WeirFoulds LLP

Transportation Notes: Standing and Waiting – Determination of Passenger Rights Advocate's Standing to Bring Application Still Stuck on the Tarmac

September 13, 2021

By Carlos Martins, Andrew MacDonald

On July 31, 2017, 20 commercial flights destined for Toronto or Montreal were redirected to Ottawa due to unexpected severe thunderstorms. With the sudden influx of traffic at the Ottawa airport, all 20 diverted flights were delayed on the tarmac for at least one hour. Two of those flights, both operated by Air Transat, experienced particularly lengthy waits, with one delayed by nearly five hours and the other by nearly six.

After an investigation and inquiry, Air Transat was sanctioned by the Canadian Transportation Agency (the "Agency"), which issued a number of orders against the carrier, including requiring it to compensate affected passengers for any out-of-pocket expenses incurred as a result of the ordeal. In addition, the Agency's enforcement wing levied an administrative monetary penalty of $295,000 against Air Transat – at the time, this was by far the largest such penalty ever imposed on an airline. However, the Agency stipulated that a "credit" would be applied against the penalty in respect of any amounts Air Transat paid to passengers beyond the expenses compensation it had been ordered to pay. Air Transat had offered up to $500 to each of the 590 passengers on the affected flights.

Gábor Lukács, an air passenger rights advocate based in Halifax, sought to challenge the Agency's decision to allow for this credit mechanism to offset the penalty and brought an application for judicial review. Lukács was not a passenger on either of the affected flights, so he sought public interest standing to bring his application.

In September 2019, after a number of interlocutory proceedings to sort out the correct court and procedure, the Federal Court (the "FC") determined that Lukács did not meet the test for public interest standing and grounded his application (*Lukács v Canada (Transportation Agency)*, 2019 FC 1148). However, in the summer of 2021, the Federal Court of Appeal (the "FCA") set aside that decision and sent Lukács's application back to make another attempt at take off (2021 FCA 141).

Preparing for Departure: Background Facts and Application to Federal Court of Appeal

The Agency received 72 complaints from passengers on the two affected Air Transat flights. The complaints described inadequate supply of food and drink, high temperatures, and several passengers suffering physical illness. No passenger on either flight was disembarked during the delays. At least one passenger called 911.

The Agency opened an inquiry, which included an investigation and a two-day oral hearing at the end of August 2017. On November 30, 2017, the Agency issued a Determination and a Notice of Violation.

In its Determination, the Agency found that Air Transat had failed to properly apply its tariff rules relating to the offer of drinks and snacks and to disembarking during a tarmac delay. The Agency ordered Air Transat to compensate all affected passengers for any

expenses they had incurred as a result of its failure to properly apply its tariff.

While, at the time, the Agency had no authority to order compensation beyond the reimbursement of expenses (Canada's *Air Passenger Protection Regulations* were not brought in until 2019), Air Transat offered compensation of up to $500 to each affected passenger.

The Notice of Violation issued by the Agency's Designated Enforcement Officer ("DEO") required Air Transat to pay $295,000 – $500 for each of the 590 passengers on the affected flights – to "The Receiver General for Canada" on or before January 3, 2018. However, while not mentioned in the Notice of Violation itself, the cover letter stated, in part:

A credit up to the amount of the penalty will be applied and accepted as payment in lieu upon provision of evidence, to the satisfaction of the Chief Compliance Officer, of the amount of compensation provided to passengers on the affected flights, excluding the refund of out of pocket expenses.

Lukács, who is a frequent critic of the Agency and often challenges its decisions in court, the media and elsewhere, did not agree that a credit should be applied against the penalty. In his view, the Government of Canada should collect the full $295,000 penalty that the Agency levied against Air Transat, no matter what compensation was paid to passengers. Lukács commenced a judicial review application in the Federal Court of Appeal at the end of 2017.

Awaiting Clearance for Takeoff (Is This the Right Runway?): Transfer to Federal Court

Air Transat took the position that Lukács lacked standing to bring his application and that the FCA lacked jurisdiction to hear it. After a series of directions from the FCA, Air Transat brought a formal motion to dismiss the application on these grounds.

Meanwhile, Lukács brought a motion to contest the sufficiency of the tribunal record filed by the Agency, seeking further documentation relating to the DEO's decision.

At the end of May 2018, the FCA ruled that it does not have original jurisdiction to hear the application, and transferred it – and all pending motions relating to it – to the Federal Court.

Taxiing Back to the Gate: Federal Court Dismisses Application

Air Transat's motion was heard in March 2019 in Halifax. Justice Heneghan applied the public interest standing test articulated by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45:

1. Whether there is a serious justiciable issue raised;
2. Whether the plaintiff has a real stake or a genuine interest in it; and
3. Whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

Lukács argued that he met all three elements of the test. The main justiciable issue he said his application raised was whether the DEO had the statutory authority to implement the "credit" mechanism set out in the November 30, 2017 cover letter.

The FC held that Lukács did not meet any of the elements of the test and dismissed the application. In her decision, Heneghan J. held that, while the Government of Canada might have an interest in whether or not funds are directed to the Consolidated Revenue Fund of Canada, she was not persuaded that Lukács had a "real stake or a genuine interest" in the manner in which the penalty was to be paid by Air Transat.

Keep that Pre-Takeoff Checklist Handy: Standing Should be Determined at Merits Hearing

Lukács appealed the FC's decision. The FCA held that Heneghan J. had erred in dismissing the application because, in the circumstances, it was premature to rule on the question of Lukács's standing to bring it. Somewhat ironically – coming after a number of interlocutory steps and more than three years after the FCA decided that the proceeding should have been commenced in the Federal Court – the underlying reason for the FCA's decision to send it back to the FC again is that judicial review applications are meant to proceed and be determined "summarily".

The FCA held that, in general, an interlocutory motion to dismiss a judicial review application should only be granted where the circumstances suggest "that the proceeding is doomed to fail." The discretion to make a final determination on standing on a motion to strike out an application for judicial review "should be exercised sparingly – and explicitly". Because the FC had not applied the "doomed to fail" test, it erred in law.

According to the FCA, because the evidentiary record remained unsettled – with Lukács's challenge to the sufficiency of the Agency's tribunal record (dating from the spring of 2018) still pending – it was preferable that the question of his standing be heard along with the hearing of the application on the merits.

In the interim, as has been reported in the media, Lukács has obtained documents through access to information requests that he says show that Air Transat paid $55,000 of the $295,000 to the Government of Canada. (The reporting did not disclose how much public money has so far been expended on the various court proceedings aimed at challenging the legality of what Lukács, at least, considers to be a $240,000 shortfall in the Receiver General's collections.)

The application was therefore returned once more to the Federal Court where, presumably, the next order of business is to finalize the evidentiary record, likely through further interlocutory proceedings. Once that is done, the court should be in a position to hear and determine whether Lukács's application should be cleared for takeoff – and, at the same time, whether he has standing to be on board.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:

Carlos Martins

Toronto
416.619.6284

Email:
cmartins@weirfoulds.com

Carlos Martins is a skilled litigator with 30 years' experience providing legal advice in diverse sectors. He is a member of the firm's Commercial Litigation Practice Group and specializes in aviation and defamation law.

Andrew MacDonald

Toronto
416.619.6291

Email:
amacdonald@weirfoulds.com

Andrew MacDonald is a Partner at WeirFoulds LLP with a civil litigation and advisory practice that includes extensive experience in media and defamation law, aviation law and administrative law.

© 2026 WeirFoulds LLP