

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT**PART I – STATEMENT OF FACTS****A. OVERVIEW**

1. The Applicant challenges the legality of the new “approach” of the Canadian Transportation Agency (“Agency”) that purports to exclude and/or exempt certain types of airlines from the statutory requirement of holding a licence, set out in s. 57(a) of the *Canada Transportation Act* (“CTA”). The new “approach” effectively removes all consumer protection measures that were put in place by Parliament by enacting the *CTA*. The Agency wishes to implement this new “approach” using its decision-making powers, contrary to s. 80(2) of the *CTA*.

2. The Applicant is seeking a declaration that the Agency lacks jurisdiction to make a decision or order that has the effect of exempting and/or excluding certain types of airlines from the statutory requirement of holding a licence, and that the implementation of the new “approach” requires legislative amendments. The Applicant is also seeking a prohibition enjoining the Agency from making such orders and decisions.

3. The Applicant, Dr. Gábor Lukács, is a Canadian air passenger rights advocate, whose work and public interest advocacy has been widely recognized in Canada, including in a number of judgments of this Honourable Court.

Lukács Affidavit, paras. 1-3	Tab 2, p. 12
<i>Lukács v. Canada (CTA)</i>, 2015 FCA 269, para. 43	Vol. II, Tab 11, p. 323
<i>Lukács v. Canada (CTA)</i>, 2015 FCA 140, para. 1	Vol. II, Tab 10, p. 287
<i>Lukács v. Canada (CTA)</i>, 2014 FCA 76, para. 62	Vol. II, Tab 9, p. 284

4. The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. One of the Agency's key functions is to act as an economic regulator of transportation by air within Canada. The Agency carries out this function by issuing licences that permit operating an air service, and enforcing and reviewing the terms and conditions imposed by licence holders on the travelling public through its adjudicative proceedings.

B. THE LEGISLATIVE SCHEME

5. Paragraph 57(a) of the *CTA* prohibits operating an air service without a licence issued by the Agency under Part II of the *CTA*. Subsection 55(1) of the *CTA* defines "air service" as a service provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

<i>Canada Transportation Act</i>, ss. 55(1) & 57(a)	App. A, pp. 108 & 112
--	----------------------------------

6. Parliament imposed a number of economic and consumer protectionist conditions for obtaining a licence for operating an air service within Canada:

- (a) Canadian ownership of at least 75%, ensuring that the licence holder is substantially owned and controlled by Canadians;
- (b) prescribed liability insurance coverage; and
- (c) prescribed financial fitness requirements.

<i>Canada Transportation Act</i>, s. 61	App. A, p. 113
--	-----------------------

7. The *Air Transportation Regulations*, SOR/88-58 (“ATR”), promulgated pursuant to ss. 36 and 86 of the *CTA* with the approval of the Governor in Council, provides that:

- (a) an operator of an air service within Canada (“domestic service”) must carry an insurance that covers risks of injury to or death of passengers and public liability; and
- (b) an applicant for a licence to operate domestic service (“domestic licence”) must demonstrate having sufficient funds for the cost of operating the air service for 90 days, even without any revenue.

Air Transportation Regulations, ss. 7 & 8.1
Canada Transportation Act, ss. 36 & 86

App. A, pp. 91 & 93
App. A, pp. 106 & 128

8. As an additional consumer protection measure, Parliament chose to subject the relationship between the travelling public and domestic air service providers to regulatory oversight by the Agency:

- (a) each domestic licence holders is required to establish and publish a Tariff setting out its terms and conditions with respect to a prescribed list of core issues;
- (b) the Tariff is the contact of carriage between the consumers and the licence holder, and can be enforced by the Agency; and
- (c) upon complaint by any person, the Agency may suspend or disallow tariff provisions that are found to be unreasonable or unduly discriminatory.

Canada Transportation Act, ss. 67, 62.1, 67.2
Air Transportation Regulations, s. 107

App. A, pp. 118-119
App. A, p. 100

9. A licence to operate air service is not transferable.

Canada Transportation Act, s. 58

App. A, p. 112

10. Any contravention of a provision of the *CTA* or a regulation or order made under the *CTA*, including the operating of an air service without a licence, is an offence punishable on summary conviction.

Canada Transportation Act, s. 174

App. A, p. 131

(i) Decision-making powers of the Agency with respect to licensing

11. The decision-making powers of the Agency under the *CTA* with respect to the licensing of domestic air service providers include:

(a) issuing, suspension, and cancellation of licences (ss. 61 and 63);

(b) granting exemptions, by way of orders, from certain licensing requirements on a case-by-case basis (s. 80); and

(c) ensuring compliance with the licensing requirements (s. 81).

Canada Transportation Act, ss. 61, 63, 80, 81

App. A, pp. 113, 126

12. The decision-making powers of the Agency to grant exemptions from licensing requirements are not open-ended. First, before an exemption is granted, the Agency must be satisfied that certain conditions, set out in s. 80(1), are met. Second, and more importantly, by virtue of s. 80(2) of the *CTA*:

(a) only the Minister of Transport, and not the Agency, can grant an exemption from the Canadian ownership requirement; and

(b) the Agency cannot grant an exemption from the requirement of having prescribed liability insurance coverage.

Canada Transportation Act, ss. 62 & 80

App. A, pp. 113 & 126

(ii) Regulation-making powers of the Agency with respect to licensing

13. Subsection 86(1) of the *CTA* confers broad regulation-making powers on the Agency, including defining words and expressions for the purposes of Part II, and excluding a person from any of the requirements of Part II of the *CTA*.

Canada Transportation Act, s. 86(1)(k)-(l)

App. A, p. 128

14. Nevertheless, Parliament saw it fit to impose some restrictions on the Agency's regulation-making powers:

- (a) pursuant to s. 36 of the *CTA*, the Agency can exercise these powers only after it has sought and obtained the approval of the Governor in Council; and
- (b) by virtue of s. 86(2) of the *CTA*, the Agency cannot make regulations having the effect of relieving anyone from the Canadian ownership or liability insurance coverage requirements.

Canada Transportation Act, ss. 36 & 86(2)

App. A, pp. 106 & 130

C. THE "CONSULTATION ON THE REQUIREMENT TO HOLD A LICENCE"

(i) Indirect Air Services Providers

15. An "Indirect Air Service Provider" (IASP) is a person who has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person (often referred to as a "wet lease").

Girard Affidavit, para. 3

Agency's Record

16. IASPs substantially differ from travel agents. First, an IASP contracts to transport passengers in its own name, while travel agents act as mere agents, and are not parties to the contract of carriage. Second, travel agents have no commercial control over the air service that they sell, and in particular, assume no risks relating to the air services sold.

17. It is common ground that since 1996 and up until recently, the Agency had consistently held that a person with commercial control over a domestic air service “operates” it within the meaning of the *CTA*, and thus requires them to hold a domestic licence. In doing so, the Agency had been following the so-called *1996 Greyhound Decision*. As of February 2016, there are approximately 14 IASPs in Canada that hold a domestic licence.

**Girard Affidavit, paras. 4-7
Decision No. 232-A-1996 (public version)**

**Agency’s Record
Tab 3, p. 48**

(ii) The “Approach under consideration”

18. On December 23, 2015, the Agency announced that it would conduct a public consultation on the requirement for IASPs to hold a license (“Consultation”), and that the Agency was considering implementing the following “Approach under consideration”:

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

[Emphasis added.]

**Lukács Affidavit, Exhibit “A”
Girard Affidavit, para. 12**

**Tab 2A, p. 17
Agency’s Record**

19. On January 21, 2016, the Agency released an announcement that confirms that the Agency intends to exercise its decision-making powers following the consultation:

Business models in the airline industry are rapidly evolving. To ensure that users of transportation services are protected, while still allowing innovative approaches that can increase consumer choice in the market, the Agency is currently reviewing whether companies that bulk purchase all seats on planes and then resell those seats to the public, but do not operate any aircraft, should be required to hold a licence.

In December, the Agency advised these companies that while this review was ongoing, they would not be required to seek a license, so long as they met certain conditions. This approach has been consistent since the beginning.

Once consultations are complete, the Agency will review and carefully consider the submissions received and issue a determination on which companies are required to hold licences. This will be done as quickly as possible while ensuring that all relevant information is taken into account.

[Emphasis added.]

Lukács Affidavit, Exhibit “I”

Tab 21, p. 46

20. The Agency misled the public in the January 21, 2016 announcement, and did not disclose that the real reason the Consultation was created was for the sake of a specific new IASP. The truth is that the IASP business model is neither new nor innovative, and has been known in Canada at least since the time of the *1996 Greyhound Decision*, for at least 20 years. As the Agency has acknowledged, there are approximately 14 IASPs in Canada that hold a domestic licence.

Girard Affidavit, paras. 7-10

Agency’s Record

21. On January 22, 2016, the present application for judicial review with respect to the “Approach under consideration” was commenced.

Notice of Application

Tab 1, p. 1

D. EVIDENCE OF UNLAWFUL CONDUCT OF THE AGENCY AND/OR ITS CHAIR

22. On October 29, 2015, almost two months before the Consultation was announced, the Chair of the Agency unlawfully instructed the staff of the Agency to not require IASPs to hold a licence pending the outcome of the Consultation. The Secretary of the Agency, whose duties under ss. 21-22 of the *CTA* include record keeping for the Agency, confirmed that:

- (a) no order or decision was made to reflect the Chair's instructions;
- (b) the Chair's instructions were made orally; and
- (c) no minutes were taken for the meeting where the instructions were given.

Canada Transportation Act, ss. 21-22,
Lukács Affidavit, Exhibits "F"- "H"

App. A, pp. 104-105
Tabs 2F-2H, pp. 37-42

PART II – STATEMENT OF THE POINTS IN ISSUE

23. The question to be decided on the present application is whether the Agency has jurisdiction to make a decision or order to the effect that Indirect Air Service Providers are no longer required to hold a domestic licence.

PART III – STATEMENT OF SUBMISSIONS

24. The crux of the case at bar is that the Agency attempts to circumvent the will of Parliament, and engages in an impermissible legislative exercise under the guise of decision-making. The Agency pretends that the requirement to hold a licence is a mere policy choice of itself as a regulator, and that it can change its mind about it. This is clearly not the case.

25. It was Parliament, and not the Agency, that chose to impose a regulatory scheme on air transportation to establish commercial standards and consumer protection measures. The requirement that all air service providers hold a licence is an inherent part of the regulatory scheme, and it serves as an enforcement mechanism to protect the the travelling public.

26. Since 1996, the time that the *CTA* was enacted, and until recently, the Agency had consistently and correctly been interpreting s. 57(a) of the *CTA* as requiring all IASPs providing domestic service to hold a domestic licence. The IASP business model is not new, and the relevant provisions of the *CTA* have not been amended by Parliament.

27. Dr. Lukács submits that:

- (a) no reasonable interpretation of the *CTA* is capable of supporting the conclusion that IASPs are not required to hold a domestic licence in order to provide domestic service; and
- (b) the Agency has no jurisdiction to make a decision or order to the effect that IASPs are no longer require a domestic licence.

A. INDIRECT AIR SERVICE PROVIDERS ARE REQUIRED TO HOLD A LICENCE

28. Section 57 of the *CTA* provides that:

57 No person shall operate an air service unless, in respect of that service, the person

- (a) holds a licence issued under this Part;
- (b) holds a Canadian aviation document; and
- (c) has the prescribed liability insurance coverage.

Canada Transportation Act, s. 57

App. A, p. 112

29. Subsection 55(1) of the *CTA* defines “air service” as follows:

air service means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both; (*service aérien*)

Canada Transportation Act, s. 55(1)

App. A, p. 108

30. Since the requirement to hold a licence was imposed by Parliament and not by the Agency, the question of who “operates an air service” is not a mere question of policy that the Agency can change overnight; rather, it is a matter of what Parliament intended to accomplish by imposing the requirement.

31. Although the *CTA* has a built-in mechanism for the review of the Act every eight years, and the *CTA* was amended on a number of occasions, Parliament chose not to amend the domestic licensing provisions. In these circumstances, it is submitted that considerable weight should be given to the jurisprudence developed by the Agency in the 19 years from 1996 to 2015.

Canada Transportation Act, s. 53
Lukács v. Canada (CTA), 2015 FCA 269, para. 40

App. A, p. 107
Vol. II, Tab 11, p. 322

(i) **1996-2015: the Agency's jurisprudence for the past 19 years**

32. Until 2015, the Agency consistently interpreted the *CTA* as imposing a requirement to hold a licence on any person who enters into a contract to provide an air service. A person who does not hold a licence can participate in the agreement only as an agent, not as a principal. In a 2010 decision, the Agency summarized the state of the law as follows:

Duke Jets is reminded that only air carriers holding a valid Agency licence may enter into an agreement to provide an air service to, from or within Canada. [...] As such, the charter agreement with the air carrier must clearly indicate that Duke Jets has entered into the agreement on behalf of the named client failing which other regulatory requirements may apply and need to be met.

CTA Decision No. 222-A-2010, p. 2

Vol. II, Tab 1, p. 172

33. It is not uncommon for an air service to be delivered with the participation of multiple entities. The Agency established four factors for determining which of the participants is the one who operates an air service and thus is required to hold a licence in such situations:

1. Risks and benefits associated with the operation of the proposed air service;
2. Performance of key functions and decision-making authority with respect to the operation of the proposed air service;
3. Exclusivity and non-competition provisions; and
4. Use of firm name and style.

The “operator” of an air service is the participant who assumes the majority of the risks, is entitled to most of the benefits, and has decision-making authority.

Decision No. 42-A-2013, p. 2
Decision No. 152-A-2014

Vol. II, Tab 2, p. 174
Vol. II, Tab 7, p. 208

34. Dr. Lukács submits that the aforementioned longstanding interpretation of the *CTA* by the Agency adequately reflects the intent of Parliament and the purpose for which the *CTA* was enacted. Items 1, 2, and 4 are precisely what characterize IASPs, and set them apart from a travel agent or businesses that rent out aircraft and flight crew, and thus IASPs are required to hold a licence.

(ii) Textual and contextual analysis

35. Subsection 57(a) requires a person who “operate[s] an air service” to hold a licence. The definition of “air service” in s. 55(1) unambiguously refers to providing transportation service to the public at large (i.e., consumers), and not renting out aircraft with flight crew to another person. Thus, it is not the operator of the aircraft, but the IASP that is required to hold a domestic licence.

Canada Transportation Act, ss. 55(1) & 57(a)* **App. A, pp. 108 & 112*

36. Any ambiguity that might possibly exist as to who “operates” an air service is resolved by s. 60(1) of the *CTA*, which specifically addresses the business model of a person providing an air service using an aircraft, with a flight crew, provided by another person:

60 (1) No person shall provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee’s licence and no licensee shall provide an air service using all or part of an aircraft, with a flight crew, provided by another person except

- (a) in accordance with regulations made by the Agency respecting disclosure of the identity of the operator of the aircraft and other related matters; and
- (b) where prescribed, with the approval of the Agency.

[Emphasis added.]

Canada Transportation Act, s. 60(1)

App. A, p. 112

37. The wording of s. 60(1) underscores the distinction between the “operator of the aircraft” used to provide an air service, and the person who “provide[s] an air service” using the aircraft and crew of another person. Thus, the “operator of the aircraft” is not the same as the person who “operate[s] an air service,” and thus requires a licence. Parliament’s implicit assumption that the person who “provide[s] an air service” would be a “licensee” confirms that it is the provider of the air service (IASP) who is required to hold a licence. Holding otherwise would violate the presumption of consistent expression.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 41** **Vol. II, Tab 9, p. 280**

(iii) Purposive analysis

38. Dr. Lukács adopts as his own position the Agency’s analysis of the purpose of the air licensing requirement set out in Decision No. 390-A-2013. Parliament requires air service providers to hold a licence as a way of establishing commercial standards and consumer protection measures. These requirements serve a number of purposes, including:

- (a) preventing underfunded service providers, who cannot deliver the services that consumers have paid for in advance, from entering the market;
- (b) ensuring that the terms and conditions of the service address prescribed core areas (such as bumping, delays, cancellations, refunds, etc.) and that the terms and conditions are reasonable and not unduly discriminatory; and
- (c) restricting foreign control over domestic air service.

Decision No. 390-A-2013, paras. 20-25

Vol. II, Tab 3, pp. 181-182

39. As the Agency acknowledged, the effect of interpreting the *CTA* as not requiring IASPs to hold a licence is that these commercial standards and consumer protection measures would not apply to IASPs and their consumers:

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

[Emphasis added.]

Lukács Affidavit, Exhibit “A”

Tab 2A, p. 17

40. Therefore, the Agency’s interpretation of the licensing requirement in the “Approach under consideration” is unreasonable, because it circumvents the very purpose for which Parliament enacted the *CTA*.

B. THE AGENCY LACKS JURISDICTION TO OVERRIDE THE REQUIREMENT TO HOLD A LICENCE

41. The effect of exempting IASPs from the requirement of holding a domestic licence is that they would not be subject to the requirement of Canadian ownership or of maintaining a prescribed liability insurance coverage.

Canada Transportation Act, s. 81

App. A, p. 127

42. However, the Agency lacks jurisdiction to do so. In enacting s. 80(2) of the *CTA*, Parliament chose to explicitly withhold these powers from the Agency:

No exemption shall be granted under subsection (1) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

Canada Transportation Act, s. 80

App. A, p. 126

C. REMEDIES

43. In the case at bar, the Agency intends to make decisions and/or orders that are in both unlawful and expose the public to significant risks which Parliament intended to eliminate:

- (a) IASPs selling tickets to the public without having the capital necessary to pay for costs associated with operating the air service that consumers have paid for in advance;
- (b) IASPs stranding passengers by overbooking, delaying, or cancelling flights for economic reasons, and without any compensation to passengers; and
- (c) IASPs being unable to meet their financial obligations to passengers and the public in the case of an accident.

Lukács Affidavit, Exhibits “A” and “I” **Tabs 2A and 2I, pp. 17 and 46**

44. These risks are significantly higher in the case of domestic air service, where consumers are not protected by the comprehensive liability regime of the *Montreal Convention* that imposes liability both on the “contracting carrier” (IASP) and the “actual carrier” (the operator of the aircraft).

Montreal Convention, Chapter V **App. A, p. 150**

45. Pursuant to s. 28 of the *Federal Courts Act*, judicial review powers with respect to the Agency are assigned to this Honourable Court, which has jurisdiction to grant a declaratory relief and/or a prohibition against the Agency.

Federal Courts Act, ss. 28, 18, and 18.1(3) **App. A, pp. 133 and 136**

46. The unlawful conduct of the Agency and/or its Chair, summarized in paragraph 22, lend further support to the need for this Honourable Court to provide guidance to the Agency by way of the sought declarations and prohibition in order to prevent further harm to the public.

D. COSTS

47. In *Lukács v. Canada (Transportation Agency)*, this Honourable Court awarded the appellant disbursements even though the appeal was dismissed:

In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62** **Vol. II, Tab 9, p. 284**

48. Dr. Lukács respectfully ask 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 application is in the nature of public interest litigation, challenging a public body for excess of jurisdiction on a matter that affects the travelling public at large;
- (b) the issue raised in the application is not frivolous; and
- (c) the application raises novel questions of law relating to the *CTA* that have not yet been addressed by this Honourable Court.

PART IV – ORDER SOUGHT

49. The Applicant, Dr. Gábor Lukács, is seeking an Order:
- (a) declaring that:
 - (1) the Canadian Transportation Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding Indirect Air Service Providers from the statutory requirement of holding a license; and
 - (2) Indirect Air Service Providers can be excluded from the statutory requirement to hold a license only:
 - (i) if the Canadian Transportation Agency makes regulations to that effect and obtains the approval of the Governor in Council as per ss. 86 and 36(1) of the Act; or
 - (ii) if Parliament amends the *Canada Transportation Act*, S.C. 1996, c. 10.
 - (b) enjoining the Canadian Transportation Agency from making a decision or order that purports to exempt and/or exclude Indirect Air Service Providers from the statutory requirement of holding a license;
 - (c) granting disbursements and a moderate allowance for the time and effort the Applicant devoted to the present application; and
 - (d) such further and other relief or directions that the Applicant may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 15, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, SOR/88-58,
ss. 7, 8.1, 8.2, 8.5, 107

Canada Transportation Act, S.C. 1996, c. 10,
ss. 36, 53, 55, 57-61, 67, 67.1, 67.2, 80, 86, 174

Federal Courts Act, R.S.C. 1985, c. F-7,
ss. 18, 18.1, 28

Montreal Convention (Schedule VI to the *Carriage by Air Act*,
R.S.C. 1985, c. C-26)

Statutory Instruments Act, R.S.C. 1985, c. S-22
ss. 1-12

CASE LAW

Determination of whether Duke Jets Ltd. requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 222-A-2010

Determination of whether WestJet Encore Ltd. requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 42-A-2013

Determination of what constitutes an “air service” and the criteria to be applied by the CTA,
Canadian Transportation Agency, Decision No. 390-A-2013

Determination of whether Angel Flight of British Columbia Society is operating an air service within the meaning of subsection 55(1) of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 462-A-2013

CASE LAW (CONTINUED)

Determination of whether Angel Flight of Alberta Society is operating an air service within the meaning of subsection 55(1) of the Canada Transportation Act,

Canadian Transportation Agency, Decision No. 41-A-2014

Determination of whether Hope Air is operating an air service within the meaning of subsection 55(1) of the Canada Transportation Act,

Canadian Transportation Agency, Decision No. 129-A-2014

Determination of whether Air Georgian Limited requires a licence pursuant to Part II of the Canada Transportation Act,

Canadian Transportation Agency, Decision No. 152-A-2014

Dunsmuir v. New Brunswick, 2008 SCC 9

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

Lukács v. Canada (Canadian Transportation Agency), 2015 FCA 140

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

WestJet v. Greyhound et al., Canadian Transportation Agency, Decision No. 232-A-1996 (public version)

WestJet v. Greyhound et al., Order in Council, P.C. 1996-849