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February 28, 2025

**VIA ONLINE SUBMISSION**

Canadian Transportation Agency  
15 Eddy Street  
Gatineau, Quebec K1A 0N9

Dear Madam or Sir:

**Re: Proposal to add s. 85.09(1) of the *Canada Transportation Act* to the *Canadian Transportation Agency Designated Provisions Regulations***

I am writing on behalf of *Air Passenger Rights* [APR], Canada's independent federal nonprofit organization that works to make the travelling public aware of its rights and capable of enforcing them. Our mission is to turn helpless passengers into empowered travelers through education, advocacy, investigation, and litigation. We have sixteen years of experience in this area.<sup>1</sup>

We are profoundly concerned about the proposal to allow government agents to fine any individual, organization, or even a reporter or a media outlet who speaks out about what transpired in the handling of air travel complaints by the Canadian Transportation Agency.

In our view, the proposal to add [subsection 85.09\(1\)](#) of the *Canada Transportation Act* to the [Canadian Transportation Agency Designated Provisions Regulations](#), purporting to authorize such fines, is unconstitutional and unlawful because:

- i. regulating the media's and/or the public's speech and expression is *ultra vires* the Canadian Transportation Agency, whose mandate is confined to the economic regulation of various modes of transportation, including transportation of passengers by air; and
- ii. it infringes upon rights protected by s. 2(b) of the *Charter* in a manner that is unjustifiable in a free and democratic society.

We urge the Agency to reconsider this proposal, and not designate [subsection 85.09\(1\)](#) as a provision that may be enforced by way of an Administrative Monetary Penalty (AMP).

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<sup>1</sup> See the Appendix on page 9 for details about APR's expertise and work.

## **The Administrative Monetary Penalties regime under the *Canada Transportation Act***

[Section 174](#) of the *Canada Transportation Act* [*Act*] makes the violation of any provision of the *Act* or a regulation or order made under the *Act* a summary conviction offence that is punishable by a fine of up to \$5,000 in the case of an individual, and up to \$25,000 in the case of a corporation. Such an offence would typically be prosecuted in provincial courts, and the burden of proof for a conviction would be the criminal one: “beyond a reasonable doubt.”

The regime of Administrative Monetary Penalties, set out in [sections 176.1-181.1](#) of the *Act*, provides an alternative method for enforcing—without having to resort to the criminal law system—provisions of the *Act* and the regulations made under it.

Under [subsection 177\(1\)](#) of the *Act*, the Canadian Transportation Agency [**Agency**] may designate any provision of the *Act*, or any regulation, order or direction made pursuant to the *Act*, the requirements of any such provision, or any condition of a licence issued under the *Act* as a provision, requirement, or condition the contravention of which may be punished by a notice of violation and an Administrative Monetary Penalty [**AMP**] of up to \$5,000 in the case of an individual, and up to \$25,000 in the case of a corporation.

Once a provision has been “designated” under [section 177\(1\)](#) of the *Act*, a Designated Enforcement Officer of the Agency who believes that a person contravened that provision may issue that person a notice of violation pursuant to [section 180](#), and require that person to pay an AMP up to the maximum prescribed by the Agency.

Pursuant to [section 179](#) of the *Act*, a contravention can be treated either as a violation under the AMP system or as an (summary conviction) offence, but not both. Issuing a notice of violation for an act or omission precludes treating the same act or omission as an offence.

A person who has been served with a notice of violation must either pay the amount of the penalty specified in the notice or file a request for review with the Transportation Appeal Tribunal of Canada (*Act*, [s. 180.1](#)). In the case of some violations, there is also an option of requesting to enter into a compliance agreement with the Agency. Payment of the AMP ensures that no further proceedings would be taken against the person under the *Act* (*Act*, [s. 180.2](#)).

*Canadian Transportation Agency Designated Provisions Regulations* [**DPR**] is a table (Schedule) whose first column is the list of provisions, requirements, and conditions designated under [subsection 177\(1\)](#) of the *Act*, and its second and third columns are the maximum AMP that can be issued for a corporation and an individual, respectively, for the violation of each designated provision.

## **The Agency’s proposed amendment to the *DPR***

The Agency proposes, among others, to add [subsection 85.09\(1\)](#) of the *Act* to the *DPR*, thereby designating it as a provision for the contravention of which an AMP may be issued. In what follows, we unpack [subsection 85.09\(1\)](#) and the ramifications of it being included in the *DRP*.

## The impact of subsection 85.09(1) of the *Act*

Subsection 85.09(1) of the *Act* is part of the amendments to the *Act* set out in the *Budget Implementation Act, 2023, No. 1* that introduced a new air travel complaints process whereby Agency staff act as “complaint resolution officers” in passengers’ complaints against airlines (*Act*, s. 85.02).

A complaint resolution officer is required to first mediate a complaint (*Act*, s. 85.05). If no agreement is reached as a resolution of mediation, then the complaint resolution officer must issue a legally binding decision (*Act*, s. 85.06).

Subsection 85.09(1) of the *Act* provides that:

**85.09 (1)** All matters related to the process of dealing with a complaint shall be kept confidential, unless the complainant and the carrier otherwise agree, and information provided by the complainant or the carrier to the complaint resolution officer for the purpose of the complaint resolution officer dealing with the complaint shall not be used for any other purpose without the consent of the one who provided it.

In practical terms, subsection 85.09(1) of the *Act* is a gag order that purports to preclude passengers from publicly discussing and criticizing the complaint resolution officer’s legally binding decision in their own case. For example, as reported by CBC’s Go Public:

Tim Rodger also knows what it feels like to have his social media monitored after the Canadian Transportation Authority (CTA) took exception to a post he made on that same Air Passenger Rights Facebook page.

After a trip to Belize last December, Rodger’s bag came off an Ottawa luggage carousel badly damaged. When WestJet wouldn’t pay full replacement costs, he filed a complaint with the CTA and won.

He posted the regulator’s decision to the Facebook group, and got a phone call from the CTA shortly after, telling him the decision was confidential. Rodger took the post down, but says he doesn’t think the confidentiality makes sense.

If previous decisions had been made public, he says, “I maybe could have resolved this sooner if I’d found case law showing the exact same thing.”<sup>2</sup>

Indeed, subsection 85.09(1) of the *Act* creates a significant imbalance in information and knowledge about the Agency’s interpretation of the law between airlines and passengers. Airlines, which are the respondents to thousands of complaint, have a treasure trove of decisions by complaint resolution officers; passengers, however, are expected to not share and exchange that information among themselves.

<sup>2</sup> “WestJet tried to silence couple fighting for compensation after airline cancelled their flight,” CBC Go Public (Nov. 25, 2024).

[Subsection 85.09\(1\)](#) of the *Act* impacts consumer protection organizations like our APR in multiple ways. *First*, the Agency expects us to be complicit in curtailing passengers' expression about their own complaints in our "Air Passenger Rights (Canada)" Facebook group. For example, on July 9, 2024, Mr. Dany Ross, Acting Director General, Dispute Resolution Branch of the Agency, wrote us that:

It was brought to our attention that a recently issued confidential air travel complaint decision was posted in its entirety on your Air Passenger Rights (APR) Facebook group page. The decision was posted in the group by one of the passengers involved in the decision, who has since removed the post at our request.

As per the *Canada Transportation Act* (the *Act*), the Canadian Transportation Agency publishes on its website information relating to the outcome of air travel complaints. Decisions issued by an Agency complaint Resolution Officer are otherwise confidential, unless all involved parties agree to the contrary.

We would appreciate your collaboration in preventing future public sharing of confidential information.

[Subsection 85.09\(1\)](#) of the *Act* also purports to preclude us from exercising our rights under the constitutionally protected open court principle and obtaining copies of such legally binding decisions and/or the documents on the basis of which these decisions were made. For example, on August 9, 2024, the Secretariat, Legal and Secretariat Services Branch of the Agency wrote us that:

This is in response to your letter dated July 16, 2024, requesting copies of certain Complaint Resolution Officer decisions and associated documents. Pursuant to subsection 85.09(1) of the Canada Transportation Act, all matters related to the process of dealing with an air travel complaint shall be kept confidential, unless the complainant and carrier otherwise agree. Following receipt of your request, the Agency contacted the parties in Air Travel Complaint Decisions ATC-350270-CO-2024, ATC-378575-CO-2024, ATC-375879-CO-2024, ATC-376906-CO-2024 and ATC-375218-CO-2024 to verify whether they would consent to the release of the information requested. None of the parties provided consent. Therefore the Agency is unable to provide the requested documents. [Emphasis added.]

### **Making subsection 85.09(1) of the *Act* a designated provision has profound ramifications**

Making [subsection 85.09\(1\)](#) of the *Act* a designated provision and adding it to the [DPR](#) as the Agency proposes to do would have profound societal consequences in general, and for passengers, consumer protection organizations, and the media in particular.

*First*, to our knowledge, it is unprecedented in Canada that government agents would be authorized to fine any individual or organization for allegedly breaching some confidentiality obligations. The power to sanction such infractions should be reserved to the independent judiciary.

*Second*, passengers like Tim Rodger, who post on social media about the complaint resolution officer's legally binding decision in their case,<sup>3</sup> would not only receive a stern phone call from the Agency, but would also be facing the prospect of being issued a notice of violation and having to pay an Administrative Monetary Penalty (fine). Even the mere prospect of a fine would have a profound chilling effect on passengers' freedom of expression.

*Third*, organizations like our APR, that provide a platform for passengers to exchange information, could be the target of notices of violation and Administrative Monetary Penalties if we do not cave in to demands to remove posts, such as the one we received from Mr. Dany Ross on July 9, 2024.

*Lastly*, journalists and media outlets who report on the outcome of passenger complaints decided by the Agency's complaint resolution officers would be at risk of being served with a notice of violation and being required to pay an AMP.

### **Making subsection 85.09(1) of the *Act* a designated provision is unlawful and unconstitutional**

Making [subsection 85.09\(1\)](#) of the *Act* a designated provision insofar as the media and the public are concerned is *ultra vires* the Agency and is contrary to the *Charter*.

*First*, the Agency is a quasi-judicial tribunal and an economic regulator with a mandate to deal with transportation matters under Parliament's legislative authority, including aviation. The Agency performs two functions:

- (1) The Agency applies rules that establish responsibilities of transportation service providers and rights of users and that level the playing field among competitors. As part of its regulatory function, the Agency makes determinations as to the issuance of licences and permits; and
- (2) The Agency adjudicates commercial and consumer transportation-related disputes and accessibility issues.

Parliament did not confer nor did it intend to confer any powers on the Agency to regulate the media's and/or the public's speech and expression about any matter, including but not limited to complaints adjudicated in a legally binding manner by the Agency's complaint resolution officers. The Agency's powers to enforce, through AMPs, the *Act* and the regulations made thereunder arises as part of the Agency's function as an economic regulator, not as a quasi-judicial tribunal.<sup>4</sup>

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<sup>3</sup> ["WestJet tried to silence couple fighting for compensation after airline cancelled their flight,"](#) CBC Go Public (Nov. 25, 2024).

<sup>4</sup> [IATA v. Canada \(Transportation Agency\), 2024 SCC 30 at para. 6.](#)

Consequently, it is *ultra vires* the Agency to enforce and/or make regulations that purport to allow the Agency to enforce [subsection 85.09\(1\)](#) by way of AMPs against any person other than those associated with a regulated entity (e.g., transportation service providers and/or their agents), such as passengers, members of the public, consumer protection organizations, journalists, and the media.

In short, public expressions of the latter group are none of the Agency's business, and the Agency cannot lawfully appoint itself to police such public expressions.

*Second*, and perhaps more importantly, [subsection 85.09\(1\)](#) of the *Act* is unconstitutional in that it infringes on the open court principle and freedom of expression guaranteed by s. 2(b) of the *Charter*, and the infringement is unjustifiable in a free and democratic society.

The century-old open court principle provides that legal proceedings are presumptively open to the public. Citizens and the media have the right to access court proceedings and the same evidence that the court relied on. The open court principle is a hallmark of a democratic society, which permits the public to discuss and put forward opinions and criticisms of legal practices and proceedings. The open court principle is inextricably tied to freedom of expression and the press guaranteed by section 2(b) of the *Charter*.<sup>5</sup>

Curtailment of public access to legal proceedings can only be justified where there is the need to protect social values of superordinate importance, such as if disclosure would subvert the ends of justice or unduly impair its proper administration, or to protect a vulnerable party from revictimization.<sup>6</sup> Generic privacy concerns, which do not rise to the level of posing a threat to a person's dignity or physical safety, are insufficient to displace the presumption of openness in legal proceedings.<sup>7</sup>

The open court principle was held to apply to tribunals engaged in adjudication of disputes between parties in an adversarial setting in the context of immigration, labour relations, automobile injuries, whistleblower protection, and human rights.<sup>8</sup> Ontario's *Freedom of Information and Protection of Privacy Act* was found to infringe on s. 2(b) of the *Charter* and declared to have no force or effect to the extent it prevented public disclosure of adjudicative records of tribunals that adjudicate disputes in an adversarial setting.<sup>9</sup>

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<sup>5</sup> *Canadian Broadcasting Corp. v. New Brunswick (AG)*, [1996] 3 SCR 480 at paras. 21-23; and *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 31-34.

<sup>6</sup> *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras. 4-5; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at paras. 14 and 27; *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 30.

<sup>7</sup> *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 85.

<sup>8</sup> *Southam Inc. v. Canada (MEI)*, [1987] 3 FC 329; *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110; *Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106 at para. 104; *El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT) at paras. 59-60; *Woodgate v. RCMP*, 2022 CHRT 27 at para. 12.

<sup>9</sup> *Toronto Star v. AG Ontario*, 2018 ONSC 2586.



The Agency is required to follow the open court principle. Documents filed with the Agency in the course of adjudication of consumer disputes between passengers and airlines, such as submissions and evidence, are placed on the public record, unless the Agency makes a confidentiality order on the basis of the same strict legal test used by the courts. In 2015, the Federal Court of Appeal held that it was “impermissible” for the Agency to refuse to provide such documents to members of the public in the absence of a confidentiality order, on the mere basis of generic privacy concerns.<sup>10</sup>

[Subsection 85.09\(1\)](#) of the *Act* creates a presumption of secrecy and covertness for the new process of adjudication of consumer disputes between passengers and airlines, contrary to s. 2(b) of the *Charter*, by making all information provided by passengers and the airlines for adjudication confidential unless the party providing the information agrees otherwise.

The practical effect of [s. 85.09\(1\)](#) of the *Act* is a Star Chamber-like process, where the public and the media have no access to the evidence used by the decision maker to determine whether the airline owes compensation to the passenger, and even the reasons for the decision will remain secret. Instead, only bald bottom-line conclusions will be published pursuant to [s. 85.014](#). This, in turn, shields from public scrutiny both the Agency’s conduct in adjudicating disputes and the airlines’ treatment of passengers. As Professor Paul Daly so aptly summarized:

This is a breach of the open justice principle, with the effect that proceedings before the Agency will be conducted in secret. Perhaps the rationale here is that the complaints resolution officers (82.01(1)) engage in mediation (85.01) which is best conducted in private. But the confidentiality clause sweeps beyond the mediation stage to encompass the entirety of air passenger proceedings before the Agency, including those that are quasi-judicial in nature. It is difficult to see how this clause would survive constitutional challenge based on the open justice principle grounded in s. 2(b) of the *Charter of Rights and Freedoms*.

[...]

Taken together, these provisions would create mechanisms for binding mediation and adjudication that would operate largely in secret. Decision-making would be done in the shadows, on the basis of past decisions and guidelines that have only seen the light of day to the extent the Agency chooses.<sup>11</sup>

[Subsection 85.09\(1\)](#) offends s. 2(b) of the *Charter*. While parties are at liberty to participate in mediation in private, binding adjudication of their disputes by a tribunal remains subject to the open court principle.

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<sup>10</sup> *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para. 80.

<sup>11</sup> Daly, Paul. *Judicial Oversight and Open Justice in Administrative Proceedings*, Administrative Law Matters (May 18, 2023).

## Conclusion

[Subsection 85.09\(1\)](#) of the *Act* **should not be designated** as a provision that may be enforced by way of an Administrative Monetary Penalty.

Sincerely yours,

Dr. Gábor Lukács  
President



## Appendix: About *Air Passenger Rights*

*Air Passenger Rights* [APR] is Canada's independent federal nonprofit organization of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation. APR has a track record of successfully predicting shortcomings and loopholes in legislation relating to air passenger rights.

- In 2017, APR appeared before the House of Commons Standing Committee on Transport, Infrastructure and Communities [TRAN] and submitted [a brief](#), cautioning that the *Transportation Modernization Act* (Bill C-49) was inadequate.
- In 2018, APR appeared before the Standing Senate Committee on Transport and Communications and submitted [a brief](#), cautioning again that the *Transportation Modernization Act* was inadequate.
- In 2019, APR published a 52-page report entitled “[Deficiencies of the Proposed Air Passenger Protection Regulations](#)” about how airlines would exploit the *Air Passenger Protection Regulations*'s shortcomings and loopholes.
- In 2020, APR appeared before the TRAN and in 2021 submitted a brief entitled “[Withheld Passenger Refunds: A Failure by Design](#)” on the refunding of flights cancelled by airlines.
- In November 2022, APR appeared before the TRAN and in December 2022, mere days before the 2022 holiday season air travel meltdown, APR submitted a 29-page brief entitled “[From the Ground Up: Revamping Canada's Air Passenger Protection Regime](#)” setting out detailed recommendations for legislative amendments, including higher administrative monetary penalties for airlines that violate passengers' rights.
- In 2023, following the 2022 holiday season air travel meltdown, APR appeared before the TRAN again as part of the study of the *Air Passenger Protection Regulations*.
- In 2025, APR obtained an injunction prohibiting Canada's second-largest airline from misleading passengers about their entitlement to reimbursement for meals and accommodation in the event of certain flight disruptions: *APR v. WestJet Airlines Ltd.*, [2025 BCSC 155](#).

APR's key predictions about the shortcomings and loopholes created by the *Transportation Modernization Act* and the *Air Passenger Protection Regulations* have been validated in the five years that have passed since the regulations came into force. APR's success in predicting shortcomings and loopholes in consumer protection legislation in the air travel sector is grounded in three factors:

- **Experience based.** APR's predictions and submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independent.** APR takes no government or business funding.
- **No business interest.** APR has no business interest in the aviation sector.

APR's presence on social media includes the [Air Passenger Rights \(Canada\)](#) Facebook group with over 240,000 members, and the [@AirPassRightsCA](#) X/Twitter feed with over 21,200 followers.

APR was founded and is led by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

### **Gábor Lukács, PhD (President)**

Dr. Lukács holds a PhD in mathematics from York University (2003), and taught financial mathematics at Dalhousie University.

Since 2008, Dr. Lukács has filed more than two dozen successful complaints with the Canadian Transportation Agency [CTA], challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers. In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking. In November 2023, the Public Interest Advocacy Centre (PIAC) awarded Dr. Lukács the Harry Gow Award for Transportation and Competition to Connect Communities.

Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar,<sup>12</sup> the academic community,<sup>13</sup> and the judiciary.<sup>14</sup> Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,<sup>15</sup> in respect of air passenger rights. He successfully challenged the CTA's lack of transparency and the reasonableness of the Agency's decisions. In 2020, the Federal Court of Appeal allowed Dr. Lukács to intervene in the airlines' challenge to the *Air Passenger Protection Regulations*, noting that he "would defend the interests of airline passengers in a way that the parties cannot."<sup>16</sup> In 2024, the Supreme Court of Canada allowed Dr. Lukács to intervene and present written and oral arguments in the airlines' challenge to the *Air Passenger Protection Regulations*, in which the high court most decisively sided with consumers.<sup>17</sup>

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<sup>12</sup> Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.

<sup>13</sup> Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018; and [Second Annual Business Ethics Conference: Ethics in the Aviation Industry](#), McGill University, November 2024.

<sup>14</sup> *Lukács v. Canada*, [2015 FCA 140 at para. 1](#); *Lukács v. Canada*, [2015 FCA 269 at para. 43](#); and *Lukács v. Canada*, [2016 FCA 174 at para. 6](#).

<sup>15</sup> *Delta Air Lines Inc. v. Lukács*, [2018 SCC 2](#).

<sup>16</sup> Order of the Federal Court of Appeal (Near, J.A.), dated March 3, 2020 in File No. A-311-19; see also *International Air Transport Association v. Canadian Transportation Agency*, [2022 FCA 211 at para. 8](#).

<sup>17</sup> *International Air Transport Association v. Canada (Transportation Agency)*, [2024 SCC 30](#).

**Final CTA Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)**

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010  
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010  
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.