation canadien» S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*.

«document d'aviation  
canadien»  
“Canadian  
aviation  
document”

«licencié» Titulaire d'une licence délivrée par l'Office en application de la présente partie.

«licencié»  
“licensee”

«prix de base»

«prix de base»  
“basic fare”

a) Prix du tarif du titulaire d'une licence intérieure qui est sans restriction et qui constitue le montant le moins élevé à payer pour le transport aller, entre deux points situés au Canada, d'un adulte accompagné d'une quantité normale de bagages;

b) dans les cas où un tel prix peut varier selon le moment du jour ou de la semaine, ou des deux, auquel s'effectue le voyage, le montant le plus élevé de ce prix.

«règlement» Règlement pris au titre de l'article 86.

«règlement»  
“prescribed”



|   |  |   |   |
|---|--|---|---|
| <p>“domestic licence”<br/><i>Version anglaise seulement</i></p>                         | <p>“domestic licence” means a licence issued under section 61;</p>   | <p>« service aérien » Service offert, par aéronef, au public pour le transport des passagers, des marchandises, ou des deux.</p>  | <p>« service aérien »<br/>“air service”</p>   |
| <p>“domestic service”<br/>« service intérieur »</p>                                     | <p>“domestic service” means an air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country;</p>  | <p>« service intérieur » Service aérien offert soit à l’intérieur du Canada, soit entre un point qui y est situé et un point qui lui est extérieur sans pour autant faire partie du territoire d’un autre pays.</p>   | <p>« service intérieur »<br/>“domestic service”</p>                                     |
| <p>“international service”<br/>« service international »</p>                            | <p>“international service” means an air service between Canada and a point in the territory of another country;</p>  | <p>« service international » Service aérien offert entre le Canada et l’étranger.</p>   | <p>« service international »<br/>“international service”</p>                            |
| <p>“licensee”<br/>« licencié »</p>  | <p>“licensee” means the holder of a licence issued by the Agency under this Part;</p>  | <p>« service international à la demande » Service international autre qu’un service international régulier.</p>   | <p>« service international à la demande »<br/>“non-scheduled international service”</p> |
| <p>“non-scheduled international licence”<br/><i>Version anglaise seulement</i></p>      | <p>“non-scheduled international licence” means a licence issued under subsection 73(1);</p>  | <p>« service international régulier » Service international exploité à titre de service régulier aux termes d’un accord ou d’une entente à cet effet dont le Canada est signataire ou sous le régime d’une qualification faite en application de l’article 70.</p>  | <p>« service international régulier »<br/>“scheduled international service”</p>         |
| <p>“non-scheduled international service”<br/>« service international à la demande »</p> | <p>“non-scheduled international service” means an international service other than a scheduled international service;</p>  |   |   |
| <p>“prescribed”<br/>« règlement »</p>   | <p>“prescribed” means prescribed by regulations made under section 86;</p>   | <p>« tarif » Barème des prix, taux, frais et autres conditions de transport applicables à la prestation d’un service aérien et des services connexes.</p>   | <p>« tarif »<br/>“tariff”</p>   |
| <p>“scheduled international licence”<br/><i>Version anglaise seulement</i></p>          | <p>“scheduled international licence” means a licence issued under subsection 69(1);</p>  | <p>« texte d’application » Arrêté ou règlement pris en application de la présente partie ou de telle de ses dispositions.</p>   | <p>« texte d’application »<br/><i>French version only</i></p>                           |
| <p>“scheduled international service”<br/>« service international régulier »</p>         | <p>“scheduled international service” means an international service that is a scheduled service pursuant to</p> <p>(a) an agreement or arrangement for the provision of that service to which Canada is a party, or</p> <p>(b) a determination made under section 70;</p>              |   |   |
| <p>“tariff”<br/>« tarif »</p>   | <p>“tariff” means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services.</p>  |   |   |
| <p>Affiliation</p>  | <p>(2) For the purposes of this Part,</p> <p>(a) one corporation is affiliated with another corporation if</p> <p>(i) one of them is a subsidiary of the other,</p> <p>(ii) both are subsidiaries of the same corporation, or</p> <p>(iii) both are controlled by the same person;</p> | <p>(2) Pour l’application de la présente partie :</p> <p>a) des personnes morales sont du même groupe si l’une est la filiale de l’autre, si toutes deux sont des filiales d’une même personne morale ou si chacune d’elles est contrôlée par la même personne;</p> <p>b) si deux personnes morales sont du groupe d’une même personne morale au même mo-</p> | <p>Groupe</p>   |

deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

2000, c. 15, s. 7.1; 2007, c. 19, s. 25.

miner la plainte conformément aux dispositions de la présente partie en vertu desquelles elle a été déposée.

(4) Le membre de l'Office ou le délégué qui a tenté de régler l'affaire ou joué le rôle de médiateur en vertu du présent article ne peut agir dans le cadre de procédures ultérieures, le cas échéant, devant l'Office à l'égard de la plainte en question.

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

2000, ch. 15, art. 7.1; 2007, ch. 19, art. 25.

Inhabilité

Prolongation

Inclusion dans le rapport annuel

REGULATIONS

Regulations

- 86.** (1) The Agency may make regulations
- (a) classifying air services;
  - (b) classifying aircraft;
  - (c) prescribing liability insurance coverage requirements for air services or aircraft;
  - (d) prescribing financial requirements for each class of air service or aircraft;
  - (e) respecting the issuance, amendment and cancellation of permits for the operation of international charters;
  - (f) respecting the duration and renewal of licences;
  - (g) respecting the amendment of licences;
  - (h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and
    - (i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,
    - (ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,

RÈGLEMENTS

- 86.** (1) L'Office peut, par règlement :
- a) classifier les services aériens;
  - b) classifier les aéronefs;
  - c) prévoir les exigences relatives à la couverture d'assurance responsabilité pour les services aériens et les aéronefs;
  - d) prévoir les exigences financières pour chaque catégorie de service aérien ou d'aéronefs;
  - e) régir la délivrance, la modification et l'annulation des permis d'affrètements internationaux;
  - f) fixer la durée de validité et les modalités de renouvellement des licences;
  - g) régir la modification des licences;
  - h) prendre toute mesure concernant le trafic et les tarifs, prix, taux, frais et conditions de transport liés au service international, notamment prévoir qu'il peut :
    - (i) annuler ou suspendre des tarifs, prix, taux ou frais,
    - (ii) établir de nouveaux tarifs, prix, taux ou frais en remplacement de ceux annulés,

Pouvoirs de l'Office

(iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

(iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

(i) requiring licensees to file with the Agency any documents and information relating to activities under their licences that are necessary for the purposes of enabling the Agency to exercise its powers and perform its duties and functions under this Part and respecting the manner in which and the times at which the documents and information are to be filed;

(j) requiring licensees to include in contracts or arrangements with travel wholesalers, tour operators, charterers or other persons associated with the provision of air services to the public, or to make those contracts and arrangements subject to, terms and conditions specified or referred to in the regulations;

(k) defining words and expressions for the purposes of this Part;

(l) excluding a person from any of the requirements of this Part;

(m) prescribing any matter or thing that by this Part is to be prescribed; and

(n) generally for carrying out the purposes and provisions of this Part.

(2) No regulation shall be made under paragraph (1)(l) 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.

(3) [Repealed, 2007, c. 19, s. 26]

1996, c. 10, s. 86; 2000, c. 15, s. 8; 2007, c. 19, s. 26.

(iii) enjoindre à tout licencié ou transporteur de prendre les mesures correctives qu'il estime indiquées et de verser des indemnités aux personnes lésées par la non-application par le licencié ou transporteur des prix, taux, frais ou conditions de transport applicables au service et qui figuraient au tarif,

(iv) obliger tout licencié ou transporteur à publier les conditions de transport du service international sur tout site Internet qu'il utilise pour vendre ce service;

i) demander aux licenciés de déposer auprès de lui les documents ainsi que les renseignements relatifs aux activités liées à leurs licences et nécessaires à l'exercice de ses attributions dans le cadre de la présente partie, et fixer les modalités de temps ou autres du dépôt;

j) demander aux licenciés d'inclure dans les contrats ou ententes conclus avec les grossistes en voyages, voyagistes, affréteurs ou autres personnes associées à la prestation de services aériens au public les conditions prévues dans les règlements ou d'assujettir ces contrats ou ententes à ces conditions;

k) définir les termes non définis de la présente partie;

l) exempter toute personne des obligations imposées par la présente partie;

m) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

n) prendre toute autre mesure d'application de la présente partie.

(2) Les obligations imposées par la présente partie relativement à la qualité de Canadien, au document d'aviation canadien et à la police d'assurance responsabilité réglementaire en matière de service aérien ne peuvent faire l'objet de l'exemption prévue à l'alinéa (1)l).

(3) [Abrogé, 2007, ch. 19, art. 26]

1996, ch. 10, art. 86; 2000, ch. 15, art. 8; 2007, ch. 19, art. 26.

Exclusion not to provide certain relief

Exception



CANADA

CONSOLIDATION

CODIFICATION

# Air Transportation Regulations

# Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to February 6, 2014

À jour au 6 février 2014

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*Interest*

**107.1** Where the Agency, by order, directs an air carrier to refund specified amounts to persons that have been overcharged by the air carrier for fares or rates in respect of its air service pursuant to paragraph 66(1)(c) of the Act, the amount of the refunds shall bear interest from the date of payment of the fares or rates by those persons to the air carrier to the date of the Agency's order at the rate of interest charged by the Bank of Canada on short-term loans to financial institutions plus one and one-half percent.

SOR/2001-71, s. 3.

## DIVISION II

## INTERNATIONAL

*Application*

**108.** Subject to paragraph 135.3(1)(d), this Division applies in respect of every air carrier that operates an international service, except an air carrier that operates TPCs, TPNCs or TGCs.

SOR/96-335, s. 55.

*Exception*

**109.** An air carrier that operates an international service that serves the transportation requirements of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees and workers is excluded, in respect of the service of those requirements, from the requirements of subsection 110(1).

*Filing of Tariffs*

**110.** (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, before commencing the operation of an international service, an air carrier or its agent shall file with the Agency a tariff for that service, including the terms and conditions of free and reduced rate transportation for that service, in the style, and containing the information, required by this Division.

*Intérêts*

**107.1** Dans le cas où, en vertu de l'alinéa 66(1)c) de la Loi, l'Office enjoint, par ordonnance, à un transporteur aérien de rembourser des sommes à des personnes ayant versé des sommes en trop pour un service, le remboursement porte intérêt à compter de la date du paiement fait par ces personnes au transporteur jusqu'à la date de délivrance de l'ordonnance par l'Office, au taux demandé par la Banque du Canada aux institutions financières pour les prêts à court terme, majoré d'un et demi pour cent.

DORS/2001-71, art. 3.

## SECTION II

## SERVICE INTERNATIONAL

*Application*

**108.** Sous réserve de l'alinéa 135.3(1)d), la présente section s'applique aux transporteurs aériens qui exploitent un service international, sauf ceux qui effectuent des VAP, des VAPNOR ou des VAM.

DORS/96-335, art. 55.

*Exception*

**109.** Le transporteur aérien est exempté de l'application du paragraphe 110(1) en ce qui concerne l'exploitation d'un service international servant à répondre aux besoins de transport des véritables clients, des véritables employés et des véritables travailleurs d'un hôtel pavillonnaire, y compris le transport des bagages, du matériel et des fournitures de ces personnes.

*Dépôt des tarifs*

**110.** (1) Sauf disposition contraire des ententes, conventions ou accords internationaux en matière d'aviation civile, avant d'entreprendre l'exploitation d'un service international, le transporteur aérien ou son agent doit déposer auprès de l'Office son tarif pour ce service, conforme aux exigences de forme et de contenu énoncées dans la présente section, dans lequel sont comprises les conditions du transport à titre gratuit ou à taux réduit.

(2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency.

(3) No air carrier shall advertise, offer or charge any toll where

(a) the toll is in a tariff that has been rejected by the Agency; or

(b) the toll has been disallowed or suspended by the Agency.

(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

SOR/96-335, s. 56; SOR/98-197, s. 6(E).

**111.** (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(2) L'acceptation par l'Office, pour dépôt, d'un tarif ou d'une modification apportée à celui-ci ne constitue pas l'approbation de son contenu, à moins que le tarif n'ait été déposé conformément à un arrêté de l'Office.

(3) Il est interdit au transporteur aérien d'annoncer, d'offrir ou d'exiger une taxe qui, selon le cas :

a) figure dans un tarif qui a été rejeté par l'Office;

b) a été refusée ou suspendue par l'Office.

(4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

(5) Il est interdit au transporteur aérien ou à ses agents d'offrir, d'accorder, de donner, de solliciter, d'accepter ou de recevoir un rabais, une concession ou un privilège permettant, par un moyen quelconque, le transport de personnes ou de marchandises à une taxe ou à des conditions qui diffèrent de celles que prévoit le tarif en vigueur.

DORS/96-335, art. 56; DORS/98-197, art. 6(A).

**111.** (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

SOR/93-253, s. 2; SOR/96-335, s. 57.

**112.** (1) All air carriers having joint tolls shall establish just and reasonable divisions thereof between participating air carriers.

(2) The Agency may

(a) determine and fix just and equitable divisions of joint tolls between air carriers or the portion of the joint tolls to be received by an air carrier;

(b) require an air carrier to inform the Agency of the portion of the tolls in any joint tariff filed that it or any other carrier is to receive or has received; and

(c) decide that any proposed through toll is just and reasonable notwithstanding that an amount less than the amount that an air carrier would otherwise be entitled to charge may be allotted to that air carrier out of that through toll.

**113.** The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

DORS/93-253, art. 2; DORS/96-335, art. 57.

**112.** (1) Les transporteurs aériens qui appliquent des taxes pluritransporteurs doivent établir une répartition juste et raisonnable de ces taxes entre les transporteurs aériens participants.

(2) L'Office peut procéder de la façon suivante :

a) déterminer et fixer la répartition équitable des taxes pluritransporteurs entre les transporteurs aériens, ou la proportion de ces taxes que doit recevoir un transporteur aérien;

b) enjoindre à un transporteur aérien de lui faire connaître la proportion des taxes de tout tarif pluritransporteur déposé que lui-même ou tout autre transporteur aérien est censé recevoir ou qu'il a reçue;

c) décider qu'une taxe totale proposée est juste et raisonnable, même si un transporteur aérien s'en voit attribuer une portion inférieure à la taxe qu'il serait autrement en droit d'exiger.

**113.** L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

SOR/93-253, s. 2; SOR/96-335, s. 58.

**113.1** If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

(a) take the corrective measures that the Agency considers appropriate; and

(b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

SOR/2001-71, s. 4; SOR/2009-28, s. 1.

**114.** (1) Every tariff or amendment to a tariff shall be filed with the Agency by the air carrier or by an agent appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(2) Every joint tariff or amendment to a joint tariff shall be filed by one of the air carriers that is a party thereto or by an agent of the air carrier appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(3) Where an air carrier files a joint tariff pursuant to subsection (2), that air carrier shall be known as the issuing carrier.

(4) No air carrier that issues a power of attorney to another air carrier or any other agent to publish and file tolls shall include in the carrier's own tariff tolls that duplicate or conflict with tolls published under such power of attorney.

(5) Every tariff or amendment to a tariff that is on paper shall be filed with the Agency together with a filing advice in duplicate.

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa a).

DORS/93-253, art. 2; DORS/96-335, art. 58.

**113.1** Si un transporteur aérien n'applique pas les prix, taux, frais ou conditions de transport applicables au service international qu'il offre et figurant à son tarif, l'Office peut lui enjoindre :

a) de prendre les mesures correctives qu'il estime indiquées;

b) de verser des indemnités à quiconque pour toutes dépenses qu'il a supportées en raison de la non-application de ces prix, taux, frais ou conditions de transport.

DORS/2001-71, art. 4; DORS/2009-28, art. 1.

**114.** (1) Les tarifs et leurs modifications doivent être déposés auprès de l'Office par le transporteur aérien ou un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(2) Les tarifs pluritransporteurs et leurs modifications doivent être déposés par l'un des transporteurs aériens participants ou par un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(3) Le transporteur aérien qui dépose un tarif pluritransporteur conformément au paragraphe (2) doit être désigné comme le transporteur aérien émetteur.

(4) Il est interdit à un transporteur aérien qui habilite par procuration un agent ou un autre transporteur aérien à publier et à déposer des taxes, de publier dans ses propres tarifs des taxes qui font double emploi ou sont incompatibles avec celles-ci.

(5) Les tarifs sur papier et leurs modifications doivent être déposés auprès de l'Office en deux exemplaires et être accompagnés d'un avis de dépôt fourni en double.



*Contents of Tariffs*

**122.** Every tariff shall contain

(a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

(b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified; and

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

- (i) the carriage of persons with disabilities,
- (ii) acceptance of children for travel,
- (iii) compensation for denial of boarding as a result of overbooking,
- (iv) passenger re-routing,
- (v) failure to operate the service or failure to operate on schedule,
- (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
- (vii) ticket reservation, cancellation, confirmation, validity and loss,
- (viii) refusal to transport passengers or goods,
- (ix) method of calculation of charges not specifically set out in the tariff,
- (x) limits of liability respecting passengers and goods,
- (xi) exclusions from liability respecting passengers and goods, and

*Contenu des tarifs*

**122.** Les tarifs doivent contenir :

a) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

b) les taxes ainsi que les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

- (i) le transport des personnes ayant une déficience,
- (ii) l'admission des enfants,
- (iii) les indemnités pour refus d'embarquement à cause de sur réservation,
- (iv) le réacheminement des passagers,
- (v) l'inexécution du service et le non-respect de l'horaire,
- (vi) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,
- (vii) la réservation, l'annulation, la confirmation, la validité et la perte des billets,
- (viii) le refus de transporter des passagers ou des marchandises,
- (ix) la méthode de calcul des frais non précisés dans le tarif,
- (x) les limites de responsabilité à l'égard des passagers et des marchandises,
- (xi) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xii) procedures to be followed, and time limitations, respecting claims.

SOR/93-253, s. 2; SOR/96-335, s. 65.

**123.** [Repealed, SOR/96-335, s. 65]

#### *Supplements*

**124.** (1) A supplement to a tariff on paper shall be in book or pamphlet form and shall be published only for the purpose of amending or cancelling that tariff.

(2) Every supplement shall be prepared in accordance with a standard form provided by the Agency.

(3) Supplements are governed by the same provisions of these Regulations as are applicable to the tariff that the supplements amend or cancel.

SOR/93-253, s. 2(F); SOR/96-335, s. 66.

#### *Symbols*

**125.** All abbreviations, notes, reference marks, symbols and technical terms shall be fully defined at the beginning of the tariff.

SOR/96-335, s. 66.

#### *Reference to Orders*

**126.** Every tariff or portion thereof published pursuant to an order of the Agency shall make reference therein to the number and date of the order.

#### *Disallowance*

**127.** (1) [Repealed, SOR/96-335, s. 67]

(2) Where a tariff or any portion thereof is disallowed, the CTA(A) number, supplement number or revised page number shall not be used again.

(3) A tariff or any portion thereof issued in substitution for a disallowed tariff or portion thereof shall make reference to the disallowed tariff or portion.

(4) Where any tariff or portion thereof of an air carrier operating a scheduled international service or operating a non-scheduled international service that is operated at a toll per unit of traffic, that contains through tolls applicable to the transportation of traffic between a point in

(xii) la marche à suivre ainsi que les délais fixés pour les réclamations.

DORS/93-253, art. 2; DORS/96-335, art. 65.

**123.** [Abrogé, DORS/96-335, art. 65]

#### *Suppléments*

**124.** (1) Les suppléments à un tarif sur papier doivent être publiés sous forme de livres ou de brochures et ne doivent servir qu'à modifier ou annuler le tarif.

(2) Les suppléments doivent être conformes au modèle fourni par l'Office.

(3) Les suppléments sont régis par les dispositions du présent règlement qui s'appliquent aux tarifs qu'ils modifient ou annulent.

DORS/93-253, art. 2(F); DORS/96-335, art. 66.

#### *Symboles*

**125.** Les abréviations, notes, appels de notes, symboles et termes techniques doivent être définis au début du tarif.

DORS/96-335, art. 66.

#### *Renvoi à un arrêté*

**126.** Tout tarif ou partie de tarif publié en exécution d'un arrêté de l'Office doit mentionner le numéro et la date de cet arrêté.

#### *Refus*

**127.** (1) [Abrogé, DORS/96-335, art. 67]

(2) Lorsque tout ou partie d'un tarif est refusé, ni le numéro OTC(A) ni le numéro de supplément ou de page révisée ne peuvent être réutilisés.

(3) Tout ou partie d'un tarif qui est publié en remplacement de tout ou partie d'un tarif refusé doit mentionner le tarif ou la partie du tarif refusé.

(4) Lorsque le transporteur aérien exploitant un service international régulier ou exploitant un service international à la demande moyennant une taxe unitaire applicable au trafic se voit refuser, par les autorités compétentes d'un pays étranger, tout ou partie de son ta-

**Appendix “B”**  
**Case Law**

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DECISION NO. 227-C-A-2013

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June 12, 2013

**COMPLAINT by Gábor Lukács against WestJet.**

**File No. M4120-3/13-01286**

**INTRODUCTION**

- [1] On February 27, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that:
- Rule 110(B), governing denied boarding compensation, appearing in WestJet’s *International Passenger Rules and Fares Tariff No. WS-1, Airline Tariff Publishing Company, Agent, NTA(A) No. 518* (Tariff), contradicts Rule 75 of the Tariff, which relates to cancellation, changes and refunds, and is therefore unclear, contrary to paragraph 122(c) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR);
  - Tariff Rule 110(B) is unreasonable, contrary to subsection 111(1) of the ATR;
  - Part of Tariff Rule 110(E), setting out the amount of denied boarding compensation tendered by WestJet, is unreasonable, contrary to subsection 111(1) of the ATR; and,
  - Tariff Rule 110(G), respecting a passenger’s options, is unreasonable, contrary to subsection 111(1) of the ATR.
- [2] WestJet filed its answer on March 12, 2013, and Mr. Lukács submitted his reply on March 13, 2013. In its answer, WestJet proposed certain revised Tariff provisions, and did not provide any submissions specifically responding to those provided by Mr. Lukács.

**ISSUES**

- [3] With respect to the Existing Tariff Rules:
1. Does Existing Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Existing Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?
  2. Is Existing Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

3. Is part of Existing Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR? and,
4. Is Existing Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

[4] With respect to the Proposed Tariff Rules:

1. Does Proposed Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Proposed Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?
2. Is Proposed Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?
3. Is part of Proposed Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR? and,
4. Is Proposed Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

#### **RELEVANT STATUTORY AND TARIFF EXTRACTS**

[5] The existing and proposed Tariff provisions and the statutory extracts relevant to this Decision are set out in the Appendix.

#### **CLARITY AND REASONABLENESS OF TARIFF PROVISIONS**

##### **Clarity**

[6] As recently stated by the Agency in Decision No. 248-C-A-2012 (*Lukács v. Air Transat*), a carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

##### **Reasonableness**

[7] To assess whether a term or condition of carriage is “unreasonable”, the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier’s statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 150-C-A-2013 (*Forsythe v. Air Canada*).

- [8] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.
- [9] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

### EXISTING TARIFF RULES

#### **Issue 1: Does Existing Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Existing Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?**

- [10] Mr. Lukács submits that Existing Tariff Rule 75, which was previously Rule 15, imposes several obligations on WestJet relating to passengers who are denied boarding, and that Existing Tariff Rule 75(F) explicitly recognizes that the rights of passengers are also governed by Article 19 of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention). He points out that the provisions of Existing Tariff Rule 75 were addressed in Decision No. 249-C-A-2012 (*Lukács v. WestJet*).
- [11] Mr. Lukács asserts that in sharp contrast with the obligations set out in Existing Tariff Rule 75, Existing Tariff Rule 110(B) provides, in part, that “[t]he Carrier shall not be liable to any passenger in respect of such overbooking, whether or not resulting from an Event of Force Majeure.”
- [12] Mr. Lukács maintains that the blanket exclusion of liability in Existing Tariff Rule 110(B) contradicts and negates the provisions of Existing Tariff Rule 75, which recognize WestJet's liability.

#### Analysis and findings

- [13] As stated by Mr. Lukács, Existing Tariff Rule 75, which was addressed in Decision No. 249-C-A-2012, sets out certain obligations assumed by WestJet in the event that a passenger is denied boarding, and reflects the rights of passengers under the Convention. The Agency agrees with Mr. Lukács' submission that Rule 110(B) fully exempts WestJet from liability for passengers who are affected by denied boarding, which contradicts Existing Tariff Rule 75. Given this contradiction, the Agency finds that Existing Tariff Rule 110(B) is unclear because it is stated in such a manner as to create a reasonable doubt and ambiguity regarding its application.

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**Issue 2: Is Existing Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?**

- [14] Mr. Lukács asserts that the effect of Existing Tariff Rule 110(B) is to relieve WestJet from liability for denied boarding if it provides a full refund or future credit to the passenger. He adds that, as noted by the Agency in Decision No. 249-C-A-2012, and incorporated in the Tariff as Existing Tariff Rule 75(F), most cases of denied boarding fall within the scope of Article 19 of the Convention, which imposes a regime of strict liability on WestJet. Mr. Lukács contends that, as a contractual provision tending to relieve WestJet from liability for delay under Article 19 of the Convention, Existing Tariff Rule 110(B) is null and void pursuant to Article 26 of the Convention. He also contends that Existing Tariff Rule 110(B) represents a blanket exclusion of liability that is inconsistent with the legal principles of the Convention, and therefore it is unreasonable even for itineraries where the Convention is not applicable.

Analysis and finding

- [15] Existing Tariff Rule 110(B) exempts WestJet from liability for overbooking a flight, irrespective of whether that overbooking occurred as a result of force majeure, provided that WestJet furnishes the passenger with a travel credit or a full refund. The Agency is of the opinion that this exemption represents a blanket exclusion from liability and is inconsistent with Article 19 of the Convention. The Agency is also of the opinion that, in respect of itineraries where the Convention does not apply, Existing Tariff Rule 110(B) is inconsistent with the principles of Article 19. Therefore, the Agency finds Existing Tariff Rule 110(B) to be unreasonable, contrary to subsection 111(1) of the ATR.

**Issue 3: Is part of Existing Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR?**

- [16] Mr. Lukács challenges the reasonableness of that part of Existing Tariff Rule 110(E) which states:

For flights to/from Canada (except flights from USA), as WestJet does not commercially oversell its aircraft, no denied boarding compensation will be provided.

- [17] Mr. Lukács points out that the Agency considered the principles governing the amount of denied boarding compensation payable to passengers in Decision No. 666-C-A-2001, and held, in part, that any passenger who is denied boarding is entitled to compensation and evidence of specific damages suffered need not be provided.
- [18] Mr. Lukács submits that the above quoted part of Existing Tariff Rule 110(E) violates the principle that any passenger who is denied boarding is entitled to compensation, and that, as such, that part is inconsistent with the Agency's finding in Decision No. 666-C-A-2001, and is therefore unreasonable.

- [19] Mr. Lukács maintains that there are two components to the obligations of a carrier to a passenger who is denied boarding: denied boarding compensation (which is equal for all passengers) and compensation for damages specific to the passenger's situation (such as meals, accommodation, transportation by another carrier, etc.) He submits that denied boarding compensation is not meant to replace or displace the carrier's liability for reasonable out-of-pocket expenses incurred by passengers. In this regard, Mr. Lukács points out that in Decision No. 268-C-A-2007 (*Kirkham v. Air Canada*), the Agency directed Air Canada to reimburse the complainant's reasonable out-of-pocket expenses and to tender the denied boarding compensation prescribed by its tariff.
- [20] Mr. Lukács submits that it is unclear how the obligation of paying denied boarding compensation would affect WestJet's ability to meet its statutory, commercial and operational obligations, given that WestJet represents in Existing Tariff Rule 110(E) that it does not engage in the practice of overselling its flights. Mr. Lukács argues that if WestJet's representation were true, then it would never have to pay any compensation to passengers, and the introduction of reasonable monetary compensation would not have any impact on WestJet at all. Mr. Lukács maintains that if WestJet does occasionally overbook its flights, perhaps inadvertently and/or as a result of a computer malfunction, then Existing Tariff Rule 110(E) deprives the passengers of being compensated for denied boarding.

#### Analysis and finding

- [21] As pointed out by Mr. Lukács, the Agency, in Decision No. 666-C-A-2001, held, in part, that any passenger who is denied boarding is entitled to compensation. Given that Existing Tariff Rule 110(E) does not provide for that compensation for flights to and from Canada, it is inconsistent with Decision No. 666-C-A-2001. The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.

#### **Issue 4: Is Existing Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?**

- [22] Mr. Lukács submits that, in Decision No. 249-C-A-2012, the Agency disallowed a rule similar to Existing Tariff Rule 110(G), which read:

If a passenger accepts the alternative remedies offered by the Carrier, that acceptance shall be in full and final satisfaction of all claims the passenger may have had against the Carrier by reason of the overbooking or cancellation.

- [23] Mr. Lukács points out that the Agency determined that rule to be unreasonable, and stated:

[154] WestJet has argued that obtaining a release, in itself, is permissible under the Convention. However, it has not demonstrated why unilaterally imposing the terms of a release in its tariff does not tend to relieve it from liability under Article 26 of the Convention. The Agency is therefore of the opinion that WestJet has not shown that Proposed Tariff Rule 15.6 is consistent with Article 26 of the Convention.



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[155] Accordingly, the Agency finds that this provision would be considered unreasonable under the ATR if filed with the Agency.

- [24] Mr. Lukács contends that subparagraph 122(c)(iii) of the ATR requires carriers to clearly state their policies with respect to denied boarding compensation. He adds that in Decision No. 666-C-A-2001, the Agency held that any passenger who is denied boarding is entitled to compensation for specific damages.
- [25] Mr. Lukács submits that given the disparity between the negotiating powers, positions and resources of a carrier and the passengers affected by denied boarding, permitting a carrier to condition payment of denied boarding compensation upon release of the carrier from any further liability to the passenger undermines the purpose of the obligation to pay denied boarding compensation. Mr. Lukács points out that the Agency confirmed in Decision No. 666-C-A-2001 that the purpose of denied boarding compensation is to address, in a standardized manner, damage that is common to all passengers affected by denied boarding, and it is not subject to the requirement of proof of specific damages suffered.
- [26] Mr. Lukács argues that a carrier's obligation to pay denied boarding compensation is independent of its obligation to compensate passengers for out-of-pocket expenses or other damages specific to the passenger's circumstances. He claims that it is unreasonable for WestJet to unilaterally impose a release from liability as a precondition for payment of denied boarding compensation.
- [27] According to Mr. Lukács, Existing Tariff Rule 110(G) is not necessary for WestJet to meet its statutory, commercial and operational obligations.

#### Analysis and findings

- [28] The first part of Existing Tariff Rule 110(G) purports to relieve WestJet from further liability should a passenger who is denied boarding accept the compensation offered by WestJet. The second part of Existing Tariff Rule 110(G) leaves the impression that a passenger can only seek to recover damages in a court of law or in some other manner if the payment offered by WestJet is declined. As indicated by Mr. Lukács, in Decision No. 249-C-A-2012, the Agency found a similar rule to be unreasonable because it established a limit of liability lower than that provided for under the Convention. The Agency finds, therefore, that the first part of Existing Tariff Rule 110(G) is unreasonable. With respect to the second part of that Rule, the Agency is of the opinion that even if a payment is accepted by a passenger, that passenger can still seek to recover damages in a court of law or in some other manner. The Agency finds, therefore, that the second part of Existing Tariff Rule 110(G) is unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR.

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**PROPOSED TARIFF RULES****Issue 1: Does Proposed Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Proposed Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?**

- [29] Mr. Lukács submits that Proposed Tariff Rule 110(B), by allowing WestJet to choose the form of payment it offers to a passenger who is denied boarding, contradicts Existing Tariff Rule 75(B), which states that “[i]n cases where the passenger is offered alternative remedies, the choice among the alternatives shall rest with the passenger.”
- [30] Mr. Lukács points out that Existing Tariff Rule 75(B)(3) provides for “monetary payment in an amount to be defined by the Carrier which shall in no case be less than the value of the unused portion of the passenger’s ticket.”
- [31] In addition, Mr. Lukács points out that Existing Tariff Rule 75(D) provides that:

In defining the alternative remedies to be offered, the Carrier will consider, to the extent they are known to the Carrier, the circumstances of the passenger affected by the overbooking or cancellation, including any expenses which the passenger, acting reasonably, may have incurred as a result of the overbooking or cancellation as, for example, **costs incurred for accommodation, meals or additional transportation.** [Emphasis added by Mr. Lukács]

- [32] Mr. Lukács maintains that Proposed Tariff Rule 110(B) contradicts Existing Tariff Rules 75(B)(3) and 75(D) in that Proposed Tariff Rule 110(B) precludes reimbursement for out-of-pocket expenses for accommodation, meals or additional transportation, and a refund for segments that no longer serve any purpose with respect to the passenger’s travel plans.

Analysis and finding

- [33] The Agency agrees with Mr. Lukács’ submission that, with respect to the party with whom the choice rests regarding alternative remedies, the application of Proposed Tariff Rule 110(B) is unclear given the contradiction between that Proposed Tariff Rule and Existing Tariff Rule 75(B). The Agency also agrees with Mr. Lukács’ assertion that Proposed Tariff Rule 110(B) contradicts Existing Tariff Rules 75(B)(3) and 75(D) for the reason he has stated. As such, the Agency finds that Proposed Tariff Rule 110(B) would be unclear if it were to be filed with the Agency because it is worded in such a fashion as to create reasonable doubt and ambiguity respecting its application.

**Issue 2: Is Proposed Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?**

- [34] Mr. Lukács submits that Proposed Tariff Rule 110(B) appears, implicitly, to preclude reimbursement of passengers for out-of-pocket expenses for accommodation, meals or additional transportation, and purports to cap WestJet’s liability in the case of denied boarding at the

amount of fare paid by the passenger. He maintains that in the vast majority of cases, this liability cap is substantially lower than the limit of 4,694 SDRs set out in Article 22(1) of the Convention. Mr. Lukács claims, therefore, that Proposed Tariff Rule 110(B) establishes a limit of liability lower than that provided for in the Convention, and as such, it is null and void pursuant to Article 26 of the Convention.

- [35] Mr. Lukács points out that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency held that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He asserts that Proposed Tariff Rule 110(B) appears to allow WestJet to decide whether it compensates passengers by a cash payment or a travel credit, contrary to the Agency's findings in Decision No. LET-C-A-83-2011.

#### Analysis and findings

- [36] WestJet's Proposed Tariff Rule 110(B) involves the deletion of the provision, appearing in Existing Tariff Rule 110(B), which relieves WestJet from liability for overbooking, irrespective of whether an event of force majeure occurred. The condition of carriage that provides that WestJet will tender, at its discretion, a travel credit or a full refund to passengers who have been denied boarding is retained. As indicated by Mr. Lukács, the retention of that condition of carriage implies that certain reimbursement (for example, for expenses incurred for accommodation and meals), will not be tendered, and that WestJet's maximum liability will be limited to the amount of the fare paid by the passenger. The Agency is of the opinion that Proposed Tariff Rule 110(B) establishes a limit of liability lower than that required under Article 22(1) of the Convention and, as such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.
- [37] With respect to the form of payment to be offered to passengers affected by denied boarding, the Agency concurs with Mr. Lukács' submission that WestJet's restriction of payment to either a travel credit or refund of the fare paid is inconsistent with the Agency's findings in Decision No. LET-C-A-83-2011. As such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.

#### **Issue 3: Is part of Proposed Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR?**

- [38] Mr. Lukács submits that while WestJet proposes to remove a provision that explicitly deprives passengers travelling to and from Canada of their rights to denied boarding compensation, Proposed Tariff Rule 110(E) provides denied boarding compensation only to passengers departing from the United States of America. He asserts that this situation is inconsistent with the Agency's findings in Decision No. 666-C-A-2001, and that WestJet has failed to explain how paying denied boarding compensation would affect its ability to meet its statutory, commercial and operational obligations.

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Analysis and finding

- [39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

**Issue 4: Is Proposed Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?**

- [40] Mr. Lukács points out that Proposed Tariff Rule 110(G) states, in part, that “[t]he passenger may decline the payment and seek to recover damages in a court of law or in some other manner.”
- [41] Mr. Lukács maintains that this proposed provision is unclear because although the conjunctive language (using “and”) suggests that a passenger must decline the payment in order to seek recovery in a court of law, the provision does not state so explicitly.
- [42] Mr. Lukács also asserts that the proposed provision is unreasonable because it still appears to require passengers to decline any payment in order to retain their right to seek redress in a court of law. He indicates that this issue has already been settled by the Agency’s disallowance of a similar provision in Decision No. 249-C-A-2012.

Analysis and findings

- [43] With respect to the clarity of Proposed Tariff Rule 110(G), the Agency agrees with Mr. Lukács’ submission that the phrasing of that Rule, without being explicit, suggests that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by WestJet. The Agency finds, therefore, that Proposed Tariff Rule 110(G) would be considered unclear if it were to be filed with the Agency given that it is phrased in such a manner as to create reasonable doubt and ambiguity respecting its application.
- [44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács’ submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

Additional comments

- [45] On June 28, 2012, the Agency, in Decision No. 249-C-A-2012, ordered WestJet to make certain revisions to its Tariff. The appropriate revisions were filed shortly afterwards. As evident by this complaint, several provisions appearing in Rule 110 of the Tariff conflicted with the revisions made in response to Decision No. 249-C-A-2012. The Agency is of the opinion that WestJet has

been irresponsible in failing to ensure that consequential tariff revisions were not promptly made in relation to the revisions filed respecting that Decision. In the future, WestJet should exercise greater care in considering Agency decisions and in ensuring that its tariffs are amended in the appropriate manner, not only to conform to those decisions, but also to address inconsistencies.

## CONCLUSION

[46] In light of the foregoing, the Agency concludes the following:

### Existing Tariff Rules

1. With respect to the clarity of Existing Tariff Rule 110(B)

[47] The Agency has determined that the application of the tariff provision is unclear, contrary to paragraph 122(c) of the ATR.

2. With respect to the reasonableness of Existing Tariff Rule 110(B)

[48] The Agency has determined that the tariff provision is unreasonable, contrary to subsection 111(1) of the ATR.

3. With respect to Existing Tariff Rule 110(E)

[49] The Agency has determined that the tariff provision is unreasonable, contrary to subsection 111(1) of the ATR.

4. With respect to the clarity and reasonableness of Existing Tariff Rule 110(G)

[50] The Agency has determined that the tariff provision is unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR.

### Proposed Tariff Rules

1. With respect to the clarity of Proposed Tariff Rule 110(B)

[51] The Agency has determined that if Proposed Tariff Rule 110(B) were to be filed with the Agency, the application of that Rule would be determined to be unclear, contrary to paragraph 122(c) of the ATR.

2. With respect to the reasonableness of Proposed Tariff Rule 110(B)

[52] The Agency has determined that if Proposed Tariff Rule 110(B) were to be filed with the Agency, that Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

3. With respect to Proposed Tariff Rule 110(E)

[53] The Agency has determined that if Proposed Tariff Rule 110(E) were to be filed with the Agency, that Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

4. With respect to the clarity and reasonableness of Proposed Tariff Rule 110(G)

[54] The Agency has determined that if Proposed Tariff Rule 110(G) were to be filed with the Agency, the application of that Rule would be determined to be unclear, contrary to paragraph 122(c) of the ATR, and the Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

**ORDER**

[55] The Agency disallows Existing Tariff Rules 110(B), 110(E) and 110(G).

[56] The Agency orders WestJet, by no later than July 15, 2013, to revise Existing Tariff Rules 110(B), 110(E) and 110(G) to conform to the findings set out in this Decision.

[57] Pursuant to paragraph 28(1)(b) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, the disallowance of Existing Tariff Rules 110(B), 110(E) and 110(G) shall come into force when WestJet complies with the above or on July 15, 2013, whichever is sooner.

(signed)

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Geoffrey C. Hare  
Member

(signed)

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J. Mark MacKeigan  
Member

## APPENDIX TO DECISION NO. 227-C-A-2013

**RELEVANT TARIFF EXTRACTS**

*WestJet's International Passenger Rules and Fares Tariff No. WS-1, Airline Tariff Publishing Company, Agent, NTA(A) No. 518*

**Rule 75****CARRIER CANCELLATION, CHANGE, AND REFUND TERMS (See Rules 60, 100, 105 and 110 for additional Information)**

(A) The provisions of this Rule are not intended to make the Carrier responsible in all cases for the acts of nature, or for the acts of third parties that are not deemed servants and/or agents of the Carrier per applicable law or international conventions and all the rights here described are subject to the following exception:

The Carrier shall not be liable for damage occasioned by overbooking or cancellation if it, and its employees and agents, took all measures that could reasonably be reasonably be required to avoid the damage or if it was impossible for the Carrier, and its employees or agents, to take such measures.

(B) Subject to the exception stated in (A), if a flight is overbooked or cancelled, with the result that a ticketed passenger is not transported on a flight for which he held confirmed space, the Carrier will define a remedy or remedies to mitigate the impact of the overbooking or cancellation upon the passenger. In defining the remedy or remedies appropriate in a particular case, the Carrier will consider the transportation needs of the passenger and any damages the passenger may have suffered by reason of the overbooking or cancellation. In cases where the passenger is offered alternative remedies, the choice among the alternatives shall rest with the passenger. In particular, the Carrier will offer one or more of the following remedies:

- (1) Transportation, without further charge and within a reasonable time, to the passenger's intended destination on a transportation service which service will be identified by the Carrier;
- (2) Transportation, without further charge and within a reasonable time, to the passenger's point of origin on a transportation service which service will be identified by the Carrier;
- (3) A monetary payment in an amount to be defined by the Carrier which shall in no case be less than the value of the unused portion of the passenger's ticket;
- (4) A credit, to be defined by the Carrier, towards the purchase of future transportation on a service operated by the Carrier.

(C) In identifying the transportation service to be offered to the passenger, the Carrier will not limit itself to considering its own services or the services of carriers with which it has interline agreements.

(D) In defining the alternative remedies to be offered, the Carrier will consider, to the extent they are known to the Carrier, the circumstances of the passenger affected by the overbooking or cancellation, including any expenses which the passenger, acting reasonably, may have incurred

as a result of the overbooking or cancellation as, for example, costs incurred for accommodation, meals or additional transportation.

(E) In defining the alternative remedies to be offered, the Carrier will make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the overbooking or cancellation upon the passenger.

(F) The rights of a passenger against the Carrier in the event of overbooking or cancellation are, in most cases of international carriage, governed by an international convention known as the Montreal Convention, 1999. Article 19 of that convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could be reasonable expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of passengers are not governed by an international convention. In such cases only a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

(G) For the purpose of this Rule, a passenger whose journey is interrupted by a flight cancellation or overbooking, and to whom the Carrier is not able to present a reasonable transportation option which takes into account all known circumstances, may surrender the unused portion of his/her ticket. In such a case the value of that unused portion shall be calculated as follows:

(1) When no portion of the trip has been made, when due to a cancellation or denied boarding within the Carrier's control, if the passenger chooses to no longer travel and return to the point of origin, the amount of refund will be the fare and charges paid.

(2) When a portion of the trip has been made, the refund will be calculated as follows: Either an amount equal to the one-way fare less the same rate of discount, if any, that was applied in calculating the original one-way fare, or on round-trip tickets, one half of the round-trip fare and charges applicable to the unused transportation from the point of termination to the destination or stopover point named on the ticket.

### **Existing Tariff Rule 110**

#### **DENIED BOARDING COMPENSATION**

[...]

(B) The Carrier shall not be liable to any passenger in respect of such overbooking, whether or not resulting from an Event of Force Majeure; provided that, the Carrier will, at the carrier's discretion, provide any passengers affected by such denied boarding with:

(1) A credit, valid for one year from the cancellation date, towards the provision of a fare relating to a future flight or flights if booked as a round trip and the originating sector is cancelled, which credit shall be equal to the original fare(s) which was/were cancelled; or

(2) To otherwise refund to such passenger, an amount which shall not be greater than the fare paid by the passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.



[...]

(E) AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation for flights departing from the US must be offered a payment equal to 200% the sum of the fare values of their ticket coupons, with a \$650 USD maximum if WestJet is able to place you on another flight or flights that are planned to each your final destination or first stopover less than four hours of the scheduled arrival of your original flight. However, if WestJet cannot arrange “alternate transportation (see below) the passenger must be offered a payment equal to 400% the sum of the fare values of their ticket coupons, with a \$1,300 USD maximum. For flights to/from Canada (except flights from USA), as WestJet does not commercially oversell its aircraft, no denied boarding compensation will be provided. “Alternate transportation” is air transportation (by an airline licensed by the D.O.T.) or transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger’s next scheduled stopover (of 4 hours or longer) (for international flights) after the passenger’s originally scheduled arrival time.

[...]

(G) PASSENGER’S OPTIONS

Acceptance of the compensation (by endorsing the cheque or draft within 30 days) relieves WestJet from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

**Proposed Tariff Rule 110**

**DENIED BOARDING COMPENSATION**

[...]

(B) The Carrier will, at the carrier’s discretion, provide any passengers affected by denied boarding with:

- (1) A credit, valid for one year from the cancellation date, towards the provision of a fare relating to a future flight or flights if booked as a round trip and the originating sector is cancelled, which credit shall be equal to the original fare(s) which was/were cancelled; or
- (2) To otherwise refund to such passenger, an amount which shall not be greater than the fare paid by the passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

[...]

(E) AMOUNT OF DENIED BOARDING COMPENSATION

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Passengers who are eligible for denied boarding compensation for flights departing from the US must be offered a payment equal to 200% the sum of the fare values of their ticket coupons, with a \$650 USD maximum if WestJet is able to place you on another flight or flights that are planned to each your final destination or first stopover less than four hours of the scheduled arrival of your original flight. However, if WestJet cannot arrange “alternate transportation (see below) the passenger must be offered a payment equal to 400% the sum of the fare values of their ticket coupons, with a \$1,300 USD maximum. “Alternate transportation” is air transportation (by an airline licensed by the D.O.T.) or transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger’s next scheduled stopover (of 4 hours or longer) (for international flights) after the passenger’s originally scheduled arrival time.

[...]

(G) PASSENGER’S OPTIONS

The passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

**RELEVANT STATUTORY EXTRACTS**

***Air Transportation Regulations, SOR/88-58, as amended***

111(1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

122. Every tariff shall contain

[...]

(c) the terms and conditions of carriage, clearly stating the air carrier’s policy in respect of at least the following matters, namely,

[...]

# Canadian Transportation Agency

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## Decision No. 201-C-A-2005

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April 8, 2005

**IN THE MATTER OF a complaint filed by Irwin Nathanson concerning denied boarding by Lineas Aereas Costarricenses S.A. carrying on business as LACSA for a flight from Havana, Cuba to Toronto, Canada.**

**File No. M4370/L150/03-01**

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### COMPLAINT

[1] On April 14, 2003, Irwin Nathanson filed with the Air Travel Complaints Commissioner (hereinafter the ATCC) the complaint set out in the title.

[2] On August 12, 2004, the complaint was referred to the Canadian Transportation Agency (hereinafter the Agency) for consideration as the complaint raised a tariff issue that falls within the jurisdiction of the Agency.

[3] On September 1, 2004, Agency staff advised the parties of the Agency's jurisdiction in this matter and sought Mr. Nathanson's confirmation whether he wished to pursue this matter formally before the Agency. As both parties had previously filed comments regarding Mr. Nathanson's complaint with the ATCC, Agency staff also requested the parties' confirmation as to whether they wished to have the comments they filed with the ATCC considered as pleadings before the Agency.

[4] On September 20, 2004, Mr. Nathanson advised the Agency that he wished to pursue the matter formally before the Agency, and to have the Agency consider the comments he filed with the ATCC as pleadings before the Agency.

[5] On October 5, 2004, Grupo TACA, on behalf of Lineas Aereas Costarricenses S.A. carrying on business as LACSA (hereinafter LACSA), filed a submission respecting Mr. Nathanson's complaint and, on October 13, 2004, advised that it did not want the Agency to solely rely on the pleadings before the ATCC, but to also consider the submission dated October 5, 2004.

[6] On October 28, 2004, Mr. Nathanson responded to LACSA's submission dated October 5, 2004.

[7] In its Decision No. LET-A-66-2005 dated February 28, 2005, the Agency directed questions to LACSA

regarding the application of its denied boarding policy in respect of Mr. Nathanson and his family. On March 17, 2005, LACSA filed its response.

[8] Pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C., 1996, c. 10 (hereinafter the [CTA](#)), the Agency is required to make its decision no later than 120 days after the application is received unless the parties agree to an extension. In this case, the parties agreed to an extension of the deadline until April 8, 2005.

## ISSUE

[9] The issue to be addressed is whether LACSA applied the terms and conditions of its tariff as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the [ATR](#)).

## POSITIONS OF THE PARTIES

[10] On March 23, 2003, Mr. Nathanson and his family arrived at the airport in Havana to check in for LACSA Flight No. 622 to Toronto, and were informed that the flight was oversold.

[11] Mr. Nathanson alleges that he informed the ticket agent that it was necessary that he and his family return to Toronto on March 23, 2003, so as to be able to board an Air Canada flight from Toronto to Vancouver the next morning, thereby allowing Mr. Nathanson to attend a business meeting at his office that day. According to Mr. Nathanson, the agent responded that there was nothing that could be done, other than placing Mr. Nathanson and his family on a LACSA flight to Toronto departing Havana on March 24, 2003.

[12] Mr. Nathanson submits that he and his family returned to their hotel and had someone contact air carriers departing from Varadero airport. Mr. Nathanson advises that he was eventually able to make reservations for himself and his family for an Air Transat A.T. Inc. carrying on business as Air Transat (hereinafter Air Transat) flight departing the night of March 23, 2003 from Varadero to Montréal, and a second flight with Air Canada from Montréal to Toronto, which would then allow Mr. Nathanson and his family to connect with their originally booked flight with Air Canada from Toronto to Vancouver.

[13] Mr. Nathanson requests a full refund of CAD\$3,462 for the additional Air Transat and Air Canada ~~tickets~~ that he purchased for himself and his family to travel from Varadero to Montreal, and then from Montréal to Toronto.

[14] In its response, LACSA explains the industry practice of "overbooking", and states that, in general, this practice works to the advantage of both airlines and passengers because the air carriers are able to operate at maximum capacity, thus resulting in the lowest possible fares for consumers. LACSA submits that in situations where overbooking occurs, carrier staff handle affected passengers according to the carrier's over-sale

procedures. LACSA notes that, although there was no requirement in its over-sale procedures to provide hotel, meals or any such courtesies, it did offer Mr. Nathanson and his family hotel accommodations.

[15] LACSA submits that it provided Mr. Nathanson with a travel voucher on May 13, 2003 worth 400\$USD, which was not redeemable in cash, and which represents the compensation required by the United States Department of Transportation. LACSA also submits that on December 2, 2003, it offered additional compensation in the form of four travel vouchers for 100\$USD for each member of the Nathanson family, or one travel voucher for 400\$USD in the name of Mr. Nathanson. LACSA further states that, in February 2004, it refunded 810.16\$USD to Mr. Nathanson for the unused portions of the four tickets belonging to Mr. Nathanson and his family. LACSA maintains that it respected its regulations in addressing this matter.

[16] Mr. Nathanson submits that he is not satisfied with the response from LACSA, and maintains that the requirements set by the United States Department of Transportation relating to compensation for overbooking are not applicable to his contract for return transportation between Canada and Cuba.

[17] By Decision No. LET-A-66-2005 dated February 28, 2005, the Agency requested that LACSA provide its comments as to why it appears that the carrier failed to respect its policy in respect of compensation for denial of boarding as a result of overbooking. The Agency noted that although the policy is not reflected in LACSA's International Passenger Rules Tariff No. WHG-1, [NTA\(A\)](#) No. 326, Airline Tariff Publishing Company, Agent (hereinafter the Tariff), it is nonetheless set out in a policy document applicable to travel between Canada and Cuba, a copy of which LACSA submitted to the Agency in relation to Mr. Nathanson's complaint. The Agency notes that as of the date of the present Decision, LACSA refuses to provide compensation to Mr. Nathanson.

## ANALYSIS AND FINDINGS

[18] In making its findings, the Agency has considered all of the evidence submitted by the parties during the pleadings, and the Tariff, as filed with the Agency.

[19] The Agency's jurisdiction with respect to the application to the terms and conditions of tariffs is set out in subsection 110(4) and section 113.1 of the [ATR](#).

[20] Subsection 110(4) of the [ATR](#) provides that:

110(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

[21] Section 113.1 of the [ATR](#) states:

113.1 Where a licensee fails to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs, the Agency may

(a) direct the licensee to take corrective measures that the Agency considers appropriate; and

(b) direct the licensee to pay compensation for any expense incurred by a person adversely affected by the licensee's failure to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs.

[22] A review of the Tariff indicates that it does not include terms and conditions of carriage clearly stating LACSA's policy in respect of compensation for denial of boarding as a result of overbooking.

[23] With respect to the compensation requested by Mr. Nathanson for the Air Transat and Air Canada tickets that he purchased for himself and his family on March 23, 2003, the Agency notes that, on several occasions, staff acting on behalf of the ATCC requested that LACSA reconsider its apparent refusal to tender this compensation. Following the referral of this matter to the Agency, LACSA offered to issue Mr. Nathanson a new travel voucher for 800\$USD, in exchange for the vouchers previously provided to Mr. Nathanson that have since expired.

[24] Based on the evidence, as well as the lack of any policy in LACSA's Tariff regarding denied boarding compensation, the Agency does not have the statutory authority to order the payment of compensation in this case. In light of the foregoing, the Agency finds that the compensation requested by Mr. Nathanson is a matter beyond its jurisdiction.

[25] In this regard, subparagraph 122(c)(iii) of the [ATR](#) and section 26 of the [CTA](#), provide as follows:

122. Every tariff shall contain

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(iii) compensation for denial of boarding as a result of overbooking

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

[26] The Agency notes that, in this case, as stated above, LACSA's Tariff does not set out its policy related to denied boarding compensation. Accordingly, the Agency finds that LACSA has contravened subparagraph 122(c)(iii) of the [ATR](#). In this regard, LACSA should be aware that the Agency considers contraventions of

provisions of the [CTA](#) or the [ATR](#) to be serious and will take appropriate punitive action should any such contraventions occur in the future.

[27] Further, it is important to note that the authority of the Agency in such situations is limited to requiring a carrier to amend its tariff so as to comply with subparagraph 122(c)(iii) of the [ATR](#). The Agency cannot require a carrier to apply a policy if that policy is not reflected in its tariff.

## CONCLUSION

[28] As the Agency has no jurisdiction in the matter, the Agency hereby dismisses Mr. Nathanson's complaint in respect of the request for compensation.

[29] In addition, in respect of the contravention of the [ATR](#), the Agency, pursuant to section 26 of the [CTA](#), hereby directs LACSA to, within thirty (30) days from the date of this Decision, file a revision to the Tariff with the Agency, which clearly states LACSA's policy in respect of compensation for denial of boarding as a result of overbooking for travel to and from Canada.

*Indexed as:*

**Zündel v. Canada (Canadian Human Rights Commission)**

**Between**

**Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, the Attorney General of Canada, the Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'nai Brith, appellants, and Ernst Zündel and Canadian Association for Free Expression Inc., respondents**

[2000] F.C.J. No. 678

[2000] A.C.F. no 678

[2000] 4 F.C. 255

[2000] 4 C.F. 255

256 N.R. 125

25 Admin. L.R. (3d) 135

97 A.C.W.S. (3d) 977

Dockets A-258-99, A-269-99

Federal Court of Appeal  
Toronto, Ontario

**Isaac, Robertson and Sexton JJ.**

Heard: April 4, 2000.

Judgment: May 18, 2000.

(18 paras.)

Appeal from the judgment of the Trial Division of the Federal Court of Canada, delivered April 13,



1999 in Docket No. T-1411-98, [1999] F.C.J. No. 503.

**Counsel:**

Jane S. Bailey, for the appellants, Sabina Citron and the Canadian Holocaust Remembrance Association.

Andrew A. Weretelnyk, for the appellants, Toronto Mayor's Committee on Community and Race Relations.

Richard Kramer, for the appellant, Attorney General of Canada.

René Duval, for the appellant, Canadian Human Rights Commission.

Robyn M. Bell, for the appellant, Simon Weisenthal Centre.

Joel Richler and Judy Chan, for the appellant, Canadian Jewish Congress.

Marvin Kurz, for the appellant, League for Human Rights of B'Nai Brith.

Douglas Christie and Barbara Kulaszka, for the respondent, Ernst Zündel.

Gregory Rhone, for the respondent, Canadian Association for Free Expression Inc.

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The judgment of the Court was delivered by

**SEXTON J.:**--

**INTRODUCTION**

**1** This is an appeal from an application for judicial review of two rulings made by the Canadian Human Rights Tribunal in the course of hearing a human rights complaint made against Mr. Zündel. In the first ruling (A-258-99), the Tribunal ruled that counsel for Mr. Zündel could not engage in a certain line of cross-examination. In the second ruling (A-269-99), the Tribunal refused to qualify a witness tendered by Mr. Zündel as an expert witness. The issue in these appeals is whether Mr. Zündel's applications for judicial review of the Tribunal's rulings are premature on the basis that the rulings are interlocutory decisions made during the course of the Tribunal's proceedings. This set of reasons deals with both appeals and a copy will be placed in each file.

**BACKGROUND FACTS**

**2** Prior to the time that these applications for judicial review were brought, the Canadian Human Rights Tribunal was inquiring into whether an Internet website operated by Mr. Zündel contravened s. 13(1) of the Canadian Human Rights Act.

Ruling at issue in A-258-99

**3** During the hearing, counsel for the Canadian Human Rights Commission called a witness

described as "an expert historian in the field of anti-Semitism and Jewish-Christian relations."<sup>1</sup> During the course of cross-examination of that witness, counsel for Mr. Zündel sought to cross-examine the witness on the "truth" of certain statements found on Mr. Zündel's website, which the witness had testified were anti-Semitic.

**4** Counsel for the Canadian Human Rights Commission objected to the line of questioning, arguing that the so-called "truth" of the statements was irrelevant, since truth was not a defence to the s. 13(1) complaint at issue before the Tribunal.

**5** The Tribunal accepted the Commission's arguments. It held that "questions as to the truth or falsity of the statements found on the Zundel site [i.e. the website at issue] add nothing to our ability to determine the issues before us, and potentially will add a significant dimension of delay, cost and affront to the dignity of those who are alleged to have been victimized by these statements."<sup>2</sup>

Ruling at issue in A-269-99

**6** In its second ruling, the Tribunal was asked to qualify a witness tendered by Mr. Zündel as an expert. It declined to do so, holding that an expert witness "must be capable of giving an objective, disinterested and unbiased opinion."<sup>3</sup> The Tribunal held that the witness tendered by Mr. Zündel was not capable of doing so, since it considered his views on anti-Semitism to be "so extreme as to render his opinion well beyond the impartial and objective standard required of an expert."<sup>4</sup> The Tribunal added that the witness did "not bear any of the essential indicia of an expert in the subject area."<sup>5</sup>

**7** Mr. Zündel applied to the Federal Court-Trial Division for judicial review of the Tribunal's two rulings.

#### THE FEDERAL COURT - TRIAL DIVISION'S DECISION

**8** In short reasons, the Motions Judge held that he was satisfied that "special circumstances exist to hear the present judicial review applications which are with respect to interlocutory evidentiary decisions."<sup>6</sup> He held that because he had concluded in a related application for judicial review that one of the members who had participated in the two evidentiary rulings was subject to a reasonable apprehension of bias, the two rulings should be quashed.

#### ANALYSIS

**9** In a related appeal (A-253-99), I have concluded that the member who participated in the two evidentiary rulings at issue in this appeal is not subject to a reasonable apprehension of bias. Accordingly, I disagree with the Motion Judge's reasons for allowing Mr. Zündel's applications for judicial review in these matters. Consequently, the interlocutory rulings must be dealt with on an alternative ground.

**10** Are the applications for judicial review premature? As a general rule, absent jurisdictional issues, rulings made during the course of a tribunal proceeding should not be challenged until the tribunal's proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute. For example, in the proceedings at issue in this appeal, the Tribunal made some 53 rulings. If each and every one of the rulings was challenged by way of judicial review, the hearing would be delayed for an unconscionably long period. As this Court held in *In Re Anti-Dumping Act*,<sup>7</sup> "a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal."<sup>8</sup>

**11** This rule has been re-affirmed by many courts. Although her remarks were made in the context of criminal proceedings, I think McLachlin J.'s remarks in *R. v. Seaboyer*<sup>9</sup> are apposite here:

[...] I would associate myself with the view that appeals from rulings on preliminary enquiries ought to be discouraged. While the law must afford a remedy where one is needed, the remedy should, in general, be accorded within the normal procedural context in which an issue arises, namely the trial. Such restraint will prevent a plethora of interlocutory appeals and the delays which inevitably flow from them. It will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case.<sup>10</sup>

**12** In *Szczecka v. Canada (Minister of Employment and Immigration)*,<sup>11</sup> Létourneau J.A. held:

[...] Unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgment. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses which interfere with the sound administration of justice and ultimately bring it into disrepute.<sup>12</sup>

**13** Similarly, in *Howe v. Institute of Chartered Accountants of Ontario*,<sup>13</sup> the Ontario Court of Appeal held that it was "trite law that the court will only interfere with a preliminary ruling made by an administrative tribunal where the tribunal never had jurisdiction or has irretrievably lost it."<sup>14</sup>

**14** Notwithstanding the general rule, counsel for Mr. Zündel argued that the two rulings made by the Tribunal constituted "special circumstances" that warranted immediate judicial review. He argued that the Tribunal's rulings were so significant that they went to the Tribunal's very

jurisdiction.

**15** I disagree. The rulings at issue in these appeals are mere evidentiary rulings made during the course of a hearing. Such rulings are made constantly by trial courts and tribunals and if interlocutory appeals were allowed from such rulings, justice could be delayed indefinitely. Matters like bias and a tribunal's jurisdiction to determine constitutional questions or to make declaratory judgments have been held to go to the very jurisdiction of a tribunal and have therefore constituted special circumstances that warranted immediate judicial review of a tribunal's interlocutory decision.<sup>15</sup> By contrast, rulings made by a coroner refusing to permit certain questions to be asked have been considered not to result in the loss of jurisdiction sufficient to warrant immediate judicial review of an interlocutory decision.<sup>16</sup> Similarly, in *Doman v. British Columbia (Securities Commission)*,<sup>17</sup> Huddart J. (as she then was) held that "the fact that an evidentiary ruling may give rise to a breach of natural justice is not sufficient reason for a court to intervene in the hearing process."<sup>18</sup> Huddart J. added:

I find support for that conclusion in the policy of the appeal courts not to review a judge's ruling under the Charter made during the course of a trial. Substantive rights are at stake, the trial judge can be wrong, evidence may be inadmissible, the decision may be overturned, a new trial may be required, but nothing should be allowed to interfere with the trial process once it has begun.<sup>19</sup>

**16** In oral argument, counsel for Mr. Zündel argued that had he waited until the Tribunal determined the merits of the complaint, ss. 18.1(2) of the Federal Court Act would have deprived him of the ability to seek judicial review of the two rulings at issue in this appeal. Subsection 18.1(2) states:

18.1(2) Time limitation -- An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Trial Division may, either before or after the expiration of those thirty days, fix or allow.

**17** In light of my conclusion that each and every ruling made by a Tribunal in the course of its proceedings cannot be the subject of an application for judicial review, it follows that the word "decision" contained in s. 18.1(2) cannot refer to every interlocutory decision a tribunal makes. A party against whom an interlocutory order has been made is not therefore under an obligation to immediately appeal in order to preserve his rights. In my view, the time period prescribed in s. 18.1(2) of the Federal Court Act does not begin to run until the final decision in the proceedings has been rendered. If the Tribunal's final decision is appealed, any objection to procedures taken during the hearing of the appeal can be raised at that time.

## CONCLUSION

**18** I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999.

SEXTON J.

ISAAC J.:-- I agree.

ROBERTSON J.:-- I agree.

cp/d/qlndn/qlhcs/qlhbb

1 Appeal Book A-258-99, p. 37 XXXX.

2 Ibid., pp. 37 DDDDD-37 EEEEE.

3 Appeal Book A-269-99, p. 234.

4 Ibid., p. 231.

5 Ibid.

6 Ibid., p. 8.

7 [1974] 1 F.C. 22 (C.A.), cited approvingly by this Court in *Canada v. Schnurer Estate*, [1997] 2 F.C. 545 (C.A.).

8 Ibid., p. 34.

9 [1991] 2 S.C.R. 577.

10 Ibid., p. 641.

11 (1993), 116 D.L.R. (4th) 333 (F.C.A.).

12 Ibid., p. 335. See also *People First of Ontario v. Ontario (Niagara Regional Coroner)* (1992), 87 D.L.R. (4th) 765 (Ont. C.A.) ("We entirely agree with the Divisional Court that it is undesirable to interrupt inquests with applications for judicial review. Whenever possible, it is best to let the inquest proceed to its resolution and then perhaps, if circumstances dictate, to take judicial proceedings.")

13 (1994), 19 O.R. (3d) 483 (C.A.).

14 Ibid., p. 490.

15 Pfeiffer v. Canada, [1996] 3 F.C. 584 (T.D.).

16 People First of Ontario v. Ontario (Niagara Regional Coroner) (1992), 87 D.L.R. (4th) 765 (Ont. C.A.).

17 (1995), 34 Admin. L.R. (2d) 102 (B.C.S.C.).

18 Ibid., p. 109.

19 Ibid.