

Halifax, NS
lukacs@AirPassengerRights.ca



January 29, 2016

URGENT

VIA FAX

Judicial Administrator
Federal Court of Appeal
Ottawa, ON K1A 0H9

Dear Madam or Sir:

**Re: Dr. Gábor Lukács v. Canadian Transportation Agency
Federal Court of Appeal File No.: A-39-16
Request for directions and/or case management to expedite proceeding**

I am the Applicant in the present application for judicial review. I am writing to ask for the intervention of this Honourable Court to expedite the proceeding and bring it to a hearing in the coming weeks due to its significant impact on and ramifications for the entire travelling public.

The application concerns the legality of the Agency's proposed policy to "not require" airlines that rent aircraft and crew from a third party to hold an economic licence, contrary to the explicit direction of Parliament in s. 57 of the *Canada Transportation Act*, S.C. 1996, c. 10 ("CTA"). The proposed policy effectively exempts such airlines from the stringent requirements set out in s. 61 of the *CTA*, a decision-making power that Parliament explicitly withheld from the Agency in s. 80(2).

The Applicant's position is that the Agency is improperly engaging in a legislative act in the guise of decision-making. The proposed policy requires either:

- (i) Parliament amending the *CTA*; or
- (ii) the Agency seeking and obtaining the approval of the Governor in Council to make regulations, as required by s. 36(1) of the *CTA*.

The latter would also require compliance with the provisions of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.

Some of the direct and immediate impacts of the proposed policy on the travelling public are summarized in the Agency's own announcement about the proposed policy (enclosed):

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.]

Thus, the proposed policy circumvents the will of Parliament, and exposes the public to significant risk from which Parliament intended to protect the public by enacting the *CTA* and laying down statutory requirements for operating an airline.

Due to the risk to the public posed by the proposed policy, a judicial determination of its legality is a matter of public interest and great urgency. I have attempted to seek the cooperation of the Agency in expediting the proceeding and ensuring that the Agency does not end-run this Court by issuing a decision or order purporting to implement the proposed policy; alas, the Agency has refused to cooperate (see attached correspondence).

In these circumstances, I have no choice but to ask for the intervention of this Honourable Court to expedite the proceeding by way of directions and/or case management.

Sincerely yours,

Dr. Gábor Lukács
Applicant

Enclosed: "Consultation on the requirement to hold a licence," Canadian Transportation Agency
Email of Mr. John Dodsworth to Dr. Lukács, dated January 28, 2016

Cc: Mr. John Dodsworth, counsel for the Canadian Transportation Agency



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Consultation on the requirement to hold a licence

The Canadian Transportation Agency (Agency) is requesting comments from the aviation industry and other interested stakeholders on whether persons who have commercial control over an air service, but do not operate aircraft (Indirect Air Service Providers), should be required to hold a licence.

Background

The Canadian Transportation Agency (Agency) regulates the licensing of air transportation pursuant to Part II of the [Canada Transportation Act](http://laws-lois.justice.gc.ca/eng/acts/C-10.4/index.html) (<http://laws-lois.justice.gc.ca/eng/acts/C-10.4/index.html>) (Act) and the [Air Transportation Regulations](http://laws-lois.justice.gc.ca/eng/regulations/SOR-88-58/index.html) (<http://laws-lois.justice.gc.ca/eng/regulations/SOR-88-58/index.html>).

The Act requires that persons hold the appropriate licence before they can operate a publicly available air transportation service (air service), which subjects these persons to a number of economic, consumer and industry protection safeguards, including with respect to [tariffs](https://www.otc-cta.gc.ca/eng/tariffs) (<https://www.otc-cta.gc.ca/eng/tariffs>), [financial requirements](https://www.otc-cta.gc.ca/eng/publication/financial-requirements-guide-air-licence-applicants) (<https://www.otc-cta.gc.ca/eng/publication/financial-requirements-guide-air-licence-applicants>), and [Canadian ownership](https://www.otc-cta.gc.ca/eng/canadian-ownership) (<https://www.otc-cta.gc.ca/eng/canadian-ownership>). When more than one person is involved in the delivery of the air service, it is important to determine who is operating the air service and is required, as such, to comply with the licensing requirements.

When the *National Transportation Act, 1987* (subsequently consolidated and revised by the Act) was introduced in 1987, it ushered in the deregulation of the aviation industry. At this time, the distinction between chartered and scheduled air carriers was eliminated for domestic air services. Industry subsequently developed new and innovative approaches to the delivery of air services that did not always fit into the Act's licensing parameters. One such approach is the Indirect Air Service Provider model, where persons have commercial control over an air service and make decisions on matters such as on routes, scheduling, pricing, and aircraft to be used, while charter air carriers operate flights on their behalf.

The Agency's current approach to determining which person is operating a domestic air service originated from its [1996 Greyhound Decision](https://www.otc-cta.gc.ca/eng/ruling/232-a-1996) (<https://www.otc-cta.gc.ca/eng/ruling/232-a-1996>) and requires the person with commercial control to hold the licence, irrespective of whether the

person operates any aircraft. As of December 1, 2015, 16 persons that did not operate any aircraft held licences providing them the authority to operate domestic air services.

For international air services, the Regulations require the air carrier, not the charterer, to hold a licence. Consequently, under the current approach, a person who is in commercial control of an air service and does not operate aircraft must hold the licence for domestic, but not for international air services.

All licensed air carriers are required to hold a Canadian Aviation Document (CAD) (<http://www.tc.gc.ca/eng/civilaviation/publications/tp8880-chapter1-section3-5193.htm>) issued by the Minister of Transport. When a person does not operate any aircraft, they are neither required nor entitled to obtain a CAD. The Agency has issued domestic licences to Indirect Air Service Providers on the basis that the CAD requirement is met by the charter air carrier.

The Agency, after careful review and study, is considering a change in its approach to determining who is operating an air service in situations where a person has commercial control over an air service, but does not operate aircraft. It is important to note that a review of the Act (<http://www.tc.gc.ca/eng/ctareview2014/canada-transportation-act-review.html>) is underway and may recommend changes to the legislative framework. Regulatory reforms may also be contemplated.

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.

However, the Agency would preserve its discretion to apply legislative and regulatory requirements in a purposive manner to ensure that the objectives underpinning the air licensing regime continue to be met. Accordingly, should a person who does not operate aircraft hold themselves out to the public as an air carrier and not a charterer or structure their business model to circumvent the licensing requirements, the Agency could determine that they are operating the air service. Considerations in any such determination could include the manner in which they hold themselves out to the public, whether their involvement goes beyond a typical contractual charter arrangement, and the extent to which their operations are integrated into those of the air carrier.

When an air service is marketed and sold by an air carrier that has commercial control and the flights are operated by another air carrier, pursuant to a wet lease, code share, blocked space, capacity purchase agreement or other similar agreement, the Agency will continue to require the air carrier in commercial control to hold the licence for that air service, consistent with existing regulatory requirements.

Call for comments

The Agency invites interested stakeholders to submit their comments on the Agency's proposed approach, including with respect to the following questions:

- Whether Indirect Air Service Providers should be required to hold a licence to sell their services directly to the public, in their own right. Provide a clear explanation for your position;
- What criteria the Agency should consider in determining whether an Indirect Air Service Provider is holding itself out as an air carrier, and therefore, should be required to hold the licence; and
- What regulatory amendments, if any, should be contemplated to clarify who is operating an air service and is required, as such, to hold a licence.

Participants may submit **written** comments no later than the end of the business day on January 22, 2016.

All submissions made as part of this consultation process will be considered public documents and, as such, may be posted on the Agency's website.

How to Participate

Submit your comments to consultations@otc-cta.gc.ca (<mailto:consultations@otc-cta.gc.ca>).

Contact:

John Touliopoulos - Manager, Financial Evaluation Division (<http://geds20-sage20.ssc-spc.gc.ca/en/GEDS20/?pgid=015&dn=cn%3DTouliopoulos%5C%2C%20John%2C%20ou%3DRACD-DARC%2C%20ou%3DIRDB-DGRDI%2C%20ou%3DCTA-OTC%2C%20o%3DGC%2C%20c%3DCA>)

Telephone:

819-953-8960

Email:

john.touliopoulos@otc-cta.gc.ca

Latest Milestones

Title	Date
Deadline for submissions	January 22, 2016

Date modified:
2015-12-21



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Consultation on the requirement to hold a licence

The Agency is asking the aviation industry and other interested stakeholders whether persons who have commercial control over an air service, but do not operate aircraft (indirect air service providers), should be required to hold a licence.

[Details of the consultation \(/eng/consultation/consultation-requirement-hold-a-licence\)](#)

Date modified:

2015-12-23

From John.Dodsworth@otc-cta.gc.ca Thu Jan 28 12:34:40 2016
Date: Thu, 28 Jan 2016 16:34:27 +0000
From: John Dodsworth <John.Dodsworth@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Alexei Baturin <Alexei.Baturin@otc-cta.gc.ca>, Wendy Liston <Wendy.Liston@otc-cta.gc.ca>
Subject: RE: Bringing the application to a hearing in an expedited manner [Federal Court of Appeal File No.: A-39-16]

Dr. Lukacs

Thank you for your email and your request that we agree that the hearing of the application you have brought be heard on an expedited basis.

I do not agree that this matter is as straightforward as you suggest. I will require the time provided for in the Federal Court Rules to fully respond to your application

Nor can the Agency provide the undertaking you request.

Best regards

John Dodsworth

-----Original Message-----

From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Sent: January-26-16 9:09 PM
To: John Dodsworth
Cc: Alexei Baturin; Wendy Liston
Subject: Bringing the application to a hearing in an expedited manner [Federal Court of Appeal File No.: A-39-16]

Dear Mr. Dodsworth,

I am writing in relation to the above-noted application for judicial review before the Federal Court of Appeal.

1. I am requesting that, bearing in mind the impact of the subject matter of the application on the travelling public, the Canadian Transportation Agency cooperate in bringing the application to a hearing in the coming weeks.

(a) As you know, I have already served my affidavit in support of the application.

(b) I would propose that by January 29, 2016, the Agency serve its affidavit or confirm that it will rely only on the evidence in my affidavit. Since the application concerns a question of law, I do not anticipate having any factual disputes.

(c) I propose that we speak on the phone on January 28 or 29, 2016 and discuss:

(i) the timeline for the next procedural steps to ensure that the case is ready for hearing in the coming weeks; and

(ii) sending a letter, on behalf of both parties, to the Judicial Administrator about the proposed timeline and our request to bring the matter to a hearing in an expedited manner.

2. In the meantime, I am requesting that the Agency undertake not to issue a decision or order that purports to relieve Indirect Service Providers from the requirement of holding a licence until the application has been heard and determined by the Court.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs