Court File No. 13-A-37

**FEDERAL COURT OF APPEAL**

BETWEEN:

**RAYMOND PAUL NAWROT and**
**KRISTINA MARIE NAWROT and**
**KAROLYN THERESA NAWROT**

Moving Parties

- and -

**SUNWING AIRLINES INC. and**
**CANADIAN TRANSPORTATION AGENCY**

Respondents

# MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, SUNWING AIRLINES INC.


**BERSENAS JACOBSEN CHOUEST**
**THOMSON BLACKBURN LLP**
**Barristers, Solicitors**
**33 Yonge Street**
**Suite 201**
**Toronto, Ontario M5E 1G4**

Gerard A. Chouest
Tel: 416-982-3804
Fax: 416-982-3801

Elliot Saccucci
Tel: 416-982-3812
Fax: 416-982-3801

Lawyerss for the Respondent,
SUNWING AIRLINES INC.

**TO:** **LOUIS BÉLIVEAU**
Barrister & Solicitor
530 – 65 Queen Street West
Totonro, ON M5H 2M5

**Louis Raphael Béliveau - LSUC No.: 55432B**
Tel: 416-368-7975
Email: lbeliveau@loogol.ca

Lawyer for the Moving Parties

**AND TO:** **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Québec J8X 4B3

**Odette Lalumiere**
Tel: 819-994-2226
Fax: 819-953-9269
Email: odette.lalumiere@otc-cta.gc.ca

Lawyer for the Respondent, Canadian Transportation Agency

**MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, SUNWING AIRLINES INC.**

## OVERVIEW

1. These are the written submissions of Sunwing Airlines Inc respecting the motion for leave to appeal the decision of the Canadian Transportation Agency (the "Agency") dated November 15, 2013 and bearing decision number 432-C-A-2013 (the "Decision").
2. It is submitted that no reasonable ground on which leave to appeal might be granted has been established and that accordingly leave should be denied.

   *Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141 (F.C.A.).

## PART I – STATEMENT OF THE FACTS

3. The Nawrots purchased tickets for transportation from London Gatwick to Toronto with a scheduled time of departure of 12:20 p.m. on August 10, 2012.
4. The flight in question was operated by Sunwing as flight WG 201.
5. Flight WG 201 was delayed by approximately 14 hours and departed at approximately 2:25 on the morning of August 11, 2012.
6. In accordance with the terms of the contract of carriage, the Nawrots were required to present themselves at the check-in point at least one hour before the scheduled time of departure.
7. The Nawrots failed to present themselves for check-in as required and were accordingly denied boarding.

## PART II - POINTS IN ISSUE

8. As a preliminary matter, Sunwing concedes, as it has throughout, that it is responsible to pay to the Nawrot's the out-of-pocket expenses caused by the 14-hour delay. These have been identified as a charge of $157.99 in relation to a one-night stay at the Holiday Inn Express in North Acton and some unidentified portion of $360, being costs of meals for a two-day period which includes the 14-hour delay period. Sunwing takes no exception to reimbursing the Nawrots for two meals at $20 per person, per meal, and undertakes to do so on receipt of confirmation from the Nawrots that they agree these are the out-of-pocket expenses associated with the 14-hour delay. Accordingly, any appeal of this issue is moot.

9. Sunwing agrees that the Moving Parties have accurately stated the test for granting leave to appeal in paragraphs 40 and 41 of their Memorandum and have accurately stated the basic rule respecting standard of review in paragraphs 43 and 44.

10. Sunwing states that the following points are in issue on this motion and that the points might be most logically considered in the following order:

    a. Have the Moving Parties established a reasonable ground for asserting that the Agency erred in law by misstating the standard of proof?

    b. Have the Moving Parties established a reasonable ground for asserting that the Agency erred in law or exceeded its jurisdiction by failing to consider the Montreal Convention in disposing of their claim for compensation?

c. Have the Moving Parties established a reasonable ground for asserting that the Agency erred in law or exceeded its jurisdiction by accepting the existence of a burden of proof which is contrary to Articles 19 and 20 of the Montreal Convention?

d. Have the Moving Parties established a reasonable ground for asserting that the Agency erred in law by failing to consider relevant evidence or by failing to provide adequate reasons with respect to the impugned portion of the Decision?

e. Have the Moving Parties established a reasonable ground for asserting that the Agency erred in law by fettering its jurisdiction with respect to the award of costs?

## PART III – STATEMENT OF SUBMISSIONS

### GENERAL STANDARD OF PROOF

11. It is conceded that the question of whether the Agency has made a significant error in identifying and applying the burden of proof resting on the Moving Parties requires consideration of the Agency's conduct on a correctness standard.

12. The Moving Parties cite as evidence of the Agency's alleged legal error the statement that the Moving Parties "have a greater burden of proof than simply presenting facts". It is submitted that this is not an error. Rather it is the statement of undoubted evidentiary principle. The party with a burden (and we will address the question of whether the Moving Parties had an evidentiary burden in a section to follow) must present appropriate, adequate and

persuasive evidence from which the decision maker can conclude that the point requiring proof has been established on a balance of probabilities. A review of paragraphs 38 through 47 of the Decision should, it is submitted, establish that the Agency well understood and applied the applicable burden of proof.

## CONSIDERATION OF THE MONTREAL CONVENTION

13. To the extent that the Moving Parties submit that the Montreal Convention ought to have been applied to the claim for reimbursement of out-of-pocket expenses arising from the 14-hour delay, the issue is moot by reason of Sunwing's undertaking to reimburse these expenses as noted above.

14. The only remaining question related to the Montreal Convention is whether, in a case of denied boarding, one can proceed directly to an analysis of the procedural and substantive rules governing a claim for delay (whether set out in the Montreal Convention or elsewhere) without determining whether the passengers in question have fulfilled a condition of the contract of carriage which determines whether they are entitled to be carried. That is the issue specifically addressed in the following section. We submit that if the Agency reasonably concluded that the Moving Parties failed to fulfill a contractual condition on which their right to be carried depended there was no issue in respect of which the Convention might apply.

## ONUS OF PROOF AND THE MONTREAL CONVENTION

15. If the Montreal Convention should apply to the claim for denied boarding it is submitted nevertheless that a reasonable check-in cut-off rule is necessary and does not conflict with any of the provisions of the Montreal Convention. Such

a rule is authorized by Article 27 of the Montreal Convention which provides in relevant part: "Nothing contained in this Convention shall prevent the carrier . . . from laying down conditions which do not conflict with the provisions of this Convention".

> *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Article 27, being Schedule VI of the *Carriage by Air Act*, R.S.C. 1985, c. C-26. (the "Convention").

16. It is common ground, as admitted in paragraph 9 of the Memorandum of the Moving Parties, that the check-in cut-off time for Flight WG 201 was 60 minutes before the scheduled time of departure. This was a proper condition of carriage laid down by Sunwing and not challenged by the Moving Parties.

17. The Moving Parties have implicitly admitted that they were aware of the need to arrive at the check-in counter 60 minutes before scheduled departure and the greatest part of their case is an attempt to prove they met the contractual obligation to arrive in time.

18. It might have been open to the Moving Parties to contest the reasonableness of the 60-minute rule, and if they had chosen to do so, the burden of proving the reasonableness of the rule might have fallen on Sunwing.

19. At no point do the Moving Parties contest the reasonableness of the 60-minute rule for check-in cut-off but rather assert that they complied with the rule. The Agency has simply applied one of the most common of evidentiary rules: He who asserts must prove.

20. In these circumstances it was not necessary for the Agency to consider whether Articles 19 and 20 of the Convention should be considered in relation to the claim for denied boarding if it properly found that the Moving Parties failed to

prove what they asserted, namely that they arrived in time to be allowed to board the aircraft. We submit, as detailed in the following section, that the Agency did properly conclude that the Moving Parties did fail to prove what they asserted.

**EVIDENCE RESPECTING COMPLIANCE WITH THE CHECK-IN CUT-OFF RULE**

21. It is submitted that a review of paragraphs 13 through 47 of the Decision must lead to the conclusion that the Agency reviewed and analyzed all significant relevant evidence and provided adequate reasons for its decision.

22. The Agency was entitled to conclude that the Moving Parties did not introduce adequate evidence to prove arrival in time. It is entitled to absolute deference in weighing evidence and reaching factual conclusions. Such conclusion may not be reviewed on appeal. It is submitted that the Moving Parties are seeking leave to appeal findings of fact.

**COSTS**

23. In their Complaint of March 21, 2013, the Moving Parties objected to the "general rule" applied by the Agency and suggested it should be replaced by the opposite "general rule" that "costs should be allowed unless the circumstances justify a different approach".

> Complaint of the Nawrots, dated March 21, 2013. Motion Record of the Moving Parties, Volume I, Tab 3, pp. 64-76.

24. The general rule that costs should be awarded to a successful party is not appropriate in all contexts. By way of example, the Ontario Court of Appeal has confirmed that in proceedings under the Provincial Offences Act "the rule .

. .is that generally no costs are awarded either against the Crown or the defendant."

*R. v. Felderhof (2003)*, 68 O.R. (3d) 481 (O.C.A.).

25. In paragraph 101 of their Memorandum, the Moving Parties state that the Canada Transportation Act "unambiguously demonstrates the intent of Parliament that costs *are* to be awarded by the Agency in the same manner as in the Federal Court" (emphasis added).

26. If this is intended to mean that it is imperative that the Agency look to the Federal Court for guidance respecting whether and how costs are to be awarded in a particular case the assertion is, it is submitted, incorrect. The words of section 25.1 of the Canada Transportation Act are permissive, not imperative. The Agency "may" determine whether costs are to be fixed or taxed, "may" direct who is to pay and who is to receive costs as well as who may tax costs, and "may" specify a scale of costs. In each case the operative word is permissive, not imperative.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 11.

27. The case of *Canada v. Georgian College*, relied upon by the Moving Parties for the proposition that a tribunal with authority to award costs must not "fetter its discretion" is notable for the particularly asymmetric treatment of costs by the tribunal in question, the Canadian International Trade Tribunal. In 50 cases surveyed where complaints made against government institutions were dismissed in their entirety, the Tribunal refused to award costs to the government. In 37 cases where complaints were upheld, the Tribunal awarded

costs to the complainant in every case. In 19 cases of mixed success the Tribunal awarded costs to the complainant.

> *Canada (Attorney General) v. Georgian College of Applied Arts & Technology* (2003), 305 N.R. 275 (F.C.A.), para. 11. ("*Georgian*").

28. In the *Georgian* case this Honourable Court concluded: "What is in issue here is the Tribunal's practice of denying costs to the Crown despite its success, while awarding costs to complainants in the same circumstances". It is submitted that any more general comments in the case should be read with this particular context in mind.

> *Georgian*, *supra*, para. 20.

29. The Agency, has never demonstrated such an asymmetrical approach to the award of costs and has not fettered its discretion by any such rule. Rather it exercises its discretion in reliance on a set of general principles, "including whether the applicant for an award of costs has a substantial interest in the proceeding, has participated in the proceeding in a responsible manner, has made a significant contribution that is relevant to the proceeding, and has contributed to a better understanding of the issues by all the parties before the Agency. In addition, the Agency may consider other factors, such as the importance and complexity of the issues, the amount of work and the result of the proceeding in justifying an award of costs".

> *Decision No. 432-C-A-2013* (*November 15, 2013 – Paul Nawrot et al v. Sunwing Airlines Inc. et al*), para. 129.

30. In Decision No. 63-AT-A-2008 the Agency considered an application by Linda McKay-Panos for an award of costs following her participation, as intervener, in a proceeding relating to the accommodation of persons with disabilities. The

Agency considered and discussed in detail the nature of her interest in the proceeding, the responsible nature of her participation, the contribution she made to the proceeding and the fact that her participation led to a better understanding of the issues. At paragraphs 26 and 27 of Decision 63-AT-A-2008 the Agency lists additional factors which lead it to conclude that an award of costs was appropriate. It appointed a taxing officer to determine the costs to be taxed and allowed.

> *Decision No. 63-AT-A-2008 (February 15, 2008 - Linda McKay-Panos).*

31. It is submitted that the standard of review is reasonableness and that it is not reasonably arguable that the practice of the Agency in general or in this particular case failed to meet that standard.

> *Georgian, supra*, para. 22.

**CONCLUSION**

32. It is submitted that the Moving Parties have failed to identify a fairly arguable question of jurisdiction or law.

## PART IV – ORDER SOUGHT

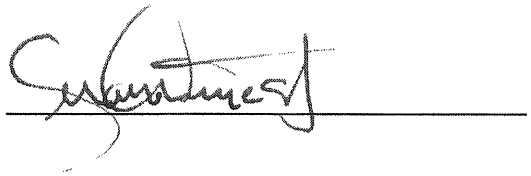
33. The Responding Party, Sunwing Airlines Inc., seeks an Order:

    a. dismissing the motion for leave to appeal the Decision;

    b. granting it costs of this motion, and

c. granting such further relief as to this Honourable Court may seem just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this16th day of January, 2014**



**BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP**
**Barristers, Solicitors**
**33 Yonge Street**
**Suite 201**
**Toronto, Ontario M5E 1G4**

Gerard A. Chouest
Tel: 416-982-3804
Fax: 416-982-3801

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Fax: 416-982-3801

Lawyerss for the Respondent,
SUNWING AIRLINES INC.

## PART V – LIST OF AUTHORITIES

Legislation

*Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Article 27, being Schedule VI of the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 11.

Jurisprudence

*Canada (Attorney General) v. Georgian College of Applied Arts & Technology* (2003), 305 N.R. 275 (F.C.A.), para. 11.

*Decision No. 63-AT-A-2008 (February 15, 2008 - Linda McKay-Panos)*.

*Decision No. 432-C-A-2013 (November 15, 2013 – Paul Nawrot et al v. Sunwing Airlines Inc. et al)*, para. 129.

*Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141 (F.C.A.).

*R. v. Felderhof (2003)*, 68 O.R. (3d) 481 (O.C.A.).

# APPENDIX A – STATUTES & REGULATIONS

## 1. The Montréal Convention

SCHEDULE VI

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

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***Article 27 — Freedom to Contract***

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

## 2. The Interpretation Act

Interpretation Act

R.S.C., 1985, c. I-21

An Act respecting the interpretation of statutes and regulations

**IMPERATIVE AND PERMISSIVE CONSTRUCTION**

Shall" and "may"

**11.** The expression "shall" is to be construed as imperative and the expression "may" as permissive

Court File No. 13-A-37

**FEDERAL COURT OF APPEAL**

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**RAYMOND PAUL NAWROT and**
**KRISTINA MARIE NAWROT and**
**KAROLYN THERESA NAWROT**

Plaintiffs

- and -

**SUNWING AIRLINES INC. and CANADIAN TRANSPORTATION AGENCY**

Defendant

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# MEMORANDUM OF FACT AND LAW OF THE DEFENDANT, SUNWING AIRLINES INC.

(Filed this day of January, 2014)

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**BERSENAS JACOBSEN CHOUEST**
**THOMSON BLACKBURN LLP**
Barristers, Solicitors
33 Yonge Street
Suite 201
Toronto, Ontario M5E 1G4

Gerard A. Chouest
Tel: 416-982-3804
Fax: 416-982-3801

Elliot Saccucci
Tel: 416-982-3812
Fax: 416-982-3801

Solicitors for the Defendant, SUNWING AIRLINES INC.