

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

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

Dated: October 17, 2013

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PART I – STATEMENT OF FACTS

(a) Overview

1. This appeal concerns the delegated legislative powers of the Canadian Transportation Agency (the “Agency”), and the limitation imposed upon it by Parliament, namely, the requirement that the Agency must seek and obtain approval of the Governor in Council to make regulations.

Canada Transportation Act, S.C. 1996, c. 10, s. 36(1)

2. The Appellant challenges the validity of the *Rules Amending the Canadian Transportation Agency General Rules* (the “Quorum Rules”), which were made without the approval of the Governor in Council.

*Rules Amending the Canadian Transportation
Agency General Rules, S.O.R./2013-133*

[Appeal Book, Tab 2]

3. Neither “regulation” nor “rule” is defined in the *Canada Transportation Act*; however, up until recently, rules governing the conduct of proceedings before the Agency were treated as regulations within the meaning of s. 36 of the *Canada Transportation Act*, and approval of the Governor in Council was sought and obtained for the making of such rules. This interpretation harmonizes with the *Statutory Instruments Act* and the *Interpretation Act*.

**Canadian Transportation Agency General Rules,
S.O.R./2005-35, Registration
Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)
Interpretation Act, R.S.C. 1985, c. I-21, s. 2**

4. It is common ground that the Quorum Rules are “regulations” within the meaning of the *Statutory Instruments Act*. The Agency, however, erroneously argues that “regulation” has a different meaning in s. 36(1) of the *Canada Transportation Act* than in the *Statutory Instruments Act* and the *Interpretation Act*. As a result, the Agency mistakenly believes that the Quorum Rules do not require the approval of the Governor in Council.

Agency’s Factum in response to Motion for Leave to Appeal, para. 28

5. The appeal turns on two questions:
- (a) Are rules governing the conduct of proceedings before the Agency regulations within the meaning of s. 36(1) of the *Canada Transportation Act*?
 - (b) Can the Agency amend regulations that were approved by the Governor in Council without seeking and obtaining the approval of the Governor in Council to make the amendments?

The Appellant submits that the answer to (a) is affirmative, and the answer to (b) is negative.

(b) The parties

6. The Canadian Transportation Agency (the “Agency”) is a quasi-judicial tribunal and regulator created by the *Canada Transportation Act* (the “CTA”).

7. The Appellant, Dr. Gábor Lukács, is a Canadian air passenger rights advocate with a record of approximately two dozen successful complaints against airlines before the Agency with respect to issues such as liability for baggage, flight cancellations, and denied boarding due to overbooking. Lukács is a party to two proceedings currently pending before the Agency.

(c) The statutory scheme

8. The *CTA* confers broad adjudicative powers upon the Agency with respect to air and railway transportation. The Agency’s jurisdiction extends to matters that are intimately related to the ability of individuals to exercise their mobility rights, such as passengers banned from transportation by a carrier, and transportation of persons with disabilities.

Canada Transportation Act, S.C. 1996, c. 10, ss. 26-28, 172

9. The *CTA* also delegates certain legislative powers to the Agency, but Parliament imposed a substantial restriction on the exercise of these powers:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

Canada Transportation Act, S.C. 1996, c. 10, s. 36(1)

10. The *CTA* delegates legislative powers to the Agency with respect to the conduct of its business and the proceedings before it, including the number of Members that are required to hear any matter. Pursuant to the *CTA*, two Members of the Agency constitute a quorum, unless the Agency’s rules provide otherwise.

Canada Transportation Act, S.C. 1996, c. 10, ss. 16(1), 17

(d) The Existing Rules

11. Up until 2013, the only regulations made under s. 17 of the *CTA* were the *Canadian Transportation Agency General Rules* (the “Existing Rules”). In 2005, the Agency sought and obtained the approval of the Governor in Council for making the Existing Rules, as required by s. 36(1) of the *CTA*:

Gatineau, February 1, 2005

Her Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to subsection 36(1) of the *Canada Transportation Act*, hereby approves the making of the annexed *Canadian Transportation Agency General Rules* by the Canadian Transportation Agency.

Canadian Transportation Agency General Rules, S.O.R./2005-35, Registration

12. The Existing Rules contain no provisions concerning quorum.

(e) The Quorum Rules

13. On July 3, 2013, the *Rules Amending the Canadian Transportation Agency General Rules* (the “Quorum Rules”), purporting to amend the Existing Rules by introducing a rule that reduces the quorum required to hear any matter before the Agency to a sole Member, were published in the *Canada Gazette*.

Rules Amending the Canadian Transportation Agency General Rules, S.O.R./2013-133

[Appeal Book, Tab 2]

14. The Quorum Rules were made without the approval of the Governor in Council, contrary to s. 36(1) of the *Canada Transportation Act*.

15. On August 22, 2013, this Honourable Court granted Lukács leave to appeal the Quorum Rules.

Order granting leave to appeal

[Appeal Book, Tab 3]

PART II – STATEMENT OF THE POINTS IN ISSUE

16. The issue to be decided on this appeal is whether the Agency exceeded its jurisdiction and/or erred in law in making the Quorum Rules, because:

- (a) the Agency failed to obtain the approval of the Governor Council for making the Quorum Rules, contrary to s. 36(1) of the *CTA*;
- (b) the Quorum Rules purport to alter and amend without the approval of the Governor in Council regulations that were approved by the Governor in Council, namely, the Existing Rules.

The first ground is specific to the *CTA*, and depends on whether “regulation” in s. 36(1) encompasses rules made under s. 17. The second ground asserts a general principle of legislative hierarchy between the Agency and the Governor in Council.

17. Lukács submits that the making of the Quorum Rules without the approval of the Governor in Council is *ultra vires* the Agency’s powers, and thus the Quorum Rules are invalid, and are of no force or effect.

PART III – STATEMENT OF SUBMISSIONS

A. STANDARD OF REVIEW: CORRECTNESS

18. In *Dunsmuir v. New Brunswick*, the Supreme Court of Canada held that administrative bodies must be correct in their determinations of true questions of jurisdiction or *vires*, such as whether their enabling legislation authorizes them to enact a certain subordinate legislation.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, para. 59

19. In this appeal, the issue is whether the Agency was authorized under the *CTA* to enact the Quorum Rules without seeking and obtaining the approval of the Governor in Council. This is a true questions of jurisdiction or *vires*. Therefore, according to *Dunsmuir*, the applicable standard of review is correctness.

B. RULES GOVERNING THE CONDUCT OF PROCEEDINGS BEFORE THE AGENCY ARE REGULATIONS

20. It is common ground that rules governing the conduct of proceedings before the Agency made under s. 17 of the *CTA*, such as the Quorum Rules, are regulations within the meaning of the *Statutory Instruments Act*.

Canada Transportation Act, S.C. 1996, c. 10, s. 17

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

21. The Agency, however, erroneously argues that “regulation” has a different meaning in s. 36(1) of the *CTA* than in the *Statutory Instruments Act*, and that “rules” made under s. 17 are not “regulations” within the meaning of the *CTA*.

22. Lukács submits that “rule” and “regulation” are not mutually exclusive. Some “rules” are also “regulations,” while others are not. Whether a particular instrument is a “regulation” is determined by its pith and substance, and not by its form, title, or heading.

23. Lukács further submits that the definition of “regulation” in the *Statutory Instruments Act* is declaratory of the usual and ordinary meaning of the term “regulation,” which is not defined in the *CTA*. This definition also harmonizes with the one found in the *Interpretation Act*.

***Statutory Instruments Act*, s. 2(1)**
***Interpretation Act*, R.S.C. 1985, c. I-21, s. 2**

24. Lukács would also like to draw attention to the inconsistency between the position taken by the Agency in the present proceeding and the “Regulatory Impact Analysis Statement” published by the Agency in 2005, at the time of the making of the Existing Rules.

Regulatory Impact Analysis Statement,
***Canada Gazette*, Part II, Vol 139, No. 4, pp. 279-280**

(a) **Brief history of the meaning of “regulation”, “rule”, and “order”**

25. The *Regulations Act* 1950 defined “regulation” to mean a rule, order, regulation, by-law or proclamation made in the exercise of an Act of Parliament, or for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament; however, the definition excluded a rule, order or regulation governing the practice or procedure in any proceeding before a judicial tribunal.

***Regulations Act* 1950, R.S. 1952, c. 235, s. 2**

26. In a special lecture delivered in 1959, Driedger explained that although regulations, rules, and orders did not have, at the time, precise or generally accepted meanings, they could be distinguished based on their substance:

[S]ubsidiary laws are known by a variety of expressions—regulations, rules, orders, by-laws, ordinances—or, collectively, as subordinate legislation or delegated legislation. These expressions do not have precise or generally accepted meanings.

The term “regulation” is usually understood to be a subsidiary law of general application, whereas an “order” is usually regarded as

a particular direction in a special case. The term “order” is also used to describe the act or instrument that establishes rules or regulations, as, for example, an Order in Council. The term “regulation” is sometimes used to describe the whole instrument, and sometimes only to describe a provision thereof. The expression “rule” is usually applied to procedural regulations, as, for example, rules of court. These three expressions—regulations, rules, orders—are to some extent interchangeable, and one sometimes finds in one sentence power to make “orders, rules and regulations,” with no clue as to what the difference is.

**Elmer A. Driedger: Subordinate legislation,
Can. Bar. Rev. 38 (1960), no. 1**

27. The same sentiment was echoed by the Special Committee on Statutory Instruments (MacGuigan Committee):

It is not too unusual to find in statutory conjunction power to make “orders”, “rules” and “regulations”, with no indication as to what the difference is. The confusion of names is not only due to the use of many different words for the same thing. It is aggravated by the use of the same word for different things.

***Third Report of the Special Committee on Statutory Instruments,*
(Queen’s Printer for Canada, Ottawa, 1969), p. 12**

28. In order to resolve this conundrum, the MacGuigan Committee adopted a substance-driven definition of “regulation”:

[A] regulation is a rule of conduct, enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons; it does not matter if this rule of conduct is called an order, a decree, an ordinance, a rule, or a regulation.

***Third Report of the Special Committee on Statutory Instruments,*
(Queen’s Printer for Canada, Ottawa, 1969), p. 14**

29. The MacGuigan Committee also recommended abolishing the exclusion of rules governing practice or procedure in judicial proceedings from the scope of the *Regulations Act*.

***Third Report of the Special Committee on Statutory Instruments,*
(Queen’s Printer for Canada, Ottawa, 1969), p. 21**

(b) The usual and ordinary meaning of “regulation”

30. The current text of the *Statutory Instruments Act* defines the term “statutory instrument” based on the substance of the instrument, and incorporates the recommendation of the MacGuigan Committee with respect to the inclusion in “regulation” of rules governing practice or procedure in judicial proceedings:

“regulation” means a statutory instrument

(a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;

[Emphasis added.]

***Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 2(1)**

31. The definition of “regulation” provided by the *Statutory Instruments Act* is also applicable to the portions of the *CTA* that relate to the subject-matter of statutory instruments, because the *Interpretation Act* provides that:

15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed

∴

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

***Interpretation Act*, R.S.C. 1985, c. I-21, s. 15(b)**

32. Alternatively, even if the definition of “regulation” in the *Statutory Instruments Act* does not formally apply to the *CTA*, it is nevertheless declaratory of the usual and ordinary meaning of the term “regulation.”

***Canadian Pacific Ltd. v. Canadian Transport Commission*,
60 N.R. 298 (FCA), para. 27**

(c) Purpose and origin of s. 36(1) of the CTA

33. The *CTA* confers both adjudicative and legislative powers upon the Agency. According to s. 40, the Agency's adjudicative powers are subject to the discretionary oversight of the Governor in Council. In sharp contrast, s. 36(1) of the *CTA* imposes a mandatory, and thus more stringent, oversight of the Agency's delegated legislative powers by the Governor in Council.

Canada Transportation Act, S.C. 1996, c. 10, ss. 36(1), 40

34. Both the distinction between the exercise of adjudicative and legislative powers and the requirement of obtaining the approval of the Governor in Council for the exercise of the latter already existed in the *National Transportation Act, 1987* (the "*NTA*"), the predecessor of the *CTA*. An instrument directed to a single person or body, however, was exempted from this requirement.

National Transportation Act, 1987, c. 28 (3rd Supp.), ss. 27(2)

35. The *NTA* contained other sections conferring legislative powers upon the National Transportation Agency, the exercise of which required the approval of the Governor in Council; these included the power to make rules governing the practice and procedure of proceedings before the National Transportation Agency.

National Transportation Act, 1987, c. 28 (3rd Supp.), ss. 22, 30

36. Subsection 27(2) of the *NTA* and the repeated occurrences of "with the approval of the Governor in Council" in the *NTA* were consolidated into what is today known as s. 36(1) of the *CTA*.

37. Therefore, it is submitted that the purpose of s. 36(1) of the *CTA* is to maintain the stringent and mandatory oversight of the Agency's delegated legislative powers by the Governor in Council that existed under the *NTA*.

(d) **Past actions and statements of the Agency**

38. In 2005, when the Agency made the Existing Rules, it did seek and obtain the approval of the Governor in Council, precisely as required by s. 36(1) of the *CTA*.

Canadian Transportation Agency General Rules, S.O.R./2005-35, Registration

39. The answer to why the Agency sought the approval of the Governor in Council for the making of the Existing Rules in 2005 is found in the Regulatory Impact Analysis Statement, which leaves no doubt that in the Agency's opinion such an approval was necessary pursuant to the the *CTA*:

On July 1, 1996, the *Canada Transportation Act* (the *CTA*) came into force. The *CTA* continued the *National Transportation Agency* as the Canadian Transportation Agency (the Agency) and consolidated and revised both the *National Transportation Act*, 1987 and the *Railway Act*. Pursuant to the provisions of the *CTA*, the Agency may, with the approval of the Governor in Council, make rules respecting, among other things, the sittings of the Agency, the carrying-on of its work and the manner of, and procedures for, dealing with matters and business before the Agency.

[Emphasis added.]

**Regulatory Impact Analysis Statement,
*Canada Gazette, Part II, Vol 139, No. 4, pp. 279-280***

40. Lukács adopts the Agency's 2005 interpretation of the *CTA* with respect to the requirement of approval of the Governor in Council for the making of rules governing the conduct of proceedings before the Agency, as set out in the Regulatory Impact Analysis Statement.

41. Since neither s. 17 nor s. 36(1) of the *CTA* were amended, one struggles to understand why the Agency contradicts its 2005 interpretation of the *CTA* in the present proceeding.

(e) **Conclusion: rules of procedure are regulations**

42. Since the *CTA* does not define the terms “regulation” and “rule,” these terms must be interpreted in accordance with their usual and ordinary meaning that is harmonious with other enactments relating to the same subject-matter, such as the *Statutory Instruments Act*. Whether a particular instrument is a “regulation” depends on its pith and substance.

43. Statutory instruments governing the conduct of proceedings before a judicial or quasi-judicial body are usually called “rules” or “rules of procedure.” Their name or title, however, does not affect their pith and substance: they are delegated legislation that fall within the usual and ordinary meaning of “regulation” as declared in the *Statutory Instruments Act*.

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

44. Consequently, the reference to statutory instruments governing the conduct of proceedings before the Agency as “rules” in s. 17 of the *CTA* does not alter their nature and their falling within the scope of “regulation” within the meaning of s. 36(1) of the *CTA*. In particular, it is fallacious to argue that a statutory instrument is not a “regulation” within the meaning of the *CTA* because it is a “rule.” The terms “rule” and “regulation” are not mutually exclusive.

Canada Transportation Act, S.C. 1996, c. 10, ss. 17, 36(1)

45. Excluding rules of procedure made under s. 17 of the *CTA* from the scope of s. 36(1) would defeat the objective of imposing a more stringent and mandatory oversight upon the Agency’s delegated legislative powers, and is inconsistent with the Agency’s past actions and interpretation of the *CTA*.

46. Therefore, it is submitted that rules governing the conduct of proceedings before the Agency made pursuant to s. 17 of the *CTA* are “regulations” within the meaning of s. 36(1).

C. THE AGENCY NEEDS THE APPROVAL OF THE GIC TO AMEND LEGISLATION APPROVED BY THE GIC

47. Regardless of whether the approval of the Existing Rules by the Governor in Council was necessary, the undisputed fact is that in 2005, when the Existing Rules were made, the Agency sought and obtained such an approval.

Canadian Transportation Agency General Rules, S.O.R./2005-35, Registration

48. The Governor in Council may vary or rescind any rule or regulation of the Agency, and orders of the Governor in Council to do so are binding upon the Agency. This establishes a legislative hierarchy between the Agency and the Governor in Council that is consistent with, but independent of, s. 36(1).

Canada Transportation Act, S.C. 1996, c. 10, s. 40

49. Thus, the approval of the Existing Rules by the Governor in Council is binding upon the Agency. Consequently, the Agency cannot indirectly override the order of the Governor in Council with respect to the Existing Rules by amending the Existing Rules on its own; rather, the Agency requires the approval of the Governor in Council for making any amendments to the Existing Rules.

50. The Quorum Rules are not simply new rules that are independent of the Existing Rules, but rather they purport to amend the Existing Rules by adding Rule 2.1.

51. Therefore, it is submitted that due to the legislative hierarchy between the Agency and the Governor in Council, the Quorum Rules require the approval of the Governor in Council, because they amend a statutory instrument that was previously approved by the Governor in Council.

D. THE QUORUM RULES ARE INVALID

52. The Agency required the approval of the Governor in Council for making the Quorum Rules for two reasons. First, the Quorum Rules are “regulations” within the meaning of s. 36(1) of the *CTA*. Second, the Quorum Rules purport to amend the Existing Rules, and thus purport to indirectly override an order of the Governor in Council, contrary to s. 40 of the *CTA*.

Canada Transportation Act, S.C. 1996, c. 10, ss. 36(1), 40

53. Since the Agency failed to seek the approval of the Governor in Council for making the Quorum Rules, it acted *ultra vires*, and consequently the Quorum Rules are invalid.

(a) Quorum is a matter of public policy

54. Quorum is the minimum number of members of a body made up of several members who must be present for that body to exercise its powers validly. Having quorum at all relevant times is not a mere technicality, but rather a question of principle, of public policy and of the sound and fair administration of justice.

IBM Canada Ltd. v. Deputy Minister of National Revenue, [1992] 1 F.C. 663, paras. 8-9

55. Quorum is a condition imposed by Parliament for the benefit of the public in the broad sense, and all those who might be affected by the decisions of a tribunal. It is not merely a protective device which only affect the parties themselves. Decisions made without a quorum are *automatically* null and void. Consequently, the Quorum Rules affects the public in the broad sense, whose rights are affected by the decisions of the Agency.

IBM Canada Ltd. v. Deputy Minister of National Revenue, [1992] 1 F.C. 663, footnote 11

(b) The rule of law

56. The fundamental constitutional principle of the rule of law dictates that all decision-making and regulation-making powers must find their source in law. Accordingly, administrative bodies such as the Agency can exercise only those powers that were explicitly assigned to them, and may exercise them only in the form prescribed by law. Courts have a constitutional duty to ensure that public authorities do not overreach their lawful powers. Statutory appeals are one of the ways in which courts supervise those who exercise statutory powers. By doing so, courts not only uphold the rule of law, but also perform an important constitutional function in maintaining legislative supremacy.

***Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paras. 27-30**

57. In *North Coast Air Services Limited et al. v. Canadian Transport Commission*, the Supreme Court of Canada considered the validity of regulations enacted by the Canadian Transportation Commission (a former incarnation of the Agency). It was held that, as in the present case, the power of the Commission to make regulations could be exercised only subject to the approval of the Governor in Council, and that the absence of such an approval rendered the regulations invalid.

***North Coast Air Services Limited et al. v. Canadian Transport Commission*, [1968] S.C.R. 940**

58. Similarly to *North*, in the present case, the Agency failed to respect the restrictions that Parliament imposed on its delegated legislative powers, and acted *ultra vires* in making the Quorum Rules without the approval of the Governor in Council.

59. Hence, it is respectfully submitted that, as in *North*, the Quorum Rules ought to be declared invalid.

PART IV – ORDER SOUGHT

60. The Appellant, Dr. Gábor Lukács, is asking that the appeal be allowed and that:

- (i) this Honourable Court declare that it is *ultra vires* the powers of the Agency to make, without the approval of the Governor in Council, rules governing practice or procedure in adjudicative proceedings before the Agency;
- (ii) this Honourable Court declare that it is *ultra vires* the powers of the Agency to amend, without the approval of the Governor in Council, regulations that were approved by the Governor in Council;
- (iii) this Honourable Court declare that the Agency exceeded its jurisdiction in making the Quorum Rules without the approval of the Governor in Council;
- (iv) this Honourable Court declare that the Quorum Rules are invalid, and are of no force or effect;
- (v) the Appellant be awarded costs and/or reasonable out-of-pocket expenses incurred in relation to the appeal; and
- (vi) this Honourable Court grant such further and other relief as is just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 17, 2013

DR. GÁBOR LUKÁCS

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Appellant

PART V – LIST OF AUTHORITIES

CASES	PARA. No.
<i>Canadian Pacific Ltd. v. Canadian Transport Commission</i> , 60 N.R. 298 (FCA)	32
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<i>IBM Canada Ltd. v. Deputy Minister of National Revenue</i> (<i>Customs & Excise</i>), [1992] 1 F.C. 663	54, 55
<i>North Coast Air Services Limited et al. v. Canadian Transport</i> <i>Commission</i> , [1968] S.C.R. 940	57, 58, 59
STATUTES AND REGULATIONS	PARA. No.
<i>Canada Transportation Act</i> , S.C. 1996, c. 10, ss. 16, 17, 26-28, 36, 40, 41, 172	1, 8, 9, 10, 20, 33, 44, 48, 52
<i>Canadian Transportation Agency General Rules</i> , SOR/2005-35 Registration, Regulatory Impact Analysis Statement, <i>Canada Gazette</i> , Part II, Vol 139, No. 4, pp. 254, 279-280	3, 11, 24, 38, 39, 47
<i>Interpretation Act</i> , R.S.C. 1985, c. I-21, ss. 2, 15	3, 23, 31
<i>National Transportation Act</i> , 1987, c. 28 (3rd Supp.), ss. 22, 27(2), 30	34, 35
<i>Regulations Act</i> 1950, R.S. 1952, c. 235, s. 2	25
<i>Statutory Instruments Act</i> , R.S.C. 1985, c. S-22, s. 2	3, 20, 23, 30, 43

OTHER AUTHORITIES

PARA. No.

Elmer A. Driedger: Subordinate legislation,
Can. Bar. Rev. 38 (1960), no. 1

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Jones and de Villars: *Principles of Administrative Law*,
5th edition (2009, Carswell)

Third Report of the Special Committee on Statutory Instruments,
(Queen's Printer for Canada, Ottawa, 1969), pp. 12, 14, 21

27, 28, 29