

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

**MEMORANDUM OF FACT AND LAW OF THE APPELLANT,
DR. GÁBOR LUKÁCS**

Dated: September 10, 2016

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**MEMORANDUM OF FACT AND LAW OF THE APPELLANT,
DR. GÁBOR LUKÁCS****PART I – STATEMENT OF FACTS****A. OVERVIEW**

1. The Appellant, Dr. Gábor Lukács, is appealing, with leave of the Court, a decision of the Canadian Transportation Agency [the Agency] dated March 23, 2016 and bearing Decision No. 91-C-A-2016 [Decision Under Appeal].

2. In *Lukács v. Canada (CTA)*, 2015 FCA 269, this Honourable Court granted the appeal of Lukács and directed the Agency to redetermine certain issues relating to the tariff rules governing payment of denied boarding compensation by British Airways.

***Lukács v. Canada (CTA)*, 2015 FCA 269, paras. 40 and 42**

3. Subsequently, the Agency correctly determined that British Airways' tariff was unclear and ordered the airline to amend its tariff "to reflect the regime proposed by Air Canada in the proceeding related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004."

Redetermination Decision, paras. 17-18 Appeal Book, Tab 8, pp. 67-68

4. In response to the Redetermination Decision, British Airways submitted to the Agency a proposed wording for a Tariff rule that improperly includes exceptions, found in Rule 87(B)(3)(a), to the obligation to pay denied boarding compensation on flights from the EU to Canada.

Proposed Tariff Rule

Appeal Book, Tab 3, p. 9

5. The exceptions set out in Rule 87(B)(3)(a):
- (a) relieve British Airways from the obligation to pay denied boarding compensation in situations where compensation is owed under *Regulation (EC) 261/2004*; and
 - (b) were previously found, in part, to be unreasonable and were disallowed by the Agency.

***Lukács v. Air Canada*, 204-C-A-2013, para. 45**

6. In the Decision Under Appeal, the Agency concluded that the Proposed Tariff Rule complied with the Order found in the Redetermination Decision.

Decision Under Appeal

Appeal Book, Tab 2, p. 7

7. Lukács submits that the Agency erred in law and rendered an unreasonable decision, because the exceptions found in Rule 87(B)(3)(a) limit the obligation to pay denied boarding compensation in a manner that is inconsistent with *Regulation (EC) 261/2004*, and consequently the Proposed Tariff Rule does not comply with the Agency's Order in the Redetermination Decision.

B. THE LEGISLATIVE SCHEME

8. Air carriers operating international flights to and from Canada are required to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is the contract of carriage between the passengers and the air carrier.

***Air Transportation Regulations*, s. 110
Lukács v. Canada (CTA), 2015 FCA 269, Appeal Book, Tab 7, p. 54
para. 20**

9. The tariff of an air carrier must clearly state the terms and conditions with respect to an enumerated list of core areas, including “compensation for denial of boarding as a result of overbooking,” that is, denied boarding compensation.

***Air Transportation Regulations*, s. 122(c)(iii)
Lukács v. Canada (CTA), 2015 FCA 269, Appeal Book, Tab 7, p. 54
para. 21**

10. All terms and conditions of carriage established by an air carrier are required to be “just and reasonable.”

***Air Transportation Regulations*, s. 111
Lukács v. Canada (CTA), 2015 FCA 269, Appeal Book, Tab 7, p. 55
para. 22**

11. The Agency is a federal regulator and quasi-judicial tribunal created by the *Canada Transportation Act*. Parliament conferred upon the Agency broad powers with respect to the contractual terms and conditions that are imposed by airlines on passengers travelling internationally, to and from Canada.

***Canada Transportation Act*, s. 86(1)(h)**

12. 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.

***Air Transportation Regulations*, s. 113
Lukács v. Canada (CTA) 2015 FCA 269, Appeal Book, Tab 7, p. 56
para. 23**

C. PROCEDURAL HISTORY

(i) First Decision of the Agency

13. The Appellant, Dr. Gábor Lukács, is a Canadian air passenger rights advocate, whose work and public interest litigation have been recognized by this Honourable Court in a number of judgments.

14. On January 30, 2013, Lukács filed a complaint with the Agency that challenged the reasonableness and clarity of certain policies of British Airways, including the policy governing the denied boarding compensation payable to passengers bumped from oversold British Airways flights.

Complaint of Dr. Lukács to the Agency	Appeal Book, Tab 11, p. 76
<i>Lukács v. Canada (CTA)</i>, 2015 FCA 269, para. 2	Appeal Book, Tab 7, p. 51

15. On March 22, 2013, in its answer to the complaint, British Airways represented to the Agency, among other things, that:

British Airways complies with *Regulation (EC) No 261/2004* that applies, pursuant to Article 3, section 1.

Answer of British Airways, p. 3	Appeal Book, Tab 10, p. 74
Redetermination Decision, para. 14	Appeal Book, Tab 8, p. 67

16. On January 17, 2014, the Agency ordered British Airways to “show cause” why it should not be required to amend Rule 87(B)(3)(B) to conform to one of three denied boarding compensation schemes that were listed by the Agency, or to propose a new scheme.

Show Cause Decision, para. 144	Appeal Book, Tab 4, p. 34
<i>Lukács v. Canada (CTA)</i>, 2015 FCA 269, para. 10	Appeal Book, Tab 7, p. 52

17. On March 17, 2014, British Airways stated in its answer to the Agency that it was choosing to implement “[t]he regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*)”

***Lukács v. Canada (CTA)*, 2015 FCA 269, Appeal Book, Tab 7, p. 53
para. 11**

18. On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 [First Decision] that determined, with finality, the issue of denied boarding compensation.

**First Decision Appeal Book, Tab 5, p. 43
Lukács v. Canada (CTA), 2015 FCA 269, Appeal Book, Tab 7, p. 53
para. 16**

19. In response to the First Decision, in June 2014, British Airways filed with the Agency a revised version of its International Tariff Rule 87(B).

**British Airways’ International Tariff Appeal Book, Tab 6, p. 46
Rule 87(B), as of June 2014**

(ii) Judgment of the Federal Court of Appeal

20. On November 27, 2015, this Honourable Court granted the appeal of Lukács, set aside the First Decision, and directed the Agency to redetermine the issue of denied boarding compensation. This Court held that:

[...] the Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada, or whether the fact that British Airways passengers from the E.U. to Canada are covered by E.U. Regulation (EC) No. 261/2004 is sufficient.

***Lukács v. Canada (CTA)*, 2015 FCA 269, Appeal Book, Tab 7, p. 60
para. 40**

(iii) **Redetermination Decision of the Agency**

21. On February 18, 2016, the Agency issued Decision No. 49-C-A-216 [Redetermination Decision], in which it redetermined the issue of denied boarding compensation on British Airways flights from the European Union to Canada, and correctly concluded that:

It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier's policy with respect to these flights.

Redetermination Decision, para. 17

Appeal Book, Tab 8, p. 67

22. In the Redetermination Decision, the Agency correctly observed that:

In the circumstances of this case, British Airways elected to apply the compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. The denied boarding compensation regime appearing in Air Canada's tariff clearly establishes the carrier's policy, which includes not just the specific compensation that was proposed, but also incorporates by reference Regulation (EC) 261/2004. Therefore, British Airways' election of the compensation regime proposed by Air Canada includes not just the specific amounts of compensation proposed for outbound flights, but the context in which these amounts are set out, which includes a tariff provision that incorporates by reference Regulation (EC) 261/2004.

[Emphasis added.]

Redetermination Decision, para. 13

Appeal Book, Tab 8, p. 67

23. Accordingly, the Agency ordered British Airways to amend its tariff:

[...] to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004 [...]

Redetermination Decision, para. 18

Appeal Book, Tab 8, p. 68

24. Air Canada's tariff rule referenced at paragraphs 13 and 18 of the Redetermination Decision reads as follows:

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 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 legislation:

[...]

European Union and Switzerland: EC regulation No. 261/2004;

[Emphasis added.]

Air Canada's International Tariff Rule 90(A) Appeal Book, Tab 9, p. 69

25. Both Lukács and British Airways are content with the Redetermination Decision, and it is not subject to any challenge.

(iv) British Airways' Proposed Tariff Rule

26. On March 9, 2016, in response to the Redetermination Decision, British Airways submitted to the Agency a proposed wording for Rule 87(B)(3)(c), governing denied boarding compensation on flights from the EU to Canada:

(c) Amount of compensation payable for flights from the European Union to Canada

(l) 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 300 EUR for delay of 0 to 4 hours and in the amount of 600 EUR for delay over 4 hours.

:

[Emphasis added.]

Proposed Tariff Rule

Appeal Book, Tab 3, p. 9

27. The mischief in the Proposed Tariff Rule is that it subjects the rights of passengers to the provisions of Rule 87(B)(3)(a), which contains exceptions that limit entitlement to compensation, including the following one:

EXCEPTION 1: The passenger will not be eligible to compensation if the flight on which the passenger holds confirmed reservation 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.

[Emphasis added.]

**British Airways' International Tariff
Rule 87(B)(3)(a), as of June 2014**

Appeal Book, Tab 6, p. 46

(v) Decision Under Appeal

28. The Agency proceeded *ex-parte* to consider whether the Proposed Rule complied with the Redetermination Decision. The Agency gave Lukács no notice nor any opportunity to make submissions in response to British Airways' Proposed Tariff Rule, which was not provided to Lukács at the time.

29. On March 23, 2016, the Agency issued Decision No. 91-C-A-2016 [Decision Under Appeal], in which it found that:

- (a) British Airways was ordered to amend its tariff to include a reference to *Regulation (EC) No. 261/2004* (para. 2);
- (b) the tariff rule proposed by British Airways does not mention *Regulation (EC) No. 261/2004* (para. 3); and
- (c) nevertheless, the tariff rule proposed by British Airways complies with Decision No. 49-C-A-2016 (para. 5).

Decision Under Appeal

Appeal Book, Tab 2, p. 7

30. The Decision Under Appeal neither recognized nor considered that the Proposed Tariff Rule mischievously makes the obligation of British Airways to pay denied boarding compensation on flights from the EU to Canada “subject to the provisions of paragraph (B)(3)(a) of this rule,” which contains exceptions that are both inconsistent with *Regulation (EC) No. 261/2004* and have previously been found by the Agency to be unreasonable.

PART II – STATEMENT OF THE POINTS IN ISSUE

31. The sole issue to be determined on this appeal is whether the inclusion of the exceptions found in Rule 87(B)(3)(a) in the Proposed Tariff Rule renders it non-compliant with the Order of the Agency found in the Redetermination Decision, directing British Airways to amend its Tariff “to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004.”

**Order of the Federal Court of Appeal
granting Leave to Appeal (May 20, 2016)**

Appeal Book, Tab 12, p. 104

PART III – STATEMENT OF SUBMISSIONS

32. Lukács submits that the Agency erred in law and rendered an unreasonable decision, because Rule 87(B)(3)(a):

- (a) relieves British Airways from the obligation to pay denied boarding compensation in situations where compensation is owed under *Regulation (EC) 261/2004*; and
- (b) contains exclusions that were previously found, in part, to be unreasonable and were disallowed by the Agency.

Consequently, the inclusion of the exceptions found in Rule 87(B)(3)(a) in the Proposed Tariff Rule renders it non-compliant with the Order of the Agency found in the Redetermination Decision.

A. WHAT DID THE AGENCY ORDER BRITISH AIRWAYS TO DO?

33. In the Redetermination Decision, the Agency ordered British Airways to amend its tariff:

[...] to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004 [...]

Redetermination Decision, para. 18

Appeal Book, Tab 8, p. 68

34. The Agency unambiguously and correctly observed in the Redetermination Decision that Air Canada's denied boarding compensation regime includes not just the specific amounts of compensation proposed for outbound flights, but the context in which these amounts are set out, which includes a tariff provision that incorporates by reference Regulation (EC) 261/2004.

Redetermination Decision, para. 13

Appeal Book, Tab 8, p. 67

35. Thus, British Airways was ordered to amend its tariff in a manner that it would conform to Air Canada's denied boarding compensation regime, including the obligation to pay denied boarding compensation on flights from the European Union to Canada in the amounts set out in *Regulation (EC) 261/2004*.

Air Canada's International Tariff Rule 90(A) Appeal Book, Tab 9, p. 69

B. THE PROPOSED TARIFF RULE DOES NOT COMPLY WITH THE AGENCY'S ORDER FOUND IN THE REDETERMINATION DECISION

36. The Proposed Tariff Rule differs from Air Canada's regime in that the former incorporates a host of exceptions to the obligation of British Airways to pay denied boarding compensation (set out under Rule 87(B)(3)(a)), while Air Canada's regime contains no such exceptions.

(i) Air Canada's regime: *Regulation (EC) 261/2004*

37. As noted in paragraph 24, Air Canada's tariff rule governing denied boarding compensation on flights from the European Union to Canada requires the airline to pay compensation in accordance with *Regulation (EC) 261/2004*.

Air Canada's International Tariff Rule 90(A) Appeal Book, Tab 9, p. 69

38. Article 4(3) of *Regulation (EC) 261/2004* provides that:

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.

Regulation (EC) 261/2004, Article 4(3)

39. *Regulation (EC) 261/2004* calls for compensation in the amount of 600 EUR for flights from the European Union to Canada (Article 7(1)(c)). If the passenger is offered an alternative itinerary that results in less than 4 hours of delay to their destination, the amount can be reduced to 300 EUR (Article 7(2)(c)).

Regulation (EC) 261/2004, Article 7

40. *Regulation (EC) 261/2004* contains no exceptions to the obligation to pay denied boarding compensation. This obligation applies to all passengers with a confirmed reservation who checked in on time.

Regulation (EC) 261/2004, Article 3(2)

41. This is to be contrasted with Article 5(3) of *Regulation (EC) 261/2004*, which relieves an airline from the obligation of paying compensation for flight **cancellation** in extraordinary circumstances:

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

[Emphasis added.]

Regulation (EC) 261/2004, Article 5(3)

42. The notion of “extraordinary circumstances” is to be construed very narrowly. The European Court of Justice, which is the highest court with expertise in interpreting *Regulation (EC) No. 261/2004*, has held that:

[...] technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, ‘extraordinary circumstances’ under Article 5(3) of Regulation No 261/2004.

***Wallentin-Hermann v. Alitalia*,
European Court of Justice, Case C-549/07, para. 25**

43. In a subsequent decision, The European Court of Justice also clarified that “operational reasons” cannot relieve a carrier from the obligation to pay denied boarding compensation.

***Finnair Oyj v. Timy Lassooy*,
European Court of Justice, Case C-22/11**

(ii) **The Proposed Tariff Rule**

44. The Proposed Tariff Rule subjects the rights of passengers to denied boarding compensation to the provisions of Rule 87(B)(3)(a), which provides, among other things, that:

EXCEPTION 1: The passenger will not be eligible to compensation if the flight on which the passenger holds confirmed reservation is unable to accommodate him because of:

[...]

(bb) substitution of equipment of lesser capacity when required by operational or safety reasons.

[Emphasis added.]

**British Airways' International Tariff
Rule 87(B)(3)(a), as of June 2014**

Appeal Book, Tab 6, p. 46

45. Thus, the Proposed Tariff Rule relieves British Airways from the obligation to pay denied boarding compensation in circumstances where the compensation is owed under *Regulation (EC) 261/2004*, which is Air Canada's regime.

46. The aforementioned conclusion is supported not only by the rulings of the European Court of Justice, but also by the Agency's own jurisprudence. In Decision No. 204-C-A-2013, the Agency considered Exception 1(bb) from Rule 87(B)(3)(a), which used to appear in Air Canada's tariff (under Rule 245(E)(1)(b)(iv)), and found that it was unreasonable and disallowed it. In reaching this conclusion, the Agency adopted the analysis of the European Court of Justice in *Wallentin-Hermann v. Alitalia* with respect to what constitutes "extraordinary circumstances" that relieve airlines from the obligation of paying compensation.

***Lukács v. Air Canada*, Decision No. 204-C-A-2013, paras. 43-45**

***Wallentin-Hermann v. Alitalia*,
European Court of Justice, Case C-549/07**

(iii) Conclusion

47. Exception 1(bb) in Rule 87(B)(3)(a), which is incorporated into the Proposed Tariff Rule, relieves British Airways from the obligation to pay denied boarding compensation in situations where compensation is owed under *Regulation (EC) 261/2004* (i.e., Air Canada's regime).

48. Therefore, the Proposed Tariff Rule does not conform to Air Canada's denied boarding compensation regime in that it allows British Airways to pay zero compensation in situations where Air Canada's regime calls for compensation in the amount of 300 EUR or 600 EUR.

49. Hence, the Proposed Tariff Rule cannot possibly comply with the Agency's Order found in the Redetermination Decision, and as such the Decision Under Appeal is unreasonable.

C. COSTS

50. Lukács respectfully asks this Honourable Court that he be awarded his disbursements in any event of the cause, and if successful, also a modest allowance for his time, for the following reasons:

- (a) the appeal is not not frivolous, as this Honourable Court granted leave to appeal;
- (b) the appeal is in the nature of public interest litigation, as the majority of this Honourable Court found in its previous judgment relating to British Airways' denied boarding compensation rules; and
- (c) the appeal could likely have been avoided if British Airways had extended to Lukács the courtesy of providing him with a copy of the Proposed Tariff Rule concurrently with its submission to the Agency.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62**

***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 43**

PART IV – ORDER SOUGHT

51. The Appellant, Dr. Gábor Lukács, is seeking an Order:
- (a) setting aside Decision No. 91-C-A-2016 of the Canadian Transportation Agency;
 - (b) substituting Decision No. 91-C-A-2016 with the order that should have been made by the Agency, namely, declaring that the Tariff wording proposed by British Airways does not comply with the order found in Decision No. 49-C-A-2016 of the Agency, and directing British Airways to amend its International Tariff within seven (7) days;
 - (c) awarding the Appellant a moderate allowance for the time and effort he devoted to preparing and presenting his case, and reasonable out-of-pocket expenses incurred in relation to the appeal; and
 - (d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 10, 2016

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Appellant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

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

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

Regulation (EC) No. 261/2004 of the European Parliament and
of the Council

CASE LAW

Finnair Oyj v. Timy Lassooy, European Court of Justice,
Case C-22/11

Lukács v. Air Canada, Canadian Transportation Agency,
Decision No. 204-C-A-2013

Lukács v. Canada (Canadian Transportation Agency), 2014 FCA 76

Lukács v. Canada (Canadian Transportation Agency), 2015 FCA 269

Wallentin-Hermann v. Alitalia, European Court of Justice,
Case C-549/07