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TRANSPORTATION NOTES

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Definition of "Publicly Available" Vexes Court

Marina District Development Company, doing business as "Borgata Hotel Casino & Spa" (the "Casino") operates a casino in Atlantic City, New Jersey. Between July 2008 and March 2009, two aircraft owned and operated by the Casino undertook ten flights between Toronto/ Montreal and Atlantic City, for the purpose of bringing some of its preferred clients to its facility. The selection of clients for the perk was entirely in the discretion of the Casino and there was no way to request the service, much less to have an entitlement to it.

In Canada, those who operate a "publicly available air service" need a licence from the Canadian Transportation Agency (the "Agency"), pursuant to s. 57(a) of the *Canada Transportation Act* (the "*Act*").

On April 15, 2009, the Agency issued a notice of violation against the Casino for operating a "publicly available air service" without a licence. An Administrative Monetary Penalty ("AMP") was issued in the amount of $25,000.

The Casino appealed the AMP to the Transportation Appeal Tribunal of Canada (the "TATC"). The TATC appeal turned on the interpretation of the term "publicly available" — a term which is not defined under the *Act*.

In support of its position, the Agency filed affidavits from three passengers on the flights in question, an enforcement officer, a manager from the Agency and an expert witness on the Agency's jurisdiction. In his affidavit, the Agency manager acknowledged that it is the Agency's position is that a corporate jet used to transport employees for a specific purpose is not publicly available.

The Casino filed affidavits from the vice-president of the National Business Aviation Association (the "NBAA") and the president of the Canadian Business Aviation Association (the "CBAA") as well as an expert witness on the mandate of the Agency.

The NBAA witness testified that, under American law, an air operator certificate was not required for the purposes of transporting guests of a company on an airplane. In this regard, a vice-president of the Casino gave evidence that complimentary perks to high-level customers are a key ingredient of the Casino's marketing strategy and that the free flights are at the sole discretion of the Casino. Evidence was also tendered by the Casino that no customer was entitled to such service and that the provision of it was not based on the amount spent at the Casino's facility.

In arguing the merits of the case, the Agency noted that the Saskatchewan Court of Appeal had previously held that just because passengers on a company aircraft are guests, it does not necessarily mean that the service is not "publicly available", as these guests are simply a subset of the public using the service. That Court held that it is sufficient for a segment of the public to have access to a flight for it to be properly characterized as "publicly available".

In turn, the Casino relied on a legal dictionary's definition of "available" — meaning "available to all to use".

Having heard these arguments, the TATC crafted a test to determine whether a service was "publicly available", as follows:

> Any member of the public who is interested in obtaining the service can, of his own initiative, contact the service provider to enquire about the availability of flights and reasonably expect to be able to book a flight. Should the conditions be to his satisfaction including price and schedule and they meet certain conditions, if any exist, the service provider is offering an air service that is publicly available. If any member of the public cannot do so, the service is not publicly available and section 57 of the CTA [the *Act*] does not apply.

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The TATC found that the Casino does not publicize or promote the free flights, the public could not contact the Casino to enquire about the availability of flights and no client of the Casino could have a reasonable expectation to call and arrange a flight. The TATC also noted that, because only 0.1% of the Casino's customers were offered the service, it was "more akin to private than public."

The TATC held that the Casino was not offering a "publicly available air service" and, as a result, a licence from the Agency was not required.

The Agency then appealed the TATC's decision to the Appeal Panel of the TATC. The Appeal Panel faced three issues: first, it had to determine the standard of review to be applied to the TATC decision; second, it had to consider whether the TATC created a flawed test for determining whether an air service is "publicly available" and, finally, it had to rule on whether the TATC had misapplied its own test.

As to the standard of review, the Appeal Panel determined that it would use the standard of correctness on the basis that, at first instance, the Agency was not acting in a

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Definition of "Publicly Available" *(cont'd)*

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quasi-judicial capacity but rather in an enforcement capacity. The Appeal Panel also found that the TATC had the jurisdiction to determine the legal test, based on prior jurisprudence under the *Aeronautics Act*.

As to the next issue, the Appeal Panel took a dim view of the suitability of the test put forth by the TATC. It criticized the TATC for focusing too much on the economic regulation part of the Agency's mandate and not giving effect to an ordinary meaning of the term "publicly available". The Appeal Panel found that "while an operator must meet economic requirements in order to get a licence from the Agency, the obligation to do so rests on whether the service is publicly available."

In essence, the Appeal Panel determined that it is the nature of the service that determines whether it is publicly available — and suggested that some of the relevant considerations are: "How it is made known to the affected public and whether the initial contact is made by a member of that public is irrelevant. If the flight is made available to a segment of the public, even at the initiative of the operator, then it is 'publicly available'."

On the issue of whether the TATC properly applied its own test, the Appeal Panel took a similarly dim view. It noted that, in his affidavit, the vice-president of the Casino testified that a customer who received a free flight and continued to spend at his current level would likely continue to receive the complimentary service. It also noted that one of the Casino's customers stated in an affidavit that he was regularly offered free flights "whether he initiates contact with the Casino or vice versa."

On this evidence, the Appeal Panel found that the TATC had made an erroneous finding when it held that premium clients would not have a reasonable expectation of booking a complimentary flight.

The Appeal Panel reinstated the penalty, but reduced it to $12,500, given that it was the Casino's first offence.

The Casino sought a judicial review of the Appeal Panel's decision from the Federal Court of Canada. The issues before the Court were: (a) what is the appropriate standard of review; and (b) did the Appeal Panel err in its decision?

On the first of these issues, the Court had no trouble in finding that it should apply a standard of reasonableness in assessing the lower level decision, given that the Appeal Panel was interpreting its "home statute". It found that it would not intervene in the Appeal Panel's decision unless the Appeal panel had come to a conclusion that "is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it." The Court noted that it was not its function to substitute its own view of a preferable outcome, nor was its function to reweigh evidence.

The Court then turned to the merits in order to decide whether the Appeal Panel decision met the standard of review outlined in the paragraph above.

As a starting point, the Court noted that the Appeal Panel's conclusion that "a service available only to a segment of the public is 'publicly available'" borders on tautology in that it provides no insight into what constitutes a "segment of the public." The Court found that this was unlike the more useful test formulated by the TATC (quoted above).

> ***[The Federal Court] appreciates that this is the third round of litigation between the parties and redetermination followed by a potential judicial review may entail a fourth or fifth round with all associated costs. Yet [the Court] cannot let this concern trump the proper relationship between courts and specialized tribunals.***

The Court indicated that even if the Appeal Panel was able to review the TATC's test on the correctness standard, the Appeal's Panel's reformulation of the test was "unintelligible," vague and not properly justified. Moreover, there was no explanation as to why a less clearly defined test is preferable to the more clearly defined test created by the TATC. Accordingly, the Court could interfere with the Appeal Panel's decision.

The Appeal Panel's decision was set aside. Nevertheless, the Court decided that it would not restore the TATC's decision, nor would it determine the issue itself. Rather, it felt that it would benefit from a more cogent interpretation of the test from the Appeal Panel.

The judicial review was granted and the matter was returned the Appeal Panel for redetermination.

Marina District Development Company v. Attorney General of Canada, 2013 FC 800

Cabin Photography

Earlier this year, Gabor Lukács filed a complaint with the Canadian Transportation Agency (the "Agency") which was prompted by an incident that was reported in the media when a passenger was removed for taking photographs on board a United Airlines flight. The removal of the passenger was undertaken on the basis that he was violating a prohibition on photography in the cabin, as published in *Hemispheres*, United's in-flight magazine. The prohibition reads as follows:

> ONBOARD PHOTO AND VIDEO The use of still and video cameras, film or digital, including any cellular or other devices that have this capability, is permitted only for recording of personal events. Photography or audio or video recording of other customers without their express prior consent is strictly prohibited. Also unauthorized photography or audio or video recording of airline personnel, aircraft equipment or procedures is always prohibited. Any photography (video or still) or voice or audio recording or transmission while on any United Airlines aircraft is strictly prohibited, except to the extent specifically permitted by United Airlines.

Mr. Lukács' complaint was that, because this prohibition was not in United's conditions of carriage, it is "misleading" pursuant to s. 18 (b) of the *Air Transportation Regulations*, SOR/88-58 (the "*ATR*s"), and therefore not enforceable.

He asserted that:

- it is very common for passengers to take photographs on board aircraft;
- United takes the policy so seriously that it would actually remove a passenger for violating it; and
- documenting the conduct of airline personnel is an important tool for passengers to defend themselves against allegations made by airlines that they conducted themselves inappropriately.

In its submissions, United clarified that the policy arose out of an incident in 2009 when a passenger videotaped another without consent or knowledge and uploaded the video for public viewing on the internet.

United argued that the policy was published in *Hemispheres* in order for it to be easily accessible to passengers and flight attendants who are required to enforce the rule when it is appropriate to do so. United felt that publishing the prohibition in its in-flight magazine prevents conflicts between passengers and the embarrassment that can arise when passengers are confronted by a flight attendant. It also reassures passengers that United would take steps if their privacy should be unreasonably interfered with.

United acknowledged that s. 122(c) of the

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Denied Boarding Compensation *(cont'd)*

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rather, that it could be entirely controlled by Air Canada by decreasing its oversell rates. It is worth noting that while the present case arises out of a case dealing with overbooking and denied boarding, and while the decision technically only applies to such cases, the decision, along with the compensation regime it adopts, is likely to have more general application. The Agency has insisted in a number of recent cases that carriers should, *prima facie*, be liable for delay, whether in international or domestic travel. This liability can be rebutted only by showing that "reasonable measures" were taken or impossible.

Using Air Canada's figures for delays related to overbooking, he argued that increasing the amount payable for delays of up to two hours from $100 to $650 (the maximum payable in the US for this delay) would amount to an additional cost of 49.5¢ per passenger. Similarly, increasing the amount from $100 to $400 (as suggested in Mr. Lukács' regime) would only amount to a cost of 27¢ per passenger.

The Agency accepted Mr. Lukács' characterization of the lack of evidence filed by Air Canada on the financial burdens placed on it by the US or Lukács regimes. It further noted that it placed little importance on the submission that Air Canada's scheme was the most generous in Canada — mainly for the reason that no other Canadian carrier deliberately oversells its flights. The Agency noted that overselling is completely within Air Canada's control and that it could manage the costs of paying compensation by engaging in overselling to a lesser extent. Again, this fails to acknowledge that more is at stake here than delay.

As to Air Canada's plea for a level playing field for denied boarding compensation, the Agency invited the airline to "propose and advocate for any regulatory changes it considers necessary to achieve such a level playing field and engage in discussions in other *fora* a where permitted by law."

The matter then turned to which regime would be applied: that of the US, or that which was proposed by Mr. Lukács. In this respect, the Agency considered three factors:

- the degree to which the regime mitigates inconvenience;
- the extent to which the regime is understandable; and
- the ease of implementation of the regime.

With respect to the first of these factors, the Agency noted that the Lukács regime provides greater incentives for Air Canada to accommodate passengers within a short period than does the U.S. regime because it provides for much lower compensation for short delays. On the other hand, the Lukács regime is also more favourable to Air Canada in that the maximum amount to be paid for long delays is much lower than that which is payable in the U.S.

The Lukács regime is also the preferred choice on the last two factors by virtue of its simplicity, compared to the U.S. mechanism which is based on the fare paid by each passenger (as opposed to the more "egalitarian" flat rate proposed by Mr. Lukács).

As a result, the Agency ordered Air Canada to apply the Lukács regime, noting that it would only apply to passengers who are denied boarding without their consent and not to passenger volunteers who accept an alternative offer from the airline.

The final issue to be determined was the method by which denied boarding compensation would be paid — cash or voucher.

Not surprisingly, Mr. Lukács argued for cash payment. He cited *Lukács v. WestJet* (CTA Decision No. LET-C-A-83-2011) where the Agency held that compensation paid in accordance with the tariff is payable in cash, cheque, credit to a credit card, or any other form acceptable *to the passenger*.

He also noted that this decision was recently endorsed in *Lukács v. WestJet (*CTA Decision No. 227-C-A-2013) in the specific context of denied boarding compensation. In further support of his argument, he submitted that:

- vouchers expire after one year;
- they are only valid on Air Canada and its affiliates, but not its code-share partners or other airlines;
- taxes, fees and surcharges cannot be paid with a voucher;
- only three vouchers may be used for a single ticket — making them less flexible; and
- vouchers from domestic flights cannot be used for transatlantic travel.

Mr. Lukács requested an order that Air Canada be required to amend its tariffs to include the following conditions on vouchers, if passengers choose to take vouchers over cash:

1. Passengers must be informed of the amount of cash they could receive in lieu of a voucher.
2. All restrictions on vouchers must be disclosed before the voucher is issued.
3. Air Canada must obtain a signed agreement of passenger that the above information was relayed.
4. The value of the voucher must be at least 300% of its cash value.
5. Vouchers may be exchanged for cash (at 1/3 of their face value) within one year.

The Agency agreed, with one exception — passengers will have only one month to convert their vouchers back in to cash.

Cabin Photos *(cont'd)*

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*ATR*s provides that a tariff must include the terms and conditions of carriage, but it maintained that photography policies do not form part of the "terms and conditions of carriage".

United argued that the tariff need only include those stipulations and conditions that are prerequisites and requirements for carriage, rather than setting out every detail of how the carrier will deal with every possible circumstance. As support for this proposition, United cited *Lukács v. Porter Airlines* (CTA Decision No. 16-C-A-2013). Put differently, United argued that the policy can be distinguished from a term and condition of carriage because it acts as a guide for passengers reflecting United's view of what behaviours and activities are appropriate in the cabin. United argued that its flight crews exercise discretion in applying the policy, based on their experience and expertise in managing large numbers of passengers in the confines of a cabin. It acknowledged that transgressions are, at times, overlooked.

The Agency noted that context weighs heavily in situations involving recording the interior of the cabin. Because there is no sanction imposed in the policy for unauthorized use of recording equipment, the photography policy does not constitute a condition of carriage. As a result, it need not be included in the tariff. Consequently, the Agency does not need to determine whether the prohibition is misleading and unreasonable. The complaint was dismissed.

Lukács v. United Airlines, Inc.,
CTA Decision No. 311-C-A-2013

End of the Line *(Denied Boarding Compensation)*

In the June 2013 edition of *Transportation Notes*, we reported on a decision of the Canadian Transportation Agency (the "Agency") (*Lukács v. Air Canada*, CTA Decision No. 204-C-A-2013) wherein the Agency found certain Air Canada tariff provisions relating to compensating delayed passengers to be unreasonable. In that decision, Air Canada was ordered to come up with a new compensation scheme. The Agency noted in that decision that the U.S. mechanism, as well as a mechanism proposed by Mr. Lukács, would be considered reasonable.

Length of Delay	***Compensation***
Less than 2 hours	50% base amount =CAD$200
2 hours, but less than 6 hours	100% base amount =CAD$400
6 hours of more	200% base amount =CAD$800

Mr. Lukács' suggested regime was as follows:

As a response to this decision, Air Canada put forth a proposed new compensation mechanism for delayed passengers that "intertwines Mr. Lukács' proposal with aspects of the U.S. regime." The reasonableness of Air Canada's new proposal was recently considered by the Agency, as were some other ancillary issues.

The first issue related to a request by Air Canada to modify the tariff language to permit the airline to decline delayed flight compensation when an aircraft has to be substituted with another with less capacity when operational or safety issues arise that are beyond Air Canada's control. Mr. Lukács argued that Air Canada's proposed tariff language did not go far enough and was not consistent with the directions given in the prior ruling. More specifically, he argued that Air Canada should only be able to avoid paying denied boarding compensation if it "took all reasonable measures to avoid the substitution, or that it was impossible for the Carrier to take such measures."

The Agency agreed with Mr. Lukács' submissions in this respect and ruled that Air Canada had failed to show cause why its new language should not be found to be unreasonable. The Agency ordered Air Canada to amend the language taking Mr. Lukács' concern into account, failing which the Agency would prescribe the appropriate text.

The second issue, which was at the heart of the matter, was an examination as to whether Air Canada's 'intertwined' proposal was reasonable.

Delay	***Compensation***	***Voucher***
Up to 1 hr	CAD$100	$150
1 to 6 hrs	100% of one-way air transportation charges, but no less than CAD$100 and no more than CAD$400	$400
6 hrs +	200% of one-way air transportation charges, but no less than CAD$100 and no more than CAD$800	$800

It proposed the following scheme:

In this arrangement, "air transportation charges" would be defined as in s. 135.5 of the *Air Transportation Regulations*, SOR 88-58. They would not include taxes, fees and surcharges payable to third parties.

Air Canada argued that its scheme properly addressed the commercial realities in that:

- the amount of compensation paid increases with the length of the delay
- in the vast majority of cases passengers would be fully reimbursed for the one-way transportation charges *and* they would be re-protected based on Air Canada's tariff provisions
- a minimum level of compensation addresses the inconvenience suffered by those passengers who purchased even the most deeply discounted fares.

Mr. Lukács' response was that the Air Canada proposal:

- does not reimburse passengers for taxes and airport fees, which are recoverable in the United States
- inappropriately treats delays of 1 and 6 hours as causing the same level of inconvenience, unlike the more scaled regime in the United States
- provides, in many cases, less than half of the compensation available under the regime in the United States
- does not address where the choice lies with respect to compensation via cash or voucher.

Mr. Lukács also addressed an argument made by Air Canada that to go beyond the proposed regime would create a financial burden on Air Canada that would place it at a competitive disadvantage. On this point, he remarked that Air Canada did not advance a "scintilla of evidence" that paying more would create any noteworthy or significant financial burden on Air Canada. He argued that overselling was not an act of God but,

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