Court File No. 16-A-37

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and DR. GÁBOR LUKÁCS

Moving Parties

- and -

CANADIAN TRANSPORTATION AGENCY and
AIR CANADA

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT AIR CANADA

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MEMORANDUM OF FACT AND LAW OF THE RESPONDENT AIR CANADA

PART I - STATEMENT OF FACTS

OVERVIEW

1. The question to be decided on this motion is whether this Honourable Court should grant leave to appeal from Decision No. 286-C-A-2016 (hereinafter "Decision No. 286") of the Canadian Transportation Agency (hereinafter the "Agency") or any related interlocutory decisions.

2. Decision No. 286 involved a somewhat unusual set of circumstances, and was thus entirely fact driven. The Agency considered all relevant evidence before it and ruled on the application in a manner consistent with its statutory mandate and rules of practice. Despite the efforts of the moving parties to turn the complaint into an inquest on Air Canada's passenger expense guidelines, the Agency made no error of law or jurisdiction in ruling upon the complaint.

Background Facts Relevant to the Motion for Leave

3. Christopher Johnson, the moving party, was scheduled to travel from London-Heathrow to Ottawa on December 10, 2013, on Flight No. AC889. The flight was first delayed and ultimately cancelled due to low hydraulic system pressure caused by a wiring fault. The hydraulic system of the aircraft used to operate Flight No. AC889 was checked prior to every flight. No defect was detected on the inbound flight, and the malfunction could not have been detected or prevented by Air Canada.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 10 – 11, paras. 38, 42

4. Most passengers were re-protected on flights the same day. To limit the effects of this irregular operation, Air Canada called for 20 volunteers to stay overnight in London. Air Canada offered to provide the volunteers with accommodation, airport-hotel transfers and meals.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 10 – 11, paras. 38, 42

5. Mr. Johnson volunteered to stay overnight in London. He was told to collect his baggage and that there would be a van outside the arrivals' area to take the passengers to a local hotel where he and the others would be provided with a room and meal vouchers.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 10, para. 38

6. Mr. Johnson says he collected his baggage and waited outside, but says he saw neither a van nor any other of the volunteers. None of the other 19 volunteers experienced any difficulties locating the van.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 10 – 11, paras. 39 – 42

7. Mr. Johnson states that after he was unable to obtain assistance from Air Canada, he stayed at a local hotel and paid for his own meals, incurring expenses of $461.77 for accommodation and $69.79 for meals.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 10 – 11, paras. 39 – 41

8. Air Canada subsequently reimbursed Mr. Johnson in the amount of $222.00 CAD, being $150.00 towards his hotel, $7.00 for breakfast, $15.00 for dinner and $50.00 for transportation to the hotel. This was consistent with Air Canada's guidelines on expense reimbursement. Air Canada also provided a one-time discount of 25% on airfare. At the outset of the application, Air Canada offered, as a goodwill gesture, to pay Mr. Johnson an additional $309.56, being the balance of his expenses.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 11, 15 paras. 40 – 41, 58

Witness Statement of Col. Johnson dated November 27, 2015 – Motion Record of the Moving Parties, Tab 3 – p. 61

9. Air Canada publishes internal guidelines for reimbursement of passenger expenses in cases of uncontrollable flight delays (such as mechanical failure). The uncontradicted evidence before the Agency was that these guidelines may be exceeded with approval of the customer relations lead. Each case is assessed on its own facts. Therefore, the guidelines do not constitute a limitation of liability.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 16, para. 64

Statement of Twyla Robinson – Motion Record of the Moving Parties, Tab 9 – pp. 177 – 178

The Application Before the Agency

10. On December 4, 2015, almost two years after the events in question, Mr. Johnson filed a complaint with the Agency alleging that Air Canada did not properly apply the terms and conditions set out in its International Passenger Rules and Fares Tariff, NTA(A) No. 458 (Tariff) with respect to his travel on Flight No. AC889 on December 10, 2013 from London, England, to Ottawa, Ontario, Canada, and that Air Canada is applying policies that are not set out in its Tariff.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 1, para. 1

11. The application was in fact filed on behalf of Mr. Johnson by Gábor Lukács, who represented himself as a co-applicant. Mr. Lukács did not travel on the subject flight.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 1, para. 1

12. The application filed by the moving parties claimed that Air Canada's policies purport to limit its liability with respect to delay of passengers, that the policies are unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and that by applying these policies, Air Canada failed to properly apply the terms and conditions set out in its Tariff, contrary to subsection 110(4) of the ATR.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 1, para. 2

13. On December 29, 2015, the Agency opened pleadings. On December 29, 2015 and January 12, 2016, the moving parties filed notices requesting answers to written questions and the production of documents pursuant to subsection 24(1) of the Canadian Transportation

Agency Rules (*Dispute Proceedings and Certain Rules Applicable to All Proceedings*), SOR/2014-104 (hereinafter the "*Dispute Adjudication Rules*").

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 2, para. 3

14. On January 20, 2016, Air Canada submitted its answer to the pleadings and made a request for confidentiality pursuant to section 31 of the *Dispute Adjudication Rules* with respect to documents submitted in response to the notices filed by the moving parties.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 2, para. 3

15. On February 24, 2016, the Agency issued Decision No. LET-C-A-6-2016 which rejected most of Air Canada's request for confidentiality. The Agency affirmed the confidentiality of one of the internal documents disclosed by Air Canada.

Decision No. C-A-6-2016 – Motion Record of the Moving Parties, Tab 13 – pp. 199 – 206

16. On March 18, 2016, the moving parties filed an additional notice seeking answers to written questions and further production of documents from Air Canada. On April 6, 2016, Air Canada filed its response to that notice.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 2, para. 4

17. On April 8, 2016, the moving parties filed a request pursuant to section 32 of the *Dispute Adjudication Rules* to require Air Canada to provide additional documents and information. The request included extensive submissions by the moving parties. The moving parties requested:

(i) documents pertaining to Air Canada's guidelines for passengers who were involuntarily denied boarding;

(ii) Air Canada's position as to whether it is liable under Article 19 of the *Montreal Convention* for the expenses of passengers who are delayed as a result of a schedule change; and

(iii) particulars of when the guideline limit is exceeded including: (1) In the years 2013-2015, how many claims for expenses occasioned by delay did Air Canada receive?; (2) How many of these claims were in relation to delays that Air Canada considered to be within its control?; and (3) Air Canada is requested to provide a list of the amounts of compensation that it paid out to these passengers.

Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 3 – 9, paras. 7 – 36

18. On May 4, 2016, the Agency denied the moving parties' request with reasons to follow. The reasons were ultimately memorialized in Decision No. 286. With respect to request (i), documents pertaining to Air Canada's guidelines for passengers who were involuntarily denied boarding, the Agency ruled the documents requested were not relevant as they dealt with involuntary delay – a different type of situation altogether:

> **The Agency is of the opinion that this application relates to the application of policies in the context of schedule irregularities. In this regard, the Agency agrees with Air Canada that the extension of the application to any circumstance that may lead to delay is, based on the evidence provided, excessive, unnecessary, and disproportionate.** To allow this request would be contrary to Section 4 of the Dispute Adjudication Rules which requires that proceedings be conducted in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed.

> **Moreover, the Agency finds that question Q9 is not relevant as the evidence that is to be produced or disclosed would not show, or at least tend to show, or increase or diminish the probability of the existence of the fact related to what is claimed.** (emphasis added)
>
> **Decision of the Canadian Transportation Agency – Motion Record of the Moving Parties, Tab 19 – p. 241**
>
> **Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 5, paras. 17 – 18**

19. With respect to request (ii), Air Canada's position as to whether it is liable under Article 19 of the *Montreal Convention* for the expenses of passengers who are delayed as a result of a schedule change, the Agency ruled that the treatment of different passengers in different circumstances was not relevant:

> **In the context of this application, the Agency finds that question Q12 is not relevant as the information sought by the applicants would neither directly nor indirectly assist in addressing this matter.** Moreover, the Agency is of the opinion that requiring Air Canada to provide an answer to question Q12 would be disproportionate to the issues at stake (i.e. the application of policies in the context of schedule irregularities). (emphasis added)
>
> **Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 6, para. 22**

20. With respect to request (iii) particulars of when the guideline limit is exceeded, the Agency ruled again that the treatment of different passengers in different circumstances was not relevant, and further, that the request was disproportionate:

> **With respect to the specific particulars sought, the Agency is of the opinion that the applicants have failed to establish that this evidence is relevant.** This information alone would not assist the Agency in determining whether Air Canada is complying with the Montreal Convention. Without having more details about the nature of the cause of the delay, the nature of the amounts being claimed, the category of expense, the reasonableness of the expense, and details regarding the amount being paid, it would be difficult, if not impossible, to determine if the compensation being paid is consistent with that required by the Montreal Convention. …

> **Moreover, to require Air Canada to attempt to compile the information being sought would be excessive in the circumstances of this case. Section 4 of the Dispute Adjudication Rules requires that the Agency conduct all proceedings in a manner that is proportionate to the importance and complexity of the issue at stake and the relief claimed. To require Air Canada to conduct a review of the expenses that it paid over the period requested would be inconsistent with this rule.** (emphasis added)
>
> **Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 9, paras. 32 and 34**

21. On May 17, 2016, the moving parties filed a request pursuant to sections 30 and 34 of the *Dispute Adjudication Rules* for an extension of time to file their reply and rebuttal evidence. The moving parties again filed extensive submissions in support of the request.

> **Request of Col. Johnson and Dr. Lukács – Motion Record of the Moving Parties, Tab 22 – pp. 302 – 305**
>
> **Reply of Col. Johnson and Dr. Lukács – Motion Record of the Moving Parties, Tab 24 – pp. 311 – 314**
>
> **Decision No. C-A-24-2016 – Motion Record of the Moving Parties, Tab 25 – pp. 315 – 320**

22. On June 10, 2016, the Agency issued Decision No. LET-C-A-24-2016 which granted the request for an extension of time. The Agency considered the submissions of all parties and denied the moving parties' request to submit additional evidence after Air Canada filed its response. The additional evidence sought to be tendered was in the nature of evidence detailing the experience of passengers who were not parties to the application.

> **Decision No. C-A-24-2016 – Motion Record of the Moving Parties, Tab 25 – pp. 315 – 320**

23. The Agency denied the request to submit additional evidence in Decision LET-C-A-24-2016 because it was not responsive to new issues raised by Air Canada in its response. It was an effort by the moving parties to buttress the case already submitted. In denying the request the

Agency applied the well-established principle that a party should not be permitted to split its case:

> In this case, the applicants do not point to any unforeseen argument or issue raised in the answer other than to say the representations contained therein are false.
>
> ...
>
> **Therefore the Agency finds that the evidence is not proper rebuttal evidence as it is not responsive to new issues in the answer but, instead, is being submitted in support of the allegations in the application.**
>
> Air Canada argued that it would be denied the opportunity to respond to the issues raised. **While the Agency could grant Air Canada an opportunity to respond as part of a decision allowing the evidence to be admitted, such an order would result in further delays in a proceeding which has already been marred by significant procedure and delays. Also, such an order could mark the beginning of "the interminable confusion that would be created by an unending alternation of successive fragments of each case" (*R. v. Miazga, supra.*).**
>
> **Decision No. C-A-24-2016 – Motion Record of the Moving Parties, Tab 25 – pp. 317 – 319**

24. The Agency also determined that the evidence sought to be tendered by the moving parties after Air Canada filed its response was of limited probative value:

> **It is not clear that one can draw from this new evidence the conclusions suggested by the applicants, that Air Canada continues to deny claims for expenses even in cases where it is not disputed that the delay was within Air Canada's control.** The statements of these passengers indicate that they were delayed and that Air Canada did not offer accommodation. However, attached to one of the statements is an email dated April 21, 2016, wherein an Air Canada representative states that in accordance with its tariff a hotel room is provided, that hotel rooms had been booked and blocked for passengers on the flight which was delayed, and that the accommodation was offered but declined. Payment towards the expenses claimed by the passengers was offered but only as a gesture of goodwill, according to the email.
>
> A review of this evidence, therefore, establishes that there was a dispute as to whether Air Canada offered accommodation in these circumstances. **The evidence therefore does not tend to establish a fact in issue in**

> **this proceeding and, as such, is of limited probative value.** (emphasis added)
>
> **Decision No. C-A-24-2016 – Motion Record of the Moving Parties, Tab 25 – p. 319**

25. On June 17, 2016, the moving parties filed their reply pleading, having been granted an extension by the Agency.

> **Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 2, para. 6**

26. After the close of pleadings, a non-party to the application attempted to file a position statement. Since the position statement was delivered after the close of pleadings on June 17, 2016, it was rejected by the Agency.

> **Decision of the Canadian Transportation Agency – Motion Record of the Moving Parties, Tab 19 – p. 241**

27. On September 21, 2016 the Agency issued Decision No. 286-C-A-2016 dismissing the moving parties' application. Decision No. 286 is 25 pages in length. The Agency canvassed the comprehensive submissions of all parties. The Agency ruled on two primary issues:

> **Issue #1**: Did Air Canada properly apply the terms and conditions set out in its tariff with respect to Mr. Johnson's travel, as required by subsection 110(4) of the Air Transport Regulations?
>
> **Issue #2**: Has Air Canada contravened subparagraph 122(c)(x) of the Air Transport Regulations, by failing to clearly state its policies regarding limitations of liability with respect to delay of passengers in its tariff?
>
> **Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 9 – 10, 20, paras. 80 and 81**

28. With respect to **Issue #1** the Agency ruled, based on the evidence before it, that this was not a case of delay, and that, in any event, Air Canada took all reasonable measures to avoid the damages sustained by Mr. Johnson:

> **The Agency is satisfied that, in the circumstances of this case, Air Canada took all reasonable measures required to avoid the damages incurred by Mr. Johnson.**
>
> **Moreover, the Agency is not satisfied that the damages incurred by Mr. Johnson were the result of the delay** and, therefore, compensable pursuant to the Tariff and the Montreal Convention. In this case, **the damages appear to have been the result of Mr. Johnson's failure to present himself, as did the other volunteers, to obtain transportation to the hotel, a room and meal vouchers**. For this reason as well, Air Canada was not obligated to compensate Mr. Johnson for the expenses he incurred as a result of failing to avail himself of the accommodations offered by Air Canada and, therefore, did not contravene the Montreal Convention or its Tariff when it offered only a goodwill payment.
>
> Based on the foregoing, the Agency finds that Air Canada has properly applied the terms and conditions set out in its Tariff with respect to Mr. Johnson's travel, as required by subsection 110(4) of the ATR. (emphasis added)
>
> **Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – p. 14, paras. 54, 55 and 56**

29. With respect to **Issue #2** the Agency ruled the evidence did not disclose that Air Canada was applying an inflexible policy in cases of delay, and it was not thus a condition which should be included in Air Canada's tariff:

> **In the circumstances of this case, the Agency finds that the applicants have failed to establish, on a balance of probabilities, that Air Canada is applying a policy that limits its liability to compensate passengers for damage occasioned by delay, contrary to its Tariff or the Montreal Convention.** The Agency is not satisfied that, in the case of Mr. Johnson or the other situations to which the applicants have referred, Air Canada was obligated to compensate the passenger for delay, and yet limited its liability in this regard by application of a policy.
>
> In situations such as the one before the Agency, where an airline is not legally required to undertake an action, whether pursuant to its Tariffs or International Conventions, the airline will often voluntarily apply

> goodwill policies to go beyond its legal requirements. Documents A-1 and A-2 are examples of such "goodwill" policies and, as such, there is no requirement that their contents be included in Air Canada's Tariff. **The Agency therefore finds that, in the circumstances of this case, those documents do not constitute a limitation of the airline's liability under its Tariff or the Montreal Convention.**
>
> **Given the Agency's finding that the applicants have failed to establish that Air Canada is applying a policy as alleged, it follows that the applicants have not met their burden to show that Air Canada has failed to clearly state, in its Tariff, its policy regarding its limits of liability respecting passengers and goods.**
>
> ... Based on these findings, it is not necessary to consider whether the policy is just and reasonable within the meaning of subsection 111(1) of the ATR, whether Air Canada has failed to apply its Tariff systemically by applying the policy instead of its Tariff, and what remedies should be provided. (emphasis added)
>
> **Decision No. 286-C-A-2016 – Motion Record of the Moving Parties, Tab 1 – pp. 19 - 20, paras. 75, 76, 77 and 79**

PART II - POINTS IN ISSUE

30. The sole issue on this motion for leave to appeal is whether the moving parties have established that there is an arguable ground to conclude that the Agency committed an error of law or an error of jurisdiction in reaching Decision No. 286, or any related interlocutory decisions. This Honourable Court may only hear appeals from a decision of the Agency where the Agency has committed an error of law or has exceeded its jurisdiction as provided by the Act.

> ***Canada Transportation Act*, S.C. 1996, c.10, section 41(1), Appendix A -Tab 1**

PART III - SUBMISSIONS

31. A moving party requesting leave to appeal decisions of the Agency to this Honourable Court must establish "some arguable ground upon which the appeal might succeed".

> ***Martin v. Canada (Minister of Human Resources Development)*, 1999 9245 (F.C.A.) at para. 5; Respondent Air Canada's Book of Authorities – Tab 1**

32. Under section 41(1) of the *Canada Transportation Act* there is a limited scope for appeal of Agency decisions. This Honourable Court cannot interfere with a decision of the Agency in the absence of an error of law or jurisdiction.

***Canada Transportation Act*, *supra*, section 41(1), Appendix A – Tab 1**

33. Decision No. 286 is entirely fact driven and is not therefore susceptible to appeal. No questions of law or jurisdiction were decided by the Agency.

***supra*, paras. 27 – 29**

34. The Agency decided **Issue #1** in favour of Air Canada because the unique circumstances of this case did not amount to delay, and because the Agency found on the evidence before it, that Air Canada took all reasonable measures to avoid the damages sustained by Christopher Johnson. The Agency did not base its findings on an interpretation of the law.

***supra*, para. 28**

35. Similarly, **Issue #2** was decided based upon a review of the evidence before the Agency regarding Air Canada's practice and the requirements for inclusion in a carrier's tariff. The ruling represented a fact and evidence based approach to a question inarguably within the Agency specialized knowledge, namely, tariff filing requirements.

***supra*, para. 29**

36. The Agency is responsible for the economic regulation of modes of transportation under federal jurisdiction. The *Canada Transportation Act* empowers the Agency to regulate domestic and international air transportation services. The Agency is a highly specialized and expert tribunal, charged with the responsibility of overseeing a complex array of transportation matters.

***Northwest Airlines, Inc. v. Canadian Transportation Agency*, 2004 F.C.A. 238 at para. 30; Respondent Air Canada's Book of Authorities – Tab 2**

37. The linchpin of the Agency's decision on **Issue #2** is the finding of fact that Air Canada's internal guidelines for reimbursing passengers did not amount to a limitation of liability that would ordinarily need to be included in its tariff. Each case was assessed individually by Air Canada. **Issue #2** did not involve a question of law, or an interpretation of the law. **Issue #2** required the Agency to consider the nature of Air Canada's internal guidelines and determine whether inclusion in a tariff was required. As a fact based decision, it is not susceptible to appellate scrutiny, and was well within the Agency's jurisdiction and specialization.

***supra*, para. 29**

Specific Issues Raised by the Moving Parties

38. The grounds for leave to appeal advanced by the moving parties appear to fall into two broad categories. First, the moving parties contend that they were denied procedural fairness because certain interlocutory and evidentiary decisions did not go in their favour. Second, they contend that the Agency misinterpreted the *Montreal Convention*. In fact, neither of the issues raised amount to an error of law that would warrant leave to appeal.

(a) Denial of Procedural Fairness

39. The submissions of the moving parties amount to an argument that because they were denied relief in certain interlocutory motions, and certain evidence was excluded, they were thus denied procedural fairness. No authority for this proposition is cited, since no such authority exists.

40. A duty of procedural fairness was described by the Supreme Court of Canada in *Baker v Canada* as such:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional and social context of the decision.

***Baker v. Canada*, [1999] 2 S.C.R. 817; 1999 CarswellNat 1124 at para. 28; Respondent Air Canada's Book of Authorities – Tab 3**

41. The moving parties have advanced no credible basis to conclude that they have been denied a full and fair hearing by an impartial adjudicator. As discussed more fully herein, every decision of the Agency was made after due consideration of the submissions of all parties, and in accordance with the *Dispute Adjudication Rules*.

The Dispute Adjudication Rules

42. In 2014, the Governor-in-Council promulgated the *Dispute Adjudication Rules* to bring procedural structure to applications to the Agency. The *Dispute Adjudication Rules* provide for a comprehensive procedure to be followed in applications, such as the present. The *Dispute Adjudication Rules* provide for, among other things, pleading timelines, as well as discovery of documents and information.

***Dispute Adjudication Rules*, SOR 2014/104, Appendix A – Tab 2**

43. The *Dispute Adjudication Rules* require the Agency to balance the need for disclosure of documents and information relevant to the issues before it, with the principles of proportionality and expeditious determination of complaints.

***Dispute Adjudication Rules, supra*, Appendix A – Tab 2**

44. The *Dispute Adjudication Rules* are designed to avoid the type of problem encountered in *Air Canada v. Greenglass* – a decision relied on by the moving parties. That decision involved a complaint decided prior to the 2014 *Dispute Adjudication Rules*, and highlighted the need for a comprehensive set of procedural rules to govern applications before the Agency.

***Dispute Adjudication Rules*, *supra*, Appendix A – Tab 2**

45. The *Dispute Adjudication Rules* emphasize the principle of proportionality. Rule 4 provides "The Agency is to conduct all proceedings in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed".

***Dispute Adjudication Rules*, *supra*, Rule 4, Appendix A – Tab 2**

46. Another principle on which the Agency's rules are grounded is expeditious determination of complaints. Rule 5(1) provides "These Rules are to be interpreted in a manner that facilitates the most expeditious determination of every dispute proceeding, the optimal use of Agency and party resources and the promotion of justice".

***Dispute Adjudication Rules*, *supra*, Rule 5(1), Appendix A – Tab 2**

47. The principle of expeditious determination of applications is also contained in the Agency's enabling statute:

> The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

***Canada Transportation Act*, *supra*, section 29(1), Appendix A – Tab 1**

48. It cannot be disputed from a review of the motion record that:

(a) all parties were afforded a full opportunity by the Agency to make submissions;

(b) all parties made extensive submissions to the Agency on all issues, interlocutory and final;

(c) the Agency provided extensive reasons for its decisions, interlocutory and final; and

(d) the Agency's decisions included reference to the authorities on which they relied, which authorities were primarily grounded in the *Dispute Adjudication Rules*.

***supra*, paras. 10 – 29**

49. There is no allegation by the moving parties that the Agency's *Dispute Adjudication Rules* were not followed. The moving parties are unhappy with the outcome of the application of the *Dispute Adjudication Rules*. However, that is not a ground for appeal.

50. The Agency admitted extensive evidence proffered by the moving parties, but excluded certain evidence pertaining to the experience of other passengers as being not sufficiently relevant to the matters in issue in the application. All triers of fact must exercize a gatekeeper role on evidentiary matters before it. That gatekeeper role is discretionary and should only be interfered within the clearest of cases. It is essential to the just and efficient operation of a hearing that the trier of fact be given latitude to exercize a measure of control over the proceedings.

***Prohaska v. Howe*, 2016 ONSC 48 (CANLII); Respondent Air Canada's Book of Authorities – Tab 4**

51. What is absent from the moving parties' materials is any explanation as to how evidence of the different experiences of unrelated passengers is even remotely relevant to deciding the

issues that were properly before the Agency. The rejected evidence involved experiences in very different circumstances from Mr. Johnson. As such, the evidence of other passengers was correctly determined to be not relevant in deciding the application before the Agency.

***supra*, paras. 10 – 29**

52. To require the Agency to delve into the circumstances of a number of unrelated passengers on every delay application would saddle it with an impossible task. The Agency would be required to determine whether each situation was a case of delay; whether the carrier took all reasonable measures to avoid the damages sustained by the passenger; and the proper measure of damages. To undertake this analysis for some indeterminate number of passengers that an applicant may elect to proffer would entirely negate the Agency's statutorily mandated role to conduct expeditious and proportionate applications. It would risk turning every application into a sprawling inquest.

53. The Agency's evidentiary and disclosure rulings struck the appropriate balance between proportionality and expeditious determination of the application. That is the balance the Agency is mandated to strike by the *Dispute Adjudication Rules* and the *Canada Transportation Act*.

***supra*, paras. 10 – 29**

Confidentiality Ruling

54. The moving parties also take issue with a ruling on confidentiality of certain Air Canada documents – ruling LET-C-A-6-2016 dated February 24, 2016. Ironically, the moving parties were largely successful in that ruling.

***supra*, paras. 14 – 15**

55. The *Dispute Adjudication Rules* expressly provide that the Agency may consider a request for confidentiality. Rule 7(2) provides that "All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document".

***Dispute Adjudication Rules, supra*, Rule 7(2), Appendix A – Tab 2**

56. The Agency duly considered the submissions of the parties and opted to not protect some of the documents over which Air Canada sought confidentiality. The Agency affirmed confidentiality over one document. However, the moving parties were provided with a copy of that document and referred to it in their submissions. As such, they were in no way prejudiced by the ruling and there are no grounds to appeal the confidentiality decision. It is, moreover, the case that the confidentiality ruling had no impact on the ultimate decision and thus provides no basis for appeal of Decision No. 286.

***supra*, paras. 14 – 15**

(b) The *Montreal Convention*

57. The moving parties contend that the Agency made an error in interpreting the *Montreal Convention*. They appear to be under the misapprehension that any event of delay caused by mechanical failure gives rise to a claim for damages limited only by the monetary limits contained in the *Montreal Convention*. There is no authority for that proposition. Each case of alleged delay is assessed on its own facts.

58. The *Montreal Convention* is an international treaty incorporated into the laws of Canada by the *Carriage by Air Act*. It updates and modernizes the *Warsaw Convention, 1929*, while at

the same time continuing the basic structure of that treaty, including, word for word, many of its provisions.

***Carriage by Air Act*, Schedule VI, "*Montreal Convention*", R.S.C., 1985, c. C-26, Appendix A – Tab 3**

59. The provisions dealing with liability of the carrier for delay in the transportation of passengers are contained in Chapter III of the *Montreal Convention* entitled "Liability of the Carrier and Extent of Compensation for Damage". Chapter III of the *Montreal Convention* provides a comprehensive set of rules to address liability of the carrier for damages claims by passengers.

***Montreal Convention*, *supra*, Appendix A – Tab 3**

60. There are presently 120 nations that have ratified the *Montreal Convention*. Chapter III of the *Montreal Convention* represents an effort by those nations to establish a common set of rules governing the liability of the carrier to the passenger, where a passenger claims damages arising from international carriage by air.

***Montreal Convention*, *supra*, Appendix A – Tab 3**

61. As with all claims for delay, whether the carrier is liable, and the quantum of damages, are entirely dependent on the unique facts before the court adjudicating the dispute. In order to determine liability for delay in international carriage by air, the court must first determine whether there has been a delay within the meaning of Article 19. The Court must then determine if the carrier took all measures that could reasonably be required to avoid the damage or that it was impossible for it to take such measures. Lastly, the court must assess damages in accordance with the law of forum.

***Montreal Convention*, *supra*, Article 19, Appendix A – Tab 3**

62. The Agency reviewed the evidence before it and correctly concluded that there was no liability for delay under the *Montreal Convention* because:

(1) Mr. Johnson volunteered to stay overnight in London, after his flight was cancelled;

(2) Mr. Johnson failed to locate the transfer van to the hotel in circumstances where all other nineteen volunteers had no difficulty locating the van; and

(3) Air Canada took all reasonable measures to avoid the damages sustained by Mr. Johnson, including performing all required maintenance of the aircraft; and when the flight was ultimately cancelled, arranging accommodation, meals and airport transfers for Mr. Johnson and all other volunteers.

***supra*, paras. 27 – 29**

63. Decision No. 286 was plainly a fact driven analysis by the Agency based upon the somewhat unusual circumstances of the case. No questions of law were decided.

***supra*, paras. 27 – 29**

Summary

64. The Agency considered all relevant evidence before it and made rulings that were consistent with both its statutory mandate and the facts. The moving parties have not identified an arguable ground for appeal on the basis of an error in law or jurisdiction.

PART IV - ORDER SOUGHT

65. Therefore, Air Canada respectfully requests that this Honourable Court dismiss the moving parties' application for leave to appeal Agency Decision No. 286 and to the extent sought, any related interlocutory decisions of the Agency.

66. Air Canada seeks an order granting it costs of this application, and such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of November, 2016.

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PART V - LIST OF AUTHORITIES

1. *Martin v. Canada (Minister of Human Resources Development)*, 1999 9245 (F.C.A.)
2. *Northwest Airlines, Inc. v. Canadian Transportation Agency*, 2004 F.C.A. 238
3. *Baker v. Canada*, [1999] 2 S.C.R. 817; 1999 CarswellNat 1124
4. *Prohaska v. Howe*, 2016 ONSC 48 (CANLII)