Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and
DR. GÁBOR LUKÁCS

Moving Parties

– and –

CANADIAN TRANSPORTATION AGENCY and
AIR CANADA

Respondents

MOTION RECORD OF THE MOVING PARTIES

Motion for Leave to Appeal, Rule 352

VOLUME 1

Notice of Motion, Procedural History, and Supporting Affidavit

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Decision No. 286-C-A-2016

September 21, 2016

APPLICATION by Christopher Johnson et al. against Air Canada also carrying on business as Air Canada rouge and as Air Canada Cargo (Air Canada).

Case Number: 15-05627

INTRODUCTION

[1] On December 4, 2015, Christopher Johnson filed an application with the Canadian Transportation Agency (Agency) alleging that Air Canada did not properly apply the terms and conditions set out in its International Passenger Rules and Fares Tariff, NTA (National Transportation Agency)(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. The application was in fact filed on behalf of Mr. Johnson by Gabor Lukács, who represented himself as a co-applicant. Mr. Lukács did not travel on the subject flight. Mr. Johnson and Mr. Lukács are referred to as the applicants in this Decision.

[2] The applicants claim that the carrier'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 (Air Transportation Regulations)), and that by applying these policies, Air Canada has failed to properly apply the terms and conditions set out in its Tariff, contrary to subsection 110(4) of the ATR (Air Transportation Regulations). The applicants request that the Agency direct Air Canada to:

- reimburse Mr. Johnson for the amount of CAD$309.56, pursuant to section 113.1 of the ATR (Air Transportation Regulations);
- cease and desist applying the policies;
- circulate a bulletin to its agents, retracting the policies and setting out Air Canada's obligations to compensate passengers for delay in transportation pursuant to Articles 19 and 22 of the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention); and,
- publish on its website and in the mainstream media an invitation for passengers who were delayed since January 1, 2013, to submit their claims for compensation in accordance with Articles 19 and 22 of the Montreal Convention; and process these claims and compensate the claimants in accordance with Articles 19 and 22 of the Montreal Convention.

[3] On December 29, 2015, the Agency opened pleadings, and on December 29, 2015 and January 12, 2016, the applicants 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 (Dispute Adjudication Rules). 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 information submitted in response to the aforementioned notices. On February 24, 2016, the Agency issued Decision No. LET-C-A-6-2016 and confirmed the confidentiality of one of the policies submitted.

[4] On March 18, 2016, the applicants filed an additional notice of written questions and production of documents, and on April 6, 2016, Air Canada filed its response. On April 8, 2016, the applicants filed a request pursuant to section 32 of the Dispute Adjudication Rules to require Air Canada to provide a complete response. On May 4, 2016, the Agency denied the applicants' request with reasons to follow in this Decision.

[5] On May 17, 2016, the applicants 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. On June 10, 2016, the Agency issued Decision No. LET-C-A-24-2016, granted the request for an extension of time, and denied the applicants' request to submit rebuttal evidence.

[6] On June 17, 2016, the applicants filed their reply to the pleadings.

PRELIMINARY MATTER

[7] On April 8, 2016, the applicants filed a request pursuant to subsection 32(1) of the Dispute Adjudication Rules asking the Agency to order Air Canada to produce a complete and unredacted copy of document A-2, referred to as an expense policy, including the portions pertaining to the expenses of passengers who were involuntarily denied boarding, and complete answers to questions Q12 and Q18 that are contained in the third notice of written questions and production of documents dated March 18, 2016.

[8] The following are the reasons for denying the applicants' request.

[9] Section 32 of the Dispute Adjudication Rules provides as follows:

> (1) A party that has given notice under subsection 24(1) may, if they are not satisfied with the response to the notice or if they wish to contest an objection to their request, file a request to require the party to which the notice was directed to provide a complete response. The request must be filed within two business days after the day on which they receive a copy of the response to the notice or the objection, as the case may be, and must include the information referred to in Schedule 13.
>
> […]
>
> (2) The Agency may do any of the following:
>
> (a) require that a question be answered in full or in part;
>
> (b) require that a document be provided;
>
> (c) require that a party submit secondary evidence of the contents of a document;
>
> (d) require that a party produce a document for inspection only;
>
> (e) deny the request in whole or in part.

[10] In Decision No. LET-C-A-154-2012 dated October 24, 2012 (*Lukács v. Air Canada*), the Agency established the test to use when making a determination on the relevancy of evidence. The Agency noted that in order to make a determination on the relevancy of evidence, it must:

1. examine the nature of what is claimed; and then

2. look at whether the question to be answered or the evidence that is to be produced/disclosed shows, or at least tends to show, or increases or diminishes the probability of the existence of the fact related to what is claimed.

If the answer to the second question is positive, the question/evidence is relevant. The Agency however retains discretion to decide to disallow a relevant question/document where responding to it would place undue hardship on the answering party, where there is any other alternative information, or where the question forms part of a “fishing expedition”.

(a) Question Q9

Air Canada is requested to produce the complete and unredacted copy of document A-2, including the portions referring to the expenses of passengers who were involuntarily denied boarding.

[11] Document A-2 was filed with the Agency on January 20, 2016, along with a request for confidentiality. This document is referred to as an expense policy dated December 2015 and reference is also made to this document in Air Canada’s answer to the application. In its answer, Air Canada specifically mentions that a section of document A-2 has not been disclosed as it does not relate to irregular operations or schedule changes. A section from the document is redacted.

[12] In Decision No. LET-C-A-6-2016 dated February 24, 2016, the Agency granted Air Canada’s request for confidentiality with respect to document A-2. Air Canada was ordered to provide the applicants with a copy of this document upon receipt of a signed non-disclosure agreement.

[13] Following receipt of the document and by letter dated March 15, 2016, the applicants made reference to the section of the document that had been redacted and requested a copy of document A-2 without redaction. This was followed by a notice of written questions and production of documents dated March 18, 2016, in which the request for a complete copy is repeated as question Q9.

[14] In their notice dated March 18, 2016, the applicants argue that passengers can be delayed for a number of reasons, including being denied boarding as a result of overbooking. The applicants referred to (/eng/ruling/250-C-A-2012)Decision No. 250-C-A-2012 (/eng/ruling

/250-c-a-2012) wherein the Agency found that overbooking and cancellation *within the carrier's control* may constitute delay for the purposes of Article 19 of the Montreal Convention. Therefore, the entire policy, including expenses that are paid in the case of denied boarding, is relevant, according to the applicants.

[15] Air Canada objects to the production of the document and argues that it maintained from the beginning that this section of the document was not being disclosed. Air Canada states that the application is based on Mr. Johnson's expense refund request made in the context of an *uncontrollable flight cancellation*. According to Air Canada, the information is not relevant and the applicants are attempting to extend the application to any circumstance that may lead to delay. Air Canada argues that the extension of relevance, in combination with the remedies being sought, is excessive, unnecessary, and disproportionate, as well as being outside of the mandate and jurisdiction of the Agency. Air Canada notes that the application is based on the "rights of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule", and that no allegation or reference is made to denied boarding.

[16] In the request dated April 8, 2016, the applicants respond by saying that the application is not limited to a specific policy or to specific causes of delay, and that it is in reference to the "Impugned Policy and/or other unofficial policies". The applicants seek only the policy as it relates to the reimbursement of expenses, and not with respect to other compensation to which passengers who are denied boarding might be entitled. The applicants state that Air Canada was fully aware of the allegations being made and that if clarification was required, it should have asked. The applicants argue that Air Canada is responsible for its choice of litigation strategy.

[17] 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.

[18] 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.

(b) Question Q12

> Is it Air Canada's position that it is not liable under Article 19 of the Montreal Convention for the expenses of passengers who are delayed as a result of a schedule change?

[19] Air Canada claims that question Q12 as formulated is irrelevant to the matter at issue and that the fact that document A-1 contains different recommendations pertaining to "schedule changes" (beyond the recommendations of the impugned policy) does not extend the scope to all other recommendations related therefrom.

[20] Air Canada claims that it has presented an answer to the proceedings, based on the allegations contained in the application, and that the applicants' extension of the scope after it filed its answer would deprive Air Canada of its right to respond to the application. Furthermore, it would alter the Agency's complaint driven mechanism, based on principles of natural justice, to an inquisitorial process, where its scope would be dictated by the applicants, outside of the Agency's control.

[21] The applicants argue that the policies stated in document A-1 limit liability for accommodation of passengers who are delayed as a result of what Air Canada calls a "schedule change", and that Air Canada states that, "All compensation is goodwill and costs should never exceed amounts above." It is the applicants' position that Air Canada has chosen to evade addressing this portion of the policy, which does limit the reimbursement of expenses to a fraction of the liability limits set out in the Montreal Convention, and identifies them as "goodwill." The applicants argue that question Q12 will seek clarification about Air Canada's position, and that the answer will tend to show that Air Canada failed to apply the provisions of the Montreal Convention.

[22] 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).

(c) Question Q18

> According to the statement of Air Canada's Manager, Customer Relations, "In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded as per the Lead's authorization [...]", Air Canada is requested to provide particulars of this

statement, 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.

[23] Air Canada argues that the magnitude of information sought is excessive, and maintains that it compensated passengers for delays within its control in compliance with the Montreal Convention, and that the amounts in its internal recommendations are often exceeded. In addition, Air Canada submits that it makes a case-by-case determination of the situation and determines whether a situation is controllable or uncontrollable.

[24] Air Canada further submits that it does not keep a register of previously processed passenger refund requests that contains the itemized list of the compensation it paid to passengers, and does not keep a record of whether these payments were made pursuant to controllable or uncontrollable delays. Air Canada argues that the applicants cannot force Air Canada to create a register that does not exist.

[25] The applicants submit that in its answer of April 6, 2016, Air Canada states that the amounts set out in documents A-1 and A-2 are mere recommendations, that in reality, passengers are compensated in accordance with the Montreal Convention, and that the amounts set out in documents A-1 and A-2 “are often exceeded.” The applicants dispute these allegations, and maintain that Air Canada has systematically failed to apply the provisions of the Montreal Convention, and was applying the policies found in documents A-1 and A-2 instead of compensating passengers in accordance with the Montreal Convention.

[26] The applicants argue that the answers to question Q18 and/or its sub-questions can demonstrate that even in cases that Air Canada considers controllable, it follows the maximums set out in documents A-1 and A-2, and that Air Canada labels most delays as “uncontrollable” to evade liability.

[27] The applicants submit that Air Canada is falsely claiming to not have the requested information for the following reasons:

- Air Canada tendered no evidence in support of its allegation that the information requested does not exist.
- The main part of question Q18 is asking Air Canada “to provide particulars” of the statement

put forward by its Manager, Customer Relations, who is an employee of Air Canada, and thus must be available to Air Canada at any time. The applicants argue that unless the Manager was merely speculating, she must have had some factual basis for making the statement in question.

- The expenses of an airline relating to reimbursing passengers for delay-related expenses is significant data regarding the airline's operations that any reasonable business would collect and analyze in great detail.
- Section 230 of the *Income Tax Act*, [R.S.C. ,1985, c. 1 (5th Supp.)] requires corporations to retain records and books for six (6) years from the end of the last taxation year to which the records and books relate. Since Air Canada is a Canadian corporation that is subject to the *Income Tax Act*, it must have retained every "record" relating to expenses it incurred in regard to the reimbursement of expenses of delayed passengers.

[28] According to the applicants, there is no need to review and analyze the file of each and every passenger, and the requested information can be obtained from the Manager, Customer Relations and/or through a standard query of Air Canada's electronic databases.

[29] In addition, the applicants submit that in Decision No. LET-C-A-173-2009, the Agency itself directed the airline (WestJet) to answer a number of questions relating to the amount of compensation tendered to individual passengers for damage to, or loss or delay of checked baggage over a period of 6 months, and that as the Agency made that order, it was clearly viewed as proportional, and as such there is no reason to conclude in this case that answering questions of the same nature would be disproportional for Air Canada.

[30] Having considered the matter, the Agency determined that Air Canada should not be compelled to produce the requested information.

[31] The applicants seek particulars of the statement made by the Manager, Customer Relations to the effect that the recommended limits are often exceeded as per the Lead's authorization, particularly when customers allege, and it is verified, that they were unable to connect with the Air Canada agents issuing vouchers or making hotel arrangements. With respect to the Manager, Customer Relations' statement, it is noted that she has been an employee with Air Canada for 30 years and has held numerous positions, including Customer Relations Representative and Lead Customer Relations Representative. Her statement confirms that she is involved in handling passenger claims and in the formulation of Air Canada customer service policies and internal recommendations. Therefore, the Agency is of

the opinion that her statement was made based on her experience and would be within her knowledge, rather than mere speculation as suggested by the applicants.

[32] 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.

[33] The applicants' reliance on the *Income Tax Act* is misplaced. Air Canada does not argue that it does not keep records of the expenses that it pays. Air Canada states that it does not keep a register of the details of what was paid and in what type of situation. There is no evidence that these types of details would be required for income tax purposes.

[34] 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.

[35] In Decision No. LET-C-A-173-2009, the only issue was compensation for damage to, or loss or delay in delivery of, baggage. There was no need for the carrier, in that case, to further categorize the types of compensation paid in order for the information to be relevant. In this case, the amount of compensation is not of assistance unless there is more information about the amount claimed, the category of expense, as well as the amount paid.

[36] For these reasons, the Agency d finds that Air Canada should not be compelled to respond to question Q18.

ISSUES

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 ATR (Air Transportation

Regulations)? If Air Canada did not properly apply its Tariff, what remedies, if any, are available to the applicants?

2. Has Air Canada contravened subparagraph 122(c)(x) of the ATR (Air Transportation Regulations), by failing to clearly state its policies regarding limitations of liability with respect to delay of passengers in its Tariff?
3. Are the policies unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations), as they purport to fix a lower limit of liability than what is set out in the Montreal Convention?

RELEVANT TARIFF AND STATUTORY EXTRACTS

[37] The legislation, Tariff provisions, and provisions of the Montreal Convention relevant to this Decision are set out in the Appendix.

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 ATR (Air Transportation Regulations)? IF AIR CANADA DID NOT PROPERLY APPLY ITS TARIFF, WHAT REMEDIES, IF ANY, ARE AVAILABLE TO THE APPLICANTS?

Positions of the parties

[38] The applicants rely on a statement signed by Mr. Johnson dated November 27, 2015, which provides details of his experience with Air Canada when he was scheduled to travel from London to Ottawa on December 10, 2013, on Flight No. AC889. According to the statement, the flight was first delayed for more than four hours while the passengers were on board before it was cancelled, and Air Canada requested 20 volunteers to agree to stay in London overnight and to travel the following day. Air Canada offered to provide the volunteers with accommodation, airport-hotel transfers and meals. The remaining passengers were to travel on another flight later that day. According to the statement, Mr. Johnson volunteered and 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.

[39] Based on these representations, Mr. Johnson collected his baggage and waited outside, but saw neither a van nor any other of the volunteers. He re-entered the terminal and asked

an attendant to contact any Air Canada representative who might still be available to assist him. The attendant was unable to locate a representative and spoke by telephone with a reservations person located in Montréal. He was also unable to locate a representative in London. According to the applicants, Mr. Johnson was told to seek his own accommodation and dinner, and seek reimbursement from Air Canada later.

[40] Mr. Johnson states that he stayed at a local hotel and paid for his own meals, incurring expenses of $461.77 for accommodation and $69.79 for meals. When he subsequently requested reimbursement from Air Canada, he was told that the flight was cancelled due to mechanical requirements, that there are instances where avoiding a flight delay is impossible and that times shown on tickets are not guaranteed. According to the applicants, Mr. Johnson was advised that “in a delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim,” and that for meals Air Canada would pay $7 for breakfast, $10 for lunch and $15 for dinner. In a subsequent e-mail submitted by the applicants, Air Canada explained that all passengers receive the same amount for meal vouchers, that Air Canada’s partner hotels are within its policy guideline costs, and that these guidelines are consistently followed.

[41] Eventually, Mr. Johnson received a payment of $222.00 CAD. It was explained to him that as he is a premium passenger, he received $150 towards his hotel, $7 for breakfast, $15 for dinner and $50.00 for transportation to the hotel.

[42] According to Air Canada, Flight No. AC889 was cancelled due to low hydraulic system pressure caused by a wiring fault, and most passengers were re-protected on another flight the same day. Those who were required to stay overnight in order to travel on the following day were provided with accommodation, airport-hotel transfers and meals. In a statement dated January 20, 2016, Air Canada’s Senior Director of Maintenance Operations Control states that the hydraulic system of the aircraft used to operate Flight No. AC889 was checked prior to every flight, that no defect was detected on the inbound flight, and that the malfunction could not have been detected or prevented by Air Canada. Air Canada claims that to limit the effects of this irregular operation, it called for volunteers to stay overnight in London.

[43] Air Canada states that pursuant to the Montreal Convention, it was not required to reimburse out of pocket expenses or provide accommodation and meals following the uncontrollable cancellation of Flight No. AC889. Air Canada further states that Mr. Johnson was offered accommodation and meals for an overnight stay, as he answered a call for volunteers to travel on the subsequent day. Air Canada provided, as evidence, Mr. Johnson’s

Passenger Name Record (PNR), which states that after Mr. Johnson missed transportation to the hotel, an Air Canada agent advised him to prepare a claim. Air Canada states that when Mr. Johnson asked if there was a limit to the amount he might claim, he was told that only the customer relations representatives would have this information.

[44] The applicants accept that Flight No. AC889 was cancelled due to mechanical failure. However, the applicants argue that Air Canada has failed to establish that itself, its servants, and its agents have taken all reasonable measures to prevent the delay or that such measures were not available. The applicants rely on *Elharradji c. Compagnie Nationale Royal Air Maroc,* 2012 QCCQ 11 (CanLII) [Elharradji] for the proposition that “mechanical issues affecting only one particular aircraft are not recognized as *force majeure* capable of establishing a defence under Article 19 of the Montreal Convention” They further rely on *van der Lans v. KLM,* European Court of Justice, Case C-257-14, which, according to the applicants, states that the prevention of mechanical breakdowns, including the replacement of a prematurely defective component, is not beyond the control of the carrier. The applicants also refer to *Quesnel c. Voyages Bernard Gendron Inc.,* [1997] J.Q. No. 5555, which states that the carrier [translation] “should provide for the possibility of mechanical breakdowns and have in place efficient replacement solutions in order to provide the service that has been promised.” According to this decision, [translation] “the onus is on the carrier to establish that no other reasonable substitutions were available, including the putting into service of a replacement aircraft.”

[45] With respect to the facts of this case, the applicants allege that Air Canada could and should have anticipated the breakdown of the aircraft as there is no evidence to suggest that the breakdown was caused by a systemic (manufacturing) issue affecting all aircraft of this model or by an act of terrorism or sabotage, that it has full control over its fleet and its maintenance, and that it chose to use a 25-year-old aircraft that could be prone to mechanical issues.

[46] The applicants contend that Air Canada has not provided evidence to show that once Flight No. AC889 was cancelled, it took all reasonable measures to transport Mr. Johnson to his destination on the same day, or that it was impossible to do so. In addition, the applicants argue that no evidence was provided regarding the availability of seats, including seats in higher classes, on its flights on December 10, 2013, or about the availability of seats on flights of other airlines.

ANALYSIS AND FINDINGS

Application of the Tariff

[47] When an application such as this one is filed with the Agency, the applicant must, on a balance of probabilities, establish that the carrier has failed to apply, or has inconsistently applied, the terms and conditions of carriage appearing in the applicable tariff.

[48] The issue in this case is whether Air Canada complied with the Montreal Convention and properly applied its Tariff (which incorporates the Montreal Convention by reference) in the case of Mr. Johnson. Article 19 of the Montreal Convention establishes that Air Canada is liable for damage occasioned by delay, unless it can prove that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures.

[49] It is undisputed that Flight No. AC889 was cancelled due to low hydraulic system pressure caused by a wiring fault. It is also undisputed that Air Canada accommodated most of the passengers of Fight No. AC889 on another flight to Canada that arrived on the same day. Mr. Johnson volunteered at Air Canada's request to be part of a group that would travel on the next day and have their accommodation, meals and airport transfers paid by Air Canada.

[50] As a volunteer, Mr. Johnson was directed to pick up his luggage and was advised that a van would be waiting to take him to a local hotel where he would be provided with accommodation and meal vouchers. Mr. Johnson claims that he followed the instructions of Air Canada's agents and collected his checked baggage at the arrivals area, but was unable to find the arranged transportation to the hotel. Mr. Johnson's evidence is that the other passengers were able to obtain transportation to the hotel, hotel rooms, and meal vouchers, but that he was not. He does not explain how this happened.

[51] According to Air Canada, the hydraulic system was checked prior to every flight, there was no history of a defect, and no defect was detected on the inbound flight using the same aircraft. The Agency accepts this evidence and finds that Air Canada took all reasonable measures in the circumstances of this case to avoid this mechanical failure.

[52] The applicants rely on Elharradji*,* and cite from paragraph 13 of that decision which refers to the book *Droit du tourisme au Québec*. The passage quoted from this book indicates that mechanical breakdown is not generally considered by judges to constitute *force majeure,* but that weather conditions and employee strikes can be*.* However, in the following paragraph of that decision, the Judge refers to another decision of the Court that found that:

> The carrier's exculpation does not constitute proof of the absence of fault or a case of *force majeure* as the cause of the delay. Rather, it is the proof of the measures taken to avoid the damage caused by the delay.

[53] In Elharradji*,* the passengers were delayed as a result of intermittent strikes by the carrier's pilots. They landed in Montréal late at night and were unable to rent a vehicle to get to their home in Gatineau because the car rental businesses were closed. The passengers sought damages as a result of being forced to stay in the airport overnight and for a missed meeting. The Court, relying on the passage quoted above, found that it was not sufficient that the strike constituted *force majeure*. The Court found that the carrier was required to take reasonable measures to avoid the damages or at least to mitigate them, once at the destination, and that it did not take these steps. The carrier was ordered to pay to the plaintiffs damages equivalent to taxi fare from the airport to their home.

[54] While the Agency is not bound by the Court's decision in Elharradji*,* the case supports the conclusion that Air Canada is not liable for Mr. Johnson's out-of-pocket expenses. Unlike in Elharradji*,* where the carrier did not provide the cost of transportation required as a result of the delay, Air Canada made available to Mr. Johnson transportation to the hotel, a room, and meals. 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.

[55] 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.

[56] 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 (Air Transportation Regulations).

Remedy

[57] Subsection 113(1) of the ATR (Air Transportation Regulations) contemplates certain

remedial actions only if a carrier has failed to apply the terms and conditions set out in its tariff. Based on the above finding that Air Canada properly applied its Tariff, the Agency cannot grant the requested remedy.

[58] In its answer to the application, Air Canada offered to pay Mr. Johnson CAD$309.56 as a goodwill gesture. Notwithstanding the fact that the Agency cannot award Mr. Johnson his expenses in this case, the Agency encourages Air Canada to honour its offer to pay Mr. Johnson CAD$309.56.

ISSUE 2: HAS AIR CANADA CONTRAVENED SUBPARAGRAPH 122(c)(x) OF THE ATR (Air Transportation Regulations), BY FAILING TO CLEARLY STATE ITS POLICIES REGARDING LIMITATIONS OF LIABILITY WITH RESPECT TO DELAY OF PASSENGERS IN ITS TARIFF?

Positions of the parties

[59] The applicants submit that paragraph 122(c) of the ATR (Air Transportation Regulations) provides that carriers are required to include in their tariff terms and conditions relating to schedule irregularities and liability limits. The applicants argue that Air Canada is applying a policy that is not set out in its Tariff, and which purports to govern the rights of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule, and limits Air Canada's liability for the accommodation and meal expenses incurred by such passengers.

[60] In support of the argument that Air Canada has such a policy, the applicants filed evidence relating to the reimbursement of expenses incurred by Mr. Johnson as a result of the cancellation of Flight No. AC889, and submit that he was advised that "in a delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim." He was also advised that for meals, Air Canada would pay $7 for breakfast, $10 for lunch and $15 for dinner.

[61] As further proof of the existence of the policy, the applicants filed an e-mail dated February 6, 2014, from Air Canada to a passenger who complained about a delay of 24 hours, which he alleged was due to crew availability and not due to weather (as presumably suggested by Air Canada). The passenger indicates that he was provided with a meal voucher of $32, which was insufficient to cover the cost of the meals at the hotel where he had been sent by Air Canada. In the e-mail, Air Canada states that there are instances where

avoiding a flight delay is impossible, and that the times shown on tickets are not guaranteed. Air Canada also states that it provides accommodation and meals to passengers when they are forced to stay overnight, and repeats the maximums, which were indicated to Mr. Johnson.

[62] The applicants also submitted a similar e-mail from Air Canada to a different passenger dated November 12, 2014. This e-mail is in response to a complaint dated October 14, 2014, which references attachments containing details of the complaint, but which attachments are not provided. In Air Canada's response, it is indicated that passengers not provided with vouchers would receive compensation for meals up to $15 for dinner, $10 for lunch, and $7 for breakfast. The passenger was invited to send in receipts and it was indicated that she would be reimbursed up to the maximum amounts. Reference is then made to hotel expenses, and it is indicated that consequential expenses such as hotel expenses at destination or intangible losses such as loss of vacation, work time or enjoyment, are not considered.

[63] With respect to the complaint of Mr. Johnson, Air Canada states that it was not obligated to compensate Mr. Johnson because the cancellation was due to a malfunction that could not have been detected and controlled by Air Canada. As the delay was outside of Air Canada's control, the amounts offered to Mr. Johnson, beyond the offer the carrier made to him as a volunteer, were on the basis of goodwill. With respect to the applicants' reference to the other instances involving passengers who are not parties to this application, Air Canada states that the reference to a policy in refusing to reimburse the totality of claimed expenses does not equate to a systemic denial of expenses in controllable situations.

[64] Air Canada argues that the policy in effect at the relevant time of the application constitutes internal recommendations for its customer relations representatives (representatives) and submits that the internal recommendations provide internal guidance for expenses in the context of irregular operations and schedule changes. Air Canada argues that the policies found in documents A-1 and A-2 do not constitute its actual policy for passenger claims, and denies having a policy that limits the reimbursement of passenger expenses for delays that are within its control. Air Canada states that where delays and cancellations are controllable, Air Canada is liable to reimburse out of pocket expenses as per the Montreal Convention and its Tariff.

[65] Air Canada contends that while the Montreal Convention provides for a liability threshold limiting passenger claims for events such as delays, the claims remain subject to the rules of

evidence and damage mitigation and, as such, while it has no policy limiting its reimbursement of expenses for controllable delays, a representative will consider all of the elements in deciding to allow or refuse, in totality or in part, the refund request. Air Canada states that while the Montreal Convention prevents the limitation of liability for expenses resulting from a controllable delay, the applicable liability principles may sometimes allow an airline not to reimburse the totality of expenses claimed where damages could have been further mitigated.

[66] The applicants submit that the policies are based on the erroneous premise that under the Montreal Convention Air Canada is not liable for the damages of delayed passengers unless the delay was caused by controllable events. The applicants allege that Air Canada seeks to circumvent the Montreal Convention by using a cause-and-fault oriented terminology of “controllable” and “uncontrollable” events and “schedule change”. The applicants submit that liability does not depend on the choice of terminology.

[67] According to the applicants, the policies distinguish between the three different types of delay, and, in cases of schedule change and uncontrollable irregular operations (IROP), the policies contain limitations and/or exclusions of liability by indicating that all compensation is goodwill and should never exceed certain amounts. The applicants argue that this cause-and-fault terminology is inconsistent with the Montreal Convention, which requires the carrier to compensate passengers, unless the carrier can demonstrate that its personnel took all measures that could reasonably be required to avoid the damage incurred by the delay.

[68] The applicants maintain that the cause of the delay does not determine liability even if the delay was caused by uncontrollable events, because it falls short of what is necessary in order to establish a defence under Article 19. In this regard, the applicants submit that they adopt the Agency’s analysis in paragraphs 104 and 105 of (/eng/ruling/16-C-A-2013)Decision No. 16-C-A-2013 (/eng/ruling/16-c-a-2013), which states in part that:

> [104] […] In short, the first sentence of Article 19 states clearly that the carrier is liable for delay. Article 19 only brings the carrier’s servants and agents into play in terms of avoidance of liability when it has proved that these personnel took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.
>
> [105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier’s

servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

[69] The applicants submit that the policies provide that in the case of a delay of passengers caused by a schedule change, all compensation is goodwill and the amount of compensation should never exceed the amounts set out in the policies. The applicants argue that Air Canada cannot avoid liability for damages to passengers who were delayed on the basis that the delay was caused by events that occurred prior to the passengers' original scheduled departure.

ANALYSIS AND FINDINGS

[70] Subparagraph 122(c)(x) of the ATR (Air Transportation Regulations) states that every tariff shall contain the terms and conditions of carriage, clearly stating the air carrier's policy in respect of limits of liability respecting passengers and goods. As recently stated by the Agency in (/eng/ruling/31-C-A-2015)Decision No. 31-C-A-2015 (/eng/ruling/31-c-a-2015) (*Khan v. Sunwing*), a carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

[71] The issue raised in the application is whether Air Canada is applying a policy that purports to limit its liability for delay, contrary to the provisions set out in its Tariff (which incorporates the Montreal Convention by reference). Air Canada's position is that the policies do not constitute its actual policy for passenger claims and it denies having a policy that limits the reimbursement of passenger expenses for delays that are within its control.

[72] With respect to Mr. Johnson's travel, the delay occurred as a result of a mechanical failure, and Air Canada asked for volunteers to remain overnight in London. Transportation, meal vouchers, and accommodation were made available to Mr. Johnson. Additional compensation was provided but for reasons that are more fully explained above, the financial compensation offered to Mr. Johnson was in the nature of goodwill and not required by the Montreal Convention. As such, this evidence does not support the applicants' claim that Air Canada is applying a policy that limits its liability.

[73] The e-mails provided by the applicants that describe the complaints of other passengers

who were delayed also do not support the applicants' claim. Firstly, these emails constitute hearsay and therefore we would not consider them. However, even if they were admissible, in order to conclude in these cases that Air Canada is applying a policy that purports to limit its liability with respect to delay, the Agency would have to be in the position to conclude that there was an obligation to compensate these passengers for the expenses claimed, and that Air Canada applied a policy to limit its liability in this regard. In both cases, it is not known whether Air Canada or its agents did everything that could reasonably be required to avoid the damage incurred as a result of the delay. In one instance, there appears to be some suggestion that the delay was due to weather, which the passenger disputes. In any event, in these cases there may have been nothing that Air Canada could have done to avoid the damages incurred.

[74] Of course, it remains open for those passengers referenced in these emails to file a separate application should they wish to have their complaint adjudicated by the Agency.

[75] 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.

[76] 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.

[77] 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.

[78] Nevertheless, in situations where Air Canada would be legally liable pursuant to Article

19 of the Montreal Convention to undertake an action, any policy that would limit liability would be considered null and void pursuant to Article 26, as Article 26 makes null and void any provision that would relieve an airline of its liability or set a lower limit than that which is laid down by the Montreal Convention.

[79] 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 (Air Transportation Regulations), whether Air Canada has failed to apply its Tariff systemically by applying the policy instead of its Tariff, and what remedies should be provided.

CONCLUSIONS

Issue 1

[80] The Agency finds that, on a balance of probabilities, 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 (Air Transportation Regulations).

Issue 2

[81] The Agency finds that Air Canada has not contravened subparagraph122(c)(x) of the ATR (Air Transportation Regulations), by failing to clearly state its policies regarding limitations of liability with respect to delay of passengers in its Tariff.

[82] For the above reasons, the Agency dismisses the application.

APPENDIX TO (/eng/ruling/286-C-A-2016)DECISION NO. 286-C-A-2016 (/eng/ruling/286-c-a-2016)

Air Transportation Regulations, SOR/88-58, as amended

110 (4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

111(1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

(a) take the corrective measures that the Agency considers appropriate; and

(b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

122 Every tariff shall contain

[...]

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

(ii) acceptance of children for travel,

(iii) compensation for denial of boarding as a result of overbooking,

(iv) passenger re-routing,

(v) failure to operate the service or failure to operate on schedule,

(vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(vii) ticket reservation, cancellation, confirmation, validity and loss,

(viii) refusal to transport passengers or goods,

(ix) method of calculation of charges not specifically set out in the tariff,

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

(xii) procedures to be followed, and time limitations, respecting claims.

Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 22 - Limits of liability in relation to delay, baggage and cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.

[...]

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

Article 26 - Invalidity of contractual provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Applicable Tariff Provisions (at the time of Mr. Johnson’s flight)

International Passenger Rules and Fares Tariff, NTA (National Transportation Agency)(A) No. 458

Rule 105(5)

For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

Rule 80(C)

Schedule Irregularity

(1) Definition

Schedule Irregularity means any of the following:

(a) Delay in scheduled departure or arrival of a carrier's flight

(b) Flight cancellation, omission of a scheduled stop, or any other delay or interruption in the scheduled operation of a carrier's flight, or

(c) Substitution of equipment or of a different class of service, or

(d) Schedule changes which require rerouting of passenger at departure time of the original flight.

[…]

(4) In the event of a scheduled irregularity, Carrier will either:

[…]

(a) carry the passenger on another of its passenger aircraft or class of service on which space is available without additional charge regardless of the class of service; or, at carrier's options;

(b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or, at carrier's option;

(c) reroute the passenger to the destination named on the ticket or applicable portion thereof

by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 100, carrier will require no additional payment from the passenger but will refund the difference if it is lower or,

(d) if the passenger chooses to no longer travel or if Carrier is unable to perform the option stated in (a), (b) or (c) above within a reasonable amount time, make involuntary refund in accordance with Rule 100 or,

(e) upon request, for cancellations within Air Canada's control, return passenger to point of origin and refund in accordance with rule 100 as if no portion of the trip had been made (irrespective of applicable fare rules), or subject to passenger's agreement, offer a travel voucher for future travel in the same amount; or, upon passenger request;

(f) for cancellations within Air Canada's control, if passenger provides credible verbal assurance to Air Canada of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (a) above, or, for On My Way customers, for cancellations within or outside carrier's control, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account, and subject to availability, buy passenger a seat on another carrier whose flight is schedule to arrive appreciably earlier than the options proposed in (a) above. Nothing in the above shall limit or reduce the passenger's right, if any, to claim damages, if any, under the applicable Convention, or under the law when neither Convention applies.

(5) Except as otherwise provided in applicable local law, in addition to the provisions of this rule, in case of scheduled irregularity within its control (and outside its control, for On My Way customers) Air Canada will offer:

(a) For a schedule irregularity lasting longer than 4 hours, a meal voucher for use, where available, at an airport restaurant or our on board cafe, of an amount dependant on the time of day.

(b) for a schedule irregularity lasting overnight or over 8 hours, hotel accommodation subject to availability and ground transportation between the airport and the hotel. This service is only available for out of town passengers.

(c) If passengers are already on the aircraft when a delay occurs, Air Canada will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and

circumstances permit, Air Canada will offer passengers the option of disembarking from the aircraft until it is time to depart.

Member(s)

William G. McMurray

Sam Barone

P. Paul Fitzgerald

Rulings

Go back to Rulings (/decisions)

Date modified:
2016-09-22

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and DR. GÁBOR LUKÁCS

Moving Parties

– and –

CANADIAN TRANSPORTATION AGENCY and AIR CANADA

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT THE MOVING PARTIES will make a motion in writing to the Court under Rules 352 and 369 of the *Federal Courts Rules*, S.O.R./98-106.

THE MOTION IS FOR:

1. An Order, pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, granting the Moving Parties leave to appeal:

   (a) a decision made by the Canadian Transportation Agency [Agency] dated September 21, 2016 and bearing Decision No. 286-C-A-2016 [Final Decision]; and

   (b) if and to the extent necessary, the following interlocutory decisions made by the Agency:

      (1) Decision No. LET-C-A-6-2016, dated February 24, 2016 **[Tab 13, Confidentiality Decision]**;

      (2) Decision dated May 4, 2016 **[Tab 19, Refusals Decision]**;

(3) Decision No. LET-C-A-24-2016, dated June 10, 2016 **[Tab 25, Exclusion of Evidence Decision No. 1]**; and

(4) Decision dated June 23, 2016 **[Tab 28, Exclusion of Evidence Decision No. 2]**.

2. Costs and/or reasonable out-of-pocket expenses of this motion; and

3. Such further and other relief or directions as the Moving Parties may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. The *Montreal Convention* is an international treaty governing the rights of passengers travelling internationally. Pursuant to subsection 2(2.1) of the *Carriage by Air Act*, the *Convention* has the force of law in Canada.

2. The *Montreal Convention* imposes a regime of strict (but not absolute) liability on airlines with respect to delay of passengers:

(a) airlines are presumed to be liable for damages occasioned by delay of passengers up to 4,694 SDR (approximately CAD$8,500);

(b) the burden of rebutting the presumption of liability and establishing an affirmative defence is on the airlines (Article 19); and

(c) the liability cannot be contracted out or otherwise contractually limited (Article 26).

3. Air Canada has been using an Expense Policy **[Tab 6]** and other similar "internal documents" **[Tab 15]** to determine the amount of compensation payable to passengers; they contain schedules such as the following:

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

4. The amounts set out in Air Canada's Expense Policy and other similar "internal documents" are less than 2% of the liability limits set out in the *Montreal Convention*.

5. On December 3, 2015, the Moving Parties filed a complaint with the Canadian Transportation Agency against Air Canada alleging that:

   (a) since 2013 or earlier, Air Canada has been shortchanging the public and limiting its liability with respect to delay of passengers to the amounts set out in the Expense Policy, contrary to the explicit language of the *Montreal Convention*; and

   (b) Col. Johnson was adversely affected by and incurred expenses as a result of Air Canada's failure to comply with the *Convention*.

Air Canada shortchanged Col. Johnson

6. The Air Canada flight of Col. Johnson from London, UK to Ottawa was cancelled due to mechanical failure in the 25-year-old aircraft assigned to the flight. Based on the assurance that Air Canada would provide him with accommodation, ground transfer, and meals, Col. Johnson selflessly volunteered to stay overnight in London and travel the next day.

7. Air Canada failed to provide Col. Johnson with accommodation, ground transfer, and meals. After unsuccessful attempts to contact Air Canada's representatives at the airport, he was eventually advised by an Air Canada agent in Montreal to seek his own accommodation and meals, and seek reimbursement from Air Canada later.

8. Air Canada refused to reimburse Col. Johnson for the $471.77 he incurred for accommodation and $69.79 for meals, and stated that:

> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner.
>
> [Emphasis added.]

9. Subsequently, Air Canada wrote to Col. Johnson that:

> In the event a customers travel plans are disrupted, Air Canada does provide assistance towards the cost of hotel and meals. To be consistent, we follow a guideline so that all customers are treated equally. We realize you have requested an exception to this policy, however, to allow this can be seen as discriminatory to those customers who received the normal assistance.
>
> [Emphasis added.]

10. Eventually, Air Canada reimbursed Col. Johnson $222.00, leaving him out of pocket for $309.56.

Systemic issue

11. Air Canada's refusal to fully reimburse Col. Johnson was not an isolated incident, but a recurrent and systemic pattern:

(a) On February 6, 2014, Air Canada quoted the same "policy" in an email to another delayed passenger **[Tab 4, p. 120]** , unrelated to Col. Johnson:

> The maximum amount we cover for hotel is $100.00 CAD, breakfast $10.00 CAD and dinner $15.00 CAD.

(b) On November 12, 2014, Air Canada wrote to a delayed passenger **[Tab 4, p. 122]** that:

> [...] in accordance with our policy, passengers not provided meal vouchers at the airport may claim up to $15.00 CAD for dinner, $10.00 CAD for lunch and $7.00 CAD for breakfast. If you could kindly forward your original meal receipts, we would be happy to reimburse you up to the maximum allowable amount.
>
> [Emphasis added.]

(c) Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein claimed reimbursement for the expenses they incurred as a result of the delay of their Air Canada flight. They explicitly identified the *Montreal Convention* as the basis for their claim. On April 29, 2016, Air Canada wrote to them **[Tabs 20 and 21]**:

> The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.

(d) Mr. Darren Powell was stranded in Frankfurt, and was told that Air Canada would cover his full accommodation costs; however, on February 3, 2016, Air Canada wrote to him **[Tab 27, p. 340]**:

> You will soon receive a draft in the amount of $120 CAD which is the standardized amount permitted for one nights' hotel stay and meals.
>
> [Emphasis added.]

12. Air Canada has been using the Expense Policy **[Tab 6, p. 130]** and other similar "internal documents" **[Tab 15, p. 211]** to determine the amount of compensation payable to these and other passengers.

Ground for the proposed appeal

13. The Agency erred in law, denied the Moving Parties procedural fairness, fettered its discretion, and rendered unreasonable decisions by, among other things:

(a) barring all evidence about the systemic nature of the complaint;

(b) misinterpreting the *Montreal Convention*; and

(c) granting Air Canada's request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]**.

Denial of procedural fairness and fettering of discretion

14. The Agency breached its duty of procedural fairness by barring all evidence unfavourable to Air Canada relating to the systemic nature of the issue raised in the complaint.

15. The Agency erred in law, applied a double standard, denied the Moving Parties procedural fairness, and made an unreasonable decision by excluding the aforementioned emails sent by Air Canada to Mr. Leatherman and Ms. Allen:

    (a) The emails are not hearsay. Air Canada acknowledged having sent them, and did not dispute their content.

    (b) The longstanding practice of the Agency, which is not a court, has been to admit emails tendered by Air Canada, even if they constituted hearsay. The Agency provided no reasons for excluding "hearsay" evidence unfavourable to Air Canada, while having admitted favourable ones in the past.

16. The Agency erred in law, fettered its discretion, denied the Moving Parties procedural fairness, applied a double standard, and made an unreasonable decision in excluding the position statement of Mr. Powell on the sole basis that it was submitted 6 hours and 42 minutes after the 5:00 pm deadline **[Tab 28, Exclusion of Evidence Decision No. 2]**.

17. The Agency erred in law, denied Johnson and Lukács procedural fairness, applied a double standard, and made an unreasonable decision in refusing to admit the witnessed statements (which are equivalent to sworn affidavits before the Agency) of the Rubensteins **[Tab 25, Exclusion of Evidence Decision No. 1]**.

    (a) The Agency erroneously superimposed the jurisprudence with respect to rebuttal evidence and re-opening cases on the regulatory regime put in place by Parliament.

(b) The Agency applied a double standard in considering the emails sent by Air Canada to the Rubensteins for the truth of their content in the face of the witnessed statements of both passengers to the contrary.

(c) The statements of the Rubensteins were clearly and obviously relevant to the question of whether Air Canada continued to deny claims contrary to the *Montreal Convention*.

(d) The Agency erred in law with respect to the threshold for admitting the evidence.

18. The Agency erred in law, denied the Moving Parties procedural fairness, and made an unreasonable decision in refusing to compel Air Canada **[Tab 19, Refusals Decision]**:

(Q9) to produce the Expense Guidelines **[Tab 15, p. 211]** in its entirety, including the portion about expenses of bumped passengers;

(Q12) to state whether it was denying liability for the expenses of passengers who are delayed as a result of a schedule change; and

(Q18) to provide particulars of Air Canada's allegation that the limits set out in its Expense Policy are "often exceeded."

Furthermore, the Agency erred in law in interpreting the *Income Tax Act* concerning the obligation of Air Canada to retain records and books.

The Agency misinterpreted the *Montreal Convention*

19. The Agency erred and misinterpreted the *Montreal Convention* by:

(a) failing to give effect to the presumption of liability prescribed by Article 19 of the *Montreal Convention*, failing to place the burden of proof on Air Canada, and failing to make a finding of liability with respect to incidents where the facts were undisputed (Mr. Leatherman and Ms. Allen);

(b) failing to find that Air Canada's use of the cause-and-fault oriented classification of "controllable" and "uncontrollable" events and "schedule change" to determine whether to compensate passengers for their delay-related expenses is inconsistent with the liability-based regime of the *Montreal Convention*;

(c) holding that routinely checking the aircraft prior to every flight is sufficient to meet the "all reasonable measures" defence of the *Montreal Convention*;

(d) failing to give effect to the phrase "occasioned by delay" in Article 19 of the *Montreal Convention*; and

(e) finding that Air Canada was not liable for the expenses incurred by Johnson in the absence of evidence of contributory negligence, contrary to Article 20 of the *Montreal Convention*.

Confidentiality Decision

20. The Agency erred in law and made an unreasonable decision by granting Air Canada's request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]** (referenced as A-2), while correctly denying the request with respect to the Expense Policy **[Tab 6, p. 130]** (referenced as A-1).

    (a) Since the two documents are virtually identical in content (although they somewhat differ in form), making one confidential while placing the other on public record defeats common sense.

    (b) Air Canada has not consistently treated the information in the Expense Guidelines as confidential; indeed, it has been communicated to passengers.

    (c) There was no evidence before the Agency of "real and substantial risk" that would pose a serious threat to an interest that can be expressed in terms of public interest in confidentiality.

Statutes and regulations relied on

21. Sections 110, 111, 113, 113.1, and 122 of the *Air Transportation Regulations*, S.O.R./88-58.

22. Sections 41 and 86 of the *Canada Transportation Act*, S.C. 1996, c. 10.

23. Subsection 2(2.1) to the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

24. The *Montreal Convention*, being Schedule VI to the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

25. Sections 230 and 248 of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

26. Rules 352 and 369 of the *Federal Courts Rules*, S.O.R./98-106.

27. Such further and other grounds as the Moving Parties may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on October 21, 2016.

2. Such further and additional materials as the Moving Parties may advise and this Honourable Court may allow.

October 21, 2016

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Air Canada

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WITNESSED STATEMENT OF CHRISTOPHER C. JOHNSON

(November 27, 2015)

I, **CHRISTOPHER C. JOHNSON**, of the Town of Kanata, in the Province of Ontario, DO SOLEMNLY DECLARE THAT:

1. I am one of the applicants, and as such, I have personal knowledge of the information set out below, which is to my knowledge true, accurate, and complete.

2. I held the following confirmed itinerary on flights of Air Canada:

Flight	**Date**	**Depart**		**Arrive**	
AC 888	Dec 4, 2013	Ottawa (YOW)	21:45	London (LHR)	09:35 (+1)
AC 889	Dec 10, 2013	London (LHR)	13:00	Ottawa (YOW)	15:45

A copy of the electronic ticket is attached and marked as Exhibit “A”.

3. On December 10, 2013, Flight AC 889 from London to Ottawa was first delayed for more than four hours (with passengers on board), and then cancelled. A copy of the email notification about the cancellation is attached and marked as Exhibit “B”.

4. I have no personal knowledge of the cause of the cancellation, and I hold Air Canada to the strict burden of proof to establish same.

5. After deplaning the aircraft, Air Canada’s agents asked for 20 volunteers to stay in London for the night and to be transported the next day. My understanding is that passengers who did not volunteer were transported on other Air Canada flights on the same day (December 10, 2013). I volunteered to stay in London for the night with the clear understanding that Air Canada would provide me with accommodation and meals.

6. One of Air Canada's agents told me to collect my checked baggage in the Arrivals Area and that there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher.

7. I did as I was told, collected my checked baggage, and waited outside the Arrivals Area for almost 30 minutes. I saw neither a van nor anyone else from the group of 20 volunteers.

8. I then re-entered the terminal, and asked an attendant at the information desk to contact any Air Canada service staff who might still be available. The attendant was unable to locate any Air Canada representative even after making announcements over the Arrivals area PA system, going into the restricted area (where I could not go), and attempting to call Air Canada's phone at Terminal 3. There were no Air Canada agents at the check-in desks either, because the last flight for the day had already departed.

9. At this point, at approximately 8 pm, I phoned Air Canada Reservations in Montreal, Canada, and spoke to an agent by the name of Louise M. She also attempted to contact Air Canada agents on the Terminal 3 premises, but was unable to reach anyone. Subsequently, the agent advised me to seek my own accommodation and dinner, and then seek reimbursement from Air Canada after the fact.

10. I obtained accommodation for the night at the Holiday Inn at the airport through British Hotels Reservations Centre for the cost of GBP 257.96, which was charged to my credit card as CAD$461.77. This cost included transportation to and from the hotel, and a breakfast. I booked my accommodation through the Centre because it was cheaper than through the hotel directly. A copy of the booking confirmation and the credit card slip is attached and marked as Exhibit "C".

11. On December 10, 2013, I had a dinner at the Holiday Inn for the cost of GBP 38.99, which was billed to my credit card as CAD $69.79. A copy of my credit card statement, showing the charges for my accommodation and meal, is attached and marked as Exhibit “D”.

12. On December 17, 2013, I requested that Air Canada reimburse me for the out-of-pocket expenses that I have incurred: CAD$461.77 for accommodation and $69.79 for a meal.

13. On December 22, 2013, Air Canada refused my request for full reimbursement on the basis that:

> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner.

A copy of Air Canada’s email of December 22, 2013 is attached and marked as Exhibit “E”.

14. A copy of the email I sent to Air Canada on January 3, 2014 is attached and marked as Exhibit “F”.

15. A copy of the email I sent to Air Canada on January 9, 2014 is attached and marked as Exhibit “G”.

16. A copy of Air Canada’s response, dated January 15, 2014, is attached and marked as Exhibit “H”.

17. A copy of the email I sent to Mr. Calin Rovinescu, Air Canada’s President and CEO, and other Air Canada staff, is attached and marked as Exhibit “I”.

18. A copy of Air Canada's response, dated February 4, 2014, is attached and marked as Exhibit "J".

19. A copy of Air Canada's response, dated February 6, 2014, is attached and marked as Exhibit "K".

20. A copy of the email I sent to Air Canada on February 6, 2014 is attached and marked as Exhibit "L".

21. A copy of Air Canada's response, dated February 21, 2014, is attached and marked as Exhibit "M".

22. Subsequently, I received from Air Canada a cheque for the amount of CAD$222.00. I have received no further payment from Air Canada in relation to this claim.

SIGNED in the Town of Kanata,
in the Province of Ontario,
on November 27, 2015, in the presence of:

_____
CHRISTOPHER C. JOHNSON

_____
Witness signature

Print Witness Name:

LIST OF EXHIBITS

A. Booking confirmation sent by Air Canada on November 28, 2013

B. Cancellation notification, sent by Air Canada on December 10, 2013 at 17:59 GMT

C. Hotel booking confirmation and credit card slip, dated December 10, 2013

D. Visa statement for the period November 26 to December 23, 2013

E. Email of Air Canada to Mr. Johnson, dated December 22, 2013

F. Email of Mr. Johnson to Air Canada, dated January 3, 2014

G. Email of Mr. Johnson to Air Canada, dated January 9, 2014

H. Email of Air Canada to Mr. Johnson, dated January 15, 2014

I. Email of Mr. Johnson to Mr. Rovincescu and others, dated January 17, 2014

J. Email of Air Canada to Mr. Johnson, dated February 4, 2014

K. Email of Air Canada to Mr. Johnson, dated February 6, 2014

L. Email of Mr. Johnson to Air Canada, dated February 6, 2014

M. Email of Air Canada to Mr. Johnson, dated February 21, 2014

This is **Exhibit "A"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

Date: Thu, 28 Nov 2013 21:02:29 +0000
From: confirmation@aircanada.ca
To: ccjohnson@sympatico.ca
Subject: Air Canada - 04-Dec: Ottawa - London (booking ref: PBK77V) - booking modified

****** PLEASE DO NOT REPLY TO THIS E-MAIL ******

Confirmation

Your passenger information has been successfully updated

Your passenger information is confirmed. Please print/retain this page for your financial records (e.g. for taxation, expense claim or payment card reconciliation purposes). We thank you for choosing Air Canada and look forward to welcoming you on board.

Booking Information

Booking Reference: PBK77V

This is your confirmation

Main Contact:
Mr Christopher Johnson
ccjohnson@sympatico.ca
Mobile:
Home:

Online Services

- **Manage** my booking online (view/change my booking; select seats*).
- **Select Seats**
- **Maple Leaf Lounge | Meal Vouchers | On My Way**
- **Check-in online** and print my boarding pass.

* Can my booking be changed online?

Customer Care

Air Canada
03 6072111

Flight Arrivals and Departures
03 6072111

Flight Itinerary

Flight	From	To	Stops	Duration	Aircraft	Fare Type

AC888	**Ottawa, Ottawa Int'l (YOW)** Wed 04-Dec 2013 21:45	**London, Heathrow (LHR)** Thu 05-Dec 2013 09:35 - Terminal 3	0	6hr50	763	Tango, K
AC889	**London, Heathrow (LHR)** Tue 10-Dec 2013 13:00 - Terminal 3	**Ottawa, Ottawa Int'l (YOW)** Tue 10-Dec 2013 15:45	0	7hr45	763	Tango, K

Passenger Information

1: Mr Christopher Johnson : Adult (16+), Ticket Number: 0142127721484

Air Canada - Aeroplan :		Meal Preference :	**Regular**
Payment Card:	**xxxx-xxxx-xxxx-3998**	Special Needs:	**None**
Seat Selection:	AC888 **16C** , AC889 **16C**		

This is **Exhibit "B"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

Date: Tue, 10 Dec 2013 17:59:02 +0000
> From: flightnotification@aircanada.ca
> Subject: Air Canada Flight Notification - AC0889 - Cancellation
> To: ccjohnson@sympatico.ca
>
> We regret to inform you that the flight you are tracking with Air Canada Flight Notification has been cancelled.
>
> Flight Number: AC0889
>
> Scheduled:
> Departing London (UK) on December 10, 2013 @ 13:00
> Arriving in Ottawa December 10, 2013 @ 15:45
>
> We apologize for the inconvenience this may have caused.
>
> You can view all your available flight notification messages here:
> http://mymessages.aircanada.com/en/8myjHiWNQW7kIq3mStA
>
> *This is an automated message, please do not reply to this e-mail*
>
> **********
>
> Voted the Best Airline in North America four years running -- Skytrax World Airline Awards 2013.
>
> Meilleur transporteur a�rien en Am�rique du Nord pour la quatri�me ann�e -- Skytrax World Airline Awards 2013.
>
> **********
>
>
> ---------- Disclaimer/Avertissement ----------
> This email and any files transmitted with it are privileged, confidential,
> and intended solely for the use of the individual or entity to whom they
> are addressed. Views expressed are those of the author and not necessarily those
> of the Corporation or its affiliates. Any unauthorized use or disclosure is
> prohibited. Please notify the sender if you have received this email in error.
> Thank you for your co-operation.
>
> Le pr�sent courriel et, s'il y a lieu, ses pi�ces jointes constituent des
> renseignements confidentiels et destin�s au seul usage de leurs destinataires,
> qu'il s'agisse de particuliers ou d'organismes. Les opinions qui y sont
> exprim�es sont celles de l'auteur et ne correspondent pas n�cessairement �
> celles de l'entreprise ou de ses affili�es. Il est interdit d'utiliser ou de
> divulguer ces renseignements sans autorisation. Si vous avez re�u ce courriel

> par erreur, veuillez communiquer avec son exp&#65533;diteur. Nous vous remercions de
> votre collaboration.
> ----------

This is **Exhibit "C"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

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BHRC **We Know London**

Booking Confirmation - T3136534 - 1

Hotel Details

Hotel Name : **Holiday Inn London Heathrow Ariel** Hotel Reference: **BHRC2**
Hotel Address : **118 Bath Road, Hayes, London Heathrow, United Kingdom, UB3 5AJ**
Tel : 0871 942 9040

Visit Details

Guest name: **Mr Johnson Charles**

Check In: **10 Dec 2013** ETA: Check Out: **11 Dec 2013**

No of Rooms : **1** Nights: **1** Guest per Room: **1**

Room Type: **Single Ensuite**

Note: Hotel booking was made at the Airport using this booking service.

10 Dec 2013 Breakfast Breakfast Included

Additional Requirements

Payment mode:

BHRC voucher

Please adjust in the final bill

British Hotels
Reservations Centre
Heathrow Airport T3
Arrivals
Hounslow Middlesex
TW6M 6AN
MID :'76001 TID :''4466
10-12-2013 20:13:08
BATCH:00001565
TCC
AID :A0000000031010
APP LABEL:VISA
TRANS TYPE:00
TC :B2A488ABBA2465C4
TVR :0000008000 TSI:F800
CVMR:4103302
VISA XXXX XXXX XXXX 3998
SALE £257.95
TOTAL £257.95
PERMISSION TO DEBIT ACCOUNT
PIN VERIFIED
AUTH CODE:001317
PLEASE KEEP RECEIPT FOR YOUR OWN RECORDS
CUSTOMER COPY

Cancellation Policy
1 Day prior to 12:00 hrs Hotel time on Day of Arrival to avoid cancellation charges of 100 % on Entire Stay

Sold at: Heathrow Terminal 3, Terminal 3 Arrivals Hall,Heathrow Airport
Enquiries Tel: 020 8759 8797 E-Mail: customer.services@bhrc.co.uk Web: http://www.bhrconline.com/
Sent by: Teresa Fedullo **Date:** 10 Dec 2013

VAT No. 240 1559 92 TID 96244746

This is **Exhibit "D"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

RBC Royal Bank

RBC Visa Infinite Avion

CHRIS C JOHNSON [redacted] 3998

STATEMENT FROM NOV 26 TO DEC 23, 2013

As an Avioner®, you can redeem your RBC Rewards® points instantly with the best one-step travel rewards online booking experience in Canada. For more information or to book your next trip today, visit www.rbcrewards.com/travel

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PREVIOUS STATEMENT BALANCE [redacted]

CHRIS C JOHNSON
[redacted] **3998 - PRIMARY**

TRANSACTION DATE	POSTING DATE	ACTIVITY DESCRIPTION	AMOUNT ($)
[redacted]			
DEC 10	DEC 12	BRITISH HOTEL RES HEATHROW T3	$461.77
		74929003346005270932147	
		Foreign Currency-GBP 257.95 Exchange rate-1.790153	
DEC 11	DEC 13	HOLIDAY INN LN-HEATH MIDDLESEX	$69.79
		74929043347325500000027	
[redacted]			

NEW BALANCE [redacted]

IMPORTANT INFORMATION

RBC REWARDS POINTS

Previous Points balance	[redacted]
Points earned this statement	[redacted]
New points balance	[redacted]

CONTACT US

Customer Service / Lost & Stolen	1-800-769-2512
Collect Outside North America	(416) 974-7780
RBC Rewards Travel Redemption	1-877-636-2870
Merchandise Redemption	1-800-769-2512
Web site	www.rbcrewards.com

PAYMENTS & INTEREST RATES

Minimum payment	[redacted]
Payment due date	**JAN 13, 2014**
Credit limit	[redacted]
Available credit	[redacted]
Annual interest rates:	
Purchases	[redacted]
Cash advances	[redacted]

CALCULATING YOUR BALANCE

Previous Statement Balance	[redacted]
Payments & credits	[redacted]
Purchases & debits	[redacted]
Cash advances	[redacted]
Interest	[redacted]
Fees	[redacted]
NEW BALANCE	[redacted]

RBC ROYAL BANK
CREDIT CARD PAYMENT CENTRE
P.O.BOX 4016, STATION "A"
TORONTO, ONTARIO M5W 2E6

NEW BALANCE	MINIMUM PAYMENT	PAYMENT DUE DATE	AMOUNT PAID
[redacted]	[redacted]	**JAN 13, 2014**	**$**

RBC Visa Infinite Avion
[redacted] **3998**

RBC0190000_2331406_030-147266 02237

CHRIS C JOHNSON
[redacted]

Payment options
· Telephone banking 1-800-769-2511
· Online banking www.rbcroyalbank.com
· RBC Royal Bank ATM
· RBC Royal Bank Branch

This is **Exhibit "E"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

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Print Close

Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **support@help-aircanada.com**
Sent: December-22-13 6:56:32 PM
To: ccjohnson@sympatico.ca

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Mr. Johnson,

Thank you for your email. We appreciate the time you have taken to contact us and we are grateful for an opportunity to try to address your concerns.

Our records confirm that AC889 was cancelled due to mechanical requirements.

While we make every effort to operate our flights as scheduled, regretfully, delays sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and certainly regret the inconvenience you experienced as a result of this delay.

As there are instances where avoiding a flight delay is impossible, times shown on tickets are not guaranteed.

In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner. Should you send in your receipts for the above mentioned items, we will submit for consideration of refund. Please send to:

Air Canada Centre 3700 - Hangar 101
8050 2nd St NE
Calgary, AB
T2E 7H6
REF-ABDA-SPVDCE

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In addition to reimbursement for accommodation and meals, as a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.

To receive your discount, enter the one time use Promotion Code JEW3G2K1 in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today.

This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.

The discount applies exclusively on published fares for Air Canada, Air Canada Express and Air Canada rouge designated flights. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.

Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

Thank you for contacting us. We hope we will have the opportunity to welcome you on board again in the near future.

Warm Regards,
Harmony
Customer Relations

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

From: ccjohnson@sympatico.ca
Sent: 17/12/2013 08:48 AM
Subject: Hotel and Delayed Flight Reimbursement

On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.

One of the service staff told me to collect my luggage in the Arrivals Area and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured

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into the restricted areas where I could not go and used the Arrivals area PA system. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.

At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.

In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?

a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
b. Dinner – 38.99 pounds - $69.79 Canadian

What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?

Regards,

Chris Johnson
613-270-8959
ccjohnson@sympatico.ca

This is **Exhibit "F"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

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Print Close

RE: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **ccjohnson@sympatico.ca**
Sent: January-03-14 6:18:37 PM
To: support@help-aircanada.com (support@help-aircanada.com)

Harmony,

Thanks for your reply. I would ask that you reconsider your current policy stance insofar as my request for reimbursement due to a flight cancellation is concerned. Your reimbursement amounts are significantly less than the actual and reasonable costs I incurred as a result of the flight cancellation. The dollar values for both my room and meals represent the bare minimum associated with staying in the London/Heathrow. I don't believe anybody would suggest that I tried to take advantage of Air Canada in that I stayed as a Holiday Inn Express and had a meal in their restaurant. Food and accommodations anywhere in the London area are quite expensive when compared to similar Canadian values and Air Canada's reimbursement policies must reflect these differences.

I would also point out that the other passengers who managed to meet up with one of your on-site representatives were provided with a free room (not sure which hotel) and meal vouchers of enough value to pay for both a reasonable dinner and breakfast. I did point out that I made all reasonable effort to contact one of your on-site representatives to no avail; even going so far as to phone your Montreal Reservations Office to see if they could contact any of your on-site representatives.

Lastly, I would like to remind you of a recent Canadian Transportation Agency ruling a few months ago with respect to flight delayes or cancellations.

"As of September 18, 2013 Air Canada must pay passengers who are bumped from flights without their permission between $200 and $800 cash depending on the length of the resulting delay. For a delay of less than 2 hours, the compensation will be $200; for a delay between 2 and 6 hours it will be $400; and for a ***6-hour delay or longer, $800****.*
The CTA also ruled that passengers can now insist on receiving cash rather than travel vouchers, and that vouchers must be issued at a 1 to 3 ratio, that is that $1 in cash equal to $3 in travel vouchers.
In a separate decision, the CTA also found that it was unreasonable for Porter Airlines to refuse to refund the fare paid by a passenger because of the airline's cancellation of a flight. It ordered Porter to refund fares for cancelled flights as well as ***reasonable expenses for flight delays.*** *It also said that Porter's policies were unclear. Porter Airlines has been given until the end of September 2013 to revise its relevant tariff provisions.*

With the above in mind I am requesting that you reconsider your previous stance and agree to provide full reimbursement for all reasonable expenses associated with my overnight stay in London as a result of a mechanical problem with your aircraft.

I am also requesting compensation in keeping with the Canadian Transportation Agenciy's

ruling. My preference would be for a travel voucher with a value of $2400 (3 X the $800 cash award stipulated by the Canadian Transportation Agency.

regards,

Chris Johnson
613-270-8959
> From: support@help-aircanada.com
> To: ccjohnson@sympatico.ca
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> Date: Sun, 22 Dec 2013 10:56:31 -0800
>
>
==========
> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
>
==========
>
> Dear Mr. Johnson,
>
>
> Thank you for your email. We appreciate the time you have taken to contact us and we are grateful for an opportunity to try to address your concerns.
>
> Our records confirm that AC889 was cancelled due to mechanical requirements.
>
> While we make every effort to operate our flights as scheduled, regretfully, delays sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and certainly regret the inconvenience you experienced as a result of this delay.
>
> As there are instances where avoiding a flight delay is impossible, times shown on tickets are not guaranteed.
>
> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner. Should you send in your receipts for the above mentioned items, we will submit for consideration of refund. Please send to:
>
> Air Canada Centre 3700 - Hangar 101
> 8050 2nd St NE
> Calgary, AB
> T2E 7H6
> REF-ABDA-SPVDCE
>
>
> In addition to reimbursement for accommodation and meals, as a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.
>
> To receive your discount, enter the one time use Promotion Code JEW3G2K1 in the

Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today.
>
> This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.
>
> The discount applies exclusively on published fares for Air Canada, Air Canada Express and Air Canada rouge designated flights. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.
>
> Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.
>
> Thank you for contacting us. We hope we will have the opportunity to welcome you on board again in the near future.
>
>
> Warm Regards,
> Harmony
> Customer Relations
>
> ------ Original Message ------
>
> From: ccjohnson@sympatico.ca
> Sent: 17/12/2013 08:48 AM
> Subject: Hotel and Delayed Flight Reimbursement
>
>
> On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.
>
> One of the service staff told me to collect my luggage in the Arrivals Area and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured into the restricted areas where I could not go and used the Arrivals area PA system. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.
>
> At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.
>
> In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?

67

>
> a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
> b. Dinner – 38.99 pounds - $69.79 Canadian
>
> What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?
>
> Regards,
>
> Chris Johnson
> 613-270-8959
> ccjohnson@sympatico.ca

This is **Exhibit "G"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

Print Close

FW: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **ccjohnson@sympatico.ca**
Sent: January-09-14 11:52:57 PM
To: nick.careen@aircanada.ca (nick.careen@aircanada.ca)

Mr. Careen,

Enclosed is a series of emails between me and your customer relations staff. I have yet to receive a reply to my query of last Fri. As you will be able to discern my disagreement centres around reimbursement for a mechanical-caused delay I encountered in early Dec 13 while returning from London to Ottawa. I can assure you that a Heathrow Holiday Inn Express room and a simple meal at that same hotel was hardly extravagant. Over my many years of passenger travel with Air Canada (current Aeroplan 50K status) I have encountered a few similar delays where my hotel and meal costs were fully covered. I have also been provided with some substantial compensation for previous delays. While I appreciate that your airline strives to reduce costs, please don't try to save cash by picking my pocket.

I'm hopeful that your intervention will resolve this matter in an amicable manner.

I look forward to your reply.

regards,

Chris Johnson
Colonel
Canadian Armed Forces

613-270-8959

From: ccjohnson@sympatico.ca
To: support@help-aircanada.com
Subject: RE: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
Date: Fri, 3 Jan 2014 18:18:36 +0000

Harmony,

Thanks for your reply. I would ask that you reconsider your current policy stance insofar as my request for reimbursement due to a flight cancellation is concerned. Your reimbursement amounts are significantly less than the actual and reasonable costs I incurred as a result of the flight cancellation. The dollar values for both my room and meals represent the bare minimum associated with staying in the London/Heathrow. I don't believe anybody would suggest that I tried to take advantage of Air Canada in that I stayed as a Holiday Inn Express and had a meal in their restaurant. Food and

accommodations anywhere in the London area are quite expensive when compared to similar Canadian values and Air Canada's reimbursement policies must reflect these differences.

I would also point out that the other passengers who managed to meet up with one of your on-site representatives were provided with a free room (not sure which hotel) and meal vouchers of enough value to pay for both a reasonable dinner and breakfast. I did point out that I made all reasonable effort to contact one of your on-site representatives to no avail; even going so far as to phone your Montreal Reservations Office to see if they could contact any of your on-site representatives.

Lastly, I would like to remind you of a recent Canadian Transportation Agency ruling a few months ago with respect to flight delayes or cancellations.

"As of September 18, 2013 Air Canada must pay passengers who are bumped from flights without their permission between $200 and $800 cash depending on the length of the resulting delay. For a delay of less than 2 hours, the compensation will be $200; for a delay between 2 and 6 hours it will be $400; and for a ***6-hour delay or longer, $800****.*
The CTA also ruled that passengers can now insist on receiving cash rather than travel vouchers, and that vouchers must be issued at a 1 to 3 ratio, that is that $1 in cash equal to $3 in travel vouchers.
In a separate decision, the CTA also found that it was unreasonable for Porter Airlines to refuse to refund the fare paid by a passenger because of the airline's cancellation of a flight. It ordered Porter to refund fares for cancelled flights as well as ***reasonable expenses for flight delays.*** *It also said that Porter's policies were unclear. Porter Airlines has been given until the end of September 2013 to revise its relevant tariff provisions.*

With the above in mind I am requesting that you reconsider your previous stance and agree to provide full reimbursement for all reasonable expenses associated with my overnight stay in London as a result of a mechanical problem with your aircraft.

I am also requesting compensation in keeping with the Canadian Transportation Agenciy's ruling. My preference would be for a travel voucher with a value of $2400 (3 X the $800 cash award stipulated by the Canadian Transportation Agency.

regards,

Chris Johnson
613-270-8959
> From: support@help-aircanada.com
> To: ccjohnson@sympatico.ca
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> Date: Sun, 22 Dec 2013 10:56:31 -0800
>
>
==========
> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
>
==========
>
> Dear Mr. Johnson,
>

>
> Thank you for your email. We appreciate the time you have taken to contact us and we are grateful for an opportunity to try to address your concerns.
>
> Our records confirm that AC889 was cancelled due to mechanical requirements.
>
> While we make every effort to operate our flights as scheduled, regretfully, delays sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and certainly regret the inconvenience you experienced as a result of this delay.
>
> As there are instances where avoiding a flight delay is impossible, times shown on tickets are not guaranteed.
>
> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner. Should you send in your receipts for the above mentioned items, we will submit for consideration of refund. Please send to:
>
> Air Canada Centre 3700 - Hangar 101
> 8050 2nd St NE
> Calgary, AB
> T2E 7H6
> REF-ABDA-SPVDCE
>
>
> In addition to reimbursement for accommodation and meals, as a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.
>
> To receive your discount, enter the one time use Promotion Code JEW3G2K1 in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today.
>
> This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.
>
> The discount applies exclusively on published fares for Air Canada, Air Canada Express and Air Canada rouge designated flights. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.
>
> Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.
>
> Thank you for contacting us. We hope we will have the opportunity to welcome you on board again in the near future.
>
>
> Warm Regards,
> Harmony
> Customer Relations

72

>
> ------ Original Message ------
>
> From: ccjohnson@sympatico.ca
> Sent: 17/12/2013 08:48 AM
> Subject: Hotel and Delayed Flight Reimbursement
>
>
> On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.
>
> One of the service staff told me to collect my luggage in the Arrivals Area and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured into the restricted areas where I could not go and used the Arrivals area PA system. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.
>
> At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.
>
> In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?
>
> a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
> b. Dinner – 38.99 pounds - $69.79 Canadian
>
> What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?
>
> Regards,
>
> Chris Johnson
> 613-270-8959
> ccjohnson@sympatico.ca

This is **Exhibit "H"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

74

Print Close

Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **support@help-aircanada.com**
Sent: January-15-14 8:36:05 PM
To: ccjohnson@sympatico.ca

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Mr. Johnson,

Thank you for your continued correspondence.

The CTA rulings in which you have referred to are for Denied Boarding scenarios when a flight is overbooked. The rulings pertain to a flight that is able to operate and does not have availability for all booked passengers.

In the case of AC889 on the 10th December, this was a Mechanical flight cancellation not a Denied Boarding.

All passengers receive the same compensation with regards to the amount of meal vouchers as previously advised. Additionally, our partner hotels are within our policy guideline costs.

We apologize you were unable to locate a representative that was able to give you vouchers. Should you wish to submit your receipts for meals and accommodation, we would be happy to reimburse you to our maximum allowable amount.

Thank you for taking the time to contact us and for allowing us to clarify our position. We hope we'll have the opportunity to welcome you on board in the future.

Sincerely,
Harmony
Customer Relations

------ Previous Message ------

75

From: ccjohnson@sympatico.ca
To: support@help-aircanada.com;
Sent: 03/01/2014 04:18:38 PM
Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

Harmony,

Thanks for your reply. I would ask that you reconsider your current policy stance insofar as my request for reimbursement due to a flight cancellation is concerned. Your reimbursement amounts are significantly less than the actual and reasonable costs I incurred as a result of the flight cancellation. The dollar values for both my room and meals represent the bare minimum associated with staying in the London/Heathrow. I don't believe anybody would suggest that I tried to take advantage of Air Canada in that I stayed as a Holiday Inn Express and had a meal in their restaurant. Food and accommodations anywhere in the London area are quite expensive when compared to similar Canadian values and Air Canada's reimbursement policies must reflect these differences.

I would also point out that the other passengers who managed to meet up with one of your on-site representatives were provided with a free room (not sure which hotel) and meal vouchers of enough value to pay for both a reasonable dinner and breakfast. I did point out that I made all reasonable effort to contact one of your on-site representatives to no avail; even going so far as to phone your Montreal Reservations Office to see if they could contact any of your on-site representatives.

Lastly, I would like to remind you of a recent Canadian Transportation Agency ruling a few months ago with respect to flight delayes or cancellations.

"As of September 18, 2013 Air Canada must pay passengers who are bumped from flights without their permission between $200 and $800 cash depending on the length of the resulting delay. For a delay of less than 2 hours, the compensation will be $200; for a delay between 2 and 6 hours it will be $400; and for a 6-hour delay or longer, $800.
The CTA also ruled that passengers can now insist on receiving cash rather than travel vouchers, and that vouchers must be issued at a 1 to 3 ratio, that is that $1 in cash equal to $3 in travel vouchers.
In a separate decision, the CTA also found that it was unreasonable for Porter Airlines to refuse to refund the fare paid by a passenger because of the airline's cancellation of a flight. It ordered Porter to refund fares for cancelled flights as well as reasonable expenses for flight delays. It also said that Porter's policies were unclear. Porter Airlines has been given until the end of September 2013 to revise its relevant tariff provisions.

With the above in mind I am requesting that you reconsider your previous stance and agree to provide full reimbursement for all reasonable expenses associated with my overnight stay

in London as a result of a mechanical problem with your aircraft.

I am also requesting compensation in keeping with the Canadian Transportation Agenciy's ruling. My preference would be for a travel voucher with a value of $2400 (3 X the $800 cash award stipulated by the Canadian Transportation Agency.

regards,

Chris Johnson
613-270-8959
> From: support@help-aircanada.com
> To: ccjohnson@sympatico.ca
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> Date: Sun, 22 Dec 2013 10:56:31 -0800
>
>
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> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
>
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>
> Dear Mr. Johnson,
>
>
> Thank you for your email. We appreciate the time you have taken to contact us and we are grateful for an opportunity to try to address your concerns.
>
> Our records confirm that AC889 was cancelled due to mechanical requirements.
>
> While we make every effort to operate our flights as scheduled, regretfully, delays sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and certainly regret the inconvenience you experienced as a result of this delay.
>
> As there are instances where avoiding a flight delay is impossible, times shown on tickets are not guaranteed.
>
> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner. Should you send in your receipts for the above mentioned items, we will submit for consideration of refund. Please send to:
>
> Air Canada Centre 3700 - Hangar 101
> 8050 2nd St NE
> Calgary, AB
> T2E 7H6

> REF-ABDA-SPVDCE
>
>
> In addition to reimbursement for accommodation and meals, as a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.
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> To receive your discount, enter the one time use Promotion Code JEW3G2K1 in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today.
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> This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.
>
> The discount applies exclusively on published fares for Air Canada, Air Canada Express and Air Canada rouge designated flights. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.
>
> Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.
>
> Thank you for contacting us. We hope we will have the opportunity to welcome you on board again in the near future.
>
>
> Warm Regards,
> Harmony
> Customer Relations
>
> ------ Original Message ------
>
> From: ccjohnson@sympatico.ca
> Sent: 17/12/2013 08:48 AM
> Subject: Hotel and Delayed Flight Reimbursement
>
>
> On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.
>
> One of the service staff told me to collect my luggage in the Arrivals Area and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff

78

still available. This proved to be fruitless, even when she ventured into the restricted areas where I could not go and used the Arrivals area PA system. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.
>
> At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.
>
> In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?
>
> a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
> b. Dinner – 38.99 pounds - $69.79 Canadian
>
> What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?
>
> Regards,
>
> Chris Johnson
> 613-270-8959
> ccjohnson@sympatico.ca

This is **Exhibit "I"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

80

Print Close

FW: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **ccjohnson@sympatico.ca**
Sent: January-17-14 10:07:18 PM
To: calin.rovinescu@aircanada.ca (calin.rovinescu@aircanada.ca); nick.careen@aircanada.ca (nick.careen@aircanada.ca); support@help-aircanada.com (support@help-aircanada.com); calin.rovinescu@aircanada.com (calin.rovinescu@aircanada.com); nicj.careen@aircanada.com (nicj.careen@aircanada.com)

Mr. Rovinescu,

The following is a lengthy email exchange, and continued disagreement, between me and your Customer Relations department. I have tried to escalate the issue to your VP Customer Relations, Mr. Nick Careen and, to date, have not received the courtesy of a reply. To that end I am escalating the issue to you in the hope that you will look at the merits of the case and adjudicate in my favour. The essence of the disagreement is as follows:

On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind and travel to Ottawa the following day. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind as I had no pressing business in Ottawa, while most of the other passengers indicated that they wished to return as soon as possible. This was not my first experience in a flight delay requiring an overnight stay; a few times over the years with Air Canada and other commercial carriers, in addition to numerous times with Canadian military aircraft.

One of the service staff told me to collect my luggage and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured into the Restricted Areas where I could not go and used the Arrivals area PA system to page any Air Canada employee. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.

At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada Heathrow staff. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.

81

My accommodation (Holiday Inn Express) came to a total of 257.95 pounds/$461.77 Canadian. This included transport to and from the hotel and breakfast). Dinner cost me a total of 38.99 pounds/$69.79 Canadian. I can assure you that my meal was not extravagant. My out of pocket expenses totalled $531.56.

The reimbursement I have been offered provides for $100 toward the cost of my hotel room, $7 for breakfast and $15 for dinner for a total of $122. I am being told that I have to "eat" the difference of $409.56.

My request to you is that you examine the facts of the case and conclude that, given the effort I made to contact your Heathrow staff, that my case is unique and not precedent setting and therefore conclude that I merit full reimbursement of my actual and reasonable expenses of $531.56.

I am available for discussion should you so wish.

regards,

Colonel Chris Johnson
613-270-8959

Calin Rovinescu

> From: support@help-aircanada.com
> To: ccjohnson@sympatico.ca
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> Date: Wed, 15 Jan 2014 12:36:05 -0800
>
>
==========
> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
>
==========
>
> Dear Mr. Johnson,
>
>
> Thank you for your continued correspondence.
>
> The CTA rulings in which you have referred to are for Denied Boarding scenarios when a flight is overbooked. The rulings pertain to a flight that is able to operate and does not have availability for all booked passengers.
>
> In the case of AC889 on the 10th December, this was a Mechanical flight cancellation not a Denied Boarding.
>
> All passengers receive the same compensation with regards to the amount of meal vouchers as previously advised. Additionally, our partner hotels are within our policy guideline costs.
>
> We apologize you were unable to locate a representative that was able to give you vouchers. Should you wish to submit your receipts for meals and accommodation, we would be happy to reimburse you to our maximum allowable amount.

82

>
> Thank you for taking the time to contact us and for allowing us to clarify our position. We hope we'll have the opportunity to welcome you on board in the future.
>
>
> Sincerely,
> Harmony
> Customer Relations
>
>
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> To: support@help-aircanada.com;
> Sent: 03/01/2014 04:18:38 PM
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
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> Lastly, I would like to remind you of a recent Canadian Transportation Agency ruling a few months ago with respect to flight delayes or cancellations.
>
> "As of September 18, 2013 Air Canada must pay passengers who are bumped from flights without their permission between $200 and $800 cash depending on the length of the resulting delay. For a delay of less than 2 hours, the compensation will be $200; for a delay between 2 and 6 hours it will be $400; and for a 6-hour delay or longer, $800.
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>
> With the above in mind I am requesting that you reconsider your previous stance and agree to provide full reimbursement for all reasonable expenses associated with my overnight stay in London as a result of a mechanical problem with your aircraft.
>
> I am also requesting compensation in keeping with the Canadian Transportation Agenciy's ruling. My preference would be for a travel voucher with a value of $2400 (3 X the $800 cash award stipulated by the Canadian Transportation Agency.
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> regards,
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> Chris Johnson
> 613-270-8959
> > From: support@help-aircanada.com
> > To: ccjohnson@sympatico.ca
> > Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> > Date: Sun, 22 Dec 2013 10:56:31 -0800
> >
> >
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> > Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
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> >
> > Dear Mr. Johnson,
> >
> >
> > Thank you for your email. We appreciate the time you have taken to contact us and we are grateful for an opportunity to try to address your concerns.
> >
> > Our records confirm that AC889 was cancelled due to mechanical requirements.
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> > While we make every effort to operate our flights as scheduled, regretfully, delays sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and certainly regret the inconvenience you experienced as a result of this delay.
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> >
> > Air Canada Centre 3700 - Hangar 101
> > 8050 2nd St NE
> > Calgary, AB
> > T2E 7H6
> > REF-ABDA-SPVDCE
> >

> >
> > In addition to reimbursement for accommodation and meals, as a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.
> >
> > To receive your discount, enter the one time use Promotion Code JEW3G2K1 in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today.
> >
> > This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.
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> > The discount applies exclusively on published fares for Air Canada, Air Canada Express and Air Canada rouge designated flights. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.
> >
> > Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.
> >
> > Thank you for contacting us. We hope we will have the opportunity to welcome you on board again in the near future.
> >
> >
> > Warm Regards,
> > Harmony
> > Customer Relations
> >
> > ------ Original Message ------
> >
> > From: ccjohnson@sympatico.ca
> > Sent: 17/12/2013 08:48 AM
> > Subject: Hotel and Delayed Flight Reimbursement
> >
> >
> > On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.
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> >
> > At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any

85

Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.
> >
> > In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?
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> > a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
> > b. Dinner – 38.99 pounds - $69.79 Canadian
> >
> > What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?
> >
> > Regards,
> >
> > Chris Johnson
> > 613-270-8959
> > ccjohnson@sympatico.ca

This is **Exhibit "J"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

87

Print Close

Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **support@help-aircanada.com**
Sent: February-04-14 6:30:44 PM
To: ccjohnson@sympatico.ca

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Mr. Johnson,

Thank you again for your follow-up email.

Please be assured we truly regret your dissatisfaction. The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.

While we wish to assure you that we value your patronage, we are unable to offer further consideration to this matter. Our previous correspondence has provided our explanations and the continual exchange of emails will not alter our position.

We regret we did not conclude this matter to your satisfaction.

Sincerely,
Harmony
Customer Relations

------ Previous Message ------

From: ccjohnson@sympatico.ca
To:
calin.rovinescu@aircanada.ca;nick.careen@aircanada.ca;support@he
aircanada.com;calin.rovinescu@aircanada.com;nicj.careen@aircanac
Sent: 17/01/2014 08:07:20 PM
Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

88

Mr. Rovinescu, The following is a lengthy email exchange, and continued disagreement, between me and your Customer Relations department. I have tried to escalate the issue to your VP Customer Relations, Mr. Nick Careen and, to date, have not received the courtesy of a reply. To that end I am escalating the issue to you in the hope that you will look at the merits of the case and adjudicate in my favour. The essence of the disagreement is as follows: On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind and travel to Ottawa the following day. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind as I had no pressing business in Ottawa, while most of the other passengers indicated that they wished to return as soon as possible. This was not my first experience in a flight delay requiring an overnight stay; a few times over the years with Air Canada and other commercial carriers, in addition to numerous times with Canadian military aircraft.
One of the service staff told me to collect my luggage and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured into the Restricted Areas where I could not go and used the Arrivals area PA system to page any Air Canada employee. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.

At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada Heathrow staff. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email. My accommodation (Holiday Inn Express) came to a total of 257.95 pounds/$461.77 Canadian. This included transport to and from the hotel and breakfast). Dinner cost me a total of 38.99 pounds/$69.79 Canadian. I can assure you that my meal was not extravagant. My out of pocket expenses totalled $531.56. The reimbursement I have been offered provides for $100 toward the cost of my hotel room, $7 for breakfast and $15 for dinner for a total of $122. I am being told that I have to "eat" the difference of $409.56. My request to you is that you examine the facts of the case and conclude that, given the effort I made to contact your Heathrow staff, that my case is unique and not precedent setting and therefore conclude that I merit full reimbursement of my actual and reasonable expenses of $531.56. I am available for discussion should you so wish. regards, Colonel Chris Johnson613-270-8959 Calin

89

Rovinescu

> From: support@help-aircanada.com
> To: ccjohnson@sympatico.ca
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> Date: Wed, 15 Jan 2014 12:36:05 -0800
>
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==========
> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
>
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>
> Dear Mr. Johnson,
>
>
> Thank you for your continued correspondence.
>
> The CTA rulings in which you have referred to are for Denied Boarding scenarios when a flight is overbooked. The rulings pertain to a flight that is able to operate and does not have availability for all booked passengers.
>
> In the case of AC889 on the 10th December, this was a Mechanical flight cancellation not a Denied Boarding.
>
> All passengers receive the same compensation with regards to the amount of meal vouchers as previously advised. Additionally, our partner hotels are within our policy guideline costs.
>
> We apologize you were unable to locate a representative that was able to give you vouchers. Should you wish to submit your receipts for meals and accommodation, we would be happy to reimburse you to our maximum allowable amount.
>
> Thank you for taking the time to contact us and for allowing us to clarify our position. We hope we'll have the opportunity to welcome you on board in the future.
>
>
> Sincerely,
> Harmony
> Customer Relations
>
>
> ------ Previous Message ------
>
> From: ccjohnson@sympatico.ca
> To: support@help-aircanada.com;
> Sent: 03/01/2014 04:18:38 PM
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
>
>
> Harmony,
>

90

> Thanks for your reply. I would ask that you reconsider your current policy stance insofar as my request for reimbursement due to a flight cancellation is concerned. Your reimbursement amounts are significantly less than the actual and reasonable costs I incurred as a result of the flight cancellation. The dollar values for both my room and meals represent the bare minimum associated with staying in the London/Heathrow. I don't believe anybody would suggest that I tried to take advantage of Air Canada in that I stayed as a Holiday Inn Express and had a meal in their restaurant. Food and accommodations anywhere in the London area are quite expensive when compared to similar Canadian values and Air Canada's reimbursement policies must reflect these differences.
>
> I would also point out that the other passengers who managed to meet up with one of your on-site representatives were provided with a free room (not sure which hotel) and meal vouchers of enough value to pay for both a reasonable dinner and breakfast. I did point out that I made all reasonable effort to contact one of your on-site representatives to no avail; even going so far as to phone your Montreal Reservations Office to see if they could contact any of your on-site representatives.
>
> Lastly, I would like to remind you of a recent Canadian Transportation Agency ruling a few months ago with respect to flight delayes or cancellations.
>
> "As of September 18, 2013 Air Canada must pay passengers who are bumped from flights without their permission between $200 and $800 cash depending on the length of the resulting delay. For a delay of less than 2 hours, the compensation will be $200; for a delay between 2 and 6 hours it will be $400; and for a 6-hour delay or longer, $800.
> The CTA also ruled that passengers can now insist on receiving cash rather than travel vouchers, and that vouchers must be issued at a 1 to 3 ratio, that is that $1 in cash equal to $3 in travel vouchers.
> In a separate decision, the CTA also found that it was unreasonable for Porter Airlines to refuse to refund the fare paid by a passenger because of the airline's cancellation of a flight. It ordered Porter to refund fares for cancelled flights as well as reasonable expenses for flight delays. It also said that Porter's policies were unclear. Porter Airlines has been given until the end of September 2013 to revise its relevant tariff provisions.
>
> With the above in mind I am requesting that you reconsider your previous stance and agree to provide full reimbursement for all reasonable expenses associated with my overnight stay in London as a result of a mechanical problem with your aircraft.
>
> I am also requesting compensation in keeping with the Canadian Transportation Agenciy's ruling. My preference would be for a travel voucher with a value of $2400 (3 X the $800 cash award stipulated by the Canadian Transportation Agency.
>
> regards,

91

>
> Chris Johnson
> 613-270-8959
> > From: support@help-aircanada.com
> > To: ccjohnson@sympatico.ca
> > Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> > Date: Sun, 22 Dec 2013 10:56:31 -0800
> >
> >
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> > Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
> >
==========
> >
> > Dear Mr. Johnson,
> >
> >
> > Thank you for your email. We appreciate the time you have taken to contact us and we are grateful for an opportunity to try to address your concerns.
> >
> > Our records confirm that AC889 was cancelled due to mechanical requirements.
> >
> > While we make every effort to operate our flights as scheduled, regretfully, delays sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and certainly regret the inconvenience you experienced as a result of this delay.
> >
> > As there are instances where avoiding a flight delay is impossible, times shown on tickets are not guaranteed.
> >
> > In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner. Should you send in your receipts for the above mentioned items, we will submit for consideration of refund. Please send to:
> >
> > Air Canada Centre 3700 - Hangar 101
> > 8050 2nd St NE
> > Calgary, AB
> > T2E 7H6
> > REF-ABDA-SPVDCE
> >
> >
> > In addition to reimbursement for accommodation and meals, as a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.
> >
> > To receive your discount, enter the one time use Promotion

Code JEW3G2K1 in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today.
> >
> > This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.
> >
> > The discount applies exclusively on published fares for Air Canada, Air Canada Express and Air Canada rouge designated flights. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.
> >
> > Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.
> >
> > Thank you for contacting us. We hope we will have the opportunity to welcome you on board again in the near future.
> >
> >
> > Warm Regards,
> > Harmony
> > Customer Relations
> >
> > ------ Original Message ------
> >
> > From: ccjohnson@sympatico.ca
> > Sent: 17/12/2013 08:48 AM
> > Subject: Hotel and Delayed Flight Reimbursement
> >
> >
> > On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.
> >
> > One of the service staff told me to collect my luggage in the Arrivals Area and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured into the restricted areas where I could not go and used the Arrivals area PA system. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.
> >
> > At this point in time it was about 8 PM and I then phoned

93

the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.
> >
> > In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?
> >
> > a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
> > b. Dinner – 38.99 pounds - $69.79 Canadian
> >
> > What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?
> >
> > Regards,
> >
> > Chris Johnson
> > 613-270-8959
> > ccjohnson@sympatico.ca

This is **Exhibit "K"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

95

Print Close

Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **support@help-aircanada.com**
Sent: February-06-14 2:38:28 AM
To: ccjohnson@sympatico.ca

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Mr. Johnson,

Thank you for your correspondence that was sent to Nick Careen. I am happy to respond on his behalf.

We regret you feel your original inquiry was not handled appropriately, but can assure you it was reviewed thoroughly by Harmony.

We recognize on time performance as an integral part of our business. While we do our best to operate flights as planned, factors such as weather and the need for unscheduled maintenance may precipitate changes. Of necessity, a transportation company's liability for expenses incurred as a result of a schedule disruption is limited. While a ticket holds a guarantee of transportation, the schedule itself is never guaranteed.

In the event a customers travel plans are disrupted, Air Canada does provide assistance towards the cost of hotel and meals. To be consistent, we follow a guideline so that all customers are treated equally. We realize you have requested an exception to this policy, however, to allow this can be seen as discriminatory to those customers who received the normal assistance.

With receipts we will reimburse you the amount discussed previously. You may scan and attach them to your original email thread with Harmony.

We regret we are unable to conclude this to your satisfaction, however, the continual exchange of correspondence will not alter our decision. Thank you for this final opportunity to review this with you. Once we receive your receipts we will consider this matter concluded.

96

Sincerely,

Michelle Sturge
Lead
Customer Relations

From: ccjohnson@sympatico.ca [mailto:ccjohnson@sympatico.ca]
Sent: Thursday, January 9, 2014 6:53 PM
To: Nick Careen
Subject: FW: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

Mr. Careen,

Enclosed is a series of emails between me and your customer relations staff. I have yet to receive a reply to my query of last Fri. As you will be able to discern my disagreement centres around reimbursement for a mechanical-caused delay I encountered in early Dec 13 while returning from London to Ottawa. I can assure you that a Heathrow Holiday Inn Express room and a simple meal at that same hotel was hardly extravagant. Over my many years of passenger travel with Air Canada (current Aeroplan 50K status) I have encountered a few similar delays where my hotel and meal costs were fully covered. I have also been provided with some substantial compensation for previous delays. While I appreciate that your airline strives to reduce costs, please don't try to save cash by picking my pocket.

I'm hopeful that your intervention will resolve this matter in an amicable manner.

I look forward to your reply.

regards,

Chris Johnson
Colonel
Canadian Armed Forces

613-270-8959

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

From: ccjohnson@sympatico.ca
Sent: 17/12/2013 08:48 AM
Subject: Hotel and Delayed Flight Reimbursement

On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After

deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.

One of the service staff told me to collect my luggage in the Arrivals Area and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured into the restricted areas where I could not go and used the Arrivals area PA system. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.

At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.

In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?

a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
b. Dinner – 38.99 pounds - $69.79 Canadian

What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?

Regards,

Chris Johnson
613-270-8959
ccjohnson@sympatico.ca

This is **Exhibit "L"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

Print Close

RE: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **ccjohnson@sympatico.ca**
Sent: February-06-14 3:21:03 AM
To: support@help-aircanada.com (support@help-aircanada.com)

As somebody who regularly flies in excess of 50,000 miles a year with Air Canada I find your lack of compensation for actual and reasonable expenses unacceptable. In fact, in other similar circumstances I have been housed and fed in some rather nice hotels as a result of aircraft issues in the past. Your aircraft was deemed to be not airworthy for flight and as a result some passengers had to stay in London as you could not accommodate everybody on your other flights. I made every effort to connect with your staff to ensure that I would be provided with an Air Canada sanctioned room and meals. I believe that the other "guests" who stayed behind had their room charges covered. I am asking for the same standard.

I have forwarded my receipts for reimbursement. I will be seeking any discrepancy through Small Claims Court.

regards,

Colonel Chris Johnson
Canadian Forces

> From: support@help-aircanada.com
> To: ccjohnson@sympatico.ca
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> Date: Wed, 5 Feb 2014 18:37:33 -0800
>
>
==========
> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
>
==========
>
> Dear Mr. Johnson,
>
> Thank you for your correspondence that was sent to Nick Careen. I am happy to respond on his behalf.
>
> We regret you feel your original inquiry was not handled appropriately, but can assure you it was
> reviewed thoroughly by Harmony.
>
> We recognize on time performance as an integral part of our business. While we do our best to operate flights as planned, factors such as weather and the need for unscheduled

maintenance may precipitate changes. Of necessity, a transportation company's liability for expenses incurred as a result of a schedule disruption is limited. While a ticket holds a guarantee of transportation, the schedule itself is never guaranteed.
>
> In the event a customers travel plans are disrupted, Air Canada does provide assistance towards the cost of hotel and meals. To be consistent, we follow a guideline so that all customers are treated equally. We realize you have requested an exception to this policy, however, to allow this can be seen as discriminatory to those customers who received the
> normal assistance.
>
> With receipts we will reimburse you the amount discussed previously. You may scan and attach them to your original email thread with Harmony.
>
> We regret we are unable to conclude this to your satisfaction, however, the continual exchange of correspondence will not alter our decision. Thank you for this final opportunity to review this with you. Once we receive your receipts we
> will consider this matter concluded.
>
>
> Sincerely,
>
> Michelle Sturge
> Lead
> Customer Relations
>
> From: ccjohnson@sympatico.ca [mailto:ccjohnson@sympatico.ca]
> Sent: Thursday, January 9, 2014 6:53 PM
> To: Nick Careen
> Subject: FW: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
>
>
>
> Mr. Careen,
>
> Enclosed is a series of emails between me and your customer relations staff. I have yet to receive a reply to my query of last Fri. As you will be able to discern my disagreement centres around reimbursement for a mechanical-caused delay I encountered in early Dec 13 while returning from London to Ottawa. I can assure you that a Heathrow Holiday Inn Express room and a simple meal at that same hotel was hardly extravagant. Over my many years of passenger travel with Air Canada (current Aeroplan 50K status) I have encountered a few similar delays where my hotel and meal costs were fully covered. I have also been provided with some substantial compensation for previous delays. While I appreciate that your airline strives to reduce costs, please don't try to save cash by picking my pocket.
>
> I'm hopeful that your intervention will resolve this matter in an amicable manner.
>
> I look forward to your reply.
>
> regards,
>
> Chris Johnson
> Colonel

101

> Canadian Armed Forces
>
> 613-270-8959
>
>
>
> ------ Original Message ------
>
> From: ccjohnson@sympatico.ca
> Sent: 17/12/2013 08:48 AM
> Subject: Hotel and Delayed Flight Reimbursement
>
>
> On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.
>
> One of the service staff told me to collect my luggage in the Arrivals Area and there would be a van outside the Arrivals Area to take us to a local hotel where we would be provided with a room and a meal voucher. I did as I was told and waited outside for almost 30 minutes. I saw neither a van nor anybody else I recognized from the group of 20 volunteers. I then re-entered the Terminal and asked one of the ladies at the information desk to contact any Air Canada service staff still available. This proved to be fruitless, even when she ventured into the restricted areas where I could not go and used the Arrivals area PA system. She also tried the Air Canada Terminal 3 phone number, still with no success. There were also no Air Canada personnel at the Check-in desk as the last flight of the day had already departed.
>
> At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.
>
> In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?
>
> a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
> b. Dinner – 38.99 pounds - $69.79 Canadian
>
> What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?
>
> Regards,
>
> Chris Johnson
> 613-270-8959
> ccjohnson@sympatico.ca

This is **Exhibit "M"** to the
Witnessed Statement
of Christopher C. Johnson
dated November 27, 2015.

Print Close

Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

From: **support@help-aircanada.com**
Sent: February-21-14 4:46:02 PM
To: ccjohnson@sympatico.ca

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Mr. Johnson,

Thank you for your continued correspondence.

A draft for $222CAD will be processed and mailed to the address on file. As you are a premium passenger with us we have reimbursed $150 towards your hotel, $7 for breakfast, $15 for dinner and $50 for transportation to your hotel.

Additionally, we do hope you will be able to make use of the promotional code offered as we look forward to welcoming you back on board in the near future.

Warm Regards,
Harmony
Customer Relations
Air Canada

------ Previous Message ------

From: ccjohnson@sympatico.ca
To: support@help-aircanada.com;
Sent: 06/02/2014 01:21:05 AM
Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement

As somebody who regularly flies in excess of 50,000 miles a year with Air Canada I find your lack of compensation for actual and reasonable expenses unacceptable. In fact, in other similar circumstances I have been housed and fed in some rather nice hotels as a result of aircraft issues in the past. Your aircraft was deemed to be not airworthy for flight

104

and as a result some passengers had to stay in London as you could not accommodate everybody on your other flights. I made every effort to connect with your staff to ensure that I would be provided with an Air Canada sanctioned room and meals. I believe that the other "guests" who stayed behind had their room charges covered. I am asking for the same standard.

I have forwarded my receipts for reimbursement. I will be seeking any discrepancy through Small Claims Court.

regards,

Colonel Chris Johnson
Canadian Forces

> From: support@help-aircanada.com
> To: ccjohnson@sympatico.ca
> Subject: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
> Date: Wed, 5 Feb 2014 18:37:33 -0800
>
>
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> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
>
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> We regret you feel your original inquiry was not handled appropriately, but can assure you it was
> reviewed thoroughly by Harmony.
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> We recognize on time performance as an integral part of our business. While we do our best to operate flights as planned, factors such as weather and the need for unscheduled maintenance may precipitate changes. Of necessity, a transportation company's liability for expenses incurred as a result of a schedule disruption is limited. While a ticket holds a guarantee of transportation, the schedule itself is never guaranteed.
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> With receipts we will reimburse you the amount discussed previously. You may scan and attach them to your original email thread with Harmony.
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> We regret we are unable to conclude this to your

satisfaction, however, the continual exchange of correspondence will not alter our decision. Thank you for this final opportunity to review this with you. Once we receive your receipts we
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>
> Sincerely,
>
> Michelle Sturge
> Lead
> Customer Relations
>
> From: ccjohnson@sympatico.ca [mailto:ccjohnson@sympatico.ca]
> Sent: Thursday, January 9, 2014 6:53 PM
> To: Nick Careen
> Subject: FW: Issue#:ABDA-SPVDCE:12/17/2013 10:48:47:Hotel and Delayed Flight Reimbursement
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> I look forward to your reply.
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>
> Chris Johnson
> Colonel
> Canadian Armed Forces
>
> 613-270-8959
>
>
>
> ------ Original Message ------
>
> From: ccjohnson@sympatico.ca
> Sent: 17/12/2013 08:48 AM
> Subject: Hotel and Delayed Flight Reimbursement
>

106

>
> On Tuesday, 10 December 2013, my flight (889) from London (England) to Ottawa (Canada) was cancelled due to a mechanical problem; this, after sitting on the aircraft for approximately four hours until the cancellation decision was made. After deplaning the service staff asked for 20 volunteers to stay behind. The remaining passengers were to be accommodated on other Air Canada flights. I elected to volunteer to stay behind.
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> At this point in time it was about 8 PM and I then phoned the Air Canada Reservation number in Montreal, Canada. Louise M. took my call and also attempted to contact any Air Canada staff still on the Terminal 3 premises. This also proved fruitless. We agreed that my only course of action was to arrange for my own accommodation and dinner and then seek reimbursement after the fact. This leads us into the purpose of this email.
>
> In order to receive reimbursement t0 whom do I send a copy of my receipts, along with the actual Canadian value as evidenced by my Visa statement?
>
> a. Hotel, Holiday Inn Express – 257.95 pounds/$461.77 Canadian (this includes transport to and from the hotel and breakfast); and
> b. Dinner – 38.99 pounds - $69.79 Canadian
>
> What other compensation will be provided given that I suffered a 24 hour delay in returning to Ottawa, due to a mechanical problem on your aircraft?
>
> Regards,
>
> Chris Johnson
> 613-270-8959
> ccjohnson@sympatico.ca

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

December 3, 2015

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers

Please accept the following application pursuant to ss. 26, 27, and 37 of the *Canada Transportation Act* ("*CTA*"), S.C. 1996, c. 10, ss. 110 and 113.1 of the *Air Transportation Regulations*, S.O.R./88-58 ("*ATR*"), and Rule 19 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104.

OVERVIEW

The Applicants challenge Air Canada's policy purporting to limit its liability with respect to delay of passengers to $100.00 of hotel costs per night, $7 for breakfast, $10 for lunch, and $15 for dinner (the "Impugned Policy"). The Applicants allege that:

(i) the Impugned Policy is not set out in Air Canada's International Tariff, contrary to s. 122 of the *ATR*;

(ii) the Impugned Policy is unreasonable within the meaning of s. 111 of the *ATR*, because it purports to fix a lower limit of liability than what is set out in the *Montreal Convention*; and

(iii) since 2013 or earlier, Air Canada has failed to apply the terms and conditions set out in its tariff by applying the Impugned Policy and/or other unofficial policies instead of the provisions of the *Montreal Convention*, contrary to s. 110(4) of the *ATR*.

In addition, Mr. Johnson alleges that:

(iv) he was adversely affected by and incurred expenses as a result of Air Canada's failure to apply the terms and conditions set out in its tariff.

The Applicants are seeking an Order, pursuant to s. 113.1(a) of the *ATR*, for corrective measures, and an Order, pursuant to s. 113.1(b) of the *ATR*, directing Air Canada to compensate Mr. Johnson.

TABLE OF CONTENTS

SUPPORTING DOCUMENTS

I. THE FACTS

(a) Mr. Johnson was delayed and incurred expenses

1. Mr. Johnson held a confirmed Ottawa-London (LHR)-Ottawa itinerary, with return on Flight AC 889 on December 10, 2013.

Mr. Johnson's Statement, Exhibit "A"

2. On December 10, 2013, Flight AC 889 from London (LHR) to Ottawa was cancelled, for what Air Canada claims to be "mechanical requirements." Mr. Johnson has no personal knowledge of the cause of cancellation.

Mr. Johnson's Statement, paras. 3-4 and Exhibits "B" and "E"

3. Based on the assurance that Air Canada would provide him with accommodation and meals for the night, Mr. Johnson volunteered at Air Canada's request to stay in London for the night and to be transported the next day.

Mr. Johnson's Statement, para. 5

4. Mr. Johnson followed the instructions of Air Canada's agents, collected his checked baggage at the Arrival Area, and waited outside to be transported to a hotel by and/or on behalf of Air Canada. After 30 minutes of waiting in vain, he returned to the terminal and sought assistance from an attendant in reaching Air Canada's representatives. The attendant, however, was unable to reach any Air Canada representative in spite of attempting various methods.

Mr. Johnson's Statement, paras. 6-8

5. Mr. Johnson then contacted Air Canada's Reservations in Montreal and spoke to an agent by the name of Louise M. The agent was also unable to contact any Air Canada representative at Terminal 3, and thus advised Mr. Johnson to arrange for accommodation and meals on his own, and then seek reimbursement from Air Canada.

Mr. Johnson's Statement, para. 9

6. Mr. Johnson incurred out-of-pocket expenses totalling CAD$531.56 for accommodation and meals. He arranged to stay at the Holiday Inn at the airport through the British Hotel Reservation Centre, which was cheaper than booking at the hotel directly. The cost of the accommodation, GBP 257.96, which also included transportation to and from the hotel and a breakfast, was charged to his credit card as CAD$461.77. The cost of dinner at the Holiday Inn, GBP 38.99, was billed to his credit card as CAD$69.79.

Mr. Johnson's Statement, paras. 10-11 and Exhibits "C" and "D"

(b) Air Canada's refusal to reimburse Mr. Johnson based on the Impugned Policy

7. On December 17, 2013, Mr. Johnson requested that Air Canada reimburse him for the aforementioned out-of-pocket expenses.

Mr. Johnson's Statement, para. 12 and Exhibit "E" (pp. 2-3)

8. On December 22, 2013, Air Canada refused Mr. Johnson's request for full reimbursement for his out-of-pocket expenses on the basis that:

> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner.
>
> [Emphasis added.]

Mr. Johnson's Statement, paras. 10-11 and Exhibit "E"

9. Mr. Johnson made numerous further attempts to persuade Air Canada to reimburse him for the expenses he incurred, and brought the issue to the attention of several Air Canada executives, including Mr. Calin Rovincescu.

Mr. Johnson's Statement, Exhibit "I"

10. Yet, Air Canada maintained its view that reimbursing passengers for their out-of-pocket expenses incurred as a result of delay is a form of assistance or goodwill gesture rather than an obligation, and confirmed that the refusal to fully reimburse Mr. Johnson is based on a policy of the airline:

> In the event a customers travel plans are disrupted, Air Canada does provide assistance towards the cost of hotel and meals. To be consistent, we follow a guideline so that all customers are treated equally. We realize you have requested an exception to this policy, however, to allow this can be seen as discriminatory to those customers who received the normal assistance.
>
> [Emphasis added.]

Mr. Johnson's Statement, Exhibit "K"

11. In February 2014, Air Canada paid Mr. Johnson the amount of CAD$222.00, leaving Mr. Johnson out of pocket for CAD$309.56 (= $531.56 - $222.00).

Mr. Johnson's Statement, para. 22 and Exhibit "M"

(c) Not an isolated incident but a systemic issue

12. Air Canada's refusal to fully reimburse Mr. Johnson was not an isolated incident. On February 6, 2014, Air Canada quoted the Impugned Policy in an email to another delayed passenger who is unrelated to Mr. Johnson:

> The maximum amount we cover for hotel is $100.00 CAD, breakfast $10.00 CAD and dinner $15.00 CAD.

Email of Air Canada (February 6, 2014), Document No. 2

13. In yet another unrelated incident, on November 12, 2014, Air Canada wrote to a delayed passenger that:

> [...] in accordance with our policy, passengers not provided meal vouchers at the airport may claim up to $15.00 CAD for dinner, $10.00 CAD for lunch and $7.00 CAD for breakfast. If you could kindly forward your original meal receipts, we would be happy to reimburse you up to the maximum allowable amount.
>
> [Emphasis added.]

Email of Air Canada (November 12, 2014), Document No. 3

(d) Air Canada's International Tariff Rules

14. Air Canada's International Tariff Rule 55(B)(5)(a) provides that:

> For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

Air Canada's International Tariff Rule 55(B)(5)(a), Document No. 4

15. Air Canada's International Tariff Rule 80(C)(3) states that Air Canada must provide accommodation and meal vouchers to passengers who are stranded due to a schedule irregularity within Air Canada's control.

Air Canada's International Tariff Rule 80(C)(3), Document No. 5

16. To Applicants have been unable to locate the Impugned Policy in Air Canada's International Tariff, and submit that it is not to be found there.

II. ISSUES

17. The following issues need to be determined:

(a) whether Air Canada contravened s. 122 of the *ATR* by not setting out the Impugned Policy in its International Tariff;

(b) whether the Impugned Policy is inconsistent with the *Montreal Convention*;

(c) whether the Impugned Policy is "just and reasonable" within the meaning of s. 111 of the *ATR*;

(d) whether Air Canada has failed to apply the terms and conditions set out in its International Tariff; and

(e) the appropriate remedies.

III. SUBMISSIONS

(a) Air Canada contravened s. 122 of the *ATR* by not setting out the Impugned Policy in its International Tariff

18. Section 110 of the *ATR* requires air carriers operating international service in Canada to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is a contract between the carrier and its passengers.

***Air Transportation Regulations*, s. 110**

19. Subsection 122(c) of the *ATR* stipulates that carriers are required to include in their tariff terms and conditions relating to schedule irregularities and liability limits:

> **122.** Every tariff shall contain
>
> ⋮
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> ⋮
>
> (v) failure to operate the service or failure to operate on schedule,
>
> ⋮
>
> (x) limits of liability respecting passengers and goods,
>
> ⋮

***Air Transportation Regulations*, s. 122(c)**

20. The Impugned Policy purports to govern the rights of of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule, and it purports to limit Air Canada's liability for the accommodation and meal expenses incurred by such passengers.

21. Therefore, Air Canada contravened s. 122 of the *ATR* by failing to set out the Impugned Policy in its International Tariff.

(b) The Impugned Policy is inconsistent with the *Montreal Convention*

22. The *Montreal Convention* is an international treaty that is marked as Schedule VI to the *Carriage by Air Act*, and has the force of law pursuant to s. 2(2.1) of the Act.

***Carriage by Air Act*, R.S.C. 1985, c. C-26, s. 2(2.1) and Schedule VI**

23. Article 19 of the *Montreal Convention* imposes strict (but not absolute) liability on carriers for damages incurred as a result of delay in the transportation of passengers, baggage or cargo. Under Article 19, the carrier is presumed to be liable, but it may rebut that presumption by establishing an affirmative defence:

> **Article 19 - Delay**
>
> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

***Montreal Convention*, Article 19**

24. Article 22 of the *Montreal Convention* limits the carrier's liability for delay in the carriage of passengers to 4,694 SDR, which is CAD$8,612.67, unless the airline or its agents acted recklessly or engaged in wilful misconduct. (This cap was established in 2009 as a result of a review pursuant to Article 24.)

***Montreal Convention*, Article 22**

25. A crucial feature of the *Montreal Convention* is that its liability regime and liability limits cannot be contracted out or lowered by the carrier to the detriment of passengers:

> **Article 26 - Invalidity of contractual provisions**
>
> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

***Montreal Convention*, Article 26**

26. The Agency has consistently held that carriers cannot limit their liability under Article 19 of the *Montreal Convention* based on the duration of the delay, and that per-day liability caps are inconsistent with the Convention.

***Dandoy v. Corsair*, Decision No. 107-C-A-2007, paras. 22-23**
***Balakrishnan v. Aeroflot*, Decision No. 328-C-A-2007, para. 28**
***Lukács v. Porter Airlines*, Decision No. 16-C-A-2013, paras. 151-158**

27. The Impugned Policy purports to limit Air Canada's liability for expenses incurred as a result of delay to CAD$100.00 per night for accommodation and a total of CAD$32.00 per day for meals. These limits are a fraction of the cap of CAD$8,612.67 set out in Article 22(1) of the *Montreal Convention*.

28. Thus, the Impugned Policy is tending to fix a lower limit of liability than what is laid down in the *Montreal Convention*, and as such it is inconsistent with the Convention. Therefore, the Impugned Policy is null and void, pursuant to Article 26 of the Convention.

***Lukács v. WestJet*, Decision No. 477-C-A-2010, paras 39-41**
(leave to appeal refused, Federal Court of Appeal File No.: 10-A-41)

(c) The Impugned Policy is not "just and reasonable" within the meaning of the *ATR*

29. Section 111 of the *ATR* sets out the requirements by which carriers must abide when setting terms and conditions of carriage:

> **111.** (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.
>
> ⋮
>
> [Emphasis added.]

***Air Transportation Regulations*, s. 111(1)**

30. It is settled law that tariff provisions that are inconsistent with the *Montreal Convention* cannot be just and reasonable within the meaning of s. 111 of the *ATR*.

***McCabe v. Air Canada*, Decision No. 227-C-A-2008, paras. 26-29**
***Maslov v. Aeroflot*, Decision No. 134-C-A-2009, paras. 19-20**
***Lukács v. Air Canada*, Decision No. 208-C-A-2009, paras. 37-39**
***Lukács v. WestJet*, Decision No. 477-C-A-2010, paras 41-44**
(leave to appeal refused, Federal Court of Appeal File No.: 10-A-41)
***Lukács v. Porter Airlines*, Decision No. 31-C-A-2014, para. 29**

31. Hence, the Impugned Policy fails to be just and reasonable, because it is inconsistent with the *Montreal Convention*, and is null and void pursuant to Article 26.

(d) Air Canada has failed to apply the terms and conditions set out in its International Tariff, contrary to s. 110(4) of the *ATR*

32. Subsection 110(4) of the *ATR* imposes a statutory obligation on carriers to apply the terms and conditions set out in their tariffs:

> **110.** (4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.
>
> [Emphasis added.]

***Air Transportation Regulations*, s. 110(4)**

33. Air Canada's International Tariff Rule 55(B)(5)(a) incorporates the *Montreal Convention* into the tariff by reference, and provides that the Convention shall supersede and prevail over any other provision of the tariff that may be inconsistent with the Convention.

Air Canada's International Tariff Rule 55(B)(5)(a), Document No. 4

34. Instead of applying the provisions of the *Montreal Convention*, Air Canada applies the Impugned Policy with respect to the compensation of passengers who are affected by delay in transportation.

35. While the *Montreal Convention* requires Air Canada to reimburse the passenger for damages incurred as a result of delay up to CAD$8,612.67, Air Canada compensates passengers only up to CAD$100.00 per night (or, in the case of Mr. Johnson, CAD$150.00) for accommodation, and up to CAD$32.00 per day for meals.

36. Therefore, Air Canada has failed to apply Air Canada's International Tariff Rule 55(B)(5)(a).

37. In the case of Mr. Johnson, Air Canada also failed to apply International Tariff Rule 80(C)(3), by failing to provide Mr. Johnson with accommodation for the night and meal vouchers.

Air Canada's International Tariff Rule 80(C)(3), Document No. 5

(e) Remedies

38. Sections 113 and 113.1 of the *ATR* confer broad powers upon the Agency to provide remedies with respect to unreasonable terms and conditions as well as failure of a carrier to apply the terms and conditions set out in its tariff:

> **113.** The Agency may
>
> (a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and
>
> (b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).
>
> **113.1** If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to
>
> (a) take the corrective measures that the Agency considers appropriate; and
>
> (b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

***Air Transportation Regulations*, ss. 113 and 113.1**

39. Mr. Johnson has incurred reasonable expenses, totalling CAD$531.56, for accommodation, ground transportation, and meals as a result of the delay in his transportation and Air Canada's failure to provide him with accommodation and meal vouchers. Although Air Canada reimbursed him for CAD$222.00, he remains out of pocket for CAD$309.56 as a result of Air Canada's failure to apply the provisions of the *Montreal Convention*. Thus, it is submitted that the Agency should order Air Canada to reimburse Mr. Johnson for the amount of CAD$309.56, pursuant to s. 113.1(b) of the *ATR*.

40. Mr. Johnson's case is not an isolated incident, but rather an instance of a systemic issue. Air Canada has repeated in numerous communications, both to Mr. Johnson and to other passengers, that it was acting based on a policy. Consequently, a substantial number of passengers have been affected by Air Canada's failure to apply the provisions of the *Montreal Convention*, and applying the Impugned Policy instead.

Email of Air Canada (February 6, 2014), Document No. 2
Email of Air Canada (November 12, 2014), Document No. 3
Mr. Johnson's Statement, Exhibits "E" and "K"

41. In order to provide a systemic remedy to a systemic problem, it is submitted that the Agency should direct Air Canada, pursuant to s. 113.1(a) of the *ATR*, to take the following corrective measures:

    (a) cease and desist applying the Impugned Policy;

    (b) issue and circulate a bulletin to its agents, including the agents at Air Canada's Customer Service, retracting the Impugned Policy and setting out Air Canada's obligations to compensate passengers for delay in transportation pursuant to Articles 19 and 22 of the *Montreal Convention*;

    (c) publish on its website and in the mainstream media an invitation for passengers who were delayed since January 1, 2013 to submit their claims for compensation in accordance with Articles 19 and 22 of the *Montreal Convention*; and

    (d) process the aforementioned claims and compensate the claimants in accordance with Articles 19 and 22 of the *Montreal Convention*.

42. Finally, in the unlikely event that the Agency finds that the Impugned Policy or portions thereof are included in Air Canada's International Tariff, it is submitted that such provisions should be disallowed pursuant to s. 113 of the *ATR*.

IV. RELIEF SOUGHT

43. The Applicants are asking the Agency that:

(a) the Agency order Air Canada to compensate Mr. Johnson for CAD$309.56 of reasonable out-of-pocket expenses he incurred;

(b) the Agency direct Air Canada to take the following corrective measures:

i. cease and desist applying the Impugned Policy;

ii. issue and circulate a bulletin to its agents, including the agents at Air Canada's Customer Service, retracting the Impugned Policy and setting out Air Canada's obligations to compensate passengers for delay in transportation pursuant to Articles 19 and 22 of the *Montreal Convention*;

iii. publish on its website and in the mainstream media an invitation for passengers who were delayed since January 1, 2013 to submit their claims for compensation in accordance with Articles 19 and 22 of the *Montreal Convention*; and

iv. process the aforementioned claims and compensate the claimants in accordance with Articles 19 and 22 of the *Montreal Convention*;

(c) should the Agency find that the Impugned Policy or portions thereof are included in Air Canada's International Tariff, then disallow these provisions.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Ms. Louise-Hélène Sénécal, Assistant General Counsel - Litigation, Air Canada
(louise-helene.senecal@aircanada.ca)

Witnessed Statement of
Mr. Christopher C. Johnson
attached under a separate cover

Gmail by Google

Bert Leatherman <bertleatherman@gmail.com>

Issue#:ABDA-TT7ACJ:01/28/2014 15:09:27:Compensation for Delay

support@help-aircanada.com <support@help-aircanada.com> Thu, Feb 6, 2014 at 7:04 PM
Reply-To: support@help-aircanada.com
To: aleather@wso.williams.edu

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
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Dear Mr. Leatherman,

Thank you for your email. We appreciate the time you have taken to contact us and are pleased to address your concerns.

We sincerely regret your disappointment that you missed your connecting flight due to the delay of Air Canada flight AC7935 on January 27th.

We recognize on-time performance as one of the key drivers of a successful airline and strive to meet our published schedule. While we make every effort to operate our flights as scheduled, regretfully, delays sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and certainly regret the inconvenience you experienced.

As there are instances where avoiding a flight delay is impossible, times shown on tickets are not guaranteed, and do not form part of the contract for carriage on any airline.

During flight disruptions, our mandate is to transport the passengers on the next available flight. We do not consider consequential expenses or intangibles such as loss of time or enjoyment.

Air Canada provides accommodation and meals to our passengers when they are forced to overnight. The maximum amount we cover for hotel is $100.00 CAD, breakfast $10.00 CAD and dinner $15.00 CAD.

The amount of the meal voucher may be more than some customers use for their meal and, in some cases, not enough. However, the voucher amount is averaged and intended to contribute toward a meal. The allowance is reasonable and we do not offer a refund of costs exceeding the voucher amount.

As a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.

To receive your discount, enter the one time use Promotion Code KZM2ECN1 in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today.

This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.

The discount applies exclusively on published fares for Air Canada, Air Canada Express and Air Canada rouge designated flights. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.

Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

In addition, a copy of your ticket has been forwarded to United Airlines for any fare consideration between the Executive Class fare paid for this part of the itinerary and the full Economy fare. They will contact you shortly under

separate cover.

Please be assured it is our earnest desire to make flying with Air Canada as pleasant as possible and we remain focused on providing an enjoyable travel experience. We hope we may have another opportunity to demonstrate this and thank you again for taking the time to contact our office.

Sincerely,

Kim
Customer Relations

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

From: aleather@wso.williams.edu
Sent: 28/01/2014 01:09 PM
Subject: Compensation for Delay

Hi, my trip from YYZ to GRU has been delayed by 24 hours due to problems with crew availability on my flight from BWI to YYZ. Both the desk/gate agent at BWI and the connections agent at YYZ confirmed that the delay was due not to weather but to crew availability, a factor within the airline's control. In effect, I was denied boarding on my originally scheduled flight because of reasons within the airline's control (crew availability) and had to wait for the next flight 24 hours later. As a result, I lost between $500 and $1,000 of work opportunities in Brazil due to canceled client engagements.

The BWI agent and the YYZ connections agent both told me I should apply for compensation through this website. After examining Canadian law, I believe I am entitled to $800 compensation per Decision No. 204-C-A-2013 of the Canadian Transportation Agency dated May 27, 2013. This Decision provides in Paragraph 74 that compensation should be "based on the length of time by which a passenger is delayed" and in Paragraph 65 sets the level of compensation at $800 for delays exceeding six hours.

In addition, I would like to note that Air Canada provided me with a hotel meal voucher worth only $32. This amount only covered one meal at the hotel where Air Canada sent me, not the four meals (Jan. 27 dinner and Jan. 28 breakfast, lunch, and dinner) to which I should have been entitled during my 24-hour delay. Therefore, I would like to request an extra $100 for the value of the meals that should have been covered. I also would like to point out that, at least as of now, I have been bumped from first class to economy class on my YYZ-GRU flight later tonight, so I would like to request compensation, in an amount Air Canada deems reasonable, for this downgrade.

Lastly, I would appreciate compensation in the U.S. dollar equivalent amount, since as an American citizen I cannot readily use Canadian dollars.

It is my hope to resolve this matter quickly and amicably directly with Air Canada rather than by filing a court case in Brazil, my final destination. In Brazil, where I am a permanent resident and once worked for a law firm, the courts are significantly more favorable to passengers and therefore I believe it is in Air Canada's interest to resolve this issue expeditiously under Canadian regulations rather than Brazilian law. I appreciate your understanding and cooperation.

Sincerely,
Albert Leatherman
1425 Anna Marie Court
Annapolis, MD 21409
Confirmation number AFWBW2
Ticket number 0162394084814

From: <support@help-aircanada.com>
Date: Wed, Nov 12, 2014 at 1:16 PM
Subject: Issue#:ABDA-10CUBG2:10/14/2014 11:26:25:Reimbursement for Air Canada incidents
To: michelefiona@gmail.com

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Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
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Dear Ms. Allen,

Thank you for taking the time to contact our office regarding your and Mr. York's travel with Air Canada to Athens.

We were genuinely sorry to learn of the inconvenience you experienced due to flight cancellations. While every effort is made to operate our flights as scheduled Ms. Allen, regretfully, delays and cancellations sometimes occur. In these circumstances, it is very important to ensure that the needs of all affected customers are being met. When handled with courtesy and professionalism, most passengers will accept the inconvenience and understand that their safe travel must always be our first priority. We realize how important on-time departures are for our customers, and sincerely apologize for the inconvenience you both experienced.

Regarding your travel on September 01, 2014, in accordance with our policy, passengers not provided meal vouchers at the airport may claim up to $15.00 CAD for dinner, $10.00 CAD for lunch and $7.00 CAD for breakfast. If you could kindly forward your original meal receipts, we would be happy to reimburse you up to the maximum allowable amount. Our mailing address is:

Air Canada Customer Relations
PO Box 64239
RPO Thorncliffe
Calgary, AB T2K 6J7

Respectfully, regarding your hotel expense in Athens, as our schedules are not guaranteed, we would be unable to comply with your refund request. Of necessity, a transportation company's liability for expenses incurred as a result of a schedule disruption is limited. While a ticket holds a guarantee of transportation, the schedule itself is never guaranteed. Consequently, airlines do not consider consequential expenses such as hotel expenses at destination or intangible such as loss of vacation/work time or enjoyment.

We also regret it appears you did not receive the letter of apology and proactive compensation provided for the disruption of flight ZX1902. We have entered your information and you should receive the emails shortly with your promotion codes.

Ms. Allen, concerning your and Mr. York's travel on September 13, 2014, in this instance, on a without prejudice basis you are each entitled to the Right to Compensation as outlined in Article 7 of the Regulation(EC)261/2004. Specifically, you shall each receive the compensation equivalent to EUR600.00 ($745.00 USD) based on the distance of the flight and the re-routing to your final destination which exceeded the scheduled arrival time of the flight originally booked by four hours.

The compensation shall be paid by bank draft. Alternatively, with your signed agreement to the Passenger Receipt at the bottom of this email, we would offer each of an Air Canada Gift Card for future travel on Air Canada equivalent to

EUR900.00 ($1312.00 CAD) instead of the bank draft.

Please reply at your earliest convenience with your preference. For bank draft, please include your mailing address.

==========

PASSENGER RECEIPT

The undersigned hereby confirm my acceptance of an Air Canada Gift card in the sum equivalent to EUR900.00 ($1312.00 CAD) for the cancellation of flight number ZX1903 on September 13, 2014, instead of a draft equivalent to EUR600.00.

As per applicable Air Canada rules which have been duly brought to my knowledge understood and accepted.

Name _____
AND

Signature _____

Name _____
AND

Signature _____

PLEASE PRINT AND RETURN TO:

Air Canada
PO Box 64239
RPO Thorncliffe
Calgary, AB T2K 6J7
Canada

With respect to your taxi and meal expense in Athens Ms. Allen, if you could please send your original receipts as well to the address noted above, we would be pleased to reimburse you.

Once again, please accept our sincere apologies for the inconvenience you and Mr. York experienced. We look forward to being of service to you again soon under less eventful conditions.

Sincerely,
Helen

****

ABOUT AIR CANADA GIFT CARDS

Simply provide your gift card number at time of payment on www.aircanada.com (Canadian and U.S. editions only) or through the Air Canada Call Centre at 1-888-247-2262.

To pay for the flight, you can use:

One (1) Air Canada Gift Card plus another form of payment if the card?s value is less than your grand total; or

Up to two (2) Air Canada Gift Cards if the combined value covers the grand total of your purchase

Additional Terms and Conditions are as follows:

Terms & Conditions
Air Canada Gift Card is redeemable at designated locations. Only for purchase of air travel and ancillary services offered by Air Canada, Air Canada Express and Air Canada rouge operated flights. Maximum two forms of payment combinable on single purchase. Treat card like cash. Stored value not refundable/redeemable for cash, except where required by law. Card may be replaced under certain conditions for a $25.00 fee, subject to applicable law. Use of card constitutes acceptance of all Terms and Conditions. Air Canada reserves the right to change Terms and Conditions without notice.

Frequently Asked Questions can be found at:

http://www.aircanada.com/en/giftcard/faq.html

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

From: michelefiona@gmail.com
Sent: 14/10/2014 09:26 AM
Subject: Reimbursement for Air Canada incidents

Hello,

I am writing to you, on behalf on my husband and myself, to seek compensation for three incidents that occurred on the same round trip San Francisco-Athens itinerary.

Please see the attached Cover Letter document for detailed information regarding our experience.

Also attached are one of our two completed EU Complaint Forms. I have copies of all receipts available to send as well.

Sincerely,
Michele Fiona Allen

NTA(A) No. 458 ¶C.A.B. No. 696

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2

6th Revised Page AC-15
Cancels 5th Revised Page AC-15

AIR CANADA
SECTION I - GENERAL RULES

RULE

55 LIABILITY OF CARRIERS

(A) SUCCESSIVE CARRIERS
Carriage to be performed under one ticket or under a ticket and any conjunction ticket issued in connection therewith by several successive carriers is regarded as a single operation.

(B) LAWS AND PROVISIONS APPLICABLE
(1) The Carrier agrees in accordance with Article 22(1) of the Convention for the Unification of Certain Rules relating to International Transportation by Air signed at Warsaw, October 12, 1929 or, where applicable, that Convention as amended by the Protocol signed at the Hague on September 28, 1955 (the "Convention") that, as to all international carriage or transportation hereunder as defined in the Convention:
(a) The Carrier shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
(b) The Carrier shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed
C †[R]100,000 Special Drawing Rights ("SDR").
(c) Except as otherwise provided in paragraphs (i) and (ii) hereof, the Carrier reserves all defenses available under the Convention to any such claim. With respect to third parties, the Carrier reserves all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.
(d) (Not applicable to social agencies in the United States)
Neither the waiver of limits nor the waiver of defenses shall be applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shall be subject to the limit in Article (22)(1) and to the defenses under Article (20)(1) of the Convention.

NOTE 1: (Applicable only for transportation to and from the United States) Paragraph (B)(1)(e) shall expire upon any final action of the Department of Transportation of the United States in proceedings in Docket OST-95-232 which does not make provisions for identical tariffs or in accordance with any order of the Department entered in the said proceedings.

NOTE 2: Rules stating any limitation on, or condition relating to, the liability of carriers for personal injury or death are not permitted to be included in tariffs filed pursuant to the laws of the United States, except to the extent provided in paragraph (B)(1) above with respect to Tariff C.A.B. No. 696. Insofar as this rule states any such limitation or condition it is included herein; except to the extent provided in paragraph (B)(1) above with respect to Tariff C.A.B. No. 696, as part of the tariff filed with governments other than the United States and not as part of tariff C.A.B. No. 696 filed with the Civil Aeronautics Board of the United States.

(2) Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, and carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket, and for the purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination set forth in the ticket and any conjunction ticket issued therewith, or shown in carrier's timetable as scheduled stopping places on the passenger's route. A list giving the full name and abbreviation of each carrier in this tariff is provided at the front of this tariff.

(3) All carriage hereunder and other services performed by each carrier are subject to:
(a) applicable laws (including national laws implementing the Convention or extending the rules of the Convention to carriage which is not "international carriage" as defined in the Convention), government regulations, orders, and requirements;
(b) provisions set forth in the passenger's ticket;
(c) applicable tariffs;
(d) except in transportation between a place in the United States and any place outside thereof and also between a place in Canada and any place outside thereof, conditions of carriage, regulations and timetables (but not the times of departure and arrival therein specified) of carrier, which may be inspected at any of its offices and at airports from which it operates regular services.

(4) (a) Normal carrier limit of liability will be waived for substantiated claims involving loss damage or delay in delivery to mobility aids such as wheelchairs, walkers, crutches etc. when such items have been accepted into the care of the carrier as checked baggage or otherwise.
(b) In case of damaged or delayed mobility aids e.g. wheelchairs and walkers, a temporary replacement will be obtained without undue delay while the passenger's mobility aid is being repaired or returned.

(5) (a) For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: February 19, 2010

EFFECTIVE: April 5, 2010 (Except as Noted)

† - Effective February 20, 2010 and issued on not less than one (1) day's notice under NTA(A) Special Permission No. 54594.

0673w

NTA(A) No. 458 ¶C.A.B. No. 696

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2

3rd Revised Page AC-22
Cancels 2nd Revised Page AC-22

RULE	AIR CANADA SECTION I - GENERAL RULES

80 REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS

(A) DEFINITIONS. For the purpose of this rule, the following terms have the meaning indicated below.

(1) Comparable air transportation means transportation provided by air carriers or foreign air carriers holding certificates of public convenience and necessity or foreign permits issued by the Civil Aeronautics Board.

(2) Connecting point means a point to which a passenger holds or held confirmed space on a flight of one carrier and out of which the passenger holds or held confirmed space on a flight of the same or another carrier. All airports through which a city is served by any carrier shall be deemed to be a single connecting point when the receiving carrier has confirmed reservations to the delivering carrier;

(3) Delivering carrier means a carrier on whose flight a passenger holds or held confirmed space to a connecting point;

(4) Misconnection occurs at a connecting point when a passenger holding confirmed space on an original receiving carrier is unable to use such confirmed space because the delivering carrier was unable to deliver him to the connecting point in time to connect with such receiving carrier's flight.

NOTE: The same rules regarding delivering and receiving carriers reponsibility apply at the subsequent point(s) of misconnection as would apply at the point of original misconnection.

(5) New receiving carrier(s) means a carrier or combination of connecting carriers, other than the original receiving carrier(s), operating between the point of misconnection and the destination or next point of stopover or connecting point shown on the passenger's ticket, on whose flight a passenger is transported from the connecting point;

(6) Original receiving carrier(s) means a carrier or combination of connecting carriers on whose flight(s) a passenger originally held or holds confirmed space from a connecting point to a destination, next stopover or connecting point;

(7) Outbound flight means the flight on which a passenger originally held confirmed space beyond the point where the schedule irregularity or failure to carry occurs;

(8) Schedule irregularity means any of the following irregularities:

(a) Delay in scheduled departure or arrival of a carrier's flight resulting in a misconnection, or

(b) Flight cancellation, omission of a scheduled stop, or any other delay or interruption in the scheduled operation of a carrier's flight, or

C (c) Substitution of equipment †[C]or of a different class of service, or

(d) Schedule changes which require rerouting of passenger at departure time of the original flight.

(B) CHANGES REQUESTED BY PASSENGER

(1) When Change can be Made

At the passenger's request, carrier will effect a change in the routing (other than the point of origin); destination carrier(s); class of service; or validity specified in an unused ticket, flight coupon(s), or Miscellaneous Charges Order provided that:

(a) such carrier issued the ticket; or Miscellaneous Charges Order;

(b) such carrier is designated in the "via carrier" box, or no carrier is designated in the "via carrier" box, of the unused flight coupon or exchange order for the first onward carriage from the point on the route at which the passenger desires the change to commence; however, where the carrier that issued the ticket is designated as carrier for any subsequent section and has an office or general agent at the point on the route where the change is to commence or where the passenger makes his request for such change, the reissuing carrier shall obtain such issuing carrier's endorsement; or

(c) such carrier has received written or telegraphic authority to do so from the carrier entitled, under (a) and (b) above, to effect the change.

(2) Method of Effecting Change

The change requested by the passenger shall be effected by:

(a) endorsement of such unused ticket, flight coupon(s), or exchange order to the new receiving carrier or

(b) reticketing of the passenger.

(3) Applicable Fare

(a) The fare and charges applicable as a result of any such change in routing, destination, or carrier shall be the fare and charges that would have been applicable if transportation had been purchased as of the date of commencement of carriage; provided that,

(i) additional passage at the through fare shall not be permitted unless request has been made prior to arrival at the destination named on the original ticket or Miscellaneous Charges Order, and

(ii) after the carriage has commenced, a one way ticket shall not be converted into a round trip or circle trip ticket at the round trip or circle trip discount for any portion already flown; and

(iii) after carriage has commenced a round trip ticket can be converted into a circle trip ticket, or vice versa provided that request is made prior to the passenger's arrival at the destination named on the original ticket or Miscellaneous Charges Order.

(Continued on next page)

† - Effective August 16 per CTA decision 250 - C - A - 2012.

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: August 15, 2012 | **EFFECTIVE:** September 29, 2012 (Except as Noted)

0674w

NTA(A) No. 458 ¶C.A.B. No. 696

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2

10th Revised Page AC-22-A
Cancels 9th Revised Page AC-22-A

RULE	AIR CANADA SECTION I - GENERAL RULES
80	REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS (Continued)
	(B) CHANGES REQUESTED BY PASSENGER (Continued) (3) Applicable Fare (Continued) (b) Any difference between the fare and charges applicable under subparagraph (A) above, and the fare and charges paid by the passenger will be collected from the passenger by the carrier accomplishing the rerouting, who will also pay to the original form of payment any amounts due on account of refunds or arrange for the applicable refund by the carrier that issued the original ticket. (See also Rule 60.) (4) Expiration Date The expiration date of any new ticket issued for a change in routing, destination, carrier(s), class of service or validity will be limited to the expiration date that would have been applicable if the new ticket had been issued on the date of sale of the original ticket or Miscellaneous Charges Order.
	(C) SCHEDULE IRREGULARITY
C	†[C](1) Given that passengers have a right to information on flight times and schedule changes, Air Canada will make reasonable efforts to inform passengers of delays, cancellations and scheduled changes and to the extent possible, the reason for the delay or change.
C	†[C](2) In the event of a scheduled irregularity, Carrier will either:
C	(a) carry the passenger on another of its passenger aircraft †[N]or class of service on which space is available without additional charge regardless of the class of service; or, at carrier's option;
	(b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or at carrier's option;
	(c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower or.
C	†[C](d) If the passenger chooses to no longer travel or if Carrier is unable to perform the option stated in (a) above within a reasonable amount time, make involuntary refund in accordance with Rule 90(D) or,
C	†[C](e) upon request, for cancellations within Air Canada's control, return passenger to point of origin and refund in accordance with rule 90(D) (2)(a), as if no portion of the trip had been made (irrespective of applicable fare rules), or subject to passenger's agreement, offer a travel voucher for future travel in the same amount; or, upon passenger request.
	†[C](f) For cancellations within Air canada's control, if passenger provides credible verbal assurance to Air canada of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (a) above, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account, and subject to availability, buy passenger a seat on another carrier whose flight is schedule to arrive appreciably earlier than the options proposed in (a) above. Nothing in the above shall limit or reduce the passenger's right, if any, to claim damages, if any, under the applicable Convention, or under the law when neither Convention applies.
	(3) Except as otherwise provided in applicable local law, in addition to the provisions of this rule, in case of scheduled irregularity within its control Air Canada will offer: (a) For a schedule irregularity lasting longer than 4 hours, a meal voucher for use, where available, at an airport restaurant or our on board cafe, of an amount dependant on the time of day.
C	(b) for a schedule irregularity lasting overnight †[N]or over 8 hours, hotel accommodation subject to availability and ground transportation between the airport and the hotel. This service is only available for out of town passengers.
	(c) If passsengers are already on the aircraft when a delay occurs, Air Canada will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, Air Canada will offer passengers the option of disembarking from the aircraft until it is time to depart.

(Continued on next page)

† - Effective August 16 per CTA decision 250 - C - A - 2012

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: August 15, 2012 | **EFFECTIVE:** September 29, 2012 (Except as Noted)

0674w

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

December 29, 2015

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Notice of Written Questions and Production of Documents

The Applicants direct the questions and requests for production of documents set out below to Air Canada pursuant to Rule 24(1) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ("*Dispute Rules*").

The Applicants rely on the documents that were attached to the Application, which have already been provided to the Agency and Air Canada.

Air Canada's Impugned Policy

Q1. Air Canada is requested to produce a copy of the policy (including but not limited to procedure manuals and/or training materials for customer service agents) referred to in the December 22, 2013 email sent to Mr. Johnson and the February 6, 2014 email sent to another passenger:

> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner.
>
> [Emphasis added.]
>
> **Mr. Johnson's Statement, Exhibit "E"**

> The maximum amount we cover for hotel is $100.00 CAD, breakfast $10.00 CAD and dinner $15.00 CAD.
>
> **Email of Air Canada (February 6, 2014), Document No. 2**

Relevance: These documents will assist the Applicants to establish that Air Canada has been applying the Impugned Policy.

Q2. Does Air Canada admit that the policy referred to in the aforementioned two emails is not set out in Air Canada's International Tariff?

If not, Air Canada is requested to identify the provision(s) of its International Tariff setting out the policy, and provide copies of same.

Relevance: The answer to this question will assist the Applicants to establish allegation (i) set out on page 1 of the Application and can be determinative of issue (a) set out on page 6 of the Application.

Q3. Based on what tariff provision did Air Canada reach the conclusion that it owed Mr. Johnson only CAD$222.00 (see Mr. Johnson's Statement, Exhibit "M")?

Relevance: The answer to this question will assist the Applicants to establish allegations (iii) and (iv) set out on pages 1-2 of the Application, and can be determinative of issue (d) set out on page 9 of the Application.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Ms. Louise-Hélène Sénécal, Assistant General Counsel - Litigation, Air Canada (louise-helene.senecal@aircanada.ca)

- Receipts always required
- Scan receipts acceptable up to $150.00 total
- Expenses exceeding $150.00 original receipts required
- Accommodation is per room not per passenger
- Meal allowance is per passenger based on time of re-accommodation.
- USA meal allowance amounts also apply for international locations
- Amounts in charts are maximum, if actual cost less, pay the actual cost
- Lead approval required for expenses that exceed the per room or meal allowance amount listed
- Lead approval required for total expenses that exceed $300.00
- Lead approval required for expenses of more than 1 night in uncontrollable situations
- Lead approval must always be obtained before responding to writer
- Special case customers (customers with disabilities, UMNR, minors 12-17 travelling alone, and elderly customers) are entitled to meals and hotel accommodation regardless of the situation
- Premium customers are VIP Red Card Holders, Super Elite 100K, Elite 75K, Elite 50K, Star Alliance Gold, Executive, Executive First class
- In controllable situations only, if pax chose to find own ground transportation, ie bus or car rental, and this is a less expensive option than the flight coupon cost plus accommodation cost, refund ground transportation but not the flight coupon.
- In uncontrollable situations, if pax chose to find own ground transportation, refund flight coupon only

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

Irregular Operations - Uncontrollable Situations

- Outbound flight and return flight NO EXPENSES
- Connection point or diversion only – one night only as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

All compensation is goodwill and costs should never exceed amounts above.

Schedule Change

- If pax did not like or accept alternate flight that would have provided same day travel NO EXPENSES
- When schedule change requires an overnight at a connecting city and there is no alternate flight service the same day or when schedule change requires a customer to travel the day before/after originally scheduled flight causing an overnight at the destination as follows:

	Accommodation Canada/US Itinerary	Accommodation International & Sun Itinerary
Regular Customers	$100.00 per room	$175.00 per room
Premium Customers	$100.00 per room	$175.00 per room

All compensation is goodwill and costs should never exceed amounts above.

AIR CANADA

Jean-François Bisson-Ross
Counsel - Litigation
Direct Line: (514) 422-5813
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Email: jean-francois.bisson-ross@aircanada.ca

Law Branch, Zip 1276
P.O. Box 7000, Station Airport
Dorval, Quebec, Canada
H4Y 1J2

VIA EMAIL: secretariat@otc-cta.gc.ca

January 11, 2016

The Secretary
CANADIAN TRANSPORTATION AGENCY
15 Eddy Street
17th Floor, Mailroom
Gatineau, Quebec
Canada J8X 4B3

SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Answer - Notice of Written Questions and Production of Documents

Dear Secretary:

Please find our response to the complainants' questions as set out in Dr. Lukács letter dated December 29, 2015.

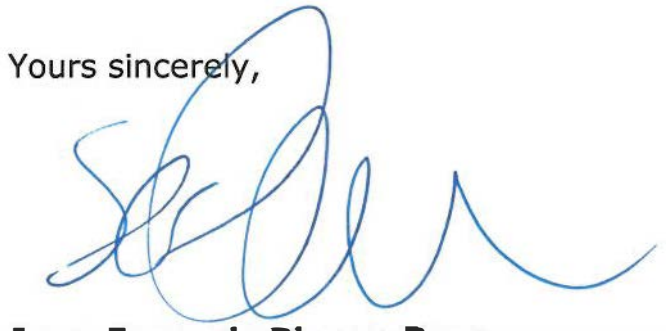
Q1. You will find attached to the present as document A-1 a copy of the internal recommendations, pertaining to the reimbursement of expenses in place at the relevant time to the present application. Another section of the document has not been disclosed as it does not relate to Irregular operations or schedule changes and related expenses therefrom.

Q2. Air Canada confirms that the internal recommendations contained in document A-1 are not set out in its international Tariff.

Q3. Air Canada chose to reimburse Mr. Johnson, and based its goodwill offer to provide accommodation, within the context of a call for volunteers to stay overnight as a result of the flight cancellation at issue which was uncontrollable.

All of which is respectfully submitted.

Yours sincerely,



Jean-François Bisson-Ross
Counsel – Litigation

JFBR/sa

Encl.

c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

January 12, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Notice of Written Questions and Production of Documents

The Applicants direct the questions and requests for production of documents set out below to Air Canada pursuant to Rule 24(1) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ("*Dispute Rules*").

The Applicants rely on the documents that were attached to the Application and the answers provided by Air Canada on January 11, 2016, which have already been provided to the Agency and Air Canada.

Air Canada's Impugned Policy of April 4, 2013

On January 11, 2016, Air Canada provided a 2-page portion of its training manual, dated April 4, 2013, entitled "Expense Policy." The questions below refer to this document.

Q4. Air Canada is requested to produce a copy of its policy (including but not limited to procedure manuals and/or training materials for customer service agents) that define the terms "controllable situations" and "uncontrollable situations."

Relevance: The Impugned Policy (April 4, 2013 version) refers to "controllable situations" and 'uncontrollable situations" without defining these terms. Without these definitions, it is not possible to fully understand the meaning of the document and/or the policy set out in it. The definitions are necessary in order to assess whether the policy is consistent with the *Montreal Convention* and/or reasonable.

Q5. What methodology did Air Canada apply to determine the maximum amounts set out in the Impugned Policy (April 4, 2013 version)?

Relevance: The answer to this question is capable of showing that the maximum amounts set out in the Impugned Policy are unreasonable. In Decision No. LET-C-A-105-2012, the Agency directed to Air Canada a similar question to determine whether the airline's denied boarding compensation levels were reasonable.

Q6. What is the legal basis for having different liability caps for "Regular Customers" and "Premium Customers" referred to in the Impugned Policy (April 4, 2013 version)?

Relevance: The answer to this question will tend to show that the Impugned Policy is unreasonable (allegation (ii) on page 1 of the Application).

Q7. Does Air Canada admit that the Impugned Policy (April 4, 2013 version) purports to fix a lower limit of liability than what is set out in the *Montreal Convention*?

Relevance: The answer to this question is capable of confirming allegation (ii) on page 1 of the Application.

Changes to Air Canada's Impugned Policy

Q8. Has the Impugned Policy been amended or revised since the April 4, 2013 version that Air Canada produced in response to question Q1?

If so, Air Canada is requested to produce copies of all revisions between April 4, 2013 and the present.

Rationale: In its answer to question Q1, Air Canada stated that the document it submitted was in place "at the relevant time to the present application," but did not specify the time interval in question. This creates the impression that the Impugned Policy was amended or revised since April 4, 2013, and there may be subsequent versions that Air Canada has not disclosed. The Application, however, refers to the period from 2013 to the present day (allegation (iii) on page 1). Thus, all amendments and/or revisions are in issue.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
(Jean-Francois.Bisson-Ross@aircanada.ca)

Policy and Conditions

This document reflects the policy and process in place when Air Canada covers hotel expenses during Irregular operations, **when same day transportation cannot be provided to final destination**.

- Hotel expenses include accommodation, meals and transfers to hotel.
  - The amounts for Hotel Meal Allowances are different from the Airport Meal Allowances.
  - Airport meal vouchers are valid for 1 year from date of issue and can be redeemed at airport concessions at any airport in North America or be used to purchase Onboard Café items and alcoholic beverages.
- Applicable to **Air Canada, AC rouge, AC Express,** for departures from North America stations only.
  - For European Airports: refer to European Community Airports – IROP/SKCH – Policy/Procedures/Compensation
  - For all other international Airports: Hotel, meal, and transportation will be provided by the local station in accordance with their local guidelines.
- Eligibility for meal and hotel expenses is based on the different scenarios (see compensation grids below).
  - Eligibility is based on the initial controllable reason for the irregular operation (for example: customer's original flight takes a mechanical (controllable) and they are provided an overnight hotel, then the protection flight is cancelled due to weather (uncontrollable). Since the customer would not have been affected by weather had

they flown on their original flight, additional hotel nights would still be provided as needed).

- For employees, compensation is provided when travelling for business purposes only.

- Local boarding hotel accommodation is authorized on a case by case basis.
- Only one night provided at a time when same day transportation cannot be provided to final destination; if more nights are required, each case will be reviewed on a daily basis.
- Special case customers (customers with disabilities, UMNR, minors 12-17 travelling alone, and elderly customers) are entitled to meals and hotel accommodation regardless of the scenario (refer to Bayshore Home Health Services For Customers With Special Needs). Minors 12-17 travelling alone do not need to be accompanied in a hotel room (adjoining rooms provided) in case of irregular operations requiring overnight accommodation.
- For delay and cancellation codes, refer to AC-IATA Delay/Cancellation Codes-Ground Delay/Stop (GDP/GSP)-IROP Definitions

Restrictions

- Tips for taxis and other services are not reimbursed by AC.

Compensation Grid - Controllable

<table>
<tr><th colspan="2">SCENARIO</th><th colspan="2">AIRPORT MEALS
(Maximum 2 meals per 24 h)
*** The customer is expected to remain at the airport</th><th>HOTEL
(Overnight only)
See hotel meal allowances below</th></tr>
<tr><td colspan="2"></td><td>Economy (Including POS space employees)</td><td>Business Class, Premium Economy, Premium rouge Super Elite 100K (and their travel companions)</td><td>Using PSO - Do not offer taxi/limo vouchers if shuttle service is available</td></tr>
<tr><td rowspan="2">Delays (includes flights ultimately cancelled following creeping delay</td><td>Between 2h - 5h59min</td><td>CAD10 meal voucher</td><td>CAD15 meal voucher</td><td>No</td></tr>
<tr><td>6h or over</td><td>Additional CAD10 meal voucher (cumulative)</td><td>Additional CAD15 meal voucher (cumulative)</td><td>On a case by case basis – Contact CJM</td></tr>
<tr><td rowspan="4" colspan="2">Cancellations (same day only)</td><td colspan="2">No same day reprotection</td><td></td></tr>
<tr><td>Not applicable</td><td>Not applicable</td><td>On a case by case basis – Contact CJM</td></tr>
<tr><td colspan="2">With same day reprotection</td><td></td></tr>
<tr><td>CAD10 meal voucher (cumulative)</td><td>CAD15 meal voucher (cumulative)</td><td>On a case by case basis – Contact CJM</td></tr>
</table>

Misconnections (only when on the same ticket and caused by a delayed AC or JAZZ inbound flight)	CAD10 meal voucher (cumulative)	CAD15 meal voucher (cumulative)	Yes - Contact CJM
Enroute stoppage (on same ticket and caused by a delayed AC or JAZZ outbound flight)	CAD10 meal voucher (cumulative)	CAD15 meal voucher (cumulative)	Yes – Contact CJM
Diversions	CAD10 meal voucher (cumulative)	CAD15 meal voucher (cumulative)	Yes – Contact CJM
(			
Special Cases (customers with disabilities, unaccompanied minors, young persons aged 12-17 travelling alone, elderly customers)	If required, meals (up to 2 x CAD10 or 2 x CAD15) and overnight accommodation are authorized		Yes – Contact CJM

Compensation Grid – Uncontrollable (Effective December 7, 2015)

Includes delay codes: ANA (04), GNC (03), SEI (86), SES (85), SOA (81), SOW (98), WXD (84), WXL (71), WXR (77), WXS (75)

SCENARIO	ACCOMMODATION	
	AIRPORT MEALS (Maximum 2 meals per day) ***** The customer is expected to remain at the airport**	**HOTEL** (Overnight only - using PSO) Do not offer taxi/limo vouchers if shuttle service is available **See hotel meal allowances below**
Delays (includes flights ultimately cancelled following creeping delay	For Delays, Cancellations, Misconnections, and Enroute stoppages, AC will **not** provide airport meal vouchers, except for the following customers (Up to 2 x CAD10 or 2 x CAD15 meal vouchers per day): • Business class (J/C/D/Z/P/R/I booking class), • Air Canada VIP/SE100K /E75K/E50K, Star Alliance Gold, • Customers connecting in Canada between two international flights	Offer the Interrupted Trip Card (ACF605) - the customers can directly contact Travelliance (Canada and U.S.A.) to obtain a discounted hotel room if accommodation is necessary. AC will not provide hotel accommodation, except for the following customers: • Business class (J/C/D/Z/P/R/I booking class), • Air Canada VIP/SE100K /E75K/E50K, Star Alliance Gold, • Customers connecting in
Cancellations (same day only)		
Misconnections/Enroute stoppage		

	• Customers connecting in Canada from International to US or from US to International • "Special case" customers listed below.	Canada between two international flights • Customers connecting in Canada from International to US or from US to International • "Special case" customers listed below.
Diversions	For Diversions, AC will **not** provide airport meal vouchers, except for the following customers (Up to 2 x CAD10 or 2 x CAD15 meal vouchers per day): • Business class (J/C/D/Z/P/R/I booking class), • Air Canada VIP/SE100K /E75K/E50K, Star Alliance Gold, • Customers connecting in Canada between two international flights • Customers connecting in Canada from International to US or from US to International "Special case" customers listed below.	Yes – Contact CJM
Special Cases (customers with disabilities, unaccompanied minors, young persons aged 12-17 travelling alone, elderly customers)	Up to 2 x CAD10 or 2 x CAD15 meal vouchers per day.	Yes – Contact CJM

Uncontrollable IROP Scenarios

	ACCOMMODATION	
SCENARIOS	**AIRPORT MEALS**	**HOTEL**
Routing: **YLW X/YYC YOW** Scenario: Customer flew YLW-YYC, delayed due to weather, misconnects YYC-YOW, and requires overnight in YYC	NO	NO
Routing: **YVR x/YUL FLL** Scenario: Customer flew YVR-YUL, YUL-FLL cancels due to weather	NO	NO
Routing: **LHR x/YYZ GRU** Scenario: Customer flew LHR-YYZ, YYZ-GRU cancels due to weather	YES	YES

Routing: **CDG x/YUL YWG** Scenario: Customer flew CDG-YUL, YUL-YWG cancels due to weather	NO	NO
Routing: **CDG x/YUL LGA** Scenario: Customer flew CDG-YUL, YUL-LGA cancels due to weather	YES	YES
Routing: **SEA x/YVR HKG** Scenario Customer flew SEA-YVR, delayed due to weather, misconnects YVR-HKG and requires overnight in YVR	YES	YES
Routing: **YXE x/YYZ YSJ** Scenario: Customer flew YXE-YYZ, YYZ-YSJ is diverted to YFC due to weather in YSJ.	NO	YES

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H4Y 1J2

VIA EMAIL: secretariat@otc-cta.gc.ca

January 19, 2016

The Secretary
CANADIAN TRANSPORTATION AGENCY
15 Eddy Street
17th Floor, Mailroom
Gatineau, Quebec
Canada J8X 4B3

SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Answer – 2nd Notice of Written Questions and Production of Documents

Dear Madam Secretary:

In response to Dr Lukács's questions served on January 12th, please find Air Canada's answers below:

Q4: Air Canada defines the terms "controllable" and "uncontrollable" as follows:

Controllable: Any circumstance that Air Canada has direct control or influence over.

Uncontrollable: Any circumstance outside of Air Canada's control or influence.

The definitions of the terms "controllable" and "uncontrollable" above are applied by Air Canada in respect of the Montreal Convention, the Canada Transportation Act and its Regulations and Air Canada's Tariff.

The Complainants sought a definition of the above terms in order to fully understand the meaning of the document they have labelled the "Impugned Policy". Air Canada provided a complete answer with the definitions above. Air Canada objects to the communication of any further Policy or Training manual, as this would be unnecessary and irrelevant for the purpose sought by the Complainants.

Q5: As will be further explained by Air Canada in its Reply to the Complaint, the "Impugned Policy", as labelled by the Complainants is a set of Internal Recommendations for Customer Relations Representatives in handling Passenger refund requests. In the case of controllable Delays or Cancellations, contrary to uncontrollable situations, as notably appears from the Recommendations, there are no limits set for the reimbursement of travel expenses, and as such Air Canada respects the Montreal Convention (1999), the Canada Transportation Act and its Regulations and Air Canada's Tariff. Reimbursement requests are treated on a case by case basis.

Consequently, Air Canada objects to the Complainants' question, as there is no reimbursement limit for expenses resulting from controllable Delays and Cancellations. The methodology used to determine the internal Recommendations for Customer Relations Representatives, which can be exceeded, is irrelevant.

Q6: As will be further explained by Air Canada in its Reply, and as indicated in its Reply to Question 5 above, the Internal Recommendations provided by Air Canada to its Customer Relations Representatives do not represent Liability limits in controllable situations and can be exceeded. As such, the distinction between Regular and Premium Customers is legally irrelevant and only has to be understood on the basis of Customer Service.

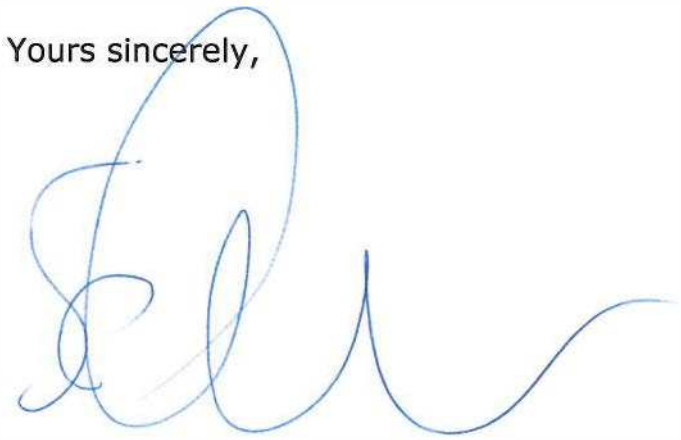
Q7: In light of the Answers above, and as will be further explained in its Reply, Air Canada has confirmed that it does not fix a lower limit of liability than what is set out in the Montreal Convention.

Q8: Please find in attachment to the present, under annex **AQ2-1**, the relevant excerpts of the current internal recommendations entitled

"Policy and Conditions" and "Compensation Grid", which relate to Irregular Operations or schedule changes and related expenses therefrom. Air Canada objects to the communication of any change to its Recommendations between those in place at the relevant time for Mr. Johnson's contract with Air Canada and the current applicable Recommendations. The current Recommendations are communicated for the purpose of any corrective measure to be evaluated in the present matter, if applicable. Other versions of the Recommendations are irrelevant.

All of which is respectfully submitted.

Yours sincerely,



Jean-François Bisson-Ross

Counsel – Litigation

JFBR/sa

Encl.

c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson

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January 20, 2016

The Secretary
CANADIAN TRANSPORTATION AGENCY
Secretary
15 Eddy Street
17th Floor Mailroom
Gatineau QC J8X 4B3

SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Response to Application

Dear Madam Secretary:

1. Air Canada is pleased to respond to Dr. Gábor Lukács and Mr. Christopher Johnson's (collectively referred to as "the Complainants") application filed on December 3, 2015 (hereinafter "the Complaint")

2. The Complainants, both represented by Dr. Lukács, challenge Air Canada's reimbursement of expenses allegedly incurred by Mr. Johnson following the cancellation of flight AC 889 from London, UK, to Ottawa on December 10, 2013 due to an unforeseen mechanical issue.

3. Although the Complaint was initiated subsequent to Mr. Johnson's claim for reimbursement of expenses, the remedies proposed by the Complainants attempt to compel Air Canada to publish a public call to reprocess, under the Canadian

Transportation Agency (the "Agency")'s purview, all of its finalized passenger expense claims of the last 2 years.

4. Air Canada has filed a request under section 31 of the *Canadian Transportation Agency Rules* concerning the internal documents submitted in response to Dr. Lukács's questions on January 11 and January 19, 2016, as well as the document to be submitted as annex **A-2** to Air Canada's Response to the present Complaint. Consequently, the documents that are subject to this request will only be attached to the Agency's copy of this response and not to the Complainants' pending the Agency's ruling on Air Canada's application.

1. Summary of Air Canada's position

5. The "Impugned Policy" in effect at the relevant time to Mr. Johnson's complaint with Air Canada referred to by the Complainants and further disclosed by Air Canada within the context of the present matter constitutes internal recommendations for Air Canada Customer Relations Representatives ("Representatives") ("Internal Recommendations", re-attached herewith as annex **A-1** for ease of reference). Where delays and cancellations are controllable, Air Canada is liable to reimburse out of pocket expenses as per the *Convention for the unification of certain rules in air transportation* signed at Montreal in May 1999 (the "Montreal Convention") as incorporated in Canadian legislation by the *Carriage by Air Act*, RSC 1985, c C-26 and Air Canada's Tariff.

6. The Internal Recommendations do not constitute liability limits in the case of controllable situations and Air Canada often reimburses passengers beyond the recommended amounts. Limits only apply in the case of goodwill offers where Air Canada is not bound to reimburse passengers. Expenses claims are assessed on a case by case basis. Air Canada's current Expense Guidelines, attached herewith as annex **A-2**, are to the same effect. Another section of annex **A-2** has not been disclosed as it does not relate to Irregular operations or schedule changes and related expenses therefrom.

7. The fact that Air Canada's Representatives have referred to a Policy in refusing to reimburse the totality of expenses claimed by some passengers does not equate to a systematic denial of expenses in controllable situations.

8. Air Canada submits that it neither infringes the Montreal Convention, the *Canada Transportation Act*, SC 1996, c 10 and its Regulations nor Air Canada's Tariff in setting up internal recommendations for its Representatives. Air Canada believes that no corrective measures and no further reimbursement in this matter is

warranted under any applicable Conventions, Laws or its Tariff. Subsidiarily, should the Agency consider the question of remedies, Air Canada submits that the remedies proposed by the Complainants are outside of the Agency's complaint based jurisdiction and mandate as well as being unnecessary and excessive.

9. Without limiting the foregoing, in particular, the Complainants' propositions to compel Air Canada to issue a public call to reprocess claims and for the Agency to force and oversee the treatment of previously closed expense refund requests is beyond the Agency's mandate, unnecessary and excessive. Furthermore, such propositions do not take the different circumstances of each expense refund request into account, which evaluation has already been performed by Air Canada. Moreover, Air Canada objects to the remedies proposed, given the fact that the Complainants have no mandate to represent an undefined and non-existent class of passengers with remote commonality of issues.

2. The Complainants' claim for reimbursement of expenses

10. The Complainants, both represented by Dr. Lukács, challenge Air Canada's reimbursement of expenses allegedly incurred by Mr. Johnson following the cancellation of flight AC 889 from London, UK, to Ottawa on December 10, 2013. Flight AC 889 was cancelled due to an uncontrollable electric pump failure.

11. Given the flight cancellation, most passengers were reprotected by Air Canada on another flight the same day, according to the space available. In order to limit the effects of this irregular operation, Air Canada called for volunteers to stay overnight in London to be reprotected on Air Canada's subsequent flight with space available.

12. Mr. Johnson volunteered to fly with Air Canada on the subsequent day and confirmed being directed to pick up his luggage where he would then subsequently be provided with accommodation and meals. Mr. Johnson also confirmed having received instructions to be transported by Air Canada to a hotel from the airport.

13. Unfortunately, Mr. Johnson advised that he was not able to find the arranged transportation to a hotel where he would have been provided with meal vouchers and a room. Subsequently, as appears from Mr. Johnson's Passenger Name Record ("PNR"), attached herewith as annex **A-3**, Air Canada informed Mr. Johnson to prepare a claim to Air Canada's Customer Relations. Air Canada did not confirm at this moment any expense limit, in answer to Mr. Johnson's inquiry,

as the claim would have to be individually reviewed by Air Canada's Representatives, who would then determine whether Air Canada would be liable to reimburse the out of pocket expenses.

14. Following his overnight stay in London without the accommodation and meal vouchers to be provided by Air Canada, Mr. Johnson declares having incurred the following out of pocket expenses:

- Hotel accommodation (including transportation and breakfast) $CAD461.77
- Cost of dinner $CAD69.79.

15. Mr. Johnson requested Air Canada to reimburse the totality of the out of pocket expenses above. Considering the uncontrollable circumstances that led to the cancellation of flight AC 889, Air Canada reimbursed Mr. Johnson the sum of $CAD 222.

2.1 Cause of flight AC 889 Cancellation

16. As appears from a Statement from Mr. Tom Liepins, Senior director, Maintenance Operations control at Air Canada, provided in attachment therewith as annex **A-4**, flight AC 889 of December 10, 2013 was cancelled due to a low hydraulic system pressure caused by a wiring fault. This malfunction could not have been detected and controlled by Air Canada, who took all reasonable measures in making a pre departure check of the system prior to every flight.

17. As per the Montreal Convention, Air Canada was not bound to reimburse out of pocket expenses or provide accommodation and meals as per the Montreal Convention following the uncontrollable cancellation of flight AC 889.

2.2 Air Canada's Tariff

18. According to Air Canada's Tariff Rule 80, applicable to Mr. Johnson's contract of carriage, attached to the present as annex **A-5**, passengers will be provided with hotel accommodation and meal vouchers for delays or cancellations within Air Canada's control. Passengers are provided with accommodations and meals proactively, alleviating the need for passengers to claim back expenses incurred during these situations.

19. *A contrario*, Air Canada is not bound to provide compensation for delays and or cancellations that were uncontrollable.

2.3 The Air Canada "Impugned Policy"

20. In response to Dr. Lukács' questions dated December 29, 2015, Air Canada communicated a copy of the applicable internal recommendations - at the time of Mr. Johnson's claim - for Customer Relations Representatives entitled "Expense Policy", in effect on December 2013 (annex **A-1**). The Internal Recommendations provide internal guidance for expenses in the context of irregular operations and schedule changes.

21. The Internal Recommendations do not constitute Air Canada's policy for passenger claims, which are rather reviewed on a case by case basis, as confirmed through a Statement by Ms. Twyla Robinson, attached herewith as annex **A-6**.

22. As provided in the Internal Recommendations the Lead Customer Relations Representative (the "Lead")'s approval must be obtained before responding to the writer ie. the passenger making an expense refund request. The Lead also allows expenses above the recommendations and for total expenses that exceed 300$. Furthermore, as confirmed by Ms. Robinson, Lead Customer Service Representatives are not bound to apply the policy and have discretion to reimburse higher amounts, when circumstances warrant such actions, each customer expense claim being reviewed on a case by case basis. In fact, the recommendations are often exceeded, as further confirmed by Ms. Robinson. As such, the Complainants' allegation that Air Canada referred to a Policy in two other instances with passengers who are not parties to the present matter is irrelevant to a systemic inquiry of whether Air Canada respected Rule 80 of its Tariff in the present matter. The reference to a Policy in refusing to reimburse the totality of expenses claimed by two other passengers does not equate to a systematic denial of expenses in controllable situations.

2.4 Air Canada's position on Mr. Johnson's claim for reimbursement of expenses

23. In the matter at hand, Mr. Johnson was offered accommodation and meals for an overnight stay, as he answered a call for volunteers to fly with an Air Canada flight on the subsequent day, within the context of an uncontrollable flight cancellation. In line with the Montreal Convention and its Tariff, Air Canada does not have to reimburse expenses where the delay or cancellation was outside its control. Air

Canada made a goodwill offer to Mr. Johnson in offering accommodation and meals pending his flight.

24. As Mr. Johnson was unable to locate the Air Canada representative arranging the accommodation and meals, he made overnight arrangements by himself. Having another opportunity to review Mr. Johnson's claim, in complete resolution of the present matter, Air Canada offers, as a further goodwill gesture, to compensate the remaining $CAD309.56, considering the circumstances at hand.

2.5 Passenger claims for expenses under the Montreal Convention

25. Claims for delays under the Montreal Convention are limited to 4 694 Special Drawing Rights ("SDRs), and Air Canada reviews such claims in respect of the Convention. In some instances, Air Canada may deny its liability based on the exemption motives as set out under the Montreal Convention. Furthermore, while the Montreal Convention provides for a liability threshold limiting passenger claims for events such as delays, they remain subject to rules of evidence and damage mitigation.

26. As such, while there is no policy limiting Air Canada's reimbursement of expenses for controllable delays or cancellations, a Representative will consider all of the former elements in deciding to allow or refuse – in totality or in part - expense refund requests.

27. In other instances, based on goodwill, Air Canada may decide to provide compensation despite not being liable to do so as per the Montreal Convention, such as in the current matter.

2.6 Conclusion on Air Canada's liability

28. In light of the above, Air Canada denies having a policy limiting reimbursement of passengers' expenses for delays or cancellations that are within its control or systematically limiting passenger claims for related expenses therefrom. Air Canada has internal recommendations for Representatives in handling passenger expense refund requests. The Internal Recommendations are not terms and conditions of carriage and are not set out in Air Canada's Tariff. Passenger claims for reimbursement of expenses are examined on a case by case basis, respecting the requirements under the Montreal Convention.

29. With regards to delays that are within Air Canada's control, the Internal Recommendations are often exceeded through the Lead Representatives' approval, who are consulted by Representatives as per Air Canada's recommendations. Otherwise, Air Canada internally recommends to respect goodwill compensation allowances in cases where it is not liable under the Montreal Convention or its Tariff to provide accommodation and meals.

30. While the Montreal Convention prevents limitation of liability for expenses resulting from a controllable delay or cancellation, applicable liability principles may sometimes allow an airline not to reimburse the totality of expenses claimed. For instance, a claim may be reduced where damages could have been further mitigated, without being considered as a limitation of liability under the Montreal Convention.

3. Remedies sought by the complainants

31. Air Canada denies that its Internal Recommendations contravene the Montreal Convention, the *Canada Transportation Act* and its Regulations or its Tariff as they do not limit expenses to be reimbursed to customers in the context of controllable delays or cancellations. The remedy proposed in paragraph 41 a) in the Complaint is thus unnecessary.

32. Air Canada addresses the Complainants' remaining proposed remedies as follows: With regard to the remedy set out in paragraph 41 b), while the current Expense Guidelines filed under annex **A-2** do not limit any reimbursement of expenses under controllable situations, Air Canada agrees to make the following modifications in order to avoid misunderstandings with passengers:

a) Change reference from "Policy and/or Procedure" to "Internal Recommendations";
b) Cease referring to the Internal Recommendations as a "Policy" in communications with passengers.

33. The change of title is sufficient to prevent misunderstandings in handling reimbursement claims.

3.1 The remedies in paragraph 41 c) and d), namely, to compel Air Canada to issue a public call to reopen and reprocess claims and for the Agency to oversee the treatment of previously closed expense matters is beyond the Agency's mandate, unnecessary, excessive and outside of the Agency's jurisdiction.

3.1.1 Agency's mandate and jurisdiction

34. The Agency is an independent, administrative body created under *the Canada Transportation Act*. In light of the Agency's status as an administrative tribunal, it only has the jurisdiction and mandate specifically granted to it by its enabling legislation. It does not have a Superior Court's inherent jurisdiction. Though it may exercise powers akin to a common law court, this would only be circumscribed to the proper exercise of its own jurisdiction[1].

35. The Agency's jurisdiction, including for the reimbursement of travel expenses, is confined under Part V, Division II, International Tariffs, of the *Air Transportation Regulations*, SOR/88-58, as amended (the "ATR"). The Agency's primary mandate is related to overseeing carriers' terms and conditions.

36. The agency exercises quasi-judicial functions through an individual complaint driven mechanism against unreasonable terms and conditions of carriage[2]. Sections 113 and 113.1 of the ATR provide for the remedies within the Agency's powers in adjudicating such claims:

> **113** The Agency may
>
> **(a)** suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and
>
> **(b)** establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).
>
> **113.1** If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to
>
> **(a)** take the corrective measures that the Agency considers appropriate; and
>
> **(b)** pay compensation for any expense incurred by **a person** adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff. [emphasis added]

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[1] *Canada Transportation Act*, SC 1996, c 10, s. 25.

[2] *Canada Transportation Act*, s. 67(2); *Cheung v. West Jet*, 324-AT-A-2015 at paras 59-68; *Newrot v. Sunwing*, 432-C-A-2013 at paras 120, 134; *In re: determinations of what constitutes an "air service" and the criteria to be applied by the CTA*; 390-A-2013 at para 25; *Azar v. Air Canada*, 442-C-A-2013 at para 6.

The corrective measures referred to in subsection 113.1 of the ATR do not confer upon the Agency a broad power to take any measure it desires within the context of a carrier's infringement of the ATR. The corrective measures are put in place to ensure that the carrier applies the "fares, rates, charges or terms and conditions set out in the tariff". Separately from these corrective measures, within the context of its complaint driven mechanism, the Agency can otherwise direct a carrier to compensate a person who has incurred expenses. Subsection 113.1 of the ATR certainly does not grant powers to the Agency to order payment of goodwill outside the parameters of an air carrier's tariff.

3.2 The remedies sought by the Complainants

37. The Complainants request the publication of a call for any delayed passenger, irrespective of whether their claim has already been processed by Air Canada, to submit their Claim for compensation and for all Claims to be processed under the purview of the Agency. Air Canada considers these remedies to fall outside of the Agency's mandate and jurisdiction, as explained above, as well as to be excessive, unnecessary and disproportionate.

38. The proposed remedies would fall outside the scope of the individual complaint based mechanism, and are unnecessary considering that the Agency issues public decisions, following resolutions of complaints. The Complainants' suggested remedies would further diverge from the Agency's power conferred by subsection 113 of the ATR in ensuring that a carrier acts in conformity with its tariff, and transform the Agency into an inquisitory tribunal outside of its mandate.[3]

39. The remedies sought by the Complainants would further place the Agency beyond the powers of a common law court of inherent jurisdiction, even acting outside the confinements of a class action lawsuit, in light of the fact that the Complainants have no authorization to act on behalf of a large undefined group of unidentified past passengers, with remote commonality of issues.

Conclusion

40. Considering:

1- That Air Canada does not limit (outside of the Montreal Convention Limits) passenger expenses reimbursement within the context of controllable delays

[3] *Cheung v. West Jet*, 324-AT-A-2015 at paras 59-68.

and cancellations, and as such, does not contravene the Montreal Convention, the *Canada Transportation Act* and its *Regulations* or its Tariff;

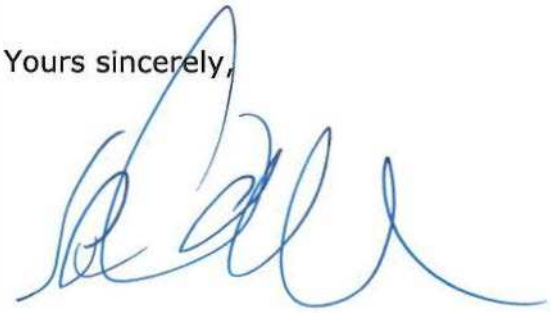
2- That Air Canada, having reviewed Mr. Johnson's claim submitted before the Agency, agrees to refund the remaining expenses of $CAD309.56, solely on a goodwill basis;

3- That Air Canada will change its reference to "Policy and/or Procedure" when referring to the "Internal Recommendations" and/or "Expense Guidelines" and cease to refer to it as a "Policy" in communications with passengers, in order to avoid any misunderstanding.

Air Canada hereby requests that the Agency dismiss the Complainants' Claim and its proposed remedies.

The whole, respectfully submitted,

Yours sincerely,



Jean-François Bisson-Ross

Counsel – Litigation

JFBR/sa

Encl.

c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson

Case No.: 15-05627

CANADIAN TRANSPORTATION AGENCY

Christopher Johnson

and

Gabór Lukács

Complainants

and

Air Canada

Respondent

LIST OF ANNEXES

Annex A-1: Internal Recommendations

Annex A-2: Expense Guidelines

Annex A-3: Copy of Passenger Name Record (PNR)

Annex A-4: Statement of Tom Liepins

Annex A-5: Copy of Air Canada's Tariff Rule 80

Annex A-6: Statement of Twyla Robinson

Montreal, January 20, 2016

Jean-François BISSON-ROSS
Counsel for the Respondent
AIR CANADA

A-1

- Receipts always required
- Scan receipts acceptable up to $150.00 total
- Expenses exceeding $150.00 original receipts required
- Accommodation is per room not per passenger
- Meal allowance is per passenger based on time of re-accommodation.
- USA meal allowance amounts also apply for international locations
- Amounts in charts are maximum, if actual cost less, pay the actual cost
- Lead approval required for expenses that exceed the per room or meal allowance amount listed
- Lead approval required for total expenses that exceed $300.00
- Lead approval required for expenses of more than 1 night in uncontrollable situations
- Lead approval must always be obtained before responding to writer
- Special case customers (customers with disabilities, UMNR, minors 12-17 travelling alone, and elderly customers) are entitled to meals and hotel accommodation regardless of the situation
- Premium customers are VIP Red Card Holders, Super Elite 100K, Elite 75K, Elite 50K, Star Alliance Gold, Executive, Executive First class
- In controllable situations only, if pax chose to find own ground transportation, ie bus or car rental, and this is a less expensive option than the flight coupon cost plus accommodation cost, refund ground transportation but not the flight coupon.
- In uncontrollable situations, if pax chose to find own ground transportation, refund flight coupon only

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

Irregular Operations - Uncontrollable Situations

- Outbound flight and return flight NO EXPENSES
- Connection point or diversion only – one night only as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

All compensation is goodwill and costs should never exceed amounts above.

Schedule Change

- If pax did not like or accept alternate flight that would have provided same day travel NO EXPENSES
- When schedule change requires an overnight at a connecting city and there is no alternate flight service the same day or when schedule change requires a customer to travel the day before/after originally scheduled flight causing an overnight at the destination as follows:

	Accommodation Canada/US Itinerary	Accommodation International & Sun Itinerary
Regular Customers	$100.00 per room	$175.00 per room
Premium Customers	$100.00 per room	$175.00 per room

All compensation is goodwill and costs should never exceed amounts above.

A-3

PNR Detail

```
-01.***1JOHNSON/CHRISTOPHERMR***
    9-IL1-C 975 613 8528603
    9-IL1-H 975 613 2708959
    9-IL1-A 21 MORENZ TERR/**/KANATA/K2K3H1 CA
    9-IL1-E CCJOHNSON//SYMPATICO.CA**NOTIFY
    6-INTERNET PNR 0720884055
    7-K13NOVIL1WW 0142127721484
    4-SSRAUTHAC HK/ACOD/IL1AC/WWGS/13NOV3 ACCOUNT CODE USED WEBACO
    4-SSRFQTVACHK/ AC720884055E -JOHNSON/CMR-ELITE 50K
    4-SSRAUTHAC HK/PSGI/IL1AC/WWGS/13NOV3 PBK77V0001
    4-SSRRQSTACHK1 16C/N
    4-SSRRBOKACHK1 AC0889K10DECLHRYOW
    4-SSRRCHKACHK1
    4-SSRRQSTACHK1 27F/N
    4-SSRDOCSYYHK1 /P/CA/SZ005587/CA/04OCT57/M/11MAY14//CHRISTOPHER CHARLES
    4-SSRDOCAYYHK1 /R/CA
    5-/******** ATTN NEXT AGT ******** IMPORTANT **********
    5-CUSTOMER WAS TOLD TO PICK UP HIS BAGS AFTER HIS FLIGHT
    5-WAS CANCELLED AND AN AIRCANADA AGENT WLD MEET THE PASSENGE
    5-RS WITH HOTEL AND MEAL VOUCHERS//PAX GOT HIS BAGS //CLD
    5-NOT FIND AC REPRESENTATICE//IT WAS 08 PM LHR TIME WHEN HE
    5-CALLED//MAPLE LEAF LOUNGE CLOSED//ADVD TO HOLD ON TO HIS
    5-HOTEL AND MEAL RECEIPTS AND PREPARE A CLAIM TO CUSTOMER
    5-RELATIONS// ASKED IF THERE WAS A LIMIT TO THE AMOUNT HE
    5-MIGHT CLAIM//TOLD HIM ONLY CUSTOMER RELATIONS HAVE THE
    5-INFORMATION// YMQLMSU10DEC
    5-LANGUAGE OF PREFERENCE FOR CORRESPONDANCE *ENGLISH*
    5-.TID0720884055
    5-PASSENGER REQUESTED I/R DELIVERY BY EMAIL TO CCJOHNSON//SYMPATICO.CA
    5-..ALERT ORIGINAL FARE HAS A NON-REF AMOUNT IL1WWGS13NOV
    5-.FLOWDET:LATEST FLOW-BOOK/MOP-CC
    5-.FRBK:FL:34636639636E,PT:CC,ID:************3998,AMOUNT:862.42,PAID:{AF-
PA:862.42
    5-BKIP 184.148.188.69 13NOV13 03:49
    5-
C/H IS CHRIS C JOHNSON/VI USER ENTERED CREDIT CARD/USD 862.42/ALL PSGRWEB BOO
KIN
    5-MOP: CHARGE MY CREDIT CARD
    5-.ROUND TRIP
    5-.11/13/2013 03:49:00/S1/ELIGIBLE/TANGO/SEAT-0.00-USD
    5-.11/13/2013 03:49:00/S2/ELIGIBLE/TANGO/SEAT-0.00-USD
    5-
..AUTO PAX REBOOK ACCT IROP AC0889 LHR YOW 1300 1545 10DEC/AC024187/1807 WW7W
WRC
    5-.ENS/10DEC/0608/E/9756138528603/SENT
    M-C-USD    862.42/VI451401IWSQZL3998-083692*1017
  1 AC0888KY      4DEC       YOWLHR     HK 1      2145    0935
  2 AC0889KY     11DEC       LHRYOW     HK 1      1300    1545
 ORIGIN   IL1/AC/WW 13NOV 0349
 H  X4- -AC0888 04DEC YOWLHR HK 32C /N
    X4- -AC0889 10DEC LHRYOW HK 32C /N
        RCVD-INTERNET  YWG/GS/FC 17JUL 0194
    X4- -AC0889 10DEC LHRYOW HK 16C /N
        RCVD-INTERNET  YWG/GS/FC 17JUL 0194
    XS- AC0889KY     10DEC       LHRYOW     HK 1      1300    1545
```

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    FQ- A13NOV13      WW/GS
    FQ- *YOW*AC LON*Q14.38*R102.59?KLXRCT62*AC YOW*Q14.38
    FQ- *R102.59?KLXRCT62
    FQ- Z NUC233.94ROE1.042970
    FQ- FARE CAD 244.00 EQU USD 233.00 TAX YQ 412.42 TAX CA 24.74 TAX RC 2.48
TAX SQ 19.09
    FQ-  TAX GB 107.13 TAX UB 63.56
    FQ-  TOT USD 862.42
    FQ- ¿1 bB1PC
    FQ- ¿  NB04DEC
    FQ- ¿  NA04DEC
    FQ- ¿ bNB10DEC
    FQ- ¿ bNA10DEC
    FQ- E VLD AC TRANSATLANTIC ONLY -REFUNDABLE/CXLFEE/CHGFEE
    AS- AC0889KY     11DEC       LHRYOW     HS 1      1300    1545
    X4- -AC0889 10DEC LHRYOW HK 36H /N
        RCVD- WW7/RC/WW 17JUL 0194
    X4- -AC0889 11DEC LHRYOW GK 14C /N
        RCVD-INTERNET  YWG/GS/FC 17JUL 0194
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A-4

Case No.: 15-05627

CANADIAN TRANSPORTATION AGENCY

BETWEEN:

Christopher Johnson

and

Gabór Lukács

Complainants

and

Air Canada

Respondent

STATEMENT OF TOM LIEPINS

I, Tom Liepins, of the City of Toronto, in the province of Ontario, DECLARE AS FOLLOWS:

[1] I am the Senior Director, Maintenance Operations Control, at Air Canada, a position I have held since 2009.

[2] Within the course of my employment, I manage Air Canada operations related to the maintenance of its fleet;

[3] I have personal knowledge of all the information stated in this Statement, unless indicated otherwise.

[4] Flight AC 889 of December 10 2013 was cancelled given a low hydraulic system pressure caused by a wiring fault of the Air Canada aircraft designated to perform said flight (the "Designated Aircraft").

[5] The hydraulic system is checked prior to every flight and the Designated Aircraft's hydraulic system had no history of a defect, nor was a defect detected on the inbound flight, also operated by the Designated Aircraft.

[6] This malfunction could not have been detected or prevented by Air Canada.

SIGNED in Toronto, in the Province of Ontario
this 20th of January, 2016.

Tom Liepins

A-5

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0080

TITLE/APPLICATION - 70

K SCHEDULE IRREGULARITIES

(A) GENERAL

(1) SCHEDULES NOT GUARANTEED. TIMES AND AIRCRAFT TYPE SHOWN IN TIMETABLES OR ELSEWHERE ARE APPROXIMATE AND NOT GUARANTEED, AND FORM NO PART OF THE CONTRACT OF CARRIAGE. SCHEDULES ARE SUBJECT TO CHANGE WITHOUT NOTICE. NO EMPLOYEE, AGENT OR REPRESENTATIVE OF CARRIER IS AUTHORIZED TO BIND CARRIER BY ANY STATEMENTS OR REPRESENTATION AS TO THE DATES OR TIMES OF DEPARTURE OR ARRIVAL, OR OF

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0080

TITLE/APPLICATION - 70 (CONT)

THE OPERATION OF ANY FLIGHT. IT IS ALWAYS RECOMMENDED THAT THE PASSENGER ASCERTAIN THE FLIGHT'S STATUS AND DEPARTURE TIME EITHER BY REGISTERING FOR UPDATES ON THEIR ELECTRONIC DEVICE, VIA THE CARRIER'S WEB SITE OR BY REFERRING TO AIRPORT TERMINAL DISPLAYS.

(2) CARRIER NOT RESPONSIBLE

CARRIER ASSUMES NO RESPONSIBILITY FOR PASSENGER MAKING CONNECTIONS NOT INCLUDED AS PART OF THE ITINERARY SET OUT IN THE TICKET. CARRIER IS NOT RESPONSIBLE FOR CHANGES, ERRORS OR OMISSIONS EITHER IN TIMETABLES OR OTHER REPRESENTATIONS OF SCHEDULES. CARRIER IS NOT RESPONSIBLE FOR NON-COMPENSATORY OR UNFORESEEABLE DAMAGES CAUSED BY DELAY, SUCH AS DAMAGES RESULTING FROM PASSENGER'S PURPOSE OF TRAVEL OR PERSONAL SCHEDULE AT ARRIVAL. THE CARRIER WILL NOT GUARANTEE

AND
WILL NOT BE HELD LIABLE FOR CANCELLATIONS
OR
CHANGES TO FLIGHT TIMES THAT APPEAR ON
PASSENGERS'
TICKETS DUE TO FORCE MAJEURE, INCLUDING
LABOUR
DISRUPTIONS OR STRIKES. HOWEVER, A
PASSENGER MAY
INVOKE THE PROVISIONS OF THE CONVENTION
REGARDING
LIABILITY IN THE CASE OF DELAY.

(3) BEST EFFORTS

CARRIER UNDERTAKES TO USE ITS BEST EFFORTS
TO
CARRY THE PASSENGER AND BAGGAGE WITH
REASONABLE
DISPATCH, BUT NO PARTICULAR TIME IS FIXED
FOR THE
COMMENCEMENT OR COMPLETION OF CARRIAGE.
SUBJECT
THERETO CARRIER MAY, WITHOUT NOTICE,
SUBSTITUTE
ALTERNATE CARRIERS OR
AIRCRAFT AND MAY ALTER THE ROUTE, ADD
STOPOVERS OR
OMIT THE STOPPING PLACES SHOWN ON THE FACE
OF THE
TICKET IN CASE OF NECESSITY.

(B) OPERATING CARRIER TO ARRANGE ALTERNATE
TRANSPORTATION

THE CARRIER OPERATING THAT FLIGHT THAT IS
EXPERIENCING THE SCHEDULE IRREGULARITY WILL
MAKE
THE ALTERNATIVE TRANSPORTATION
ARRANGERMENTS FOR
THE PASSENGER AND WILL APPLY ITS OWN TARMAC
DELAY
CONTINGENCY PLAN IN THE EVENT OF A TARMAC
DELAY.

(C) SCHEDULE IRREGULARITY

(1) DEFINITION

SCHEDULE IRREGULARITY MEANS ANY OF THE
FOLLOWING:

(A) DELAY IN SCHEDULED DEPARTURE OR
ARRIVAL OF A
CARRIER'S FLIGHT

(B) FLIGHT CANCELLATION, OMISSION OF A
SCHEDULED
STOP, OR ANY OTHER DELAY OR
INTERUPTION IN
THE SCHEDULED OPERATION OF A CARRIER'S
FLIGHT, OR

(C) SUBSTITUTION OF EQUIPMENT OR OF A
DIFFERENT

GFS TEXT MENU RULE CATEGORY TEXT DISPLAY
IN EFFECT ON: 28SEP13

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0080

TITLE/APPLICATION - 70 (CONT)

CLASS OF SERVICE, OR

(D) SCHEDULE CHANGES WHICH REQUIRE REROUTING OF PASSENGER AT DEPARTURE TIME OF THE ORIGINAL FLIGHT.

(2) IN THE CASE OF A SCHEDULE IRREGULARITY, AC SHALL IMPLEMENT THE PROVISIONS OF THIS RULE, UNLESS APPLICABLE LOCAL LAW PROVIDES OTHERWISE. IN PARTICULAR, FOR FLIGHTS DEPARTING FROM THE FOLLOWING COUNTRIES, AIR CANADA WILL APPLY THE PROVISIONS OF THE FOLLOWING LEGISLATIONS: EUROPEAN UNION AND SWITZERLAND: EC REGULATION NO. 261/2004; ISRAEL: AVIATION SERVICES LAW (COMPENSATION AND ASSISTANCE FOR FLIGHT CANCELLATION OR CHANGE OF CONDITIONS), 5772-2012. TURKEY: REGULATIONS ON AIR PASSENGER RIGHTS (SHY-PASSENGER)

(3) GIVEN THAT PASSENGERS HAVE A RIGHT TO INFORMATION ON FLIGHT TIMES AND SCHEDULE CHANGES, AIR CANADA WILL MAKE REASONABLE EFFORTS TO INFORM PASSENGERS OF DELAYS, CANCELLATIONS AND SCHEDULED CHANGES AND TO THE EXTENT POSSIBLE, THE REASON FOR THE DELAY OR CHANGE.

(4) IN THE EVENT OF A SCHEDULED IRREGULARITY, CARRIER WILL EITHER:
NOTE: ADDITIONAL SERVICES ARE PROVIDED TO ON MY WAY CUSTOMERS, AS DETAILED BELOW):

(A) CARRY THE PASSENGER ON ANOTHER OF ITS PASSENGER AIRCRAFT OR CLASS OF SERVICE ON WHICH SPACE IS AVAILABLE WITHOUT ADDITIONAL CHARGE REGARDLESS OF THE CLASS OF

SERVICE;

OR, AT CARRIER'S OPTION;

(B) ENDORSE TO ANOTHER AIR CARRIER WITH WHICH AIR CANADA HAS AN AGREEMENT FOR SUCH TRANSPORTATION, THE UNUSED PORTION OF THE TICKET FOR PURPOSES OF REROUTING; OR AT CARRIER'S OPTION;

(C) REROUTE THE PASSENGER TO THE DESTINATION NAMED ON THE TICKET OR APPLICABLE PORTION THEREOF BY ITS OWN OR OTHER TRANSPORTATION SERVICES; AND IF THE FARE FOR THE REVISED ROUTING OR CLASS OF SERVICE IS HIGHER THAN THE REFUND VALUE OF THE TICKET OR APPLICABLE PORTION THEREOF AS DETERMINED FROM RULE 100, CARRIER WILL REQUIRE NO ADDITIONAL PAYMENT FROM THE PASSENGER BUT WILL REFUND THE DIFFERENCE IF IT IS LOWER OR.

(D) IF THE PASSENGER CHOOSES TO NO LONGER TRAVEL OR IF CARRIER IS UNABLE TO PERFORM THE OPTION STATED IN (A) ABOVE WITHIN A REASONABLE

TITLE/APPLICATION - 70 (CONT)

AMOUNT TIME, MAKE INVOLUNTARY REFUND IN ACCORDANCE WITH RULE 100 OR,

(E) UPON REQUEST, FOR CANCELLATIONS WITHIN AIR CANADA'S CONTROL, RETURN PASSENGER TO POINT OF ORIGIN AND REFUND IN ACCORDANCE WITH RULE 100 AS IF NO PORTION OF THE TRIP HAD BEEN MADE (IRRESPECTIVE OF APPLICABLE FARE RULES), OR SUBJECT TO PASSENGER'S AGREEMENT,

OFFER A
TRAVEL VOUCHER FOR FUTURE TRAVEL IN
THE SAME
AMOUNT; OR, UPON PASSENGER REQUEST.
(F) FOR CANCELLATIONS WITHIN AIR CANADA'S CONTROL, IF PASSENGER PROVIDES
CREDIBLE
VERBAL ASSURANCE TO AIR CANADA OF
CERTAIN
CIRCUMSTANCES THAT REQUIRE HIS/HER
ARRIVAL AT
DESTINATION EARLIER THAN OPTIONS SET
OUT IN
SUBPARAGRAPH (A) ABOVE, OR, FOR ON MY
WAY
CUSTOMERS, FOR CANCELLATIONS WITHIN OR OUTSIDE CARRIER'S CONTROL, AIR CANADA
WILL,
IF IT IS REASONABLE TO DO SO, TAKING
ALL
CIRCUMSTANCES KNOWN TO IT INTO
ACCOUNT, AND
SUBJECT TO AVAILABILITY, BUY PASSENGER
A SEAT
ON ANOTHER CARRIER WHOSE FLIGHT IS
SCHEDULE
TO ARRIVE APPRECIABLY EARLIER THAN THE OPTIONS PROPOSED IN (A) ABOVE.
NOTHING IN THE ABOVE SHALL LIMIT OR
REDUCE
THE PASSENGER'S RIGHT, IF ANY, TO
CLAIM
DAMAGES, IF ANY, UNDER THE APPLICABLE CONVENTION, OR UNDER THE LAW WHEN
NEITHER
CONVENTION APPLIES.
(5) EXCEPT AS OTHERWISE PROVIDED IN APPLICABLE
LOCAL
LAW, IN ADDITION TO THE PROVISIONS OF THIS
RULE,
IN CASE OF SCHEDULED IRREGULARITY WITHIN
ITS
CONTROL (AND OUTSIDE ITS CONTROL, FOR ON MY
WAY
CUSTOMERS) AIR CANADA WILL OFFER:
(A) FOR A SCHEDULE IRREGULARITY LASTING
LONGER
THAN 4 HOURS, A MEAL VOUCHER FOR USE,
WHERE
AVAILABLE, AT AN AIRPORT RESTAURANT OR
OUR ON
BOARD CAFE, OF AN AMOUNT DEPENDANT ON
THE
TIME OF DAY.
(B) FOR A SCHEDULE IRREGULARITY LASTING

OVERNIGHT
OR OVER 8 HOURS, HOTEL ACCOMMODATION
SUBJECT
TO AVAILABILITY AND GROUND
TRANSPORTATION
BETWEEN THE AIRPORT AND THE HOTEL.
THIS
SERVICE IS ONLY AVAILABLE FOR OUT OF
TOWN
PASSENGERS.

(C) IF PASSSENGERS ARE ALREADY ON THE
AIRCRAFT
WHEN A DELAY OCCURS, AIR CANADA WILL
OFFER
DRINKS AND SNACKS IF IT IS SAFE,
PRACTICAL
AND TIMELY TO DO SO. IF THE DELAY
EXCEEDS 90

TITLE/APPLICATION - 70 (CONT)
MINUTES AND CIRCUMSTANCES PERMIT, AIR
CANADA
WILL OFFER PASSENGERS THE OPTION OF
DISEMBARKING FROM THE AIRCRAFT UNTIL
IT IS
TIME TO DEPART.

(D) FREE BAGGAGE ALLOWANCE
AN INVOLUNTARILY REROUTED PASSENGER SHALL BE
ENTITLED
TO RETAIN THE FREE BAGGAGE ALLOWANCE APPLICABLE
FOR THE
TYPE OF SERVICE ORIGINALLY PAID FOR. THIS
PROVISION
SHALL APPLY EVEN THOUGH
THE PASSENGER MAY BE TRANSFERRED FROM ONE FARE
CLASS TO
ANOTHER.

(E) ON MY WAY SERVICE
IN ADDITION TO THE SERVICES SET OUT HEREIN, AIR
CANADA
WILL PROVIDE ADDITIONAL SERVICES TO CUSTOMERS
WHO
PURCHASE THE ON MY WAY SERVICE.

(1) THE ON MY WAY SERVICE MAY BE PURCHASED ON
AIR
CANADA'S WEBSITE FOR FLIGHTS OPERATED BY
AIR
CANADA AND AIR CANADA EXPRESS WITHIN CANADA
AND
BETWEEN CANADA AND THE CONTINENTAL U.S.A.,

HAWAII
AND ALASKA BOOKED MORE THAN 96 HOURS PRIOR
TO
TRAVEL.
(2) THE APPLICABLE FEE IS $25 CAD FOR SHORT-
HAUL (UP
TO 1609 KM)/1000 MILES) OR $35 CAD FOR LONG
HAUL
FLIGHTS (1610 OR MORE KM/1001 MILES) PER
DIRECTION, SUBJECT TO APPLICABLE TAXES.
FEE IS
NON-REFUNDABLE.
(3) THE ADDITIONAL SERVICES PROVIDED TO ON MY
WAY
CUSTOMERS ARE, IN THE CASE OF ANY SCHEDULE
IRREGULARITY:
(A) EXCLUSIVE TOLL FREE ACCESS TO THE ON
MY WAY
DESK, AVAILABLE 24/7, AND STAFFED WITH
SPECIALIZED AIR CANADA AGENTS
AVAILABLE TO
PROVIDE ASSISTANCE;
(B) AUTOMATIC FLIGHT NOTIFICATION, BY E-
MAIL AND
SMS (WHEN A MOBLE PHONE NUMBER HAS
BEEN
PROVIDED), COMMENCING FOUR (4) HOURS
PRIOR TO
THE SCHEDULE DEPARTURE TIME PROVIDING
GATE
AND CONNECTING FLIGHT INFORMATION;
(C) WHERE NO FLIGHT IS AVAILABLE FOR RE-
BOOKING
AND WHERE THE TRIP CAN BE COMPLETED
THROUGH
GROUND TRANSPORTATION, PASSENGER WILL
BE
PROVIDED, AT HIS OR HER OPTION WITH A
CAR
RENTAL (WITH A PROVIDER SELECTED BY
AIR
CANADA), WITHIN A MAXIMUM OF 200
KILOMETRES
FROM LOCATION OF PASSENGER, OR PROVIDE
PASSENGER COMPENSATION AS FOLLOWS:
(I) A PARKING ALLOWANCE (UP TO A
MAXIMUM OF
$40) WHERE PASSENGER HAS INCURRED
PARKING EXPENSES; OR,
ALTERNATIVELY,

TITLE/APPLICATION - 70 (CONT)

(II) A TAXI ALLOWANCE (UP TO A MAXIMUM OF $100), WHERE PASSENGER HAS INCURRED TAXI EXPENSES. PASSENGER MAY RECEIVE COMPENSATION FOR ONLY ONE FORM OF THE COMPENSATION INDICATED ABOVE. PASSENGER MAY BE REQUESTED TO PROVIDE RECEIPTS FOR PARKING OR TAXI EXPENSES INCURRED.

(4) SHOULD PASSENGER, PRIOR TO OR FOLLOWING A FLIGHT DELAY OR CANCELLATION, ELECT TO CANCEL HIS OR HER FLIGHT, THEN PASSENGER SHALL NOT BE ENTITLED TO ANY OF THE ADDITIONAL ON MY WAY SERVICES.

(5) AIR CANADA IS NOT RESPONSIBLE FOR THE ACTS OR OMISSIONS OF THIRD PARTY SERVICE PROVIDERS OFFERING AIR TRANSPORTATION, HOTELS, CAR RENTAL OR OTHER SERVICES AS DESCRIBED IN THIS RULE FOR PASSENGERS PURCHASING ON MY WAY. ALL SUCH SERVICES ARE SUBJECT TO, AND PASSENGER MUST MEET, THE TERMS, CONDITIONS AND OTHER REQUIREMENTS IMPOSED BY THESE THIRD-PARTY SUPPLIERS (E.G., QUALIFICATIONS FOR CAR RENTAL). AIR CANADA IS NOT LIABLE FOR FAILURE BY PASSENGER TO MEET THESE TERMS, CONDITIONS AND REQUIREMENTS. THE LIABILITY OF SUCH SERVICE PROVIDERS MAY, IN TURN, BE LIMITED BY THEIR TARIFFS, CONDITIONS OF CARRIAGE AS WELL AS INTERNATIONAL CONVENTIONS AND ARRANGEMENTS. CONDITIONS OF CARRIAGE APPLY TO FLIGHTS BOUND TO AND FROM PASSENGER'S DESTINATION, SOME OF WHICH LIMIT OR EXCLUDE LIABILITY.

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0085

TITLE/APPLICATION - 70
K VOLUNTARY CHANGES AND REROUTING
(A) WHEN CHANGE CAN BE MADE
AT THE PASSENGER'S REQUEST AND SUBJECT TO PAYMENT OF
ANY FEE SET OUT IN APPLICABLE FARE RULE, CARRIER WILL
EFFECT A CHANGE IN THE ROUTING (OTHER THAN THE POINT OF
ORIGIN), DESTINATION CARRIER(S), CLASS OF SERVICE,
FLIGHT COUPON(S), TRAVEL DATES, OR WILL CANCEL A
RESERVATION PROVIDED THAT SUCH CARRIER ISSUED THE
TICKET.
(B) METHOD OF EFFECTING CHANGE
THE CHANGE REQUESTED BY THE PASSENGER SHALL BE EFFECTED
BY:
(1) ENDORSEMENT OR COUPON CONTROL OF SUCH UNUSED

TITLE/APPLICATION - 70 (CONT)
TICKET OR FLIGHT COUPON(S) OR,
(2) RETICKETING OF THE PASSENGER.
(C) APPLICABLE FARE
(1) THE FARE, FEES, CHARGES AND SURCHARGES APPLICABLE
AS A RESULT OF ANY SUCH CHANGE IN ROUTING,
DESTINATION, OR CARRIER SHALL BE THE NEW FARE,
TAXES, FEES, CHARGES AND SURCHARGES AVAILABLE AT
THE TIME THE CHANGE IS MADE, PLUS APPLICABLE
CHANGE FEE OR PENALTY, PER APPLICABLE FARE RULE
PROVIDED THAT,
(A) ADDITIONAL PASSAGE AT THE THROUGH FARE SHALL
NOT BE PERMITTED UNLESS REQUEST HAS BEEN MADE
PRIOR TO ARRIVAL AT THE DESTINATION NAMED ON
THE ORIGINAL TICKET AND
(B) AFTER THE CARRIAGE HAS COMMENCED, A ONE WAY
TICKET SHALL NOT BE CONVERTED INTO A ROUND

TRIP OR CIRCLE TRIP TICKET AT THE ROUND TRIP
OR CIRCLE TRIP DISCOUNT FOR ANY PORTION
ALREADY FLOWN; AND

(C) AFTER CARRIAGE HAS COMMENCED A ROUND TRIP
TICKET CAN BE CONVERTED INTO A CIRCLE TRIP
TICKET, OR VICE VERSA PROVIDED THAT REQUEST
IS MADE PRIOR TO THE PASSENGER'S ARRIVAL AT
THE DESTINATION NAMED ON THE ORIGINAL TICKET
OR MISCELLANEOUS CHARGES ORDER.

(2) ANY DIFFERENCE BETWEEN THE FARE, TAXES, FEES,
CHARGES AND SURCHARGES APPLICABLE UNDER SUBPARAGRAPH (A) ABOVE, AND THE FARE, TAXES, FEES,
CHARGES AND SURCHARGES PAID BY THE PASSENGER WILL
BE COLLECTED FROM THE PASSENGER BY THE CARRIER
ACCOMPLISHING THE REROUTING, WHO WILL ALSO REFUND
ANY AMOUNT PER REFUND RULE 100.

(D) EXPIRATION DATE
THE EXPIRATION DATE OF ANY NEW TICKET ISSUED WILL BE
THE SAME AS THE EXPIRATION DATE OF THE OLD TICKET.

(E) TIME LIMITS ON CANCELLATIONS AND CHARGES FOR LATE
CANCELLATIONS WILL BE APPLICABLE TO REVISED ROUTINGS
REQUESTED BY PASSENGER.

A-6

Case No.: 15-05627

CANADIAN TRANSPORTATION AGENCY

BETWEEN:

Christopher Johnson

and

Gabór Lukács

Complainants

and

Air Canada

Respondent

STATEMENT OF TWYLA ROBINSON

I, Twyla Robinson, of the City of Calgary, in the province of Alberta, DECLARE AS FOLLOWS:

[1] I have been an employee with Air Canada since July 31, 1986. I have been with the Customer Relations Department since April 17, 1990. In Customer Relations, I have held the positions of Customer Relations Representative, Lead Customer Relations Representative, Training and Quality Assurance Manager and Regulatory Manager. My current position is Manager, Customer Relations and Executive Centre.

[2] Within the course of my employment, I oversee customer responses and formulate Air Canada customer service policies and internal recommendations for Customer Relations Representatives in handling Passenger Claims;

[3] I have personal knowledge of all the information stated in this Statement, unless indicated otherwise.

[4] The internal recommendations document titled "Expense Policy" attached herewith as exhibit **A-1** to this Statement is a set of internal recommendations issued in April 2013 to Customer Relations Representatives ("Representatives") that guide their treatment of expense refund requests (the "Internal Recommendations") the current internal recommendations are attached herewith as exhibit **A-2** to this Statement. This is a document I developed for internal use in Customer Relations;

[5] Unless specified otherwise, my declaration applies to both the December 2013 version of the Internal Recommendations, exhibit A-1, and the current version, exhibit A-2 which I updated from the April 2013 version in December 2015;

[6] The Internal Recommendations do not constitute Air Canada's expense policy for expense refund requests;

[7] The Internal Recommendations establish the maximum amount of the refund request for which Representatives do not require the authorization of Lead Customer Relations Representatives (the "Lead");

[8] When the refund request exceeds the limit in the Internal Recommendations, the Representative consults the Lead, at which point the refund request is evaluated on a case-by-case basis.

[9] Lead Customer Relations Representatives are not bound by separate internal recommendations and have no fixed limits to the amount they can authorize as reimbursement of expenses;

[10] In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded as per the Lead's authorization, particularly when customers allege, and it is verified, that they were unable to connect with the Air Canada agents issuing the vouchers or making the hotel arrangements;

[11] In the case of a delay which is outside of Air Canada's control, the Internal Recommendations allow for goodwill compensation respecting the recommended limit;

[12] Air Canada has no other internal guidelines in handling expense refund requests;

[13] Air Canada's expense Policy under irregular operations is set forth in its Tariff at Rule 80;

[14] I make in support of Air Canada's written representations in response to Mr. Johnson and Dr. Lukács's complaint regarding the Internal Recommendations.

SIGNED at the City of Calgary, in the Province of Alberta, this 20th of January, 2016.

Twyla Robinson

Twyla Robinson

AIR CANADA

Kerianne Wilson
Counsel – Regulatory & Litigation
Direct Line: (514) 422-5959
Facsimile: (514) 422-5829
Email: kerianne.wilson@aircanada.ca

Law Branch
P.O. Box 7000, Zip 1276
Station Airport
Dorval, Québec, Canada
H4Y 1J2

By Email

January 20, 2016

The Secretary
CANADIAN TRANSPORTATION AGENCY
Complaints and Investigation Division
15 Eddy Street, 19th Floor,
Hull/Ottawa, Canada (K1A 0N9)

Re: Complaint by Mr. Christopher Johnson and Dr. Gábor Lukács against Air Canada
CTA file: 15-05627
Our File: LIT-2015-544

Request pursuant to Section 31 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104* ("Dispute Adjudication Rules")

The present constitutes Air Canada's request to have certain documents already filed and pending in the present case deemed confidential pursuant to s. 31 of the Dispute Adjudication Rules.

1. Relief sought

Air Canada hereby requests that the internal documents submitted in response to Dr. Lukács's questions on January 11 and January 19, 2016, as well as the internal document referenced as annex **A-2** in Air Canada's Response to the Complaint of January 20, 2016, be excluded from the Agency's public record as per s. 31(5)(c) of the Dispute Adjudication Rules.

2. Summary of the facts

On January 11, 2016, Air Canada filed a document entitled "Expense Policy" dated April 4, 2013. On January 19, 2016, Air Canada filed excerpts of its updated expense policy and procedures entitled "Policy and Conditions" and "Compensation Grid", dated December 2015. Air Canada also references a document entitled "Expense Policy" dated December 2015 as annex **A-2** to its Response to the Complaint of January 20, 2016. Annex **A-2** has not been filed, pending the Agency's decision on the present confidentiality request. All three of these documents contain commercially sensitive information and privileged internal procedures.

3. The arguments in support of the request

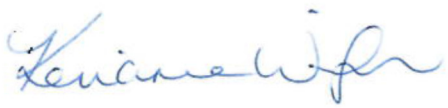
The Supreme Court of Canada has repeatedly held that there is an implicit undertaking of confidentiality regarding documents exchanged during the discovery process (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at para. 60; *Juman c. Doucette*, 2008 SCC 8 at para. 25). As explained by the Supreme Court of Canada, "this undertaking is meant to allow the parties to obtain as full a picture of the case as possible, without the fear that disclosure of the information will be harmful to their interests, privacy-related or otherwise" (*Globe and Mail v. Canada (A.G.)*, 2010 SCC 41 at para. 77).

This is precisely Air Canada's present concern. Air Canada is willing to share these documents with the Complainants, Mr. Christopher Johnson and Dr. Gábor Lukács for the purposes of the present Complaint provided that they sign a *Confidentiality and Non-Disclosure Undertaking*. However, should the Agency not deem these documents confidential, they would be released to the public, which would put Air Canada at a commercial disadvantage vis-à-vis its competitors regarding treatment of expense requests.

In *Lukács v. Canadian Transportation Agency et al.*, 2015 FCA 140, the Federal Court of Appeal examined section 31 of the Dispute Adjudication Rules, finding that no redacting of information was permitted as the parties had not requested a confidentiality order (*Lukács v. Canadian Transportation Agency et al.*, 2015 FCA 140 at para. 79). In contrast, Air Canada is hereby making such a request concerning documents provided during the discovery process to protect its commercial interests. Air Canada consistently treats Air Canada's expense procedures and policies as confidential documents, the whole as confirmed by the Statement of Twyla Robinson, attached herewith as annex **A**. The documents in question are internally developed procedures and recommendations developed by Air Canada. These documents are unique to Air Canada and are commercially sensitive. This is notably evidenced by the fact that both Expense Policy documents clearly indicate that the document is for internal use only, not to be distributed. The excerpts are similarly commercially sensitive and for internal use only as they are found only on Air Canada's internal portal ACPedia and are not downloadable, as they are intended only for internal consultation, as also confirmed by the Statement of Twyla Robinson.

As such, Air Canada respectfully requests that the three documents be deemed confidential and excluded from the Agency's public record.

Yours sincerely,



Kerianne Wilson
Counsel – Regulatory & Litigation

Case No.: 15-05627

CANADIAN TRANSPORTATION AGENCY

BETWEEN:

Christopher Johnson

and

Gabór Lukács

Complainants

and

Air Canada

Respondent

STATEMENT OF TWYLA ROBINSON

I, Twyla Robinson, of the City of Calgary, in the province of Alberta, DECLARE AS FOLLOWS:

[1] I have been an employee with Air Canada since July 31, 1986. I have been with the Customer Relations Department since April 17, 1990. In Customer Relations, I have held the positions of Customer Relations Representative, Lead Customer Relations Representative, Training and Quality Assurance Manager and Regulatory Manager. My current position is Manager, Customer Relations and Executive Centre.

[2] Within the course of my employment, I formulate and implement Air Canada customer relations policies and internal recommendations for customer relations representatives in handling passenger claims.

[3] I have personal knowledge of all the information stated in this Statement, unless indicated otherwise.

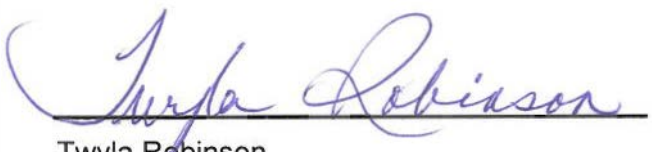
[4] Air Canada consistently treats its expense procedures and policies as confidential documents.

[5] Certain documents indicate in the footer that they are intended for internal use only, and are not to be distributed as they are commercially sensitive, particularly when they involve discretionary, goodwill payment guidelines.

[6] Furthermore, certain documents found on Air Canada's internal portal ACPedia cannot be downloaded and are accessible only through the portal, further confirming that they are intended for internal use only, as they are commercially sensitive, particularly when they involve discretionary, goodwill payment guidelines.

[7] I make this Statement in support of Air Canada's request to have certain documents already filed and pending in the present case deemed confidential.

SIGNED at the City of Calgary, in the Province of Alberta, this 20th of January, 2016.



Twyla Robinson

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

January 27, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Opposition to Air Canada's request for confidentiality dated January 20, 2016

Pursuant to Rule 31(3) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ("*Dispute Rules*"), the Applicants oppose Air Canada's request for confidentiality dated January 20, 2016, and request that the documents be placed on public record pursuant to Rule 31(5)(b).

The Applicants rely on the documents that were attached to the Application and the answers provided by Air Canada on January 11, 2016 and January 19, 2016, which have already been provided to the Agency and Air Canada.

OVERVIEW

Air Canada is seeking to seal and prevent public access to three documents that were filed with the Agency and marked as A-1, AQ2-1, and A-2. The documents pertain to Air Canada's policy with respect to passengers affected by failure to operate and/or failure to operate on schedule.

The Applicants submit that Air Canada's request is lacking any merits and is frivolous for the following reasons:

- Documents A-1 and AQ2-1 are already public and publicly available on the Internet, and thus Air Canada's request is belated.
- No implied undertaking attaches to answers and documents received under Rule 24.
- Pursuant to ss. 122(c) and 116 of the *Air Transportation Regulations* Air Canada is required to publish the policies set out in Documents A-1, AQ2-1, and A-2.
- Air Canada presented no evidence capable of demonstrating that disclosure of the documents would cause serious harm.

I. THE FACTS

(a) Document A-1, entitled "Expense Policy"

1. On January 11, 2016, Air Canada served Document A-1 on the Applicants, and filed it with the Agency. Air Canada did not make a request for confidentiality at the time of the filing.

2. The substance of the policy set out in Document A-1 has been communicated to the public on a number of occasions in 2013 and 2014.

Mr. Johnson's Statement, Exhibits "E" and "K"
Email of Air Canada (February 6, 2014), Document No. 2
Email of Air Canada (November 12, 2014), Document No. 3

3. Document A-1 is publicly available on the Internet at the following URLs:

- http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-11–AC–expense_policy.pdf
- http://web.archive.org/web/20160120220236/http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-11–AC–expense_policy.pdf

(b) Document AQ2-1, entitled "Policy and Conditions"

4. On January 19, 2016, Air Canada served Document AQ2-1 on the Applicants, and filed it with the Agency. Air Canada did not make a request for confidentiality at the time of the filing.

5. Document AQ2-1 is publicly available on the Internet at the following URLs:

- http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-19–AC–more_answers_to_questions–current_expense_policy–OCR.pdf

- http://web.archive.org/web/20160120233749/http://docs.airpassengerrights.ca/Canadian_Transportation_Agency/Air_Canada/Compensation_for_Expenses_of_Delayed_Passengers/2016-01-19–AC–more_answers_to_questions–current_expense_policy–OCR.pdf

(c) The Internet Archive (web.archive.org)

6. The Applicants have no control over the public information that has been collected and stored by the Internet Archive:

> The Internet Archive is a 501(c)(3) non-profit that was founded to build an Internet library. Its purposes include offering permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format.
>
> Founded in 1996 and located in San Francisco, the Archive has been receiving data donations from Alexa Internet and others. In late 1999, the organization started to grow to include more well-rounded collections. Now the Internet Archive includes: texts, audio, moving images, and software as well as archived web pages in our collections, and provides specialized services for adaptive reading and information access for the blind and other persons with disabilities.
>
> **http://archive.org/about/**

II. ISSUES

7. The sole question to be decided is whether the Agency should grant Air Canada's request for confidentiality with respect to Documents A-1, AQ2-1, and A-2.

III. SUBMISSIONS

Preliminary matter: The "Statement" of Ms. Twyla Robinson

8. The Agency's *Dispute Rules* permit verifying facts by way of an affidavit or witnessed statement. The requirements for an affidavit or a witnessed statement are set out in Schedules 2 and 3, respectively. A common requirement, set out under paragraph 3(c), is that the affidavit or witnessed statement must include:

> an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the information and an attestation that the information is, to their knowledge, true, accurate and complete;
>
> [Emphasis added.]

***Dispute Rules*, Schedules 2 and 3, para. 3(c)**

9. The "Statement" of Ms. Robinson, submitted in support of Air Canada's request for confidentiality, is not an affidavit nor was it made before a witness. Furthermore, it does not include the attestation as to the truth, accuracy and completeness of its contents.

10. Thus, the Applicants submit that the Agency should disregard the "Statement" of Ms. Robinson, and give it no weight.

(a) Documents A-1 and AQ2-1 are already public and Air Canada's request is belated

11. Air Canada is attempting to shut the stable door after the horse has bolted. Rule 7(2) of the Agency's *Dispute Rules* provides that:

> **7(2)** 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.
>
> [Emphasis added.]

12. Air Canada is familiar with the Agency's procedures relating to confidentiality, and has made such requests in the past. It was fully aware of the requirement that the issue of confidentiality must be raised "at the same time" as the document is filed.

13. Nevertheless, Air Canada filed Documents A-1 and AQ2-1 with the Agency on January 11 and 19, 2016, respectively, and it did not file "at the same time" a request for confidentiality.

Instead, Air Canada served the Documents on the Applicants without any indication of their sensitive or confidential nature.

14. As a result of Air Canada's conduct, Documents A-1 and AQ2-1 have already been "placed on the Agency's public record" in accordance with Rule 7(2), and are now publicly available on the Internet, including on the Internet Archive.

15. Thus, Air Canada's request with respect to Documents A-1 and AQ2-1 is belated, and even if the Agency granted the request, it would have no practical effect or benefit. Therefore, based on this consideration alone, the request should be denied.

***Takeda Canada Inc. v. Canada (Health)*, 2014 FC 1076, para. 28**

(b) No implied undertaking attaches to answers and documents received under Rule 24

16. Written questions and productions of documents in proceedings before the Agency are governed by Rule 24 of the *Dispute Rules*. Rule 24(2) provides that:

> **24(2)** The party to which a notice has been given must, within five business days after the day on which they receive a copy of the notice, file a complete response to each question or the requested documents, as the case may be, accompanied by the information referred to in Schedule 12.
>
> [Emphasis added.]

17. Rule 24 differs from discovery proceedings in courts of law, where parties exchange documents and provide answers only among themselves. Under Rule 24(2), in proceedings before the Agency, answers and documents provided in response to questions and production requests must be filed with the Agency.

18. Since Rule 24(2) requires filing answers and documents with the Agency, and all such filings are public pursuant to Rule 7(2), there can be no implied undertaking attached to the answers and documents obtained in this way.

19. Furthermore, any implied undertaking that might have existed is spent once the answers and documents are filed with the Agency and thus become part of the record before the Agency.

***Goodyear Canada Inc. v. Meloche*, 1996 CanLII 8261 (ON SC), para. 29**
***Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, para. 70**
***Juman v. Doucette*, 2008 SCC 8, para. 51**

(c) Air Canada's legal obligation to publish policy

20. Paragraph 112(c)(v) of the *Air Transportation Regulations*, S.O.R./88-58 ("*ATR*") states that:

> **122.** Every tariff shall contain
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> ⋮
>
> (v) failure to operate the service or failure to operate on schedule,
>
> ⋮
>
> (x) limits of liability respecting passengers and goods,
>
> [Emphasis added.]

21. Section 116 of the *ATR* provides that:

> **116. (1)** Every air carrier shall keep available for public inspection at each of its business offices a copy of every tariff in which the air carrier participates that applies to its international service.
>
> **(2)** Every air carrier shall display in a prominent place at each of its business offices a sign indicating that the tariffs for the international service it offers, including the terms and conditions of carriage, are available for public inspection at its business offices.
>
> **(3)** Every air carrier shall, for a period of three years after the date of any cancellation of a tariff participated in by the carrier, keep a copy of that tariff at the principal place of business in Canada of the carrier or at the place of business in Canada of the carrier's agent.

22. Documents A-1 ("Expense Policy"), AQ2-1 ("Policy and Conditions"), and A-2 set out Air Canada's policy in respect to stranded passengers, that is, "failure to operate service or failure to operate on schedule." These documents also purport to impose monetary limits on the reimbursement of expenses to stranded passengers, that is, "limits of liability."

23. Thus, Air Canada is seeking confidentiality with respect to policies that it is required, as a matter of law, to make available for public inspection. Therefore, Air Canada's request is a frivolous attempt to circumvent its obligations under the *ATR*, and should be denied accordingly.

(d) Air Canada does not meet the legal test for confidentiality

24. Proceedings before the Agency are subject to the constitutionally protected open court principle, and as such all documents filed with the Agency must be presumptively open to the public. The burden of proof lies upon the person seeking to limit this right.

Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 S.C.R. 175
***Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140**

25. The legal test for balancing the open court principle against other interests remains the *Dagenais/Mentuck* test (or its adaptation, as in *Sierra Club*):

> Without denying the importance of protecting privacy and security, we must preserve the essential core of the open court principle, and the broader principle of freedom of expression.
>
> How do we do this? In Canada, we have established a common law test for balancing the open court principle against other interests. Judges may limit the open court principle if: 1) such an order is necessary to prevent a serious risk to the proper administration of justice because other reasonably alternative measures will not prevent the risk; and 2) the salutary effects of the limit on openness outweigh the deleterious effects on the rights and interests of the parties and the public.
>
> [Emphasis added.]

Chief Justice Beverley McLachlin: "Openness and the Rule of Law"

(i) No evidence of serious harm

26. The risk under the test for confidentiality must be real and substantial, well grounded in the evidence, and posing a serious threat to an interest that can be expressed in terms of public interest in confidentiality.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, paras. 54-55**

27. It is settled law that a mere preference for personal or financial privacy and/or to be free from embarrassment does not meet this onerous requirement.

***Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, para. 97**
***Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 SCR 175, pp. 8-9**

28. In the case at bar, Air Canada would simply prefer to keep the Documents confidential, but it presented no evidence capable of demonstrating that disclosure of the Documents would cause it serious harm, or any harm for that matter, other than embarrassment.

29. On the contrary, the evidence before the Agency shows that Air Canada has not been treating the information in the Documents as sensitive:

    (a) Air Canada provided documents setting out the policies in question to the Applicants without any indication of their sensitive nature;

    (b) Air Canada filed documents setting out the policies in question with the Agency, without seeking confidentiality at the same time, and knowing that they would be placed on public record; and

    (c) Air Canada has been communicating these policies to the public, and by applying the policies it cannot avoid communicating them to the public in the future.

Mr. Johnson's Statement, Exhibits "E" and "K"
Email of Air Canada (February 6, 2014), Document No. 2
Email of Air Canada (November 12, 2014), Document No. 3

30. Air Canada's competitors are equally subject to the obligations set out in the *Montreal Convention* and the public disclosure requirements set out in ss. 116 and 122 of the *ATR* as Air Canada is. Consequently, requiring Air Canada to disclose policies that should anyway match the *Montreal Convention* and should have anyway been disclosed in its tariff cannot possibly cause Air Canada any competitive disadvantage.

(ii) Relevance and public interest in disclosure

31. The present Applications challenges the policies of Air Canada set out in the Documents. Each of these documents are vital to the proceeding before the Agency:

    (a) Document A-1 sets out the Impugned Policy since April 4, 2013;

    (b) Document AQ2-1 sets out Air Canada's policy effective December 7, 2015, and directly contradicts the position taken by Air Canada with respect to whether mechanical problems constitute "controllable" or "uncontrollable" IROPs within the meaning of Air Canada's policies; and

    (c) Document A-2 sets out what Air Canada claims to be its current policy, which was established at an unknown time, likely as a result of the present Application.

32. Since members of the public are subjected to the policies set out in the Documents, there is a significant public interest in maintaining open access to the Documents and allowing the public to inform itself about details of the present proceeding that affect not only the parties, but the public as a whole.

33. Therefore, it is submitted that even if the werere any evidence of serious harm to Air Canada (which is not the case here), the public interest in the disclosure of the Documents outweighs Air Canada's private interest in keeping the Documents confidential.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
(Jean-Francois.Bisson-Ross@aircanada.ca)

Kerianne Wilson, Counsel - Regulatory & Litigation, Air Canada
(kerianne.wilson@aircanada.ca)

Jean-François Bisson-Ross
Counsel - Litigation
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AIR CANADA

Law Branch, Zip 1276
P.O. Box 7000, Station Airport
Dorval, Quebec, Canada
H4Y 1J2

VIA E-MAIL: secretariat@otc-cta.gc.ca

February 1, 2016

The Secretary
CANADIAN TRANSPORTATION AGENCY
Secretary
15 Eddy Street
17th Floor Mailroom
Gatineau QC J8X 4B3

SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Response to the Complainants' Opposition

Dear Madam Secretary:

1. Please find Air Canada's Response to the Opposition to Air Canada's Request for confidentiality, amounting to a Request for Disclosure under s. 31 (3) of *the Canadian Transportation Agency Rules* (the "*CTA Rules*") (the "*Opposition*").

2. Air Canada further provides the comments below, given the Complainants' confirmation in the Opposition, served on January 27th, that documents A-1 and AQ-2, communicated by Air Canada during the discovery process, have been disclosed and swiftly placed on the docs.airpassengerrights.ca and the web.archive.org websites, in apparent breach of an implied confidentiality undertaking.

3. The documents A-1, A-2 and AQ2-1 (collectively referred to as the "*Documents*") are internal, proprietary to Air Canada and contain information that will place Air Canada at a commercial disadvantage vis-à-vis its competitors were they further distributed. The documents are not terms and conditions of carriage and are not subject to any publication obligation under the *Air Transportation Regulations* (the "*ATR*").

4. In adjudicating disputes, the Agency has to promote justice and favor the just determination of issues. In doing so, it has all the powers necessary to issue any Order to protect the Documents' confidentiality.

1. Documents A-1 and AQ2-1 were disseminated in breach of Implied Undertakings of Confidentiality

5. The Supreme Court has ruled on three separate occasions in the last fifteen years on the issue of an implicit undertaking of confidentiality regarding documents exchanged during the discovery process (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51; *Juman c. Doucette*, 2008 SCC 8; *Globe and Mail v. Canada* (A.G.), 2010 SCC 41). The policy reasons for this consistent stand are evident: as the purpose of discovery is to encourage the most complete disclosure of information, parties providing such information must be able to trust that it will remain confidential.

6. These same policy reasons apply to the communication of documents as part of proceedings before the Agency. In the present case, the complainant asked for certain information and documents. In the interest of responding to the best of its abilities, Air Canada communicated internal, commercially sensitive documents, with the expectation that they would be protected by an implicit undertaking of confidentiality. Air Canada does not seek to have those documents kept secret from the complainant, but rather, to restrict their use to the proceedings in question.

2. Documents A-1 and AQ2-1 were published following a communication by Air Canada within the discovery process:

7. The Complainants allege that the documents A-1 and AQ2-1 are already being part of the public domain, and as such Air Canada's Request for confidentiality affecting said documents Is belated. As further explained below, the Agency has all necessary powers to issue the appropriate confidentiality order following Air Canada's Request during the discovery process.

8. The fact that the documents were swiftly communicated In public websites, including at Airpassengerrights.ca, should not bring umbrage to the commercial harm sustained by Air Canada would the Documents remain in the Agency's official record and be further distributed.

3. The Agency has the power to grant Air Canada's Request despite the distribution of some of the Documents on two websites.

9. The Agency has the power to make "any decision that it considers just and reasonable" under the *CTA Rules*[1] in the context of a Request for confidentiality, and should make all adaptations necessary for the optimal confidentiality of the Documents, starting with, at the very least, their withdrawal from the Agency's public record. The Agency, in interpreting its own rules, has to promote justice[2]. Air Canada hereby requests the Agency to make any necessary adaptation to the *CTA Rules* to favor the just determination of the present issues[3].

10. Article 25 of the *Canada Transportation Act* (the "*CTA*") establishes that the Agency, in its role as a quasi-judicial body, has all the powers, rights and privileges that are vested in a superior court, with respect to several matters, including the Agency's jurisdiction, the attendance and examination of witnesses, and more particularly in the present circumstances, the production and inspection of documents. As such, Air Canada requests the Agency, in granting its Request for Confidentiality, which includes the signature of a confidentiality agreement, to order the Complainants to remove the document A-1 and AQ2-1 from the Air Passenger Rights website, with the understanding that they might remain available on the Internet generally as archived material.

4. Air Canada does not have to publish and disclose internal recommendations, as they are not terms and conditions of carriage.

11. Sections 116 and 122 of the *ATR* impose on a carrier to publish its terms and conditions of carriage, for clarity and certainty. The Complainants request disclosure of internal recommendations which apply and respect the published terms and conditions of carriage.

---

[1] *CTA Rules, r. 31 (5) iv.*

[2] *CTA Rules* r. 5 (1).

[3] *CTA Rules,* r. 6.

12. The Legislator has struck a balance in limiting an air carrier's disclosure obligation under sections 116 and 122 of the *ATR* to conditions of carriage. There is no obligation for an airline to publish how it organizes its resources, in handling passenger refund requests and while respecting the *Montreal Convention*, the *CTA* and its Regulations and its Tariff. Air Canada has the right to privately organize the handling of its obligations as published in its Tariff, and would otherwise be at a commercial disadvantage vis-à-vis its competitors regarding the treatment of expense requests.

13. It is self-evident that further disclosure of private internal recommendations, would hinder the proper and efficient conduct of airlines' operations in applying their Tariff.

5. Common Law Test for confidentiality

14. Air Canada disagrees with the Complainants' submission that it did not meet the legal test for confidentiality. It adds that that the test set forth under the Common Law has to be reviewed considering the *CTA Rules*[4]. Even if the Documents may be considered as relevant to the present matter, the harm resulting from their further disclosure militate for their confidentiality, trumping public interest.

15. The Agency must take into consideration the following in deciding on the confidential treatment to be conferred to the Documents:

a. The Documents' relevance to the dispute at stake (CTA Rules r. 31 (5))

16. The Complainants allege in their Complaint that Air Canada has a reimbursement policy contrary to the *Montreal Convention*, the *CTA* and its Regulations as well as Air Canada's own Tariff.

17. The Documents' relevance is disputed by Air Canada in its Answer, as it submits that the Documents are not conditions of carriage and solely constitute internal recommendations in implementing its Policy as outlined in its Tariff. Air Canada respects the *Montreal Convention* and the *CTA* and its Regulations in handling passenger refund requests. Air Canada further confirmed that it

[4] *See CTA Rules, r. 31*

does not limit the reimbursement of passenger expenses in cases where it is liable to do so.

18. It may well be that the Agency, ruling on the Complaint's merits, will not find that the Documents infringe the *Montreal Convention*, the *CTA* and its Regulations and Air Canada's own Tariff.

19. The Documents are relevant to the Complaint as delineated by the Complainants, but it is Air Canada's positon that they are not relevant as conditions of carriage, they remain commercially sensitive internal recommendations, which do not have to be published under the *ATR*.

b. The harm resulting from the disclosure versus the public interest in having the documents disclosed (CTA Rules r. 31 (5))

20. Air Canada reiterates in full its comments provided in its Request under s. 31 of the *CTA Rules*. The disclosure of commercially sensitive information will cause harm and place it at a commercial disadvantage vis-à-vis other carriers.

21. The public interest in this matter, considering the commercial sensitivity of these internal documents and the *ATR* is limited to the publication of conditions of carriage in an Air Carrier's Tariff.

6. Ms. Twyla Robinson's Statement

22. Air Canada disagrees with the Complainants' position that the Statement filed by Ms. Twyla Robinson must be struck out as it does not provide all the elements required within the context of a verification of contents by the *CTA* under rule 15 of the *CTA Rules*.

23. Section 15 of the *CTA Rules* imposes requirements within the context of a verification of contents of a document under the Agency's initiative. The *CTA Rules* do not otherwise subject a statement to any specific requirement.

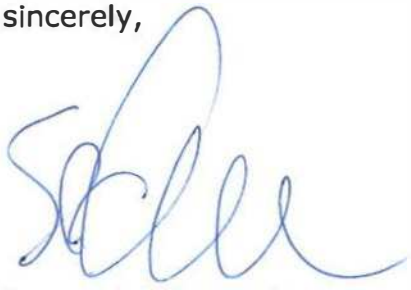
24. Ms. Robinson's clear and unequivocal Statement was provided in good faith by Air Canada in support of its request under s. 31 (1) of the *CTA Rules*. Consideration must be given to the Statement's content, as evidence filed in support of Air Canada's Request. In the situation at hand, Ms. Robinson's signed Statement confirmed her personal knowledge of Air Canada's confidential treatment of internal documents, and their commercial sensitivity.

25. Air Canada submits that the Statement's content do not require a supplementary verification by the Agency under the *CTA Rules*.

26. Although it is true that the *CTA Rules* allow the Agency, if it deems necessary, to require a verification of a witness' Statement, we respectfully submit that this is neither necessary nor justified in the case at hand. The Agency is not allowed to simply dismiss Ms. Robinson's Statement as such would be disproportionate and prevent the just determination of issues and promotion of justice.

The whole, respectfully submitted.

Yours sincerely,



Jean-François Bisson-Ross

Counsel – Litigation

JFBR/sa

c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson

Office des transports du Canada

Canadian Transportation Agency

LET-C-A-6-2016

February 24, 2016

Case No. 15-05627

BY E-MAIL:
Jean-Francois.Bisson-Ross@aircanada.ca

Jean-Francois Bisson

BY E-MAIL:
lukacs@AirPassengerRights.ca

Christopher C. Johnson
Gábor Lukács

Dear Sirs:

Re: Application by Christopher Johnson and Gábor Lukács against Air Canada

BACKGROUND

On December 4, 2015, Gábor Lukács (on behalf of himself and Christopher Johnson) (the applicants) filed an application alleging that Air Canada is applying a policy that purports to limit its liability with respect to delay of passengers that is not set out in its International Tariff, contrary to section 122 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR) and is unreasonable within the meaning of section 111 of the ATR, because it purports to fix a lower limit of liability than what is set out in the Convention for the Unification of Certain Rules for International Carriage by Air Montreal Convention (*Montreal Convention*). The applicants also assert that Air Canada has failed to apply the terms and conditions set out in its tariff by applying the impugned policy and/or other unofficial policies instead of the provisions of the *Montreal Convention*, contrary to section 110(4) of the ATR.

The Canadian Transportation Agency (Agency) opened pleadings on December 29, 2015. On the same day, the applicants filed a notice of written questions and production of documents in regard to the impugned policy pursuant to subsection 24(1) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (SOR/2014-104) (Dispute Adjudication Rules). On January 11, 2016, Air Canada filed its response to the notice and attached a document, titled A-1, which according to Air Canada, contains internal recommendations pertaining to its policy for reimbursement of expenses.

On January 12, 2016, the applicants filed a second notice of written questions and production of documents regarding A-1. On January 19, 2016, Air Canada filed its response to the second notice and attached a document, titled AQ2-1, containing excerpts from what Air Canada refers to as its current internal recommendations pertaining to the reimbursement of expenses.

On January 20, 2016, Air Canada filed its answer to the application and attached another document, titled A-2, representing what Air Canada refers to as its current expense guidelines. On the same day, Air Canada filed a request for confidentiality relating to documents A-1, AQ2-1, and A-2 (documents) and argued that the documents are subject to an implicit undertaking of confidentiality. On January 27, 2016, the applicants filed their opposition to Air Canada's request for confidentiality by way of a request for disclosure, and on February 1, 2016, Air Canada filed its response to the applicants' request for disclosure.

On February 3, 2016, the applicants filed a request pursuant to subsection 34(1) of the Dispute Adjudication Rules to file documents not otherwise provided for in the Dispute Adjudication Rules in response to Air Canada's response to the applicants' request for disclosure. In the request, the applicants submit that they would like to respond to the new allegation being made by Air Canada, namely, that they breached the implied undertaking of confidentiality, and to the related relief being sought by Air Canada.

ISSUES

1) **Are the documents A-1 and AQ2-1 filed with the Agency subject to the implied undertaking rule?**
2) **Should the documents for which Air Canada requests confidentiality be found to be confidential?**

Issue 1: Are the documents A-1 and AQ2-1 filed with the Agency subject to the implied undertaking rule?

Position of the parties

Air Canada submits that the Supreme Court of Canada has repeatedly held that there is an implicit undertaking of confidentiality regarding documents exchanged during the discovery process. Air Canada has referred to two leading cases from the Supreme Court on this issue, *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 and *Juman v. Doucette*, 2008 SCC 8. Air Canada also refers to a quote from the Supreme Court wherein the Court stated that "this undertaking is meant to allow the parties to obtain as full a picture of the case as possible, without the fear that disclosure of the information will be harmful to their interests, privacy-related or otherwise" (*Globe and Mail v. Canada (A.G.)*, 2010 SCC 41 at para. 77). Air Canada claims that this is precisely their concern and states that it is willing to share the documents with the applicants for the purposes of the present application provided that they sign a Confidentiality and Non-Disclosure Undertaking (NDU).

The applicants argue that written questions and production of documents in proceedings before the Agency are governed by section 24 of the Dispute Adjudication Rules and that section 24 differs from discovery proceedings in courts of law, where parties exchange documents and provide answers only among themselves. According to the applicants, pursuant to subsection 24(2) of the Dispute Adjudication Rules, answers and documents provided in response to questions and production requests must be filed with the Agency. The applicants assert that such filings are public pursuant to subsection 7(2) of the Dispute Adjudication Rules, and there can be no implied undertaking attached to the answers and documents obtained in this way. The applicants argue that any implied undertaking that might have existed is spent once the answers and documents are filed with the Agency and thus become part of the public record before the Agency.

Air Canada counters that the Supreme Court has ruled on three separate occasions in the last fifteen years on the issue of an implicit undertaking of confidentiality regarding documents exchanged during the discovery process and argues that the policy reasons for this consistent stance are evident: as the purpose of discovery is to encourage the most complete disclosure of information, parties providing such information must be able to trust that it will remain confidential. Air Canada argues that these same policy reasons apply to the communication of documents as part of current proceedings before the Agency.

Analysis

The implied undertaking (or "deemed undertaking") rule is well established in Canada and is intended to restrict a party who receives evidence during the discovery process from using that evidence for a collateral purpose. It is based on the principle that people should have a right to privacy but at the same time should make full disclosure in civil proceedings. The discovery process is compulsory, a litigant has little control over what evidence is compellable, and therefore should receive some assurance that the evidence that is disclosed will not be used for some other purpose. The general rule is that what is said in the discovery room stays in the discovery room until revealed in the courtroom or disclosed by judicial order (*Juman v. Doucette, supra,* at paras. 23-27).

The implied undertaking rule applies to evidence obtained on discovery and is not available to the public because it remains in the private sphere. At the discovery stage, as opposed to the trial stage, there is no imperative for transparency. The right to confidentiality will end if the adverse party decides to actually use the information in his or her own case. In the civil Courts, once the trial begins, the media will have access to the Court records, exhibits and documents filed by the parties. Information obtained on discovery therefore may become part of the court record. Information that is revealed when this happens is not subject to the obligation of confidentiality (*Lac D'Amiante Québec v. 2858-0702 Québec Inc. supra,* at paras. 63-66, 69-70, 72-73).

The Agency notes that the rule has been codified in many jurisdictions and incorporated into the rules of civil procedure governing the discovery process. In Ontario, for example, subrule 31.1.01(3) of the *Rules of Civil Procedure* RRO 1990, Reg. 194, provides that all parties and their lawyers are deemed to undertake not to use evidence or information obtained on discovery for any purposes other than those of the proceeding in which the evidence was obtained.

In some jurisdictions, however, the rules of civil procedure state that the implied undertaking rule does not apply to evidence that is filed with the Court (see, for example, subrule 30.1.01(5) (a) of the Ontario *Rules of Civil Procedure*).

Breach of the implied undertaking rule is a serious matter, and is treated as contempt of court [see for example, *N.M. Paterson & Sons v. St. Lawrence Seaway Management Corp*., 2002 FCT 1247].

The nature of the proceedings before the Agency is such that discoveries are completed on the record, as opposed to the process in civil proceedings where discoveries occur out of court. Before the Agency, answers to questions and documents which are produced are filed with the Agency. The Agency is subject to the open court principle and subsection 7(2) of the Dispute Adjudication Rules requires that documents which are filed with the Agency are placed on the public record and are publicly available, subject only to a request for confidentiality being made when the document is filed.

Subsection 31(1) of the Dispute Adjudication Rules describes the process through which a person may request confidentiality over a document. Subsection 7(2) indicates that such a request must be filed at the same time as the document over which confidentiality is sought, otherwise the document is placed on the public record. Therefore, by operation of these provisions, when documents A-1 and AQ2 were produced and filed with the Agency, they were placed on the Agency's public record. In doing so, the documents went from the private sphere and into the public sphere and based on the above case law, the Agency finds that the implied undertaking rule would not apply to these documents.

The remaining issue is whether the documents should be kept confidential.

Issue 2: Should the documents for which Air Canada requests confidentiality be found to be confidential?

Position of the parties

Are the documents relevant to the proceeding?

On the issue of relevance, Air Canada concedes that the documents are relevant to the application as asserted by the applicants, but it is its position that the documents are not relevant as conditions of carriage and remain commercially sensitive internal recommendations.

The applicants argue that the application challenges the policies of Air Canada set out in the documents and that each of these documents are vital to the proceeding.

If the documents are found to be relevant, would any specific direct harm likely result from their disclosure and, if so, whether any demonstrated specific harm is sufficient to outweigh the public interest in having the documents disclosed?

Air Canada submits that it is making the present request for confidentiality to protect its commercial interests and argues that should they not be kept confidential, Air Canada would be placed at a commercial disadvantage vis-à-vis its competitors regarding the treatment of expense requests. According to Air Canada, it consistently treats its expense procedures and policies as confidential documents, as confirmed by a statement submitted by its Manager of Customer Relations, and argues that the documents in question are internally developed procedures representing recommendations developed by Air Canada which are unique to Air Canada and are commercially sensitive. According to Air Canada, this is evidenced by the fact that the expense policy documents clearly indicate that they are for internal use only and are not to be distributed. Air Canada further submits that the excerpts are commercially sensitive and for internal use only as they are found only on Air Canada's internal portal (ACPedia) and are not downloadable, as they are intended only for internal consultation.

The applicants submit that proceedings before the Agency are subject to the constitutionally-protected open court principle, and that, as such, all documents filed with the Agency must be presumptively open to the public and the burden of proof lies upon the person seeking to limit this right (*Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175; *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140).

The applicants argue that the legal test for balancing the open court principle against other interests remains the Dagenais/Mentuck test. The applicants cite Chief Justice Beverly McLachlin from a paper entitled "Openness and the Rule of Law":

> Without denying the importance of protecting privacy and security, we must preserve the essential core of the open court principle, and the broader principle of freedom of expression.
>
> How do we do this? In Canada, we have established a common law test for balancing the open court principle against other interests. Judges may limit the open court principle if: 1) such an order is necessary to prevent a serious risk to the proper administration of justice because other reasonably alternative measures will not prevent the risk; and 2) the salutary effects of the limit on openness outweigh the deleterious effects on the rights and interests of the parties and the public.

The applicants argue that the risk under the test for confidentiality must be real, substantial, well-grounded in the evidence, and pose a serious threat to an interest that can be expressed in terms of public interest in confidentiality (*Sierra Club v. Canada (Minister of Finance),* 2002 SCC 41, paras. 54-55) and that that a mere preference for personal or financial privacy and/or to be free from embarrassment does not meet this onerous requirement (*Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, para. 97 and *Nova Scotia (Attorney General) v. MacIntyre, supra, at* pp. 8-9).

The applicants assert that, in the present case, Air Canada would simply prefer to keep the documents confidential, and presented no evidence capable of demonstrating that disclosure of the documents would cause it serious harm, or any harm for that matter, other than embarrassment. The applicants also argue that the evidence shows that Air Canada has not been treating the information in the documents as sensitive in that it provided the documents to the applicants without any indication of their sensitive nature, it filed documents setting out the policies in question with the Agency without seeking confidentiality at the same time and knowing that they would be placed on public record; and it had been communicating these policies to the public.

The applicants claim that since members of the public are subjected to the policies set out in the documents, there is a significant public interest in maintaining open access to them and allowing the public to inform itself about details of the present proceeding that affect not only the parties, but the public as a whole.

The applicants assert that Air Canada's competitors are equally subject to the obligations set out in the *Montreal Convention* and the public disclosure requirements set out in sections 116 and 122 of the ATR. Consequently, the applicants argue that requiring Air Canada to disclose policies that should match the *Montreal Convention* and should have anyway been disclosed in its tariff cannot possibly cause Air Canada any competitive disadvantage.

Air Canada disagrees with the applicants' submission that its request did not meet the legal test for confidentiality and adds that the test set forth under the common law has to be reviewed considering the Dispute Adjudication Rules. Air Canada argues that, even if the documents may be considered relevant to the present matter, the harm resulting from their further disclosure militates for their confidentiality, trumping public interest. Air Canada also argues the documents are internal proprietary documents and contain information that will place Air Canada at a commercial disadvantage.

Air Canada states that it does not seek to have those documents kept secret from the complainant, but rather, to restrict their use to the proceedings in question.

Air Canada asserts that the documents are not terms and conditions of carriage and are not subject to any publication obligation under ATRs. Air Canada submits that sections 116 and 122 of the ATR require a carrier to publish its terms and conditions of carriage for clarity and certainty and that, in the present case, the applicants request disclosure of internal recommendations which apply and respect the published terms and conditions of carriage.

Air Canada argues that the legislator has struck a balance in limiting an air carrier's disclosure obligation to conditions of carriage and that there is no obligation for an airline to publish how it organizes its resources, in handling passenger refund requests and while respecting the *Montreal Convention*, the CTA and its Regulations and its tariff. Air Canada claims that it has the right to privately organize the handling of its obligations as published in its tariff, and would otherwise be at a commercial disadvantage vis-à-vis its competitors regarding the treatment of expense requests. In addition, Air Canada submits that further disclosure of private internal recommendations, would hinder the proper and efficient conduct of airlines' operations in applying their tariff.

Air Canada submits that the Agency has the power to make "any decision that it considers just and reasonable" and should make all adaptations necessary for the optimal confidentiality of the documents, starting with their withdrawal from the Agency's public record.

In addition, Air Canada argues that section 25 of the CTA establishes that the Agency, in its role as a quasi-judicial body, has all the powers, rights and privileges that are vested in a superior court, with respect to several matters, including the Agency's jurisdiction, the attendance and examination of witnesses, and more particularly in the present circumstances, the production and inspection of documents. As such, Air Canada requests the Agency, in granting its request for confidentiality, and ordering the applicants to sign a confidentiality agreement, also order the applicants to remove the documents A-1 and AQ2-1 from the applicant's website, with the understanding that they might remain available on the internet generally as archived material. According to Air Canada, the fact that the documents were swiftly communicated in public websites should not take away from the commercial harm sustained by Air Canada should the documents remain in the Agency's official record and be further distributed.

Analysis

Pursuant to subsection 31(5) of the Dispute Adjudication Rules, the Agency must first determine whether the documents in respect of which a claim for confidentiality has been made are relevant to the proceedings. If the Agency determines that the documents are relevant, then it must assess whether any specific direct harm would likely result from their disclosure and whether any demonstrated specific direct harm is sufficient to outweigh the public interest in having it disclosed.

Should it determine that the documents are relevant and the specific direct harm likely to result from disclosure justifies a claim for confidentiality, then pursuant to paragraph 31(5)(c) of the Dispute Adjudication Rules, the Agency has a range of disclosure options, from ordering that the document not be placed on the public record to ordering that it be kept confidential, but allowing for partial disclosure or disclosure to specific parties or their representatives upon receipt of a signed undertaking of confidentiality.

Are the documents relevant to the proceeding?

The policies set out in the documents are being directly challenged in the present application. Air Canada did not object to their production, and concedes that they are relevant to the application. Accordingly, the Agency finds that the documents are relevant to this proceeding.

If the documents are found to be relevant, would any specific direct harm likely result from their disclosure and, if so, would any demonstrated specific harm be sufficient to outweigh the public interest in having the documents disclosed?

Specific direct harm must be clear, identifiable harm to a party's public reputation and/or commercial interests which results directly from disclosure to the public. As per the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, *supra*, a confidentiality order requires the presence of a real and substantial risk which is well grounded in the evidence.

The Agency finds that, given the nature of the information at issue, the placing of document A-2 on the public record could affect Air Canada's competitive position relative to other carriers, and could represent an unfair disadvantage to Air Canada. While the applicants argue that this information is subject to public disclosure requirements set out in sections 116 and 122 of the ATR, the fact remains that these documents are not reproduced in Air Canada's tariff and the question of whether any aspect of these documents should be incorporated into Air Canada's tariff would be an issue for determination in the application, but at this stage Air Canada has established that it should be kept confidential. Accordingly, the Agency finds that the public interest in having A-2 disclosed is outweighed by the specific direct harm that Air Canada would suffer if it was made public.

With respect to documents A-1 and AQ2, when they were produced and filed with the Agency, no claim for confidentiality was made by Air Canada and, as a result, they were placed on the Agency's public record. Moreover, they were immediately posted on the internet. They are therefore not only on the Agency's public record but are now otherwise in the public domain. The Agency does not accept the applicants' argument that the manner in which A-1 and AQ2 were filed demonstrate that Air Canada did not consider them to be confidential. Parties filing documents in proceedings would not normally expect those documents to be immediately posted on the internet. However, the fact that they were filed without a simultaneous claim for confidentiality means that they were placed on the public record. Although an order from the Agency finding these documents confidential would have the effect of removing them from the Agency's public record, and arguably they could be removed by the applicants from any website within their control, they would likely remain in the public sphere as the applicants have confirmed that they have been posted to a website over which they have no control. Since the documents are now publicly available, the claim for confidentiality fails. Therefore, Air Canada has failed to establish any specific direct harm which would result from keeping these documents on the public record.

Based on the foregoing, the Agency will keep the confidential version of document A-2 on the confidential record. The confidential version of the document will be considered by the Agency in its decision-making process, but will not be part of the public record. The Agency notes that Air Canada is willing to provide a copy of document A-2 in confidence after receipt of a signed NDU signed by the applicants. The Agency finds this to be reasonable in the circumstances.

With respect to the applicants' request to make further submissions on whether they are in breach of the implied undertaking rule and whether the Agency should order that documents produced by Air Canada should be removed from the applicants' website, given the Agency's finding that the implied undertaking rule does not apply to these documents, the issue is moot and further submissions are not necessary.

ORDERS

Pursuant to subparagraph 31(5)(c)(iii) of the Dispute Adjudication Rules, the Agency orders that:

1. Air Canada will have until February 26, 2016 to provide the applicants with a NDU for signature.
2. The applicants must submit the signed NDU to Air Canada within 2 business days.
3. Air Canada must provide document A-2 to the applicants within 2 business days from the date of receipt of the signed NDU.
4. The applicants will have 5 business days from the receipt of document A-2 to file their reply to the application.
5. The applicants' request to file additional submissions pursuant to subsection 34(1) of the Dispute Adjudication Rules is denied.

All correspondence and pleadings should refer to Case No. 15-05627 and be filed through the Agency's Secretariat e-mail address: secretariat@otc-cta.gc.ca.

BY THE AGENCY:

(signed)

William G. McMurray
Member

(signed)

Sam Barone
Member

(signed)

P. Paul Fitzgerald
Member

Halifax, NS

lukacs@AirPassengerRights.ca

March 1, 2016

UNDER PROTEST

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Confidentiality and non-disclosure undertaking

Enclosed please find the "Confidentiality and non-disclosure undertaking" signed by the Applicants, as per Decision No. LET-C-A-6-2016 of the Agency, dated February 24, 2016.

The Applicants have complied with Decision No. LET-C-A-6-2016 under protest. Notwithstanding signing the "Confidentiality and non-disclosure undertaking," the Applicants reserve their right to seek leave to appeal from Decision No. LET-C-A-6-2016 of the Agency pursuant to s. 41 of the *Canada Transportation Act* after the release of the Agency's final decision in the present proceeding. Furthermore, the Applicants reserve their right to argue before the Federal Court of Appeal that Air Canada would suffer no specific and/or direct harm from the public disclosure of the document(s) in question.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
(Jean-Francois.Bisson-Ross@aircanada.ca)

Kerianne Wilson, Counsel - Regulatory & Litigation, Air Canada
(kerianne.wilson@aircanada.ca)

Enclosed: Signed "Confidentiality and non-disclosure undertaking"

IN THE MATTER OF:

Application by Christopher Johnson and Gábor Lukács against Air Canada before the Canadian Transportation Agency
File no 15-05627

CONFIDENTIALITY AND NON-DISCLOSURE UNDERTAKING

We, Christopher Johnson, and Gábor Lukács (in his role of co-applicant as well as representative for Mr Johnson), (hereinafter the "Applicants", jointly and severally in this Confidentiality and Non-Disclosure Undertaking) in the above-noted Matter, have been granted, by the Canadian Transportation Agency (the "Agency"), in its decision LET-C-A-6-2016, dated February 24 , 2016, access on certain terms and conditions to Air Canada's Document A-2, confidentially filed in the Agency's record.

The Document A-2 and the information it contains therein, so designated by the Agency has been clearly identified as confidential and we confirm that we have been advised and are aware of the specific confidential information to which we are being granted access and to which this undertaking relates (hereinafter the "Confidential Information").

We acknowledge and agree that the Confidential Information is owned by and, notwithstanding disclosure to me, shall remain the property of Air Canada.

In consideration for being granted access to, and the disclosure to us of, the Confidential Information, we undertake:

a) to use the Confidential Information only for, and exclusively in respect of, pleading procedures and submissions we are required/entitled to perform in respect of this Matter;

b) to ensure that any reference to the Confidential Information when referenced in any pleadings or submissions made by either one of us to the Agency is marked as confidential and treated as confidential at all times;

c) not to divulge the Confidential Information to any other person whomever, unless specifically so authorized by the Agency and only under such terms and conditions as may be imposed by the Agency;

d) not to reproduce, in any manner whatsoever, the Confidential Information;

e) to keep confidential and protect the Confidential Information by keeping the Confidential Information at all times secured and under our control;

f) at the end of the proceedings with respect to this Matter or as may be otherwise directed by the Agency, to return to the Agency all the Confidential Information as well as, without limitation, all documents, notes, charts, analysis and memoranda created by the Applicants and based on, referring to or containing the Confidential Information (hereinafter the "Related Documents") or

to destroy such Confidential Information and Related Documents and to file with the Secretary an Agency designated Certificate of Destruction for the destroyed Confidential Information and Related Documents; and,

g) to inform the Canadian Transportation Agency immediately of any changes in the facts referred to in this Undertaking.

We acknowledge and agree that the parties from whom or through whom we have received the Confidential Information as a result of this Undertaking may not have an adequate remedy at law and may suffer specific direct harm in the event that any provision of this Undertaking is not performed in accordance with its terms or is otherwise breached**. We therefore acknowledge and agree that such parties shall be entitled to injunctive relief to prevent any breaches of this Undertaking and to enforce the terms and provisions of this Undertaking, in addition to any other remedy and/or equitable relief to which they may be entitled.**

In the event that we are required by law to disclose any of the Confidential Information or Related Documents, we will promptly notify the Agency and the owner of the Confidential Information and, subject only to the terms for disclosure at law, will not disclose the Confidential Information except in accordance with direction from the owner of the Confidential Information or until the owner of the Confidential Information has had a reasonable opportunity to oppose such disclosure.

We also acknowledge that a breach of this Undertaking will be considered to be a breach of an order of the Canadian Transportation Agency and for the purposes of this Undertaking we attorn to the jurisdiction of the Canadian Transportation Agency and such courts in Canada having jurisdiction with respect to the Agency's orders and any breaches thereof for enforcement of and punitive action with respect to this Undertaking.

Dated at _____, this ____th Day of _____, year _____.

Gábor Lukács	**Christopher Johnson**
Address	Address

THIS PAGE CONTAINTS CONFIDENTIAL INFORMATION

THIS PAGE CONTAINTS CONFIDENTIAL INFORMATION

THIS PAGE CONTAINTS CONFIDENTIAL INFORMATION

Halifax, NS

lukacs@AirPassengerRights.ca

March 18, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Notice of Written Questions and Production of Documents

The Applicants direct the questions and requests for production of documents set out below to Air Canada pursuant to Rule 24(1) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ("*Dispute Rules*").

The Applicants rely on the documents that have already been served and filed with the Agency.

Production of Document A-2 in its entirety, without erasure

On Friday, March 11, 2016, well after normal business hours, Air Canada provided Dr. Lukács with a legible but incomplete copy of its revised expense policy (Document A-2). In response to the protest of the Applicants about the erasure, Air Canada acknowledged that the document is incomplete, and stated on March 17, 2016 that:

> The undisclosed passages relate to Denied Boarding situations, which are not relevant to the present Application.

Q9. Air Canada is requested to produce the complete and unredacted copy of Document A-2, including the portions referring to the expenses of passengers who were involuntarily denied boarding.

Relevance: The present Application alleges that Air Canada has been applying the Impugned Policy with respect to the reimbursement of expenses of passengers who were delayed instead of applying the provisions of the *Montreal Convention* (see Application, p. 1, item (iii)). Passengers can be delayed and incur expenses for a number of reasons, including by way of being denied boarding as a result of overbooking (see *Lukács v. Air Canada*, Decision No. 250-C-A-2012, para. 34). Thus, Air Canada's entire policy with respect to reimbursement of expenses occasioned by delay of passengers is relevant to the present Application.

Difference between Air Canada's past and revised expense policy

Q10. Air Canada is requested to provide an itemized list of the differences between its past expense policy (A-1) and the revised expense policy (A-2).

Relevance: Air Canada's answer to the Application creates the false impression that it has significantly revised the expense policy that it had been using up until December 2015 (A-1), and Air Canada relies on it in support of its request that the Agency dismiss the Application. An itemized list of the changes will tend to show that the revision was only cosmetic.

Air Canada's policy with respect to expenses in the case of a "schedule change"

Q11. What is the difference between "Irregular Operations" and "Schedule Change"?

Q12. Is it Air Canada's position that it is not liable under Article 19 of the *Montreal Convention* for the expenses of passengers who are delayed as a result of a schedule change?

Relevance: The Applicants seek clarification about Air Canada's position, given that Document A-1 states in the "Schedule Change" section that "All compensation is goodwill and costs should never exceed amounts above." The answers will tend to show that Air Canada failed to apply the provisions of the *Montreal Convention* (see Application, p. 1, items (ii) and (iii)).

"Controllable" vs. "Uncontrollable" situations

Q13. On the basis of what criteria is it decided whether a situation is "controllable" or "uncontrollable" and who makes this decision?

Q14. Is it Air Canada's position that its liability for damages occasioned by delay of passengers depends on whether the cause for the delay is within Air Canada's control?

Relevance: Air Canada argues that Article 19 of the *Montreal Convention* imposes no liability on it in "uncontrollable" situations, and thus compensation of passengers in such situations is a mere goodwill gesture. The validity of Air Canada's position depends on what Air Canada means by "uncontrollable," and as such it is crucial for the determination of the Application.

Q15. Does Air Canada consider mechanical problems with the aircraft "controllable" or "uncontrollable"?

Relevance: The Applicants seek clarification about Air Canada's position, because Air Canada appears to be advancing contradictory positions. On the one hand, it argues at paragraphs 16-17 of its Answer to the Application that it is not liable for a delay caused by mechanical problems. On the other hand, according to the example shown at the bottom of page 1 of Document AQ2-1 (provided on January 19, 2016), mechanical issues are viewed as "controllable." Answers to these questions are relevant to whether Air Canada failed to apply the provisions of the *Montreal Convention* (see Application, p. 1, issue (iii)).

The statement of Mr. Liepins (Document A-5)

Q16. Air Canada is requested to produce the Work Order relating to the repair of the malfunction identified in paragraph 5 of the Statement of Mr. Liepins.

Q17. Air Canada is requested to produce the Aircraft Log Book, or equivalent, that is the basis of paragraph 6 of the Statement of Mr. Liepins.

Relevance: Air Canada disputes its liability for the expenses incurred by Mr. Johnson, and wishes to establish its Article 19 defense based on the statement of Mr. Liepins. The requested documents are capable of verifying or refuting the claims of Mr. Liepins, who is not an independent expert but an employee of Air Canada, that the flight was cancelled because of "low hydraulic system pressure" caused by "wiring fault" and that it was an unforeseen malfunction. As such, answers to the questions can increase or diminish the likelihood of the facts alleged by Air Canada.

The statement of Ms. Robinson (Document A-6)

Q18. According to the statement of Ms. Robinson (para. 10):

> In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded as per the Lead's authorization [...]

Air Canada is requested to provide particulars of this statement, 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?

(3) Air Canada is requested to provide a list of the amounts of compensation it paid out to these passengers.

Relevance: There is a live dispute between the parties as to whether Air Canada has systematically failed to apply the provisions of the *Montreal Convention* (Application, p. 1, items (ii) and (iii) as well as paras. 12-13 and 40-41). This dispute is relevant to the remedy of corrective measures being sought by the Applicants. The Applicants wish to exercise their right to test Air Canada's bold claim that it has been compensating passengers in accordance with the liability limits of the *Montreal Convention*. Answers to these questions are capable of showing that: (a) Air Canada labels most delays as "uncontrollable" in order to evade liability; and (b) even in cases that Air Canada considers controllable, it usually follows the maximums set out in its expense policies, and does not provide compensation in accordance with Article 19 of the *Montreal Convention*.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
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April 6, 2016

The Secretary
CANADIAN TRANSPORTATION AGENCY
Secretary
15 Eddy Street
17th Floor Mailroom
Gatineau QC J8X 4B3

SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Air Canada's Response to the Applicants' March 18, 2016 Notice of Written Questions and Production of Documents

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Dear Madam Secretary:

Please find Air Canada's Response to the Applicants' March 18, 2016 Notice of Written Questions and Production of Documents.

1. **Answer Q9:** In completing the Applicants' description of facts surrounding the communication of Exhibit A-2, Air Canada maintains that it indicated in its Response of January 20, 2016 that "Another section of annex A-2 has not been disclosed as it does not relate to Irregular operations or schedule changes and related expenses therefrom". Air Canada further refers to the Agency's Record, denying anything not in conformity therewith.

2. Air Canada also refers to its e-mail dated March 17, 2016 on the question of relevance of its Internal Recommendations based on Denied Boarding. Air Canada reiterates that the Application is based on Mr. Johnson's Expense Refund Request within the context of an uncontrollable flight cancellation. The information sought by the Applicants is irrelevant to the Application. The Applicants seek to extend relevance to Air Canada's Internal Recommendations for any circumstance which may lead to a delay, as confirmed in their comments in support of Question Q9.

3. Air Canada respectfully submits that the Applicants' extension of relevance, in combination with the remedies sought in the Application for any delayed passenger is excessive, unnecessary and disproportionate, as well as being outside of the Agency's mandate and jurisdiction. The discoveries sought by the Applicants, after the original Application is filed, have to be related to the issues at stake[1], and remain within reasonable and efficient bounds[2].

4. The Applicants have circumscribed their Application to the following delay circumstances: "rights of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule"[3], in relation to an "Impugned Policy" as an alleged limitation of liability to $100.00 of hotel costs per night, $7.00 for breakfast, $10.00 for lunch and $15.00 for dinner (the "Impugned Policy").[4]

5. The Air Transportation Regulations (hereinafter the "ATR") at section 122 lists various matters which an Airline must include in its terms and conditions. These notably include:

    i. Compensation for denial of boarding as a result of overbooking (…)
    v. failure to operate the service or failure to operate on schedule
    x. limits of liability respecting passengers and goods

6. The Applicants have circumscribed Air Canada's "Impugned Policy" in relation to a specific set of circumstances and have not referred to denial of boarding as a result of overbooking in invoking section 122 of the ATR. Otherwise, the Applicants have not made any allegation or reference to denied boarding in their Application. While Air Canada recognizes that many listed matters under section 122 of the ATR, comprising their own set of terms and conditions of carriage, may lead to a situation of delay, their relevance is not automatically extended to the determination of the issue at stake, circumscribed to the "Impugned Policy". The Application does not concern any and all sources of delays, but a specific "Impugned Policy".

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[1] Anil Janmohamed v. Air Transat, 95-C-A-2016, at para. 5;

[2] See for example On v. Rothmans Inc. 2011 ONSC 2504 at para 129 and following;

[3] Application by Christopher Johnson and Gabor Lukacs dated December 3, 2015, at para. 20.

[4] Application by Christopher Johnson and Gabor Lukacs dated December 3, 2015, see notably review section and para. 27.

7. Air Canada has filed a Response on January 20, 2016, based on the allegations contained in the Application. The Applicants' extension of the Application's scope, after Air Canada filed its Response would deprive Air Canada of its right to respond to the Application. Furthermore, it would alter the Agency's complaint driven mechanism, based on principles of Natural Justice, to an inquisitorial process, where its scope would further be dictated by the Applicants, outside of the Agency's control.

8. The Applicants' request for different internal recommendations for situations of Denied Boarding are irrelevant, and Air Canada objects to their disclosure.

9. **Answer Q10:** As Air Canada has already provided Exhibits A-1 and A-2, it objects to the preparation of a list of differences between the mentioned documents. The Applicants have all the relevant factual information they need to review said documents and formulate their position, if they wish so. It is respectfully submitted that the Applicants cannot force Air Canada to make pleadings or provide its opinion on evidence. As a rule of Natural Justice, parties have the liberty to respond to allegations and to orient their pleadings.

10. **Answer Q11:** Air Canada provides explanations on the difference between "Schedule Change" and "Irregular Operations" for the Applicants' understanding in relation to the Internal Recommendation they have labelled as the "Impugned Policy". Air Canada reiterates that the Application is based on Mr. Johnson's Expense Refund Request within the context of an uncontrollable flight cancellation.

11. The Applicants have circumscribed their Application to the following delay circumstances: "rights of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule[5]", in relation to an "Impugned Policy" as an alleged limitation of liability to $100.00 of hotel costs per night, $7.00 for breakfast, $10.00 for lunch and $15.00 for dinner (the "Impugned Policy").[6]

12. Air Canada has filed a Response on January 20, 2016, based on the allegations contained in the Application. The Applicants' extension of the Application's scope after Air Canada filed its Response would deprive Air Canada of its right to respond to the Application. Furthermore, it would alter the Agency's complaint driven mechanism, based on principles of Natural Justice, to an inquisitorial process, where its scope would be dictated by the Applicants, outside of the Agency's control.

13. In relation to Air Canada's Internal Recommendations, Exhibits A-1 and A-2, a Schedule Change encompasses events that occur beyond 48 hours prior to a passenger's original scheduled departure flight time.

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[5] Application by Christopher Johnson and Gabor Lukacs dated December 3, 2015, at para. 20.
[6] Application by Christopher Johnson and Gabor Lukacs dated December 3, 2015, see notably review section and para. 27.

14. An Irregular Operation concerns events that occur within 48 hours of the original scheduled departure time.

15. **Answer Q12:** The Applicants' Question No 12 as formulated is irrelevant to the matter at issue, which concerns an alleged limitation of liability to $100.00 of hotel costs per night, $7.00 for breakfast, $10.00 for lunch and $15.00 for dinner (the "Impugned Policy"). The fact that the Exhibit A-1, containing the Internal Recommendations labelled as the "Impugned Policy" contains other different recommendations pertaining to Schedule Changes beyond the Recommendations labelled by the Applicants as the "Impugned Policy" does not extend the Application scope to all other recommendations related therefrom.

16. The Applicants have circumscribed their Application to the following delay circumstances: "rights of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule",[7] in relation to an "Impugned Policy" as an alleged limitation of liability to $100.00 of hotel costs per night, $7.00 for breakfast, $10.00 for lunch and $15.00 for dinner (the "Impugned Policy")[8].

17. Air Canada has presented a Response on January 20, 2016, based on the allegations contained in the Application. The Applicants' extension of the Application's scope after Air Canada filed its Response would deprive Air Canada of its right to respond to the Application. Furthermore, it would alter the Agency's complaint driven mechanism, based on principles of Natural Justice, to an inquisitorial process, where its scope would dictated by the Applicants, outside of the Agency's control.

18. **Answer Q13:** Air Canada refers to its previous answer to Question no 4, where it provided a definition of the terms "controllable" and "uncontrollable" and adds the following:

19. In light of the above, Air Canada makes a case by case determination of the situation and determines whether a situation is controllable or uncontrollable. Air Canada objects to disclosing who makes this decision as this is irrelevant to the Application, as this strictly pertains to its internal organization.

20. The relevant elements to the Application are the factual circumstances related to Flight AC 889's of December 10, 2013 cancellation and that Air Canada determined that these said circumstances were uncontrollable.

21. The Applicants do not need to know the identity of the persons involved in concluding that the factual circumstances were uncontrollable.

22. There is no obligation for an airline to publish how to organize its resources, in handling passenger refund requests and while respecting the Montreal

[7] Application by Christopher Johnson and Gabor Lukacs dated December 3, 2015, at para. 20.
[8] Application by Christopher Johnson and Gabor Lukacs dated December 3, 2015, see notably review section and para. 27.

Convention, the *Canada Transportation Act* and its Regulations and its Tariff. Air Canada has the right to privately organize the handling of its obligations.

23. The discoveries sought by the Applicants, after the original Application is filed, have to be conducted within the issues at stake[9], and remain within reasonable and efficient bounds[10].

24. **Answer Q14:** Air Canada pleads that it respects the Montreal Convention (1999), the *Canada Transportation Act* and its Regulations and its Tariff, in assessing its liability for damages occasioned by delay of passengers. In respect of the legislation above, Air Canada is not bound to provide compensation for delays and for cancellations that are uncontrollable.

25. **Answer Q15:** Mechanical problems are assessed on a case by case basis, in respect of the Montreal Convention (1999), the *Canada Transportation Act* and its Regulations and Air Canada's Tariff. Mechanical situations may be controllable or uncontrollable, depending on the facts.

26. Air Canada has stated in its Response filed on January 20, 2016 that the cancellation of Flight AC 889 was due to a mechanical situation that was uncontrollable. It did not state that it is not liable for any delay caused by mechanical problems.

27. The Applicants suggested in their Question no 15 that Air Canada has viewed all mechanical issues to be controllable in document AQ2-1. Air Canada reiterates its comments provided in its e-mail dated January 20, 2016 that document AQ2-1 is irrelevant to the present Application. Nevertheless, the use of a controllable mechanical situation as an example referred to by the Applicants in their Question No 15 does not exclude the existence of an uncontrollable mechanical situations.

28. **Answer Q16**: Please find Air Canada's Production Permit for the repair of the malfunction in relation to Paragraph 5 of Mr. Liepins' Statement, filed under Annex **AQ3-1**.

29. **Answer Q17:** Please find Air Canada's Log Book abstract in relation to Mr. Liepins' statement at paragraph 6, filed under Annex **AQ3-2**. There are no other relevant Log Book abstracts considering Mr. Liepins' statement that:

    "The hydraulic system is checked prior to every flight and the Designated Aircraft's hydraulic system had no history of a defect, nor was a defect detected on the inbound flight, also operated by the Designated Aircraft".

30. **Answer Q18:** Air Canada objects to Applicants' request for the production of an analysis of all of Air Canada's Passenger Refund Request as it does not exist. Furthermore, the magnitude of information sought by the Applicants is excessive

[9] Anil Janmohamed v. Air Transat, 95-C-A-2016, at para. 5;

[10] See for example On v. Rothmans Inc. 2011 ONSC 2504 at para 129 and following;

with regards to the Statement by Ms. Robinson that "In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded".

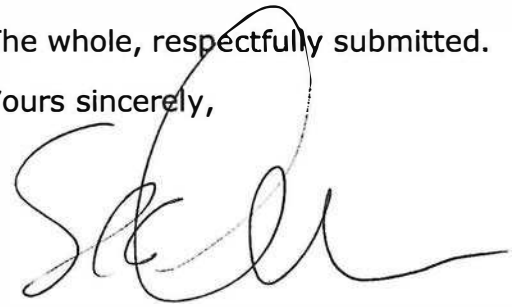
31. Air Canada has stated in its Response filed on January 20, 2016 that it compensated passengers for delays within its control in compliance with the Montreal Convention. The amounts in its internal recommendations are often exceeded.

32. Air Canada carries around 35,000,000,000 passengers yearly, and a request to review, analyze and compile each of previously processed passenger refund requests between 2013 and 2015 is excessive and impossible. The excessively large sample period requested by the Applicants will not be more useful in relation to the statement that the recommendations "are often" exceeded, and goes beyond a request to obtain the factual grounds in support of this statement. The discoveries sought by the Applicants, after the original Application is filed, have to be conducted within the issues at stake[11], and remain within reasonable and efficient bounds.[12]

33. Furthermore, Air Canada does not keep a register of previously processed passenger refund requests which contains the itemized list of the compensation heads it paid to passengers, and does not keep a record of whether these payments were made pursuant to controllable or uncontrollable Delays. The Applicants cannot force Air Canada to create a register that does not exist.

The whole, respectfully submitted.

Yours sincerely,



Jean-François Bisson-Ross

Counsel – Litigation

JFBR/sa

c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson (lukacs@AirPassengerRights.ca)

[11] Anil Janmohamed v. Air Transat, 95-C-A-2016, at para. 5;

[12] See for example On v. Rothmans Inc. 2011 ONSC 2504 at para 129 and following;

CANADIAN TRANSPORTATION AGENCY **Case No.: 15-05627**

Mr. Christopher C. Johnson and
Dr. Gábor Lukács

Applicants

Vs.

Air Canada

Respondent

LIST OF DOCUMENTS

Annexe AQ3-1 : Air Canada's Production Permit

Annexe AQ3-2 : Air Canada's Log Book

Montreal, April 6, 2016

Me Jean-François Bisson-Ross
Councel for the Respondent

AQ3-1

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Production Permit

P.P. No. B767-29-52269

1. Applicability

Part Name	Qty of Units	MDDR #	Aircraft (Tail #)	Engine (Serial #)
L Hyd sys LOW PRESS ind wiring	2		642	N/A
Part Number	**Part Serial #**		**RMS Decision #**	**Defect #**
				L5004333

Description of Discrepancy *(attach sketch as required)*
Damage found on two wires in LH pylon from chaffing, temporary repair carried out on wire W398-006-18 from connector D52 S25 elec hyd pump L press SW, temporary repair carried out on wire from connector pin 3 L elec hyd pum located fwd bulkhead area O/B of pylon

2. Disposition

Instructions for disposition of discrepancy *(highlight any deviation from standard, attach sketch as required)*
Caution: A PP can not be used to deviate or defer an AD (or MAR), CMR, or MEL item without Engineering and TC Approval

TEMPORARY DISPOSTITION

CARRY OUT TEMP REPAIR TO INSULATION WITH 602-1 SELF FUSING SILICONE RUBBER TAPE ON WIRE W398-006-18 FROM CONNECTOR D52

CARRY OUT TEMP REPAIR TO INSULATION WITH 602-1 SELF FUSING SILICONE RUBBER TAPE ON WIRE FROM CONNECTOR D916 PIN 3

SECURE WITH WAX STRING BMS13-540.

ON ARRIVAL AT YYZ FROM LHR ON INITIAL FLIGHT THE REPAIR TO BE STRIPPED BACK, RE-INSPECTED AND ASSESSED FOR SERVICABILITY BY CAT 38 ENGINEER

RAISE MONITOR FOR REPEAT INSPECTION EVERY 100HR FOR INTEGRITY OF REPAIR

FINAL DISPOSITION
MAKE PERMANENT REPAIR BY FEBRUARY 11, 2014.

3. Limitations

☒ Temporary
(deferred maintenance item)

Initial deferral interval: Hours _____ Cycles _____ Check _____ Date _____

Repeat deferral interval: Hours 100 Cycles _____ Check _____ Days _____

Current: Total Hours 91384 Total Cycles 17208 Check _____

Details of each selection described in Section 2:

☐ C of A not in-force ☒ Monitor required (see Repeat deferral limit) ☒ Material required for fix

☐ Flight Ops Affected ☐ Mandatory limit pending DTA ☒ Labour required for fix

Terminating action required by: Hours _____ Cycles _____ Check _____ Date (yyyy-mm-dd) 2014-02-11 ☐ End of MEL repair interval

☐ Permanent
(closed maintenance item)

☐ Spec. Change Summary (ACF 1002) attached or ☐ No effect upon Ops, Config, or Mtce Program

4. Compliance

I declare this data meets the requirements of AWM 571.05.

Delegated Engineer/Candidate Delegated Engineer/Engineering Specialist

Requested by	Prepared by	DE/CDE/ES #	Date (yyyy-mm-dd)
LHR LM	LHR LM	123 AEO 93-Q-03	2013-12-12

AIR CANADA

Justification Checklist

Action Document

Type: PP

No: B767-29-52269

1. Does the Action Documentation involve a mod or repair to an Aeronautical Product?

☐ No (i.e. Inspection, PMA Part, Equivalent Maintenance, etc.) Go to Block 4

☒ Yes (i.e. AWM 571.06 is Applicable)

2. Is the Action Document based upon "Approved" or "Specified" data?

☒ No (i.e. There is no Source Document that meets this requirement.) Go to Block 4

☐ Yes Provide the Source Document number and paragraph below as applicable.
Attach copies of all non-published data such as correspondence or SOC.

Comment:

3. Does the Action Document authorize a deviation from the above Source Document?

☐ No Go to Block 5

☐ Yes Describe the deviation below:

Comment:

4. Does this authorization have negligible or nil effect on (conformance with) the applicable standards of airworthiness? (as listed in the aeronautical product TCDS, including operational requirements, and noise/emissions)

☐ No Advise MOC that Aircraft C of A is "Not In-Force" until Approved or Specified data is obtained.

☒ Yes Describe your rational for this decision and refer to relevant "Acceptable" Data.
Refer to any standards which may be applicable but the effect was considered negligible.

Comment:Performed Temporary repair to protect and insulate the wire. This authorization have negligible effect on the applicable standards of airworthiness

5. Authorization

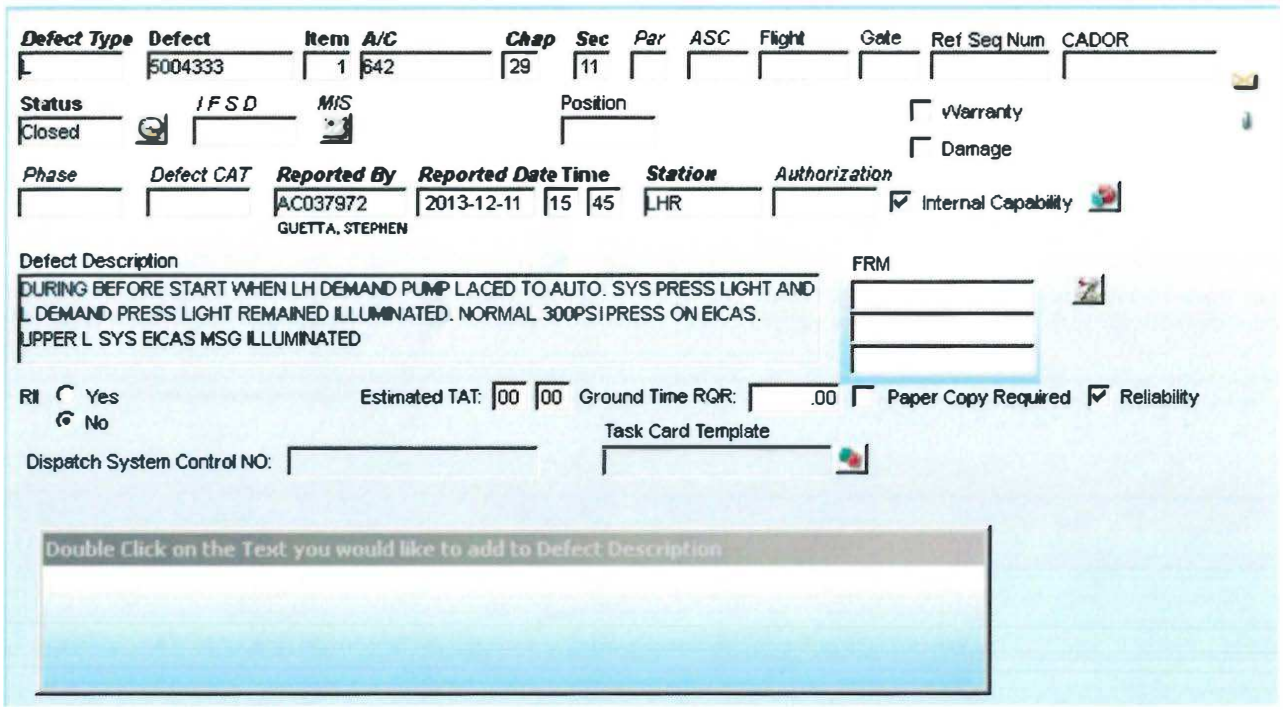
Authorized by

Candidate Delegated Engineer

Prepared by	Date
Jamal Boughalem	2013-12-12

Source Doc. Attached? ☐ Yes ☒ No	DE/CDE No. 123	(AEO 93-Q-03)

AQ3-2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Ground Time RQR:
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Paper Copy Required
Reliability
Dispatch System Control NO:
Task Card Template
Double Click on the Text you would like to add to Defect Description

Halifax, NS

lukacs@AirPassengerRights.ca

April 8, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Request for Agency to Require Party to Respond

The Applicants are hereby requesting, pursuant to Rule 32 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("*Dispute Rules*"), that the Agency require Air Canada to provide a complete response to the Notice of Written Questions and Productions, dated March 18, 2016.

I. Relief sought

The Applicants are asking the Agency to order Air Canada to:

(a) produce a complete and unredacted copy of Document A-2, including the portions referring to the expenses of passengers who were involuntarily denied boarding (Q9);

(b) answer question Q12 in full; and

(c) answer question Q18 in full.

II. Summary of the facts

On December 3, 2015, the Applicants brought the within Application against Air Canada, challenging Air Canada's policy purporting to limit its liability with respect to delay of passengers to $100.00 of hotel costs per night, $7 for breakfast, $10 for lunch, and $15 for dinner (the "Impugned Policy"), and alleging among other things that:

(i) the Impugned Policy is not set out in Air Canada's International Tariff, contrary to s. 122 of the *ATR*;

(ii) the Impugned Policy is unreasonable within the meaning of s. 111 of the *ATR*, because it purports to fix a lower limit of liability than what is set out in the *Montreal Convention*; and

(iii) since 2013 or earlier, Air Canada has failed to apply the terms and conditions set out in its tariff by applying the Impugned Policy and/or other unofficial policies instead of the provisions of the *Montreal Convention*, contrary to s. 110(4) of the *ATR*.

On December 29, 2015, the Agency opened pleadings. On January 20, 2016, Air Canada filed its answer with the Agency, but did not provide the Applicants with Document A-2, with respect to which Air Canada made a request for confidentiality.

Document A-2 is virtually the same as the Impugned Policy, and the differences are only cosmetic ones.

On February 24, 2016, in Interlocutory Decision No. LET-C-A-6-2016, the Agency granted Air Canada's request for confidentiality with respect to Document A-2, and directed that Air Canada provide it to the Applicants after they signed a non-disclosure undertaking.

On Friday, March 11, 2016, well after normal business hours, Air Canada provided the Applicants with an incomplete but legible version Document A-2.

On March 17, 2016, Air Canada acknowledged that it did not disclose a portion relating to reimbursement of expenses of passengers who are denied boarding, but argued that the withheld portion is irrelevant.

On March 18, 2016, the Applicants directed a total of 10 questions and requests for productions to Air Canada, pursuant to Rule 24(1) of the *Dispute Rules*.

On April 6, 2016, Air Canada refused to answer a number of questions, including Q12 and Q18, and refused to produce documents as requested in question Q9.

III. Arguments in support of the request

1. Air Canada objects to the questions and productions chiefly on the ground that they are irrelevant. In *R. v. Arp*, [1998] 3 SCR 339, the Supreme Court of Canada defined relevance as follows (at para. 38):

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". [...] As a consequence, there is no minimum probative value required for evidence to be relevant.
>
> [Emphasis added.]

2. In Decision No. LET-C-A-154-2012, the Agency established the test to use when making a determination on the relevancy of evidence as requiring the Agency to:

   (i) examine the nature of what is claimed; and then

   (ii) look at whether the question to be answered or the evidence to be produced or disclosed shows, or at least tends to show, or increases or diminishes the probability of, the existence of the fact related to what is claimed.

   If the answer to the second question is positive, the question or evidence is relevant.

3. The Applicants submits that this test is met with respect to each of the questions and productions addressed below.

(a) Production of Document A-2 in its entirety, without erasure (Q9)

(i) What is claimed

4. Air Canada erroneously argues at paragraph 6 of its April 6, 2016 answers that the Application is limited to specific causes of delay or to a specific policy that is not set out in its tariff; however, this is not the case. The Application of December 3, 2015 unambiguously states that the Applicants allege, among other things, that:

> (iii) since 2013 or earlier, Air Canada has failed to apply the terms and conditions set out in its tariff by applying the Impugned Policy **and/or other unofficial policies** instead of the provisions of the *Montreal Convention*, contrary to s. 110(4) of the *ATR*.
>
> [Emphasis added.]
>
> **Application (December 3, 2015), p. 1**

5. This allegation is relevant to the remedy of corrective measures, which is sought pursuant to s. 113.1(a) of the *ATR*. A precondition for ordering such corrective measures is a finding that Air Canada failed "to apply the [...] terms and conditions of carriage set out in the tariff that applies to that service."

6. Air Canada claims that there is no policy limiting Air Canada's reimbursement of expenses for controllable delays or cancellations, and argues that it has been complying with the provisions of the *Montreal Convention* with respect to reimbursement of expenses incurred by delayed passengers.

Air Canada's Answer (January 20, 2016), p. 6, paras. 25-26

(ii) What is being asked

7. The Applicants are seeking only disclosure of the portions of Document A-2 referring to reimbursement of expenses; the present Application does not deal with other compensation that passengers who are involuntarily denied boarding may be entitled to.

(iii) Relevance

8. Passengers can be delayed and incur expenses in a way that triggers liability under the *Montreal Convention* for a number of reasons, including by way of being denied boarding as a result of overbooking.

***Lukács v. Air Canada*, Decision No. 250-C-A-2012, para. 34**

9. The portions of the Revised Impugned Policy (Document A-2) that refer to reimbursement of expenses of passengers who are delayed as a result of being involuntarily denied boarding is relevant to the Application, because it can prove or disprove that Air Canada has "failed to apply the terms and conditions set out in its tariff by applying [...] other unofficial policies instead of the provisions of the *Montreal Convention*" (allegation (iii)).

(iv) Procedural fairness to Air Canada

10. Air Canada was fully aware of what was being alleged, including allegation (iii) set out in the Application. Air Canada, which is represented by counsel, made a deliberate choice to respond only to a specific aspect of the Application, and ignore the rest.

11. Air Canada could have also directed questions to the Applicants to further clarify the allegations, but chose not to do so. Thus, Air Canada is responsible for its own choice of litigation strategy.

12. Having said that, if Air Canada discloses Document A-2 in its entirety, the Applicants do not object to Air Canada making supplementary submissions to address whether the portions of Document A-2 that deal with reimbursement of expenses to passengers who are involuntarily denied boarding are consistent with the *Montreal Convention*.

(b) Air Canada's policy with respect to expenses in the case of a "schedule change" (Q12)

(i) What is claimed

13. The Applicants reiterate paragraphs 4-6 above.

(ii) Relevance

14. The Impugned Policy (Document A-1), which is virtually identical to the Revised Impugned Policy (Document A-2), limits liability for accommodation of passengers who are delayed as a result of what Air Canada calls a "schedule change" to $100.00 (or $175.00 in some cases). Moreover, it states that:

> All compensation is goodwill and costs should never exceed amounts above.
>
> [Emphasis added.]

Document A-1

15. So far, Air Canada has chosen to evade addressing this portion of the policy, which does limit the reimbursement of expenses to a fraction of the liability limits set out in the *Montreal Convention*, and actually labels them as "goodwill."

16. Question Q12 seeks clarification about Air Canada's position, and the answer will tend to show that Air Canada failed to apply the provisions of the *Montreal Convention* as required by its tariff, and instead it applied an unofficial policy.

(iii) Procedural fairness to Air Canada

17. The Applicants reiterate paragraphs 10 and 11 above.

18. Having said that, given that the present request seeks to clarify Air Canada's position with respect to its liability for the expenses of passengers who are delayed as a result of "schedule change," Air Canada will have ample opportunity to remedy any shortcomings of its Answer to the Application by providing a full and detailed answer to Question Q12.

(c) The statement of Ms. Robinson (Q18)

(i) What is claimed

19. As acknowledged by Air Canada at paragraph 31 of its Answers of April 6, 2016, Air Canada alleges that the amounts set out in the Impugned Policy and the Revised Impugned Policy (Document A-2) are mere recommendations and that in reality, passengers are compensated in accordance with the *Montreal Convention*, and that the amounts set out in the Impugned Policy and the Revised Impugned Policy "are often exceeded." The statement of Ms. Robinson (Document A-6) was tendered in support of Air Canada's allegations.

20. The Applicants dispute these allegations, and maintain that Air Canada has systematically failed to apply the provisions of the *Montreal Convention*, and was applying the Impugned Policy and subsequently the Revised Impugned Policy instead of compensating passengers in accordance with the *Montreal Convention*.

(ii) What is being asked

21. Air Canada mischaracterizes at paragraph 30 of its Answers of April 6, 2016 what is being asked in Question Q18. The question has nothing to do with "Air Canada's Passenger Refund Request" at all. Refund requests deal with unused service, and not with reimbursement for expenses.

22. The question is asking Air Canada "to provide particulars" of the statement of Ms. Robinson at paragraph 10 of Document A-6:

> In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded as per the Lead's authorization [...]

(iii) Relevance

23. The Applicants are seeking corrective measures pursuant to s. 113.1(a) of the *Air Transportation Regulations*. A precondition for ordering such corrective measures is a finding that Air Canada failed "to apply the [...] terms and conditions of carriage set out in the tariff that applies to that service."

24. There is a live dispute between the parties as to whether Air Canada has systematically failed to apply the provisions of the *Montreal Convention*.

Application, p. 1, items (ii) and (iii); paras. 12-13 and 40-41

25. Answers to question Q18 and/or its subquestions are capable of showing that

    (1) even in cases that Air Canada considers controllable, it follows the maximums set out in the Impugned Policy and/or the Revised Impugned Policy, and does not provide compensation in accordance with Article 19 of the *Montreal Convention*; and

    (2) Air Canada labels most delays as "uncontrollable" to evade liability.

(iv) Procedural fairness to the Applicants

26. The Applicants are entitled, as a matter of procedural fairness, to test Air Canada's bold and blanket claim that it has been compensating passengers in accordance with the liability limits of the *Montreal Convention*, and not in accordance with the Impugned Policy and/or the Revised Impugned Policy.

27. Denying the Applicants the opportunity to inform themselves about the details of the vague statement put forward by Ms. Robinson at paragraph 10 of Document A-6 would deprive them of a meaningful way to counter or contradict what is being alleged by Air Canada.

(v) Availability

28. For the reasons below, the Applicants submit that Air Canada is falsely claiming to not have the requested information.

29. First, Air Canada tendered no evidence in support of its allegation that the information requested does not exist. Allowing a party to evade its obligation to answer questions and produce documents based on blanket statements of unavailability that are not supported by any evidence would render Rule 24 of the *Dispute Rules* meaningless.

30. Second, Ms. Robinson made a statement that the "recommended limit is often exceeded" (emphasis added). The main part of Question Q18 is asking Air Canada "to provide particulars" of the statement put forward by Ms. Robinson, who is an employee of Air Canada, and thus must be available to Air Canada at any time.

31. Unless Ms. Robinson was merely speculating, she must have had some factual basis for making the statement in question. Question Q18 is seeking disclosure of the facts from which Ms. Robinson concluded that the "recommended limit is often exceeded" (emphasis added).

32. Thus, Air Canada, through its employee, is clearly in possession of the information requested, namely, the particulars relating to the claim of "often exceeded."

33. Third, the expenses of an airline relating to reimbursing passengers for delay-related expenses is significant data regarding the airline's operations that any reasonable business would collect and analyze in great detail. It is highly improbable that Air Canada, unlike all other airlines, would not conduct a meticulous analysis of such vital data relating to its expenses.

34. Fourth, section 230 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) requires corporations to retain records and books for six (6) years from the end of the last taxation year to which the records and books relate:

> **230.** (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.
>
> ⋮
>
> (4) Every person required by this section to keep records and books of account shall retain
>
> i. the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and
>
> ii. all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.
>
> (4.1) Every person required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period referred to in subsection 230(4).
>
> [Emphasis added.]

35. Section 248 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) defines a "record" as follows:

> "record" includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan,

> a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form;
>
> [Emphasis added.]

36. Since Air Canada is a Canadian corporation that is subject to the *Income Tax Act*, it must have retained every "record" relating to expenses it incurred in regard to the reimbursement of expenses of delayed passengers, including each and every cheque issued to passengers and the documents in support of each passenger's claim.

37. It is highly improbable that Air Canada discarded any records that it was required to retain for six years under s. 230 of the *Income Tax Act*. Thus, in the absence of evidence to the contrary, such as Air Canada explicitly and clearly declaring that it engaged in contravention of s. 230 of the *Income Tax Act*, the Agency ought to assume and find that Air Canada has always fully complied with the *Income Tax Act* in general, and with its s. 230 in particular.

38. Therefore, all "records" of Air Canada within the meaning of the *Income Tax Act* have been retained by Air Canada, and are available for the past six taxation years, that is, for 2009, 2010, 2011, 2012, 2013, 2014, and of course for 2015.

(vi) **Proportionality**

39. First, Air Canada exaggerates by a factor of 1000 the number of passengers it carries yearly by claiming that it transports 35 billion passengers, which is five times the population of the Earth. The correct statement is, at best, that it carries 35,000,000 (i.e., 35 million) passengers yearly.

40. Second, there is no need to review and analyze the file of each and every passenger, unless Air Canada claims that each one of its passengers is affected by a delay that would reasonably give rise to claims.

41. Third, according to "An Assessment of Air Passenger Level of Service Indicators in Canada," a background research paper by the Industry Regulation and Determinations Branch of the Agency, the number of complaints received by Canadian airlines is between 20,000 and 50,000 per year, and only 20-25% of these relates to flight disruptions; that is, 4,000 to 10,000 complaints per year to all Canadian airlines are related to flight disruptions (i.e., delays).

42. Fourth, the requested information can be obtained from Ms. Robinson and/or through a standard query of Air Canada's electronic databases.

43. The Federal Court of Appeal held that:

> [...] a non-existent record that can be produced from an existing machine readable record is deemed to be a record to which the respondent is entitled access.

***Yeager v. Canada (Correctional Service)*, 2003 FCA 30, para. 33**

44. On the same issue, the Ontario Court of Appeal held that re-formatting information that already existed in a recorded form does not constitute "creating" a record.

***Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20, para. 35**

45. Consequently, the Applicants are not asking Air Canada to "create" records, but rather to retrieve information from its databases.

46. Fifth, in Decision No. LET-C-A-173-2009, the Agency itself directed the airline (WestJet) to answer a wealth of questions relating to the amount of compensation tendered to individual passengers for damage to, loss or delay of checked baggage over a period of 6 months.

    Since the Agency made that order, it was clearly viewed as proportional, and as such there is no reason to conclude in the present case that answering questions of the same nature would be disproportional for Air Canada.

47. Finally, the Application relates to the period of 2013-2015 and alleges systemic failure to apply the terms and conditions set out in the tariff. The issue raised affects thousands of passengers who were likely shortchanged as a result of Air Canada's unlawful conduct.

48. Hence, the request that Air Canada answer questions with respect to this period is both reasonable and proportionate. Indeed, there is no evidence before the Agency capable of supporting a finding that answering Question Q18 would cause Air Canada undue hardship.

IV. Documents relied on

The Applicants rely on all materials that have been served and filed with the Agency in the present proceeding, including, but not limited to:

1. the Application, dated December 3, 2016;

2. Air Canada's Answer of January 20, 2016;

3. Notice of Written Questions and Production of Documents directed to Air Canada, dated March 18, 2016; and

4. Air Canada's Response to the Notice of Written Questions, dated April 6, 2016.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
(Jean-Francois.Bisson-Ross@aircanada.ca)

Kerianne Wilson, Counsel - Regulatory & Litigation, Air Canada
(kerianne.wilson@aircanada.ca)

From Secretariat.Secretariat@otc-cta.gc.ca Wed May 4 20:10:44 2016
Date: Wed, 4 May 2016 18:10:36 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: Jean-Francois Bisson-Ross <Jean-Francois.Bisson-Ross@aircanada.ca>, Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Allison Fraser <Allison.Fraser@otc-cta.gc.ca>, Mike Redmond <Mike.Redmond@otc-cta.gc.ca>
Subject: Johnson and Lukacs v. Air Canada - Case No. 15-05627

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Please replace the previous version with this one. Unfortunately, there was an error in the date, it should read May 18, 2016 and not May 17, 2016 to reflect 10 business days.

Thank you and we regret any inconvenience this may have caused.

I have been instructed by the Panel assigned to this case to communicate the following direction:

The applicants' request made pursuant to section 32 of the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104 (Dispute Adjudication Rules), dated April 8, 2016, is denied, with reasons to follow. Pursuant to the direction dated March 30, 2016, the applicants have until 5:00 pm Gatineau local time on May 18, 2016 to file the reply, and to provide a copy to Air Canada.

Please confirm receipt to all.

Sincerely,

Elizabeth C. Barker

Secrétaire de l'Office des transports du Canada

Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca

Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Secretary of the Canadian Transportation Agency

Canadian Transportation Agency / Government of Canada

secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca

From: secretariat
Sent: May-04-16 1:50 PM
To: 'Jean-Francois Bisson-Ross'; 'Gabor Lukacs'
Cc: Allison Fraser; Mike Redmond
Subject: Johnson and Lukacs v. Air Canada - Case No. 15-05627

I have been instructed by the Panel assigned to this case to communicate the following direction:

The applicants' request made pursuant to section 32 of the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104 (Dispute Adjudication Rules), dated April 8, 2016, is denied, with reasons to follow. Pursuant to the direction dated March 30, 2016, the applicants have until 5:00 pm Gatineau local time on May 17, 2016 to file the reply, and to provide a copy to Air Canada.

Please confirm receipt to all.

Sincerely,

Elizabeth C. Barker

Secrétaire de l'Office des transports du Canada

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Secretary of the Canadian Transportation Agency

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Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

WITNESSED STATEMENT OF DR. HYMIE RUBENSTEIN

(May 16, 2016)

I, **DR. HYMIE RUBENSTEIN**, of the City of Winnipeg, in the Province of Manitoba, DO SOLEMNLY DECLARE THAT:

1. The present statement concerns my own travel with Air Canada. As such, I have personal knowledge of the information set out below, which is to my knowledge true, accurate, and complete.

2. I am providing the present statement in support of the application of Col. Christopher Johnson and Dr. Gábor Lukács against Air Canada. I consent to the disclosure of my personal information for the purpose of adjudication of the application.

THE ITINERARY

3. My wife and I held the following confirmed itinerary on flights of Air Canada:

Flight	**Date**	**Depart**		**Arrive**	
AC 268	Nov 24, 2015	Winnipeg (YWG)	17:30	Toronto (YYZ)	20:57
AC 966	Nov 25, 2015	Toronto (YYZ)	13:00	Bridgetown (BGI)	15:05
AC 1965	Mar 24, 2016	Bridgetown (BGI)	15:10	Toronto (YYZ)	21:05
AC 273	Mar 24, 2016	Toronto (YYZ)	22:55	Winnipeg (YWG)	00:37 (+1)

A copy of the electronic ticket is attached and marked as **Exhibit "A"**.

4. Subsequently, our return flights were changed at our request as follows:

Flight	**Date**	**Depart**		**Arrive**	
AC 1965	Apr 1, 2016	Bridgetown (BGI)	15:10	Toronto (YYZ)	20:55
AC 273	Apr 1, 2016	Toronto (YYZ)	23:05	Winnipeg (YWG)	00:45 (+1)

A copy of the "Notice of Change in Itinerary" is attached and marked as **Exhibit "B"**.

FLIGHT DELAY AND EXPENSES INCURRED

5. On April 1, 2016, at the Bridgetown Airport, I was informed that the departure of Flight AC 1965 to Toronto was delayed by 5 hours 40 minutes, to 20:50, which would result in missing my connecting to Winnipeg. A copy of an email from Air Canada confirming the flight delay is attached and marked as **Exhibit "C"**.

6. On April 1, 2016, I received a "Notice of Change in Itinerary" from Air Canada, a copy of which is attached and marked as **Exhibit "D"**, indicating that my wife and I were rebooked on the following flights:

Flight	**Date**	**Depart**		**Arrive**	
AC 440	Apr 4, 2016	Toronto (YYZ)	07:10	Ottawa (YOW)	08:13
AC 8525	Apr 4, 2016	Ottawa (YOW)	09:00	Winnipeg (YWG)	10:41

7. While still in Barbados, upon realizing that we would be stranded in Toronto for two nights, I booked a room for my wife and myself at the Sheraton Gateway Hotel in Toronto, which is located at the airport.

8. We arrived in Toronto on April 2, 2016 at approximately 3 am. We had to wait until 5 am to speak to an Air Canada customer service and/or ticket agent, who provided us with:

(a) a printout of the alternative Toronto-Winnipeg itinerary, via Ottawa, a copy of which is attached and marked as **Exhibit "E"**; and

(b) a "we are sorry" card, offering a promotion code, a copy of which is attached and marked as **Exhibit "F"**.

9. We were not offered accommodation by Air Canada. I advised the Air Canada agent I had booked accommodation for us in Toronto at the Sheraton Gateway Hotel. The agent advised me that this hotel was on the list of accommodations approved by Air Canada,

and advised us to submit a claim for our expenses to Air Canada. A copy of a "Customer Relations" card that was provided to us by the agent is attached and marked as **Exhibit "G"**.

10. I paid the Sheraton Gateway Hotel $561.28 for two nights of accommodation and $72.63 for meals for my wife and myself, for a total of $633.91. A copy of the invoices, showing payment with my MasterCard, is attached and marked as **Exhibit "H"**.

11. As a result of the delay of Flight AC 440 on April 4, 2016, we missed Flight AC 8525, and were rebooked on the following flight:

Flight	**Date**	**Depart**		**Arrive**	
AC 8527	Apr 4, 2016	Ottawa (YOW)	16:00	Winnipeg (YWG)	17:41

In total, our return to Winnipeg was delayed by more than two and a half days (65 hours).

AIR CANADA'S REFUSAL TO REIMBURSE EXPENSES

12. On April 6, 2016, I submitted to Air Canada the invoices for the expenses my wife and I incurred at the Sheraton Gateway Hotel, as I had been previously instructed by Air Canada's agent in Toronto on April 2, 2016.

13. On or around April 21, 2016, I spoke to an Air Canada Customer Relations agent who falsely claimed that my wife and I were offered accommodation by Air Canada's agent in Toronto but we declined, and who attempted to convince me to seek reimbursement for our out-of-pocket expenses from my insurance, rather than from Air Canada.

14. Subsequently, on April 21, 2016, I received an email from Air Canada's Customer Relations, stating that "as goodwill," Air Canada would contribute $200 toward our out-of-pocket expenses.

15. On April 23, 2016, I responded to Air Canada by stating, among other things, that:

> You are reminded that our travel was subject to the Montreal Convention. Article 19 of the convention renders Air Canada liable for delays of passengers, up to approximately $9,000 per passenger.
>
> Accordingly, we request that Air Canada comply with its legal obligation by reimbursing us for the accommodation expenses we incurred as a result of delay in transportation by air, in the amount of $633.81.

A copy of my email correspondence with Air Canada between April 6, 2016 and April 23, 2016 is attached and marked as **Exhibit "I"**.

16. On April 29, 2016, I received a further email from Air Canada's Customer Relations, which ignored my claim under the Montreal Convention, and instead stated that:

> The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.

A copy of my correspondence with Air Canada between April 29, 2016 and April 30, 2016 is attached and marked as **Exhibit "J"**.

17. Subsequently, I received from Air Canada a cheque for the amount of CAD$200.00. I have received no further payment from Air Canada in relation to our claim.

SIGNED in the City of Winnipeg,
in the Province of Manitoba,
on May 16, 2016, in the presence of:

_____
DR. HYMIE RUBENSTEIN

_____
Witness signature

Print Witness Name:

LIST OF EXHIBITS

A. Booking confirmation sent by Air Canada on August 21, 2015

B. Notice of Change in Itinerary, received on March 25, 2016

C. Email from Air Canada, dated April 1, 2016

D. Notice of Change in Itinerary, received on April 1, 2016

E. Alternative itinerary, printed by Air Canada agent on April 2, 2016

F. A “we are sorry” card, offering a promotion code, provided by Air Canada agent on April 2, 2016

G. “Customer Relations” card, provided by Air Canada agent on April 2, 2016

H. Invoices from the Sheraton Gateway Hotel, dated April 4, 2016

I. Correspondence between Dr. Rubenstein and Air Canada between April 6, 2016 and April 23, 2016

J. Correspondence between Dr. Rubenstein and Air Canada between April 29, 2016 and April 30, 2016

This is **Exhibit "A"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

From: **Air Canada** confirmation@aircanada.ca
Subject: Air Canada - 24-Nov: Winnipeg - Bridgetown (booking ref: LNADJI)
Date: August 21, 2015 at 7:17 PM
To: hymie_rubenstein@icloud.com

AC

****** PLEASE DO NOT REPLY TO THIS E-MAIL ******

AIR CANADA

Itinerary/Receipt

Your booking is confirmed. Please print/retain this page for your financial records (e.g. for taxation, expense claim or payment card reconciliation purposes). We thank you for choosing Air Canada and look forward to welcoming you on board.

Scan this barcode to check in at any Air Canada check in kiosk.

Access your personalized Air Canada travel information

View your planner >

Booking Information

Booking Reference: LNADJI

Electronic Ticketing confirmed. This is your official itinerary/receipt.

Main Contact:
Mr Hymie Rubenstein
hymie_rubenstein@icloud.com
Mobile: 1-204-8874550
Home: 1-204-2697006

Online Services

- **Manage** my booking online (view/change my booking; select seats*).
- **Select Seats**
- **Maple Leaf Lounge | Meal Vouchers | On My Way**
- **Alert me** of flight status changes directly to my mobile phone or email.
- **Flight Arrivals & Departures** - check online if my flight is on time.
- **Check-in online** and print my boarding pass.

* Can my booking be changed online?

Additional passenger information is required

Your current flight itinerary includes travel to a country that requires additional passenger information.

Customer Care

Air Canada
1-888-247-2262

Flight Arrivals and Departures
1-888-422-7533

We strongly encourage you to provide this information ahead of time from the comfort of your home or office with our secure online form.

Provide passenger information

Flight Itinerary

Flight	From	To	Stops	Duration	Aircraft	Fare Type	Meal
AC268	**Winnipeg (YWG)** Tue 24-Nov 2015 17:30	**Toronto, Pearson Int'l (YYZ)** Tue 24-Nov 2015 20:57 - Terminal 1	0	19hr35	320	Tango, S	F
AC966	**Toronto, Pearson Int'l (YYZ)** Wed 25-Nov 2015 08:45 - Terminal 1	**Bridgetown (BGI)** Wed 25-Nov 2015 15:05	0		319	Tango, S	F
AC1965[1]	**Bridgetown (BGI)** Thu 24-Mar 2016 15:10	**Toronto, Pearson Int'l (YYZ)** Thu 24-Mar 2016 21:05 - Terminal 1	0	10hr27	763	Tango, S	F
AC273	**Toronto, Pearson Int'l (YYZ)** Thu 24-Mar 2016 22:55 - Terminal 1	**Winnipeg (YWG)** Fri 25-Mar 2016 00:37	0		320	Tango, S	F

Flight AC1965: This flight is operated by Air Canada rouge. You'll want to learn more about Air Canada rouge's in-flight services and amenities, as these differ from those of Air Canada.

AIR CANADA rouge

F: Food for purchase on board All Air Canada Café purchases made on board Air Canada and Air Canada rouge flights, as well as on Air Canada Express flights operated by Jazz, are payable only with Visa, MasterCard and American Express credit cards.

Operated by:
[1] Air Canada rouge

Passenger Information

1: Mr Hymie Rubenstein : Adult (16+), Ticket Number: 0142152065663

Air Canada - Aeroplan :	**135286847**	Meal Preference :	**None**
Payment Card:	**xxxx-xxxx-xxxx-1345**	Special Needs:	**None**
Seat Selection:	**None**		

2: Mrs Nopsie Carnetta Rubenstein : Adult (16+), Ticket Number: 0142152065664

Air Canada - Aeroplan :	**116509134**	Meal Preference :	**None**
Payment Card:	**xxxx-xxxx-xxxx-1345**	Special Needs:	**None**
Seat Selection:	**None**		

Purchase Summary

Purchase Summary

Fare Summary	
Passenger Type	**Adult**
Air Transportation Charges	
Departing Flight - Tango	**307.00**
Return Flight - Tango	**326.99**
Surcharges	15.01
Carrier surcharges	24.00
Taxes, Fees and Charges	
Canada Airport Improvement Fee	33.00
Canada Goods and Services Tax (GST/HST #10009-2287 RT0001)	1.25
Canada Harmonized Sales Tax (GST/HST #10009-2287 RT0001)	1.04
Air Travellers Security Charge (ATSC)	25.91
Airport facilitation fee	1.96
Barbados - Passenger Service Charge	35.96
Security Fee	4.18
Total before options (per passenger)	**776.30**
Number of passengers	x 2
Total with options	**1552.60**
Travel Insurance (declined)	0.00
Grand Total - Canadian dollars	**$1552.60**

Payment Information

Credit/Debit Card xxxx-xxxx-xxxx-1345 - Amount paid: **$1552.60**
The following amount (tax inclusive) will appear on your credit card or debit card statement:

- Air Canada: $776.30 (Air Transp. Charges - per adult)

Ticket number(s): 0142152065663, 0142152065664

Fare Rules

Departing Flight Winnipeg (YWG) To Bridgetown (BGI) - **Tango**

- **Changes:**
  - Prior to day of departure - **Change fee** per direction, per passenger, is $75 CAD plus applicable taxes and any additional fare difference. **Changes** can be made up to 2 hours prior to departure.
  - Day of departure, at check-in or at the airport - $150 CAD per direction, per passenger, plus applicable taxes (no charge for fare difference) for same-day flights only.
  - Flights can only be used in sequence from the place of departure specified on the itinerary.
  - **Minimum/maximum stay** and other conditions may apply.
- **Cancellations:**
  - Tickets are **non-refundable** and **non-transferable**.
  - **Cancellations** can be made up to 45 minutes prior to departure.
  - Provided the original booking is cancelled prior to the original flight departure, the value of the unused ticket can be applied within a one year period from date of issue of the original ticket to the value of a new ticket subject to a change fee per direction, per passenger, plus applicable taxes and any additional fare difference, subject to availability and advance purchase requirements. The new outbound travel date must commence within a one year period from the original date of ticket issuance. If the fare for the new journey is lower, any residual amount will be forfeited.
- **Paid Advance Seat Selection** is available on Air Canada, Air Canada rouge and Air Canada Express, subject to availability.

This is **Exhibit "B"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

AIR CANADA

253

Notice of Change in Itinerary

PLEASE CONTACT US IMMEDIATELY AT THE RESERVATIONS NUMBER BELOW IF YOU HAVE ANY QUESTIONS CONCERNING THIS SCHEDULE CHANGE NOTICE.

Thank you for choosing Air Canada.

Please print this new itinerary and keep your original for your reference.

Main Contact Information

Booking reference: LNADJI

Name: Mr Hymie Rubenstein
E-mail: HYMIE_RUBENSTEIN@ICLOUD.COM

Customer Care

Air Canada Reservations
1-888-247-2262

Air Canada Flight Information
1-888-422-7533

International Reservations

Alert me of flight changes
Flight notification

Updated Flight Itinerary

Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC1965 *Operated by:* *Air Canada rouge*	Bridgetown (BGI) Fri 01-Apr 2016 15:10	Toronto Pearson (YYZ) Fri 01-Apr 2016 20:55 - TERMINAL T1	763	Economy (M)	Confirmed
AC273	Toronto Pearson (YYZ) Fri 01-Apr 2016 23:05 - TERMINAL T1	Winnipeg (YWG) Sat 02-Apr 2016 00:45	320	Economy (M)	Confirmed

Previous Flight Itinerary

Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC268	Winnipeg (YWG) Tue 24-Nov 2015 17:25	Toronto Pearson (YYZ) Tue 24-Nov 2015 20:53		Economy (S)	Confirmed
AC966	Toronto Pearson (YYZ) Wed 25-Nov 2015 8:45	Bridgetown (BGI) Wed 25-Nov 2015 15:05		Economy (S)	Confirmed
AC1965	Bridgetown (BGI) Thu 24-Mar 2016 15:10	Toronto Pearson (YYZ) Thu 24-Mar 2016 21:05	763	Economy (S)	Confirmed

Passenger Information

	Passenger 1		
Name:	Mr Hymie Rubenstein	Ticket number:	014 2160 481816
Frequent Flyer Pgm:	Air Canada Aeroplan	Program number:	AC0135286847
	Passenger 2		
Name:	Mrs Nopsie Rubenstein	Ticket number:	014 2160 481817
Frequent Flyer Pgm:	Air Canada Aeroplan	Program number:	AC0116509134

If the flight for which you have a confirmed upgrade has been cancelled and we were not able to rebook you in the Business Class cabin, any eUpgrade Credits or frequent flyer miles/points that were used for the initial upgrade will be returned to your account.

You can change your new seat assignment by going to the Manage My Bookings tab on aircanada.com. If you wish to change your new flight, please contact Air Canada Reservations.

You can check in for your flight within 24 hours of departure through our convenient Web check-in or Mobile check-in options, or within 12 hours at one of our self-service check-in kiosks located in most of the airports Air Canada serves.

You must obtain your boarding pass and check in any baggage by the check-in deadline shown below.

Additionally, you must be available for boarding at the boarding gate by the boarding gate deadline shown below. Failure to respect check-in and boarding gate deadlines may result in the reassignment of any pre-reserved seats, the cancellation of reservations, and/or ineligibility for denied boarding compensation.

Travel	Recommended Check-in Time	Check-in Deadline	Boarding Gate Deadline
Within Canada	90 min.	45 min.	20 min.
To/from the US	120 min.	60 min.	20 min.
International (incl. Mexico & Caribbean)	120 min.	60 min.	30 min.
From Toronto City Airport, Ontario Canada	60 min.	20 min.	20 min.
From Tel Aviv, Israel	180 min.	75 min.	60 min.

Note: If your itinerary now includes a flight operated by another airline, please refer to the code share flights page as baggage allowance and fees may vary with other carriers.

Comments, Compliments and Complaints
Would you like to comment on a past travel experience? Your comments, compliments and complaints will help us improve the services we offer. Send us an e-mail (aircanada.com/customerrelations) or write to us at: Air Canada - Customer Relations, PO Box 64239, RPO Thorncliffe, Calgary, AB, Canada T2K 6J7.

Schedules and Timetables
Time and aircraft type shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract. Schedules are subject to change without notice and carrier assumes no responsibility for passenger making connections not included as part of the itinerary set out in the ticket. Carrier is not responsible for changes, errors or omissions either in timetables or in other representations of schedules.

This is **Exhibit "C"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

From: **Air Canada** Notification@aircanada.ca
Subject: Air Canada: FLIGHT DISRUPTION (Booking ref: LNADJI)
Date: April 1, 2016 at 7:15 PM
To: hymie_rubenstein@icloud.com

Booking Reference: LNADJI

ZX1965
Bridgetown to Toronto Pearson
Departing: Fri Apr-1, 2016 at 20:50 PM
Arriving: Fri Apr-1, 2016 at 2:44 AM

Dear Valued Customer:

Please accept our sincere apologies for the disruption to your flight. We recognize that we have upset your travel plans.

Our goal and responsibility is to ensure that your travel with us is reliable and on time. Considerable effort is made to keep these promises on a consistent basis and we are sorry that we were not able to do so on this occasion.

As a gesture of goodwill, we are pleased to offer you a one-time use promotion code to use on your next booking at aircanada.com. You have 60 days to retrieve your code, which can be applied to new tickets purchased for travel completed within the next 13 months.

About your Promotion Code:

- Your Promotion Code allows 2 customers per booking and applies to any flight operated by Air Canada, Air Canada Rouge, Air Canada Express or one of our codeshare partners.
- Promotion Code discounts apply only to new bookings made on aircanada.com for published fares.
- Promotion Codes cannot be applied to Flight Pass purchases or combined with other discount codes.
- Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.
- Promotion Codes apply to undiscounted published fares. Some of our previously discounted fares, while not eligible for the promotion, may be lower than the final price of the undiscounted fare to which the promotion applies.

Retrieve your promotion code now
http://aircanada.com/flight/promocode

To check the status of your flights, please use our Flight Status tool (http://aircanada.com/flightstatus) or call Air Canada's automated flight information system at 1-888-422-7533.

For more information on our policies or to contact us, please refer to the URLs below:

Flight Delay Policy: http://aircanada.com/delaypolicy
Flight Cancellation Policy: http://aircanada.com/cancellationpolicy
Customer Relations: http://aircanada.com/customerrelations

Thank you for flying with Air Canada. We truly hope we will have another opportunity to welcome you on board.

Sincerely,

Air Canada

This is **Exhibit "D"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

AIR CANADA

258

Notice of Change in Itinerary

PLEASE CONTACT US IMMEDIATELY AT THE RESERVATIONS NUMBER BELOW IF YOU HAVE ANY QUESTIONS CONCERNING THIS SCHEDULE CHANGE NOTICE.

Thank you for choosing Air Canada.

Please print this new itinerary and keep your original for your reference.

Main Contact Information

Booking reference: LNADJI

Name: Mr Hymie Rubenstein
E-mail: HYMIE_RUBENSTEIN@ICLOUD.COM

Customer Care

Air Canada Reservations
1-888-247-2262

Air Canada Flight Information
1-888-422-7533

International Reservations

Alert me of flight changes
Flight notification

Updated Flight Itinerary

Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC1965	Bridgetown (BGI)	Toronto Pearson (YYZ)	763	Economy (M)	Confirmed
Operated by:	Fri 01-Apr 2016	Fri 01-Apr 2016			
Air Canada rouge	15:10	20:55 - TERMINAL T1			
Seat number(s) requested:	40D 40E				
AC440	Toronto Pearson (YYZ)	Ottawa (YOW)	321	Economy (B)	Confirmed
	Mon 04-Apr 2016 07:10 - TERMINAL T1	Mon 04-Apr 2016 08:13			
Seat number(s) requested:	29B 29C				
AC8525	Ottawa (YOW)	Winnipeg (YWG)	CRA	Economy (B)	Confirmed
Operated by:	Mon 04-Apr 2016	Mon 04-Apr 2016			
Air Canada Express-Jazz	09:00	10:41			
Seat number(s) requested:	21A 21C				

Previous Flight Itinerary

AIR CANADA

259

Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC1965	Bridgetown (BGI) Fri 01-Apr 2016 15:10	Toronto Pearson (YYZ) Fri 01-Apr 2016 20:55	763	Economy (M)	Confirmed

Passenger Information

Passenger 1

Name: **Mr Hymie Rubenstein** Ticket number: **014 2160 731170**

Frequent Flyer Pgm: Air Canada Aeroplan Program number: AC0135286847

Passenger 2

Name: **Mrs Nopsie Rubenstein** Ticket number: **014 2160 731171**

Frequent Flyer Pgm: Air Canada Aeroplan Program number: AC0116509134

If the flight for which you have a confirmed upgrade has been cancelled and we were not able to rebook you in the Business Class cabin, any eUpgrade Credits or frequent flyer miles/points that were used for the initial upgrade will be returned to your account.

You can change your new seat assignment by going to the Manage My Bookings tab on aircanada.com. If you wish to change your new flight, please contact Air Canada Reservations.

You can check in for your flight within 24 hours of departure through our convenient Web check-in or Mobile check-in options, or within 12 hours at one of our self-service check-in kiosks located in most of the airports Air Canada serves.

You must obtain your boarding pass and check in any baggage by the check-in deadline shown below.

Additionally, you must be available for boarding at the boarding gate by the boarding gate deadline shown below. Failure to respect check-in and boarding gate deadlines may result in the reassignment of any pre-reserved seats, the cancellation of reservations, and/or ineligibility for denied boarding compensation.

Travel	Recommended Check-in Time	Check-in Deadline	Boarding Gate Deadline
Within Canada	90 min.	45 min.	20 min.
To/from the US	120 min.	60 min.	20 min.
International (incl. Mexico & Caribbean)	120 min.	60 min.	30 min.
From Toronto City Airport, Ontario Canada	60 min.	20 min.	20 min.
From Tel Aviv, Israel	180 min.	75 min.	60 min.

Note: If your itinerary now includes a flight operated by another airline, please refer to the code share flights page as baggage allowance and fees may vary with other carriers.

Comments, Compliments and Complaints
Would you like to comment on a past travel experience? Your comments, compliments and complaints will help us improve the services we offer. Send us an e-mail (aircanada.com/customerrelations) or write to us at: Air Canada - Customer Relations, PO Box 64239, RPO Thorncliffe, Calgary, AB, Canada T2K 6J7.

Schedules and Timetables
Time and aircraft type shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract. Schedules are subject to change without notice and carrier assumes no responsibility for passenger making connections not included as part of the itinerary set out in the ticket. Carrier is not responsible for changes, errors or omissions either in timetables or in other representations of schedules.

This is **Exhibit "E"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

PASSENGER ITINERARY FOR
HYMIE RUBENSTEIN
NOPSIE RUBENSTEIN

AIR CANADA
TORONTO
CANADA
2 APRIL 16

BOOKING REFERENCE
LNADJI

WE ARE PLEASED TO CONFIRM THE FOLLOWING TRAVEL ARRANGEMENTS

AIR CANADA	AC440	B ECONOMY	CONFIRMED
DEPART MON 4 APRIL 16		TORONTO PEARSON INTL	0710
ARRIVE MON 4 APRIL 16		OTTAWA	0813

LATEST CHECK IN IS 60 MINUTES BEFORE DEPARTURE
DEPARTS FROM TERMINAL T1
THE FOLLOWING SEATS HAVE BEEN PRE-ASSIGNED FOR YOU
29B 29C

AIR CANADA	AC8525	B ECONOMY	CONFIRMED
DEPART MON 4 APRIL 16		OTTAWA	0900
ARRIVE MON 4 APRIL 16		WINNIPEG	1041

THIS FLIGHT IS OPERATED BY JAZZ
THE FOLLOWING SEATS HAVE BEEN PRE-ASSIGNED FOR YOU
21A 21C

FREQUENT TRAVELLER
FREQUENT TRAVELLER

THANK YOU FOR CHOOSING AIR CANADA

This is **Exhibit "F"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

AIR CANADA

We are sorry for any inconvenience this disruption may have caused.

To show our concern and appreciation, **we are pleased to offer you a one time Promotion Code** that entitles you to a discount on a future booking at aircanada.com.

To claim your code, please go to **aircanada.com/flight/promocode**. You have **60 days** to retrieve your code which can be applied to new tickets purchased for travel completed within the next **13 months.**

You will be required to enter the following information, as well as your name, exactly as it appears on your booking. Please take a moment to write this down for your reference:

Flight No. ..... **Flight Date** .....

Any one of the following:

Booking Reference .....

Aeroplan / Frequent Flyer No. .....

Ticket No. .....

About your Promotion Code:

- Your Promotion Code allows 2 customers per booking and applies to any flight operated by Air Canada, Air Canada rouge, Air Canada Express™ or one of our codeshare partners.
- Your Promotion Code is fully transferable.
- All travel must be completed within 13 months of retrieving your code. Please retrieve your code within 60 days of your affected flight.
- Promotion Code discounts apply only to new bookings made on aircanada.com for published fares. Please note that promotional codes apply to undiscounted published fares. Some of our previously discounted fares, while not eligible for the promotion, may be lower than the final price of the undiscounted fare to which the promotion applies.
- Promotion Codes cannot be applied to Flight Pass purchases or combined with other discount codes.
- Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

For more information about Air Canada's Customer Service policies, go to aircanada.com or visit the following pages:

Flight Delay Policy: **aircanada.com/delaypolicy**

Flight Cancellation Policy: **aircanada.com/cancellationpolicy**

Customer Relations: **aircanada.com/customerrelations**

To check the status of your flights, use our Flight Status tool, **aircanada.com/flightstatus** or call Air Canada's automated flight information system at 1-888-422-7533.

We look forward to seeing you soon and thank you for

AIR CANADA

We are sorry for any inconvenience this disruption may have caused.

To show our concern and appreciation, **we are pleased to offer you a one time Promotion Code** that entitles you to a discount on a future booking at aircanada.com.

To claim your code, please go to **aircanada.com/flight/promocode**. You have **60 days** to retrieve your code which can be applied to new tickets purchased for travel completed within the next **13 months.**

You will be required to enter the following information, as well as your name, exactly as it appears on your booking. Please take a moment to write this down for your reference:

Flight No. ..... **Flight Date** .....

Any one of the following:

Booking Reference .....

Aeroplan / Frequent Flyer No. .....

Ticket No. .....

About your Promotion Code:

- Your Promotion Code allows 2 customers per booking and applies to any flight operated by Air Canada, Air Canada rouge, Air Canada Express™ or one of our codeshare partners.
- Your Promotion Code is fully transferable.
- All travel must be completed within 13 months of retrieving your code. Please retrieve your code within 60 days of your affected flight.
- Promotion Code discounts apply only to new bookings made on aircanada.com for published fares. Please note that promotional codes apply to undiscounted published fares. Some of our previously discounted fares, while not eligible for the promotion, may be lower than the final price of the undiscounted fare to which the promotion applies.
- Promotion Codes cannot be applied to Flight Pass purchases or combined with other discount codes.
- Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

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Flight Delay Policy: **aircanada.com/delaypolicy**

Flight Cancellation Policy: **aircanada.com/cancellationpolicy**

Customer Relations: **aircanada.com/customerrelations**

To check the status of your flights, use our Flight Status tool, **aircanada.com/flightstatus** or call Air Canada's automated flight information system at 1-888-422-7533.

We look forward to seeing you soon and thank you for

This is **Exhibit "G"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

AIR CANADA

Customer Relations Contact Information

Air Canada, Air Canada Express and Air Canada rouge:
P.O. Box 64239, RPO Thorncliffe
Calgary, AB T2K 6J7 Canada
Toll-free fax: 1-866-584-0380
www.aircanada.com/customerrelations

Baggage:
Call Center: 1-888-689-2247 (Canada and USA only)
Lost and Found: http://www.aircanada.com/en/travelinfo/airport/baggage/lost-and-found-form.html
Baggage Claims: PO Box 8000, Station Airport, Dorval, H4Y 1C3
www.aircanada.com/customerrelations

All claims for delay of baggage must be made in writing within 21 days from the date on which the baggage has been placed at passenger's disposal.

All claims for damage (including missing items) must be made forthwith after the discovery of the damage, and in writing, at the latest, within 7 days from the date of receipt of the checked baggage.

Refund Services
(Passenger Ticket Inquiry - Past Travel Refunds):
P.O. Box 6475, Winnipeg, MB R3C 3V2 Canada
http://www.aircanada.com/en/customercare/index.html

Call Centres
(Current/Future Travel Inquiries):
1-888-247-2262 (Canada and USA only)

ACF008 (2014-10)

A STAR ALLIANCE MEMBER
MEMBRE DU RÉSEAU STAR ALLIANCE

This is **Exhibit "H"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

Sheraton Gateway Hotel
PO Box 3000
Toronto AMF
Toronto, ON L5P 1C4
Canada
Tel: 905-672-7000 Fax: 905-672-7100

Sheraton
HOTELS & RESORTS

Dr. Hymie Rubenstein
197 AUGUSTA DR
WINNIPEG, MB R3T 4H3
Canada

Page Number	:	1	Invoice Nbr	: 293807
Guest Number	:	2267435		
Folio ID	:	A		
Arrive Date	:	02-APR-16	05:35	
Depart Date	:	04-APR-16	03:57	
No. Of Guest	:	2		
Room Number	:	892		
Club Account	:	SPG - Axxxxxxx5934		

Copy Tax Invoice

Tax ID : 140047879
Sheraton Gateway 05-APR-16 03:10 9999

Date	Time	Reference	Description	Charges (CAD)	Credits (CAD)
02-APR-16	05:35	DEPOSIT	Deposit-MC-1345		-531.28
02-APR-16	07:01	S794	Telecom	15.00	
02-APR-16	07:52	7271	Club Lounge	5.00	
02-APR-16	03:01	RT892	Room Revenue	229.00	
02-APR-16	03:01	RT892	Rooms HST	29.77	
02-APR-16	03:01	RT892	Destination Marketing Program	6.09	
02-APR-16	03:01	RT892	HST Destination Marketing Prog	0.78	
03-APR-16	09:43	7292	Club Lounge	5.00	
03-APR-16	18:00	7295	Club Lounge	5.00	
03-APR-16	03:05	RT892	Room Revenue	229.00	
03-APR-16	03:05	RT892	Rooms HST	29.77	
03-APR-16	03:05	RT892	Destination Marketing Program	6.09	
03-APR-16	03:05	RT892	HST Destination Marketing Prog	0.78	
04-APR-16	04:55	MC	MasterCard-1345		-30.00

For Authorization Purpose Only
xxxxxx1345

Date	Code	Authorized
02-APR-16	03784Z	100
02-APR-16	05424Z	100
03-APR-16	01385Z	100

** Total	561.28	-561.28
*** Balance	-0.00	

Continued on the next page

Sheraton Gateway Hotel
PO Box 3000
Toronto AMF
Toronto, ON L5P 1C4
Canada
Tel: 905-672-7000 Fax: 905-672-7100

Sheraton
HOTELS & RESORTS

Dr. Hymie Rubenstein
197 AUGUSTA DR
WINNIPEG, MB R3T 4H3
Canada

Page Number	:	1	Invoice Nbr	: 293935
Guest Number	:	2267435		
Folio ID	:	B		
Arrive Date	:	02-APR-16	05:35	
Depart Date	:	04-APR-16	03:57	
No. Of Guest	:	2		
Room Number	:	892		
Club Account	:	SPG - Axxxxxxx5934		

Copy

Tax ID : 140047879
Sheraton Gateway 05-APR-16 03:10 9999

Date	Time	Reference	Description	Charges (CAD)	Credits (CAD)
02-APR-16	19:46	3828	Mahogany Grill	129.13	
02-APR-16	00:11	adj	Service Promise Rooms		-56.50
05-APR-16	03:10	MC	MasterCard		-72.63
			** Total	129.13	-129.13
			*** Balance	0.00	

For your convenience, we have prepared this zero-balance folio indicating a $0 balance on your account. Please be advised that any charges not reflected on this folio will be charged to the credit card on file with the hotel. While this folio reflects a $0 balance, your credit card may not be charged until after your departure. You are ultimately responsible for paying all of your folio charges in full.

HST Summary for your stay:	Amount (CAD)
Room Revenue HST	-6.50
Food & Beverage HST	13.13
Photo/Fax/Copy Services HST	0.00
Other Revenue HST	0.00
Total HST for your stay:	6.63

Tell us about your stay www.sheraton.com/reviews for billing please connect with us at 00692guestinquiries@sheraton.com

Sheraton Gateway Hotel
PO Box 3000
Toronto AMF
Toronto, ON L5P 1C4
Canada
Tel: 905-672-7000 Fax: 905-672-7100

Sheraton
HOTELS & RESORTS

Dr. Hymie Rubenstein
197 AUGUSTA DR
WINNIPEG, MB R3T 4H3
Canada

Page Number	:	2	Invoice Nbr	: 293935
Guest Number	:	2267435		
Folio ID	:	B		
Arrive Date	:	02-APR-16	05:35	
Depart Date	:	04-APR-16	03:57	
No. Of Guest	:	2		
Room Number	:	892		
Club Account	:	SPG - Axxxxxxx5934		

Tell us about your stay. www.sheraton.com/reviews. For billing, please connect with us at 00692guestinquiries@sheraton.com

This is **Exhibit "I"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

Re: Issue#:ABDA-17SIW9R:04/06/2016 13:18:25:hymie_rubenstein@icloud.com

Hymie Rubenstein <hymie_rubenstein@icloud.com> Sat, Apr 23, 2016 at 4:56 PM
To: support@help-aircanada.com

Dear Prab Grewal,

You are mistaken in believing that we were offered accommodation by an Air Canada agent in Toronto. As I clearly told you on three occasions during our conversation on Thursday, April 21, this was not the case. We were not offered any accommodation, and instead were told to submit a claim to Air Canada later based on the approval of the agent of the on-line reservation I made at the Pearson airport Sheraton Hotel while we were stranded for over six hours in Barbados following an Air Canada e-mail with a new itinerary indicting that we would again be stranded in Toronto, this time for two days, before a connecting flight to Winnipeg was available.

I do not understand the basis for you referring to your reimbursement of expenses as “goodwill” when you obliged us to take three day to travel from Barbados to Winnipeg. If this is “goodwill,” I wonder what your airline would define as “bad will."

You are reminded that our travel was subject to the Montreal Convention. Article 19 of the convention renders Air Canada liable for delays of passengers, up to approximately $9,000 per passenger.

Accordingly, we request that Air Canada comply with its legal obligation by reimbursing us for the accommodation expenses we incurred as a result of delay in transportation by air, in the amount of $633.81.

Sincerely yours,

Hymie Rubenstein

****
Hymie Rubenstein, M.A., Ph.D.
197 Augusta Drive
Winnipeg, Manitoba R3T 4H3
Landline: (204) 269-7006
Moblie: (204) 887-4550
magicJack (613) 699-0390
SVG: (784) 528-4489
hymie_rubenstein@icloud.com
****

> On Apr 21, 2016, at 2:59 PM, support@help-aircanada.com wrote:
>
> ==========
> Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
> ==========
>
> Dear Dr. Hymie,
>
> It was a pleasure speaking with you today. As discussed on the phone here is the follow up email.
>
> In accordance with our tariff Air Canada will provide a hotel room. Air Canada booked and blocked hotel rooms for customers on flight AC1965 on April 1 2016. You were offered accommodation by our agent

and declined.

However, as goodwill we will contribute $200 toward the cost you incurred on your own. Please allow 2-3 weeks for the draft to reach your home address.

As a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.

To receive your discount, enter the one time use Promotion Codes:

B8BPNTQ1
BX6GYJ81

in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today. Please review instructions below.

We hope you will not lose confidence in us and we may have the opportunity to show you that this was not a typical experience with Air Canada. Once again, we apologize.

Customers can purchase travel insurance as a compliment to their travel plans. If you took out trip interruption/cancellation insurance, we respectfully suggest contacting your insurance provider with your expense concerns.

We appreciate your patronage and hope to be of service to you in the future.

Sincerely,
Prab Grewal
Customer Relations

This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.

The promo code applies exclusively to undiscounted published fares on Air Canada, Air Canada Express and Air Canada rouge. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.

Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

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

From: hymie_rubenstein@icloud.com
Sent: 06/04/2016 11:18 AM
Subject: hymie_rubenstein@icloud.com

Flight 1965 late leaving Barbados so missed connecting flight to Winnipeg and therefore required to layover in Toronto for two nights at the Pearson Sheraton Hotel. Please see attached receipt for accommodation and receipts for April 2-4.

This is **Exhibit "J"** to the
Witnessed Statement
of Dr. Hymie Rubenstein
dated May 16, 2016.

From: Hymie Rubenstein <hymie_rubenstein@icloud.com>
Subject: Re: Issue#:ABDA-17SIW9R:04/06/2016 13:18:25:hymie_rubenstein@icloud.com
Date: April 30, 2016 at 9:00:39 AM CDT
To: support@help-aircanada.com

Dear Prab, i can assure you that I will be taking this matter further.

Hymie Rubenstein

On Apr 29, 2016, at 4:32 PM, support@help-aircanada.com wrote:

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Dr. Hymie,

Thank you again for your follow-up email.

Please be assured we truly regret your dissatisfaction. The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.

While we wish to assure you that we value your patronage, we are unable to offer further consideration to this matter. Our previous correspondence has provided our explanations and the continual exchange of emails will not alter our position.

We regret we did not conclude this matter to your satisfaction.

Sincerely,
Prab

------ Previous Message ------

From: support@help-aircanada.com
To: hymie_rubenstein@icloud.com;
Sent: 21/04/2016 01:59:21 PM
Subject: Issue#:ABDA-17SIW9R:04/06/2016 13:18:25:hymie_rubenstein@icloud.com

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Dr. Hymie,

It was a pleasure speaking with you today. As discussed on the phone here is the follow up email.

In accordance with our tariff Air Canada will provide a hotel room. Air Canada booked and blocked hotel rooms for customers on flight AC1965 on April 1 2016. You were offered accommodation by our agent and declined.

However, as goodwill we will contribute $200 toward the cost you incurred on your own. Please allow 2-3 weeks for the draft to reach your home address.

As a gesture of goodwill, we are pleased to offer you a one time saving of 25% off of the base fare on your next booking at aircanada.com.

To receive your discount, enter the one time use Promotion Codes:

B8BPNTQ1
BX6GYJ81

in the Promo Code box at www.aircanada.com when you make your booking. This offer is valid for one year from today. Please review instructions below.

We hope you will not lose confidence in us and we may have the opportunity to show you that this was not a typical experience with Air Canada. Once again, we apologize.

Customers can purchase travel insurance as a compliment to their travel plans. If you took out trip interruption/cancellation insurance, we respectfully suggest contacting your insurance provider with your expense concerns.

We appreciate your patronage and hope to be of service to you in the future.

Sincerely,
Prab Grewal
Customer Relations

This means the booking and travel must be completed within the year. It is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.

The promo code applies exclusively to undiscounted published fares on Air Canada, Air Canada Express and Air Canada rouge. Flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.

Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

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

From: hymie_rubenstein@icloud.com
Sent: 06/04/2016 11:18 AM
Subject: hymie_rubenstein@icloud.com

Flight 1965 late leaving Barbados so missed connecting flight to Winnipeg and therefore required to layover in Toronto for two nights at the Pearson Sheraton Hotel. Please see attached receipt for accommodation and receipts for April 2-4.

WITNESSED STATEMENT OF NOPSIE RUBENSTEIN

(May 16, 2016)

I, **NOPSIE RUBENSTEIN**, of the City of Winnipeg, in the Province of Manitoba, DO SOLEMNLY DECLARE THAT:

1. The present statement concerns my own travel with Air Canada. As such, I have personal knowledge of the information set out below, which is to my knowledge true, accurate, and complete.

2. I am providing the present statement in support of the application of Col. Christopher Johnson and Dr. Gábor Lukács against Air Canada. I consent to the disclosure of my personal information for the purpose of adjudication of the application.

THE ITINERARY

3. My husband and I held the following confirmed itinerary on flights of Air Canada:

Flight	**Date**	**Depart**		**Arrive**	
AC 268	Nov 24, 2015	Winnipeg (YWG)	17:30	Toronto (YYZ)	20:57
AC 966	Nov 25, 2015	Toronto (YYZ)	13:00	Bridgetown (BGI)	15:05
AC 1965	Mar 24, 2016	Bridgetown (BGI)	15:10	Toronto (YYZ)	21:05
AC 273	Mar 24, 2016	Toronto (YYZ)	22:55	Winnipeg (YWG)	00:37 (+1)

A copy of the electronic ticket is attached and marked as **Exhibit "A"**.

4. Subsequently, our return flights were changed at our request as follows:

Flight	**Date**	**Depart**		**Arrive**	
AC 1965	Apr 1, 2016	Bridgetown (BGI)	15:10	Toronto (YYZ)	20:55
AC 273	Apr 1, 2016	Toronto (YYZ)	23:05	Winnipeg (YWG)	00:45 (+1)

A copy of the "Notice of Change in Itinerary" is attached and marked as **Exhibit "B"**.

FLIGHT DELAY AND EXPENSES INCURRED

5. On April 1, 2016, at the Bridgetown Airport, I learned that the departure of Flight AC 1965 to Toronto was delayed by 5 hours 40 minutes, to 20:50, which would result in missing my connecting to Winnipeg. A copy of an email from Air Canada confirming the flight delay is attached and marked as **Exhibit "C"**.

6. On April 1, 2016, my husband received a "Notice of Change in Itinerary" from Air Canada, a copy of which is attached and marked as **Exhibit "D"**, indicating that my husband and I were rebooked on the following flights:

Flight	**Date**	**Depart**		**Arrive**	
AC 440	Apr 4, 2016	Toronto (YYZ)	07:10	Ottawa (YOW)	08:13
AC 8525	Apr 4, 2016	Ottawa (YOW)	09:00	Winnipeg (YWG)	10:41

7. While still in Barbados, upon realizing that we would be stranded in Toronto for two nights, my husband booked a room for us at the Sheraton Gateway Hotel in Toronto, which is located at the airport.

8. We arrived in Toronto on April 2, 2016 at approximately 3 am. We had to wait until 5 am to speak to an Air Canada customer service and/or ticket agent, who provided us with:

(a) a printout of the alternative Toronto-Winnipeg itinerary, via Ottawa, a copy of which is attached and marked as **Exhibit "E"**; and

(b) a "we are sorry" card, offering a promotion code, a copy of which is attached and marked as **Exhibit "F"**.

9. We were not offered accommodation by Air Canada. My husband advised the Air Canada agent he had booked accommodation for us in Toronto at the Sheraton Gateway Hotel. The agent advised him that this hotel was on the list of accommodations approved by

Air Canada, and advised us to submit a claim for our expenses to Air Canada. A copy of a "Customer Relations" card that was provided to us by the agent is attached and marked as **Exhibit "G"**.

10. My husband paid the Sheraton Gateway Hotel $561.28 for two nights of accommodation and $72.63 for our meals, for a total of $633.91. A copy of the invoices, showing payment with my MasterCard, is attached and marked as **Exhibit "H"**.

11. As a result of the delay of Flight AC 440 on April 4, 2016, we missed Flight AC 8525, and were rebooked on the following flight:

Flight	**Date**	**Depart**		**Arrive**	
AC 8527	Apr 4, 2016	Ottawa (YOW)	16:00	Winnipeg (YWG)	17:41

In total, our return to Winnipeg was delayed by more than two and a half days (65 hours).

SIGNED in the City of Winnipeg,
in the Province of Manitoba,
on May 16, 2016, in the presence of:

_____
NOPSIE RUBENSTEIN

_____
Witness signature

Print Witness Name:

LIST OF EXHIBITS

A. Booking confirmation sent by Air Canada on August 21, 2015

B. Notice of Change in Itinerary, received on March 25, 2016

C. Email from Air Canada, dated April 1, 2016

D. Notice of Change in Itinerary, received on April 1, 2016

E. Alternative itinerary, printed by Air Canada agent on April 2, 2016

F. A “we are sorry” card, offering a promotion code, provided by Air Canada agent on April 2, 2016

G. “Customer Relations” card, provided by Air Canada agent on April 2, 2016

H. Invoices from the Sheraton Gateway Hotel, dated April 4, 2016

This is **Exhibit "A"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

From: **Air Canada** confirmation@aircanada.ca
Subject: Air Canada - 24-Nov: Winnipeg - Bridgetown (booking ref: LNADJI)
Date: August 21, 2015 at 7:17 PM
To: hymie_rubenstein@icloud.com

AC

****** PLEASE DO NOT REPLY TO THIS E-MAIL ******

AIR CANADA

Itinerary/Receipt

Your booking is confirmed. Please print/retain this page for your financial records (e.g. for taxation, expense claim or payment card reconciliation purposes). We thank you for choosing Air Canada and look forward to welcoming you on board.

Scan this barcode to check in at any Air Canada check in kiosk.

Access your personalized Air Canada travel information

View your planner >

Booking Information

Booking Reference: LNADJI

Electronic Ticketing confirmed. This is your official itinerary/receipt.

Main Contact:
Mr Hymie Rubenstein
hymie_rubenstein@icloud.com
Mobile: 1-204-8874550
Home: 1-204-2697006

Online Services

- **Manage** my booking online (view/change my booking; select seats*).
- **Select Seats**
- **Maple Leaf Lounge | Meal Vouchers | On My Way**
- **Alert me** of flight status changes directly to my mobile phone or email.
- **Flight Arrivals & Departures** - check online if my flight is on time.
- **Check-in online** and print my boarding pass.

* Can my booking be changed online?

Additional passenger information is required

Your current flight itinerary includes travel to a country that requires additional passenger information.

Customer Care

Air Canada
1-888-247-2262

Flight Arrivals and Departures
1-888-422-7533

We strongly encourage you to provide this information ahead of time from the comfort of your home or office with our secure online form.

Provide passenger information

Flight Itinerary

Flight	From	To	Stops	Duration	Aircraft	Fare Type	Meal
AC268	**Winnipeg (YWG)** Tue 24-Nov 2015 17:30	**Toronto, Pearson Int'l (YYZ)** Tue 24-Nov 2015 20:57 - Terminal 1	0	19hr35	320	Tango, S	F
AC966	**Toronto, Pearson Int'l (YYZ)** Wed 25-Nov 2015 08:45 - Terminal 1	**Bridgetown (BGI)** Wed 25-Nov 2015 15:05	0		319	Tango, S	F
AC1965[1]	**Bridgetown (BGI)** Thu 24-Mar 2016 15:10	**Toronto, Pearson Int'l (YYZ)** Thu 24-Mar 2016 21:05 - Terminal 1	0	10hr27	763	Tango, S	F
AC273	**Toronto, Pearson Int'l (YYZ)** Thu 24-Mar 2016 22:55 - Terminal 1	**Winnipeg (YWG)** Fri 25-Mar 2016 00:37	0		320	Tango, S	F

Flight AC1965: This flight is operated by Air Canada rouge. You'll want to learn more about Air Canada rouge's in-flight services and amenities, as these differ from those of Air Canada.

AIR CANADA rouge

F: Food for purchase on board All Air Canada Café purchases made on board Air Canada and Air Canada rouge flights, as well as on Air Canada Express flights operated by Jazz, are payable only with Visa, MasterCard and American Express credit cards.

Operated by:
[1] Air Canada rouge

Passenger Information

1: Mr Hymie Rubenstein : Adult (16+), Ticket Number: 0142152065663

Air Canada - Aeroplan :	**135286847**	Meal Preference :	**None**
Payment Card:	**xxxx-xxxx-xxxx-1345**	Special Needs:	**None**
Seat Selection:	**None**		

2: Mrs Nopsie Carnetta Rubenstein : Adult (16+), Ticket Number: 0142152065664

Air Canada - Aeroplan :	**116509134**	Meal Preference :	**None**
Payment Card:	**xxxx-xxxx-xxxx-1345**	Special Needs:	**None**
Seat Selection:	**None**		

Purchase Summary

Purchase Summary

Fare Summary	
Passenger Type	**Adult**
Air Transportation Charges	
Departing Flight - Tango	**307.00**
Return Flight - Tango	**326.99**
Surcharges	15.01
Carrier surcharges	24.00
Taxes, Fees and Charges	
Canada Airport Improvement Fee	33.00
Canada Goods and Services Tax (GST/HST #10009-2287 RT0001)	1.25
Canada Harmonized Sales Tax (GST/HST #10009-2287 RT0001)	1.04
Air Travellers Security Charge (ATSC)	25.91
Airport facilitation fee	1.96
Barbados - Passenger Service Charge	35.96
Security Fee	4.18
Total before options (per passenger)	**776.30**
Number of passengers	x 2
Total with options	**1552.60**
Travel Insurance (declined)	0.00
Grand Total - Canadian dollars	**$1552.60**

Payment Information

Credit/Debit Card xxxx-xxxx-xxxx-1345 - Amount paid: **$1552.60**
The following amount (tax inclusive) will appear on your credit card or debit card statement:

- Air Canada: $776.30 (Air Transp. Charges - per adult)

Ticket number(s): 0142152065663, 0142152065664

Fare Rules

Departing Flight Winnipeg (YWG) To Bridgetown (BGI) - **Tango**

- **Changes:**
  - Prior to day of departure - **Change fee** per direction, per passenger, is $75 CAD plus applicable taxes and any additional fare difference. **Changes** can be made up to 2 hours prior to departure.
  - Day of departure, at check-in or at the airport - $150 CAD per direction, per passenger, plus applicable taxes (no charge for fare difference) for same-day flights only.
  - Flights can only be used in sequence from the place of departure specified on the itinerary.
  - **Minimum/maximum stay** and other conditions may apply.
- **Cancellations:**
  - Tickets are **non-refundable** and **non-transferable**.
  - **Cancellations** can be made up to 45 minutes prior to departure.
  - Provided the original booking is cancelled prior to the original flight departure, the value of the unused ticket can be applied within a one year period from date of issue of the original ticket to the value of a new ticket subject to a change fee per direction, per passenger, plus applicable taxes and any additional fare difference, subject to availability and advance purchase requirements. The new outbound travel date must commence within a one year period from the original date of ticket issuance. If the fare for the new journey is lower, any residual amount will be forfeited.
- **Paid Advance Seat Selection** is available on Air Canada, Air Canada rouge and Air Canada Express, subject to availability.

This is **Exhibit "B"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

AIR CANADA

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Notice of Change in Itinerary

PLEASE CONTACT US IMMEDIATELY AT THE RESERVATIONS NUMBER BELOW IF YOU HAVE ANY QUESTIONS CONCERNING THIS SCHEDULE CHANGE NOTICE.

Thank you for choosing Air Canada.

Please print this new itinerary and keep your original for your reference.

Main Contact Information

Booking reference: LNADJI

Name: Mr Hymie Rubenstein
E-mail: HYMIE_RUBENSTEIN@ICLOUD.COM

Customer Care

Air Canada Reservations
1-888-247-2262

Air Canada Flight Information
1-888-422-7533

International Reservations

Alert me of flight changes
Flight notification

Updated Flight Itinerary

Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC1965	Bridgetown (BGI)	Toronto Pearson (YYZ)	763	Economy (M)	Confirmed
Operated by:	Fri 01-Apr 2016	Fri 01-Apr 2016			
Air Canada rouge	15:10	20:55 - TERMINAL T1			
AC273	Toronto Pearson (YYZ)	Winnipeg (YWG)	320	Economy (M)	Confirmed
	Fri 01-Apr 2016 23:05 - TERMINAL T1	Sat 02-Apr 2016 00:45			

Previous Flight Itinerary

Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC268	Winnipeg (YWG) Tue 24-Nov 2015 17:25	Toronto Pearson (YYZ) Tue 24-Nov 2015 20:53		Economy (S)	Confirmed
AC966	Toronto Pearson (YYZ) Wed 25-Nov 2015 8:45	Bridgetown (BGI) Wed 25-Nov 2015 15:05		Economy (S)	Confirmed
AC1965	Bridgetown (BGI) Thu 24-Mar 2016 15:10	Toronto Pearson (YYZ) Thu 24-Mar 2016 21:05	763	Economy (S)	Confirmed

Passenger Information

	Passenger 1		
Name:	Mr Hymie Rubenstein	Ticket number:	014 2160 481816
Frequent Flyer Pgm:	Air Canada Aeroplan	Program number:	AC0135286847
	Passenger 2		
Name:	Mrs Nopsie Rubenstein	Ticket number:	014 2160 481817
Frequent Flyer Pgm:	Air Canada Aeroplan	Program number:	AC0116509134

If the flight for which you have a confirmed upgrade has been cancelled and we were not able to rebook you in the Business Class cabin, any eUpgrade Credits or frequent flyer miles/points that were used for the initial upgrade will be returned to your account.

You can change your new seat assignment by going to the Manage My Bookings tab on aircanada.com. If you wish to change your new flight, please contact Air Canada Reservations.

You can check in for your flight within 24 hours of departure through our convenient Web check-in or Mobile check-in options, or within 12 hours at one of our self-service check-in kiosks located in most of the airports Air Canada serves.

You must obtain your boarding pass and check in any baggage by the check-in deadline shown below.

Additionally, you must be available for boarding at the boarding gate by the boarding gate deadline shown below. Failure to respect check-in and boarding gate deadlines may result in the reassignment of any pre-reserved seats, the cancellation of reservations, and/or ineligibility for denied boarding compensation.

Travel	Recommended Check-in Time	Check-in Deadline	Boarding Gate Deadline
Within Canada	90 min.	45 min.	20 min.
To/from the US	120 min.	60 min.	20 min.
International (incl. Mexico & Caribbean)	120 min.	60 min.	30 min.
From Toronto City Airport, Ontario Canada	60 min.	20 min.	20 min.
From Tel Aviv, Israel	180 min.	75 min.	60 min.

Note: If your itinerary now includes a flight operated by another airline, please refer to the code share flights page as baggage allowance and fees may vary with other carriers.

Comments, Compliments and Complaints
Would you like to comment on a past travel experience? Your comments, compliments and complaints will help us improve the services we offer. Send us an e-mail (aircanada.com/customerrelations) or write to us at: Air Canada - Customer Relations, PO Box 64239, RPO Thorncliffe, Calgary, AB, Canada T2K 6J7.

Schedules and Timetables
Time and aircraft type shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract. Schedules are subject to change without notice and carrier assumes no responsibility for passenger making connections not included as part of the itinerary set out in the ticket. Carrier is not responsible for changes, errors or omissions either in timetables or in other representations of schedules.

This is **Exhibit "C"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

From: **Air Canada** Notification@aircanada.ca
Subject: Air Canada: FLIGHT DISRUPTION (Booking ref: LNADJI)
Date: April 1, 2016 at 7:15 PM
To: hymie_rubenstein@icloud.com

Booking Reference: LNADJI

ZX1965
Bridgetown to Toronto Pearson
Departing: Fri Apr-1, 2016 at 20:50 PM
Arriving: Fri Apr-1, 2016 at 2:44 AM

Dear Valued Customer:

Please accept our sincere apologies for the disruption to your flight. We recognize that we have upset your travel plans.

Our goal and responsibility is to ensure that your travel with us is reliable and on time. Considerable effort is made to keep these promises on a consistent basis and we are sorry that we were not able to do so on this occasion.

As a gesture of goodwill, we are pleased to offer you a one-time use promotion code to use on your next booking at aircanada.com. You have 60 days to retrieve your code, which can be applied to new tickets purchased for travel completed within the next 13 months.

About your Promotion Code:

- Your Promotion Code allows 2 customers per booking and applies to any flight operated by Air Canada, Air Canada Rouge, Air Canada Express or one of our codeshare partners.
- Promotion Code discounts apply only to new bookings made on aircanada.com for published fares.
- Promotion Codes cannot be applied to Flight Pass purchases or combined with other discount codes.
- Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.
- Promotion Codes apply to undiscounted published fares. Some of our previously discounted fares, while not eligible for the promotion, may be lower than the final price of the undiscounted fare to which the promotion applies.

Retrieve your promotion code now
http://aircanada.com/flight/promocode

To check the status of your flights, please use our Flight Status tool (http://aircanada.com/flightstatus) or call Air Canada's automated flight information system at 1-888-422-7533.

For more information on our policies or to contact us, please refer to the URLs below:

Flight Delay Policy: http://aircanada.com/delaypolicy
Flight Cancellation Policy: http://aircanada.com/cancellationpolicy
Customer Relations: http://aircanada.com/customerrelations

Thank you for flying with Air Canada. We truly hope we will have another opportunity to welcome you on board.

Sincerely,

Air Canada

This is **Exhibit "D"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

AIR CANADA

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Notice of Change in Itinerary

PLEASE CONTACT US IMMEDIATELY AT THE RESERVATIONS NUMBER BELOW IF YOU HAVE ANY QUESTIONS CONCERNING THIS SCHEDULE CHANGE NOTICE.

Thank you for choosing Air Canada.

Please print this new itinerary and keep your original for your reference.

Main Contact Information

Booking reference: LNADJI

Name: Mr Hymie Rubenstein
E-mail: HYMIE_RUBENSTEIN@ICLOUD.COM

Customer Care

Air Canada Reservations
1-888-247-2262

Air Canada Flight Information
1-888-422-7533

International Reservations

Alert me of flight changes
Flight notification

Updated Flight Itinerary

Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC1965	Bridgetown (BGI)	Toronto Pearson (YYZ)	763	Economy (M)	Confirmed
Operated by:	Fri 01-Apr 2016	Fri 01-Apr 2016			
Air Canada rouge	15:10	20:55 - TERMINAL T1			
Seat number(s) requested:	40D 40E				
AC440	Toronto Pearson (YYZ)	Ottawa (YOW)	321	Economy (B)	Confirmed
	Mon 04-Apr 2016 07:10 - TERMINAL T1	Mon 04-Apr 2016 08:13			
Seat number(s) requested:	29B 29C				
AC8525	Ottawa (YOW)	Winnipeg (YWG)	CRA	Economy (B)	Confirmed
Operated by:	Mon 04-Apr 2016	Mon 04-Apr 2016			
Air Canada Express-Jazz	09:00	10:41			
Seat number(s) requested:	21A 21C				

Previous Flight Itinerary

AIR CANADA

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Flight	From	To	Aircraft	Cabin (Booking class)	Status
AC1965	Bridgetown (BGI) Fri 01-Apr 2016 15:10	Toronto Pearson (YYZ) Fri 01-Apr 2016 20:55	763	Economy (M)	Confirmed

Passenger Information

Passenger 1

Name: **Mr Hymie Rubenstein** Ticket number: **014 2160 731170**

Frequent Flyer Pgm: Air Canada Aeroplan Program number: AC0135286847

Passenger 2

Name: **Mrs Nopsie Rubenstein** Ticket number: **014 2160 731171**

Frequent Flyer Pgm: Air Canada Aeroplan Program number: AC0116509134

If the flight for which you have a confirmed upgrade has been cancelled and we were not able to rebook you in the Business Class cabin, any eUpgrade Credits or frequent flyer miles/points that were used for the initial upgrade will be returned to your account.

You can change your new seat assignment by going to the Manage My Bookings tab on aircanada.com. If you wish to change your new flight, please contact Air Canada Reservations.

You can check in for your flight within 24 hours of departure through our convenient Web check-in or Mobile check-in options, or within 12 hours at one of our self-service check-in kiosks located in most of the airports Air Canada serves.

You must obtain your boarding pass and check in any baggage by the check-in deadline shown below.

Additionally, you must be available for boarding at the boarding gate by the boarding gate deadline shown below. Failure to respect check-in and boarding gate deadlines may result in the reassignment of any pre-reserved seats, the cancellation of reservations, and/or ineligibility for denied boarding compensation.

Travel	Recommended Check-in Time	Check-in Deadline	Boarding Gate Deadline
Within Canada	90 min.	45 min.	20 min.
To/from the US	120 min.	60 min.	20 min.
International (incl. Mexico & Caribbean)	120 min.	60 min.	30 min.
From Toronto City Airport, Ontario Canada	60 min.	20 min.	20 min.
From Tel Aviv, Israel	180 min.	75 min.	60 min.

Note: If your itinerary now includes a flight operated by another airline, please refer to the code share flights page as baggage allowance and fees may vary with other carriers.

Comments, Compliments and Complaints
Would you like to comment on a past travel experience? Your comments, compliments and complaints will help us improve the services we offer. Send us an e-mail (aircanada.com/customerrelations) or write to us at: Air Canada - Customer Relations, PO Box 64239, RPO Thorncliffe, Calgary, AB, Canada T2K 6J7.

Schedules and Timetables
Time and aircraft type shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract. Schedules are subject to change without notice and carrier assumes no responsibility for passenger making connections not included as part of the itinerary set out in the ticket. Carrier is not responsible for changes, errors or omissions either in timetables or in other representations of schedules.

This is **Exhibit "E"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

PASSENGER ITINERARY FOR
HYMIE RUBENSTEIN
NOPSIE RUBENSTEIN

AIR CANADA
TORONTO
CANADA
2 APRIL 16

BOOKING REFERENCE
LNADJI

WE ARE PLEASED TO CONFIRM THE FOLLOWING TRAVEL ARRANGEMENTS

AIR CANADA	AC440	B ECONOMY		CONFIRMED
DEPART	MON 4 APRIL 16	TORONTO PEARSON INTL		0710
ARRIVE	MON 4 APRIL 16	OTTAWA		0813

LATEST CHECK IN IS 60 MINUTES BEFORE DEPARTURE
DEPARTS FROM TERMINAL T1
THE FOLLOWING SEATS HAVE BEEN PRE-ASSIGNED FOR YOU
29B 29C

AIR CANADA	AC8525	B ECONOMY		CONFIRMED
DEPART	MON 4 APRIL 16	OTTAWA		0900
ARRIVE	MON 4 APRIL 16	WINNIPEG		1041

THIS FLIGHT IS OPERATED BY JAZZ
THE FOLLOWING SEATS HAVE BEEN PRE-ASSIGNED FOR YOU
21A 21C

FREQUENT TRAVELLER
FREQUENT TRAVELLER

THANK YOU FOR CHOOSING AIR CANADA

This is **Exhibit "F"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

AIR CANADA

We are sorry for any inconvenience this disruption may have caused.

To show our concern and appreciation, **we are pleased to offer you a one time Promotion Code** that entitles you to a discount on a future booking at aircanada.com.

To claim your code, please go to **aircanada.com/flight/promocode**. You have **60 days** to retrieve your code which can be applied to new tickets purchased for travel completed within the next **13 months.**

You will be required to enter the following information, as well as your name, exactly as it appears on your booking. Please take a moment to write this down for your reference:

Flight No. ..... **Flight Date** .....

Any one of the following:

Booking Reference .....

Aeroplan / Frequent Flyer No. .....

Ticket No. .....

About your Promotion Code:

- Your Promotion Code allows 2 customers per booking and applies to any flight operated by Air Canada, Air Canada rouge, Air Canada Express™ or one of our codeshare partners.
- Your Promotion Code is fully transferable.
- All travel must be completed within 13 months of retrieving your code. Please retrieve your code within 60 days of your affected flight.
- Promotion Code discounts apply only to new bookings made on aircanada.com for published fares. Please note that promotional codes apply to undiscounted published fares. Some of our previously discounted fares, while not eligible for the promotion, may be lower than the final price of the undiscounted fare to which the promotion applies.
- Promotion Codes cannot be applied to Flight Pass purchases or combined with other discount codes.
- Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

For more information about Air Canada's Customer Service policies, go to aircanada.com or visit the following pages:

Flight Delay Policy: **aircanada.com/delaypolicy**

Flight Cancellation Policy: **aircanada.com/cancellationpolicy**

Customer Relations: **aircanada.com/customerrelations**

To check the status of your flights, use our Flight Status tool, **aircanada.com/flightstatus** or call Air Canada's automated flight information system at 1-888-422-7533.

We look forward to seeing you soon and thank you for

AIR CANADA

We are sorry for any inconvenience this disruption may have caused.

To show our concern and appreciation, **we are pleased to offer you a one time Promotion Code** that entitles you to a discount on a future booking at aircanada.com.

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Flight No. ..... **Flight Date** .....

Any one of the following:

Booking Reference .....

Aeroplan / Frequent Flyer No. .....

Ticket No. .....

About your Promotion Code:

- Your Promotion Code allows 2 customers per booking and applies to any flight operated by Air Canada, Air Canada rouge, Air Canada Express™ or one of our codeshare partners.
- Your Promotion Code is fully transferable.
- All travel must be completed within 13 months of retrieving your code. Please retrieve your code within 60 days of your affected flight.
- Promotion Code discounts apply only to new bookings made on aircanada.com for published fares. Please note that promotional codes apply to undiscounted published fares. Some of our previously discounted fares, while not eligible for the promotion, may be lower than the final price of the undiscounted fare to which the promotion applies.
- Promotion Codes cannot be applied to Flight Pass purchases or combined with other discount codes.
- Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

For more information about Air Canada's Customer Service policies, go to aircanada.com or visit the following pages:

Flight Delay Policy: **aircanada.com/delaypolicy**

Flight Cancellation Policy: **aircanada.com/cancellationpolicy**

Customer Relations: **aircanada.com/customerrelations**

To check the status of your flights, use our Flight Status tool, **aircanada.com/flightstatus** or call Air Canada's automated flight information system at 1-888-422-7533.

We look forward to seeing you soon and thank you for

This is **Exhibit "G"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

AIR CANADA

Customer Relations Contact Information

Air Canada, Air Canada Express and Air Canada rouge:
P.O. Box 64239, RPO Thorncliffe
Calgary, AB T2K 6J7 Canada
Toll-free fax: 1-866-584-0380
www.aircanada.com/customerrelations

Baggage:

Call Center: 1-888-689-2247 (Canada and USA only)
Lost and Found: http://www.aircanada.com/en/travelinfo/airport/baggage/lost-and-found-form.html
Baggage Claims: PO Box 8000, Station Airport, Dorval, H4Y 1C3
www.aircanada.com/customerrelations

All claims for delay of baggage must be made in writing within 21 days from the date on which the baggage has been placed at passenger's disposal.

All claims for damage (including missing items) must be made forthwith after the discovery of the damage, and in writing, at the latest, within 7 days from the date of receipt of the checked baggage.

Refund Services
(Passenger Ticket Inquiry - Past Travel Refunds):
P.O. Box 6475, Winnipeg, MB R3C 3V2 Canada
http://www.aircanada.com/en/customercare/index.html

Call Centres
(Current/Future Travel Inquiries):
1-888-247-2262 (Canada and USA only)

ACF008 (2014-10)

A STAR ALLIANCE MEMBER
MEMBRE DU RÉSEAU STAR ALLIANCE

This is **Exhibit "H"** to the
Witnessed Statement
of Nopsie Rubenstein
dated May 16, 2016.

Sheraton Gateway Hotel
PO Box 3000
Toronto AMF
Toronto, ON L5P 1C4
Canada
Tel: 905-672-7000 Fax: 905-672-7100

Sheraton
HOTELS & RESORTS

Dr. Hymie Rubenstein
197 AUGUSTA DR
WINNIPEG, MB R3T 4H3
Canada

Page Number	:	1	Invoice Nbr	: 293807
Guest Number	:	2267435		
Folio ID	:	A		
Arrive Date	:	02-APR-16	05:35	
Depart Date	:	04-APR-16	03:57	
No. Of Guest	:	2		
Room Number	:	892		
Club Account	:	SPG - Axxxxxxx5934		

Copy Tax Invoice

Tax ID : 140047879
Sheraton Gateway 05-APR-16 03:10 9999

Date	Time	Reference	Description	Charges (CAD)	Credits (CAD)
02-APR-16	05:35	DEPOSIT	Deposit-MC-1345		-531.28
02-APR-16	07:01	S794	Telecom	15.00	
02-APR-16	07:52	7271	Club Lounge	5.00	
02-APR-16	03:01	RT892	Room Revenue	229.00	
02-APR-16	03:01	RT892	Rooms HST	29.77	
02-APR-16	03:01	RT892	Destination Marketing Program	6.09	
02-APR-16	03:01	RT892	HST Destination Marketing Prog	0.78	
03-APR-16	09:43	7292	Club Lounge	5.00	
03-APR-16	18:00	7295	Club Lounge	5.00	
03-APR-16	03:05	RT892	Room Revenue	229.00	
03-APR-16	03:05	RT892	Rooms HST	29.77	
03-APR-16	03:05	RT892	Destination Marketing Program	6.09	
03-APR-16	03:05	RT892	HST Destination Marketing Prog	0.78	
04-APR-16	04:55	MC	MasterCard-1345		-30.00

For Authorization Purpose Only
xxxxxx1345

Date	Code	Authorized
02-APR-16	03784Z	100
02-APR-16	05424Z	100
03-APR-16	01385Z	100

** Total	561.28	-561.28
*** Balance	-0.00	

Continued on the next page

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Sheraton Gateway Hotel
PO Box 3000
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Page Number	:	1	Invoice Nbr	: 293935
Guest Number	:	2267435		
Folio ID	:	B		
Arrive Date	:	02-APR-16	05:35	
Depart Date	:	04-APR-16	03:57	
No. Of Guest	:	2		
Room Number	:	892		
Club Account	:	SPG - Axxxxxxx5934		

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Tax ID : 140047879
Sheraton Gateway 05-APR-16 03:10 9999

Date	Time	Reference	Description	Charges (CAD)	Credits (CAD)
02-APR-16	19:46	3828	Mahogany Grill	129.13	
02-APR-16	00:11	adj	Service Promise Rooms		-56.50
05-APR-16	03:10	MC	MasterCard		-72.63
			** Total	129.13	-129.13
			*** Balance	0.00	

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HST Summary for your stay:	Amount (CAD)
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Food & Beverage HST	13.13
Photo/Fax/Copy Services HST	0.00
Other Revenue HST	0.00
Total HST for your stay:	6.63

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Halifax, NS

lukacs@AirPassengerRights.ca

May 17, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Request to submit rebuttal evidence and for an extension

The Applicants are hereby requesting, pursuant to Rules 30 and 34 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("*Dispute Rules*"), that they be permitted to submit rebuttal evidence and that their deadline for filing the Reply be extended until after disposition of the present request.

I. Relief sought

The Applicants are asking the Agency:

(a) to allow the Applicants to submit rebuttal evidence by way of the witnessed statements of Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein; and

(b) to extend the Applicants' deadline for serving and filing their Reply under Rule 20 to 10 business days after disposition of the present request.

II. Summary of the facts

On December 3, 2015, the Applicants brought the within Application against Air Canada, challenging Air Canada's policy purporting to limit its liability with respect to delay of passengers to $100.00 of hotel costs per night, $7 for breakfast, $10 for lunch, and $15 for dinner (the "Impugned Policy"), and alleging among other things that:

(i) the Impugned Policy is not set out in Air Canada's International Tariff, contrary to s. 122 of the *ATR*;

(ii) the Impugned Policy is unreasonable within the meaning of s. 111 of the *ATR*, because it purports to fix a lower limit of liability than what is set out in the *Montreal Convention*; and

(iii) since 2013 or earlier, Air Canada has failed to apply the terms and conditions set out in its tariff by applying the Impugned Policy and/or other unofficial policies instead of the provisions of the *Montreal Convention*, contrary to s. 110(4) of the *ATR*.

On December 29, 2015, the Agency opened pleadings.

On January 20, 2016, Air Canada filed its answer with the Agency, in which Air Canada represented to the Agency that:

(a) the Impugned Policy "does not constitute Air Canada's expense policy for expense refund requests";

(b) Air Canada reviews claims made under the *Montreal Convention* in accordance with the provisions of the Convention; and

(c) Air Canada has no policy limiting reimbursement of passengers' expenses for delays or cancellations that are within its control.

Air Canada's Answer, Annex A-6: Statement of Ms. Robinson, para. 6
Air Canada's Answer, paras. 25, 28-29

The representations of Air Canada are strenuously disputed by the Applicants.

On May 16, 2016, Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein, two Air Canada passengers who were delayed for a total of 65 hours for reasons within Air Canada's control and who were affected by the Impugned Policy in late April 2016, provided the attached witnessed statements to the Applicants.

III. Arguments in support of the request

Rebuttal evidence

1. The statements of Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein, over whom the Applicants have no control, were signed on May 16, 2016, and as such they were not available to the Applicants earlier.

2. The evidence of Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein demonstrates that:

   (a) they were Air Canada passengers, and they were delayed by a total of 65 hours due to the delay of Flight AC 1965 on April 1, 2016;

   (b) Air Canada acknowledged that it was required to provide them with accommodation (see Exhibit "I", p. 1, at the bottom: "In accordance with our tariff Air Canada will provide a hotel room"), indicating that the delay was within Air Canada's control;

   (c) they were not offered hotel accommodation, and instead were told to submit their receipts to Air Canada's Customer Relations (just as Mr. Johnson was told);

   (d) nevertheless, Air Canada refused their claim for reimbursement of their out-of-pocket expenses, and only paid them $200.00 "as goodwill" and contribution "toward the cost you incurred on your own"; and

   (e) although Dr. Rubenstein explicitly claimed the out-of-pocket expenses for accommodation and meals under Article 19 of the *Montreal Convention*, Air Canada ignored the claim, and instead stated that "The compensation offered as a measure of goodwill was based on guidelines that are used consistently" (see Exhibits "I" and "J").

3. Thus, the evidence of Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein shows that:

   (a) Air Canada continues to apply the "Impugned Policy" (euphemistically rechristened as "guidelines") to deny passengers' claims for reimbursement of out-of-pocket expenses under the *Montreal Convention* even in cases where it is not disputed that the delay was within Air Canada's control; and thus

   (b) Air Canada's aforementioned representations to the Agency, dated January 2016, are false.

Extension

4. The Applicants are seeking an extension in order to be able to incorporate the evidence of Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein into their Reply.

IV. Documents relied on

The Applicants rely on all materials that have been served and filed with the Agency in the present proceeding, including, but not limited to:

1. the Application, dated December 3, 2016;
2. Air Canada's Answer of January 20, 2016;
3. the witnessed statement of Dr. Hymie Rubenstein; and
4. the witnessed statement of Ms. Nopsie Rubenstein.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
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May 20, 2016

The Secretary
CANADIAN TRANSPORTATION AGENCY
Secretary
15 Eddy Street
17th Floor Mailroom
Gatineau QC J8X 4B3

SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Air Canada's Response to the Applicants' Request to Extend Time Limit and File New Evidence

---

Dear Madam Secretary:

1. Please find Air Canada's Response to the Applicants' Request to submit rebuttal evidence and for an extension (the "Request to Extend Time and File New Evidence") filed pursuant to sections 30 (2) and 34 (2) of the *Canadian Transportation Agency Rules* (the " Agency Rules").

1. Summary of Air Canada's position

2. Air Canada objects to the Applicants' Request to Extend Time and File New Evidence, as the New Evidence is irrelevant.

3. The New Evidence does not relate to the purposes identified by the Applicants for their filing. A reading *on its face* of the New Evidence clearly demonstrates that Air Canada's reply was based on the understanding that the passengers refused accommodation, which triggered a goodwill offer. It neither supports, nor relates to the Applicants' disputed allegation that Air Canada limits its liability below the limits of the *Montreal Convention of 1999*, in the case of Controllable Delays.

4. Air Canada analyses passengers' claims on a case by case basis. The very fact that Air Canada has declined or reduced a claim does not equate to a systematic limit or denial of expenses in Controllable Delays, nor does it falsify its Response filed on January 20, 2016.

5. The Request to Extend Time and File New Evidence further amounts to an attempt to extend the Application's Scope by indirectly incorporating new claimants and a new distinct matter and widening the issue currently before the Agency. Air Canada respectfully submits that such scope extension is unnecessary, inefficient, excessive and disproportionate.

6. Subsidiarily, should the Agency allow the Applicants' Request to File New Evidence, filed on the eve of the Applicants' Reply deadline, Air Canada would be left without an opportunity to respond to the new issues raised by the New Evidence. Furthermore, the Agency would draw conclusions affecting the rights of Air Canada and Mr. and Ms. Rubeinstein (The "New Claimants") in its Judgment on the Merits of the present Application, without a fair adjudication process.

7. The Request to File New Evidence rather supports Air Canada's position that the Attempt to Extend the Scope of the Application beyond the Agency's quasi-judicial individual complaint mechanism raises serious concerns of procedural fairness and inefficient use of Parties' and the Agency's Resources.

8. Finally, Air Canada formally takes issue with the Applicants' inappropriate syllogism based on the New Evidence that Air Canada's representations are false, as outlined in paragraph 3 b of the Request to Extend Time and File New Evidence.

2. The Applicants' Summary of the Facts

9. Air Canada denies the Summary of Facts as presented by the Applicants, and refers to the Agency's Record, denying anything not in conformity therewith.

10. Without limiting the foregoing, it specifically relies on paragraphs 5,6,7,21,22, 28 and 30 of its Response filed in the Agency's Record on January 20, 2016 as well as Ms. Twyla Robinson's Statement, Exhibit A-6 to Air Canada's Response, in its entirety.

11. The "Impugned Policy" as labelled by the Applicants are Internal Recommendations for Customer Service Representatives in handling Passenger Expense Refund Requests. The Internal Recommendations do not constitute liability limits in the case of controllable situations. Limits only apply in the case of goodwill offers where Air Canada is not bound to reimburse passengers.

12. The Application is based on Mr. Johnson's Cancellation of flight AC 889 on December 10, 2013, under uncontrollable circumstances. Within this context, and without being liable to do so under the *Montreal Convention of 1999*, Air Canada reimbursed Mr. Johnson the sum of $CAD222.00, based on goodwill. Having another opportunity to review Mr. Johnson's claim, Air Canada formally offered in its Response to compensate Mr. Johnson for the totality of his claim, by offering an additional goodwill payment of $CAD 309.56.

3. The Additional Evidence filed by the Applicants is irrelevant

13. Air Canada objects to the filing of the New Evidence as included in support of the Applicant's Request to Extend Time and File New Evidence. It further reserves all of its rights in defending any claim or allegations *vis à vis* the New Evidence in the event the Agency were to allow it in the record. The New Evidence is irrelevant, and a reading *on its face* neither supports nor relates to the Applicants' allegations that Air Canada applies an "Impugned Policy" in cases of Delays that are within its control and the unwarranted conclusion that Air Canada's representations are false.

14. More precisely, without going into its merits, a reading of the New Evidence *on its face* confirms that Air Canada has denied the full compensation requested by the New Claimants on the understanding that they were offered accommodation and refused, the whole as appears from page 1 (bottom) and 2 of Exhibit "I" of Dr. Hymie Rubenstein's Statement. Indeed, the goodwill offer presented by the Air Canada Customer Service Agent was made on Air Canada's understanding that the New Claimants "were offered accommodation by [Air Canada's] agent and declined." Air Canada nevertheless made a goodwill offer.

15. While the *Montreal Convention of 1999* provides for a liability limit for claims based on Delays, said claims remain subject to the rules of evidence and damage mitigation. Without embarking into the merits of Air Canada's reply to the New Claimants, as this is unnecessary, the New Evidence is clearly irrelevant to the purposes identified by the Applicants in their Request to Extend Time and File New Evidence.

4. The New Evidence unnecessarily and unfairly widens the Application's Scope and its Incorporation in the Reply contravenes Procedural Fairness and the sound administration of justice

16. The introduction of New Evidence equates to an unnecessary extension of the Application's scope via the introduction of new facts, generated through a distinct matter, for which the Applicants stated that they will need 10 business days to "incorporate (…) into their Reply"[1].

17. Air Canada submits that the Agency's stability and clarity of rulings will be greatly affected where it would have to rule on new unrelated facts, brought as circumstantial evidence, while bypassing the exchange of arguments process provided to Parties under the Agency Rules. Procedural Fairness to Parties will also be importantly hindered in such an environment, having to respond to an uncircumscribed Application, and losing the opportunity to file a full Response, not to mention important efficiency concerns.

18. Even where Air Canada would have an opportunity to respond to the New Evidence following the Applicant's Reply, a new debate on the New Evidence will hinder and delay the fair conduct of the current matter, being based on Mr. Johnson's flight cancellation for uncontrollable circumstances. The conduct of a parallel exchange based on a distinct matter will severely infringe the sound administration of justice, including the optimal use of Agency and Party resources, as well as being disproportionate and unnecessary, further going against the *Agency Rules* 4 and 5.

19. The incorporation of New Evidence, widening the Application's scope, in combination with the remedies sought in the Application, is excessive, unnecessary and disproportionate, as well as being outside of the Agency's mandate and jurisdiction, including of its individual complaint-driven mechanism[2] Air Canada's comments provided in its April 6 letter, in Response

---

[1] Request to Extend Time and File New Evidence, at paragraph 4 of page 3.

[2] Gabor Lukacs v. Porter Airlines Inc. 121-C-A-2016, at para 75; Canada Transportation Act, s. 67(2); Cheung v. West Jet, 324-AT-A-2015 at paras 59-68; Newrot v. Sunwing, 432-C-A-2013 at paras 120, 134; In re: determinations of what constitutes an "air service" and the criteria to be applied by the CTA; 390-A-2013 at para 25; Azar v. Air Canada, 442-C-A-2013 at para 6.

to the Applicants' March 18 third Notice of Written Questions and Production of Documents, were to the same effect.

For the reasons above, Air Canada respectfully requests that the Agency dismiss the Applicant's Request to Extend Time Limit and File New Evidence.

Subsidiarily, should the Agency grant the Applicants' Request to Extend Time and File New Evidence, Air Canada respectfully requests to be entitled to file a New Response to the Reply.

Documents Relied on:

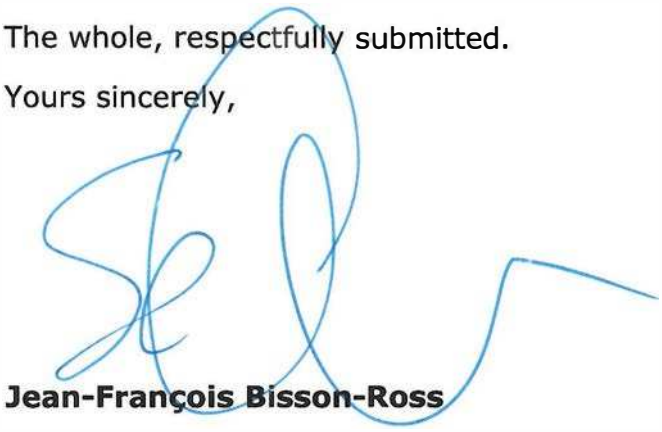
Air Canada relies on all materials that have been served and filed with the Agency in the present proceeding, including but not limited to:

a. Air Canada's Response and its attachments filed on January 20, 2016

b. Air Canada's Response to the Applicants' March 18, 2016 Notice of Written Questions and Production of Documents

The whole, respectfully submitted.

Yours sincerely,



Jean-François Bisson-Ross

Counsel – Litigation

JFBR/sa

c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson (lukacs@AirPassengerRights.ca)

Halifax, NS

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AIR PASSENGER RIGHTS

May 23, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Reply with respect to request to submit rebuttal evidence and for an extension

Please accept the following submissions as a reply to Air Canada's submissions of May 20, 2016 pursuant to Rules 30(3) and 34(3) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("*Dispute Rules*").

Scope of the Application

1. Air Canada misstates at paragraph 18 of its May 20, 2016 submissions the scope of the present Application, which encompasses Air Canada's practices with respect to the reimbursement of expenses incurred by delay of passengers for any reason, and is not confined to "flight cancellation for uncontrollable circumstances." The Applicants allege that Air Canada has been applying the Impugned Policy and/or other unofficial policies instead of the *Montreal Convention*.

Application, p. 1, item (iii)

2. The *Montreal Convention* establishes liability, not fault. Unlike fault, which depends only on causation, liability under the *Convention* does not require establishing causation, and depends also on how the airline reacts to a delay, even if the delay was caused by third parties over whom the airline has no control.

***Lukács v. United*, Decision No. 467-C-A-2012, para. 42**

3. Air Canada erroneously uses the fault-based terminology of "controllable" and "uncontrollable" delays and cancellations, and thus conflates fault with liability. As it will be explained in the Applicants' Reply in the main proceeding, Air Canada's terminology itself is inconsistent with the regime of the *Montreal Convention*, and is part of Air Canada's scheme to evade its obligations to passengers.

No "New Claimants"

4. Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein are witnesses, and not parties to the present proceeding. As such, contrary to Air Canada's position, the Rubensteins are not "New Claimants."

Relevance of the Rubensteins' evidence

5. Air Canada misstates the evidence of the Rubensteins at paragraph 14 of its May 20, 2016 submissions. As a matter of fact, the uncontradicted evidence is that:

(a) The Rubensteins were not offered accommodation by Air Canada.

Dr. Rubenstein's Statement, para. 9
Ms. Rubenstein's Statement, para. 9

(b) Instead, the Rubensteins were given a "Customer Relations" card and were directed to submit their claim for expenses to Air Canada, which they did.

Dr. Rubenstein's Statement, Exhibit "G"
Ms. Rubenstein's Statement, Exhibit "G"

(c) Dr. Rubenstein informed Air Canada that they were not offered accommodation:

> You are mistaken in believing that we were offered accommodation by an Air Canada agent in Toronto. As I clearly told you on three occasions during our conversation on Thursday, April 21, this was not the case. We were not offered any accommodation, and instead were told to submit a claim to Air Canada later based on the approval of the agent of the on-line reservation I made at the Pearson airport Sheraton Hotel [...]

Dr. Rubenstein's Statement, Exhibit "I"

(d) Dr. Rubenstein then also made a claim explicitly based on the *Montreal Convention*:

> You are reminded that our travel was subject to the Montreal Convention. Article 19 of the convention renders Air Canada liable for delays of passengers, up to approximately $9,000 per passenger.
>
> Accordingly, we request that Air Canada comply with its legal obligation by reimbursing us for the accommodation expenses we incurred as a result of delay in transportation by air, in the amountof $633.81.

Dr. Rubenstein's Statement, Exhibit "I"

(e) Instead of addressing the Rubensteins' claim based on the *Montreal Convention*, Air Canada responded:

> Please be assured we truly regret your dissatisfaction. The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.
>
> While we wish to assure you that we value your patronage, we are unable to offer further consideration to this matter. Our previous correspondence has provided our explanations and the continual exchange of emails will not alter our position.
>
> [Emphasis added.]

Dr. Rubenstein's Statement, Exhibit "J"

6. Thus, the evidence of the Rubensteins demonstrates that Air Canada was ignoring not only the provisions of the *Montreal Convention*, but also a claim that was made explicitly under the *Convention*, and instead Air Canada applied the Impugned Policy ("guidelines that are used consistently") and/or other unofficial policies, as alleged by the Applicants.

7. Therefore, the Rubensteins' evidence is relevant, because it tends to increase the probability of what is alleged by the Applicants.

Mitigation affects quantum, not liability

8. Air Canada's reference, at paragraph 15, to the principle of mitigation of damages is a red herring, because this principle affects only the *quantum* of damages, and not liability. Consequenty, whether or not the Rubensteins were offered accommodation by Air Canada is irrelevant to the question of liability under the *Montreal Convention*; it could only possibly affect the question of the *quantum* of damages. (For example, Air Canada remains obligated to pay for reasonable meal expenses regardless of whether it offered accommodation.)

Procedural fairness

9. If Air Canada had any evidence to contradict the statements of the Rubensteins, it could have and should have submitted it as part of its response to the present request. The failure of Air Canada to do so demonstrates that such evidence does not exist.

10. In these circumstances, Air Canada will suffer no prejudice if the Agency accepts the statements of the Rubensteins. On the other hand, refusal to accept the rebuttal evidence will significantly prejudice the Applicants, who would be deprived of their opportunity to contest the allegations advanced by Air Canada.

The Agency's jurisdiction

11. Air Canada improperly questions the Agency's jurisdiction at paragraph 19 of its subissions. The Agency's mandate is not to simply duplicate the roles of small claims courts with respect to the enforcement of the rights of individual passengers; rather, under s. 113.1 of the *ATR*, the Agency has sweeping powers to order corrective measures to ensure that an airline abides by the tariff, and in particular, by the provisions of the *Montreal Convention*.

***Air Transportation Regulations*, s. 113.1**

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
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Office
des transports
du Canada

Canadian
Transportation
Agency

LET-C-A-24-2016

June 10, 2016

Case No. 15-05627

BY E-MAIL:
Jean-Francois.Bisson-Ross@aircanada.ca

Jean-Francois Bisson

BY E-MAIL:
lukacs@AirPassengerRights.ca

Christopher C. Johnson
Gábor Lukács

Dear Sirs:

Re: Application by Christopher Johnson and Gábor Lukács against Air Canada

BACKGROUND

On December 4, 2015, Gabor Lukács, on behalf of himself and Christopher Johnson (the applicants), filed an application alleging that Air Canada is applying a policy that is not set out in its International Tariff and which purports to limit Air Canada's liability with respect to delay of passengers, contrary to section 122 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). The applicants claim this impugned policy is unreasonable within the meaning of section 111 of the ATR as it purports to fix a lower limit of liability than what is set out in the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention). They also allege that Air Canada has failed to apply the terms and conditions set out in its tariff by applying the impugned policy and/or other unofficial policies instead of the provisions of the Montreal Convention, contrary to subsection 110(4) of the ATR.

The Canadian Transportation Agency (Agency) opened pleadings on December 29, 2015. On January 20, 2016, Air Canada filed its answer to the application. From January 2016 to the present, the Agency has addressed a number of requests made by the parties. On May 18, 2016, the applicants' reply to the answer was due.

On May 17, 2016, the applicants, pursuant to sections 34 and 30 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (Dispute Adjudication Rules), made a request to submit rebuttal evidence and to extend the time for filing of their reply to 10 business days after the disposition of the present request.

ISSUE

Should the Agency approve the applicants' request to submit rebuttal evidence and to extend the time for the filing of their reply?

Position of the parties

The proposed evidence consists of witness statements signed by two passengers (passengers) who travelled with Air Canada in April of 2016. The applicants allege that the passengers were delayed for a total of 65 hours for reasons within Air Canada's control and were refused reimbursement of their expenses related to the delay in accordance with the impugned policy.

The applicants argue that these statements establish that Air Canada acknowledged that it was required to provide these passengers with accommodation in accordance with its tariff (indicating that the delay was within its control), that the passengers were not offered hotel accommodation, and that the passengers were provided with compensation as a measure of goodwill based on guidelines that are used consistently.

The applicants claim that the evidence demonstrates that Air Canada's representations in its answer that the impugned policy does not constitute its expense policy for expense refund requests, that it reviews claims made under the Montreal Convention in accordance with the provisions of the Convention, and that it does not have a policy limiting reimbursement of passengers' expenses for delays or cancellations that are within its control, are false.

The applicants also claim that the evidence shows that Air Canada continues to apply the impugned policy, thereby denying passengers' claims under the Montreal Convention even in cases where it is not disputed that the delay was within Air Canada's control.

Air Canada maintains that a reading of the evidence on its face clearly demonstrates that it had denied the full compensation requested by the passengers on the understanding that the passengers were offered accommodation and refused, which triggered Air Canada's goodwill offer, and that the evidence does not support the disputed allegation that Air Canada limits its liability to levels below the limits of the Convention. Air Canada contends that the Montreal Convention provides for liability limits for claims based on delays, and that said claims remain subject to the rules of evidence and damage mitigation.

Air Canada argues that should the Agency allow the applicants' request pursuant to section 34 of the Dispute Adjudication Rules, it would be left without an opportunity to respond to the new issues raised by the evidence, and that further, the Agency may draw conclusions affecting the rights of Air Canada and the passengers in its judgment on the merits of the present application without a fair adjudication process.

Air Canada also argues that a new debate on the evidence would hinder and delay the fair conduct of the application, and would be disproportionate and unnecessary.

The applicants, in reply, argue that the passengers are witnesses, not parties, and that the un-contradicted evidence is relevant as it tends to increase the probability of occurrence of what is alleged by the applicants because it shows that the passengers were also not offered accommodation by Air Canada.

Should their request be refused, the applicants argue that they would suffer prejudice given that their opportunity to contest the allegations using the new evidence would be deprived.

Analysis

The Agency has the power to accept new evidence at this late stage of the proceeding and will do so where:

1. it is rebuttal evidence to address new fact issues raised by the respondent in the answer; or,
2. it is in the interests of justice to do so, by re-opening the case.

However, the general rule is that a party cannot be permitted to split its case and that a respondent is entitled to know the case that it has to meet.

In *The Law of Evidence in Canada* (Toronto: Butterworths,1999) at pages 958-959, the authors explain the rule against allowing a party to split its case.

> At the close of the defendant's case, the plaintiff or Crown has the right to adduce rebuttal evidence to contradict or qualify new fact issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded.

The authors then identify 2 reasons for this rule.

> [F]irst, the unfairness to the opponent who has unjustly supposed that the case in chief was the entire case which he had to meet and, second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning.

In *R. v. Miazga*, 2003 SKQB 559 (CanLII) at para. 483, the Court noted that the potential for prejudice to a defendant in a civil case when permitting rebuttal evidence is less than that in a criminal case. However, the potential for "the interminable confusion that would be created by an unending alternation of successive fragments of each case" is greater in a civil case.

In *Allcock, Laight & Westwood Ltd. v. Patten* [1967] 1 O.R. 18 (C.A.) the Court stated that a plaintiff should not be permitted to adduce evidence in rebuttal which is essentially confirmatory only of the plaintiff's case [see also *Halford v. Seed Hawk Inc.* 24 CPR (4^{th}) 220; [2003] FCJ No. 237 at para. 13].

1. Rebuttal Evidence

In this case, the applicants do not point to any unforeseen argument or issue raised in the answer other than to say that the representations contained therein are false.

Rather, this evidence appears to be tendered to support the allegations made in the application. The applicants allege that Air Canada was applying a policy which purports to limit its liability with respect to delay of passengers contrary to the Montreal Convention. The application cites Article 19 of the *Montreal Convention* which states that the carrier is liable for damage occasioned by delay except if it proves that its servants and agents "took all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures." The applicants seek to adduce this new evidence to establish that "Air Canada continues to apply" this policy "even where it is not disputed that the delay was within Air Canada's control". The applicants confirm in their reply submissions (paras. 6-7) that the evidence tends to increase the probability of what is alleged, namely, that Air Canada was ignoring the provisions of the *Montreal Convention* and applying instead the impugned policy. Therefore, the evidence is only confirmatory of the applicants' case, that is, assuming one could draw the conclusions from this evidence which the applicants suggest.

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.

2. Re-Open the Case

What is clear is that this evidence was not available at the time of the application. The events described in the statements took place in April of this year, whereas the application was submitted in December of 2015. Although the applicants have not asked that the case be reopened, the Agency is of the view that this would be the proper mechanism to admit newly discovered evidence.

In *Conseil scolaire francophone de la Colombie-Britanique v. British Columbia (Education)*, 2015 BCSC 1555 (CanLII) the plaintiffs sought to tender a recently prepared report dated after the close of their case as rebuttal evidence. The defendants objected on the basis that it was not proper rebuttal just because it was recent. The Court noted that the report did not go to an issue raised by the defendants. Rather, it was being submitted to support the claims made by the plaintiffs. The Court found that the plaintiffs misunderstood the concept of rebuttal evidence and how it differs from reopening a case.

> [13] The plaintiffs' position seems to misconceive the test for rebuttal evidence, and how it differs from the test for reopening a case, "two procedural steps that are partially joined at the conceptual hip" (*Thompson v. Choi*, 2015 BCSC 35 (CanLII) at para. 16).
>
> [14] In my view, because the test for rebuttal evidence is designed to ensure the defendants know the case to be met (*Allcock* and *Krause*), it is concerned with whether the plaintiffs could have anticipated a position taken or evidence put forward by their adversaries. By contrast the test on re-opening a case is concerned with the discovery of new evidence to support the plaintiffs' case (*Mohajeriko v. Gandomi,* 2010 BCSC 60 (CanLII) at para. 21, citing *Clayton v. British American Securities Ltd.,* [1934] 49 B.C.R. 28 (C.A.)) [emphasis added].

Whether an application to reopen is granted is a matter of discretion. Where the request to reopen is made prior to a decision being made, as opposed to after the decision has issued, a broader discretion is recognized. However, the Agency has determined that it would not be in the interest of justice in this case to admit the new evidence at this stage of the proceedings *Whyte v. Canadian National Railway*, 2010 CHRT 6 (CanLII) at para. 31 citing *Vermette v. Canadian Broadcasting Corporation* [1996] F.C.J. No. 1274.

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.

There is a risk that the passengers who provided these statements would be prejudiced by a decision of the Agency addressing this dispute in a proceeding in which they are not a party. While the applicants point out that these passengers are witnesses and not parties, they also are asking that the Agency find that Air Canada did not comply with its tariff and the *Montreal Convention* in dealing with their complaint. Such a determination is more appropriately dealt with in a separate application. In such a context, these passengers would be entitled to full participation. Such a determination should not be made here where only one of the parties to the dispute is represented.

Contrary to what is indicated by the applicants at paragraph 9 of their reply submissions, Air Canada was under no obligation to submit evidence to challenge the statements before the request to submit rebuttal evidence was granted as per subsection 34(2) of the Dispute Adjudication Rules.

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*.).

Rule 4 of the Dispute Adjudication Rules states that 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. To allow this new evidence at this stage would not be consistent with this principle.

Accordingly, the Agency will not accept the filing of this new evidence.

The applicants request for an extension of time was not strenuously opposed and is reasonable in the circumstances. The reply was previously due May 18, 2016, and should be filed without further delay.

Conclusion

The applicants' request pursuant to section 34 of the Dispute Adjudication Rules to submit the proposed evidence in rebuttal is denied.

The Agency grants the applicants' request made pursuant to section 30 of the Dispute Adjudication Rules, and provides the applicants until 5:00 pm Gatineau local time on June 17, 2016 to file its reply, and to provide a copy to Air Canada.

All correspondence and pleadings should refer to Case No. 15-05627 and be filed through the Agency's Secretariat e-mail address: secretariat@otc-cta.gc.ca.

BY THE AGENCY:

(signed)

William G. McMurray
Member

(signed)

Sam Barone
Member

(signed)

P. Paul Fitzgerald
Member

Halifax, NS

lukacs@AirPassengerRights.ca

June 16, 2016

VIA EMAIL
The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Reply

Please accept the following submissions as a reply, pursuant to Rule 20 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("*Dispute Rules*"), to Air Canada's Answer of January 20, 2016.

OVERVIEW

The *Montreal Convention* is an international treaty that has the force of law in Canada, and which governs the liability of airlines vis-à-vis passengers. The *Montreal Convention* imposes on airlines a regime of strict (but not absolute) liability for damages occasioned by delay of passengers up to approximately **$9,000.00** per passenger.

The Application deals with the reality of Air Canada having two inconsistent sets of policies with respect to compensation of passengers for expenses incurred as a result of delay in transportation:

(1) Air Canada's official policy, published in the Tariff, which requires Air Canada to compensate passengers in accordance with the provisions of the *Montreal Convention*; and

(2) Air Canada's unofficial policies, which purport to limit Air Canada's liability with respect to delay to **$100.00** (or $150.00) of hotel costs per night, and approximately **$30.00** of meals per day, and in most cases refers to such amounts as "goodwill" payments.

Air Canada's unofficial policies use a cause-and-fault oriented terminology, and distinguish between three different types of delay in the transportation of passengers:

(i) "Schedule change," which means a delay caused by events that occur more than 48 hours before the passenger's original scheduled flight departure time.

Air Canada's Answers dated April 6, 2016, para. 13

(ii) "Irregular operations (IROP), uncontrollable situations," which means delay caused by events that occur within 48 hours before the passenger's original scheduled flight departure time, but outside Air Canada's control or influence.

Air Canada's Answers dated January 19, 2016, Q4

(iii) "Irregular operations (IROP), controllable situations," which means delay caused by events that occur within 48 hours before the passenger's original scheduled flight departure time, and over which Air Canada "has direct control or influence."

Air Canada's Answers dated January 19, 2016, Q4

Air Canada's position is that it is not liable for the expenses of passengers in the case of a "schedule change" or an "irregular operations, uncontrollable situation," and that any payment in such situations is merely a "goodwill" measure that is not governed by the *Montreal Convention*. Accordingly, Air Canada's agents are instructed that the amount of compensation "should never exceed" the caps set out in the unofficial policies in these cases.

"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1
"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2

Air Canada alleges that the cancellation of Mr. Johnson's flight on December 10, 2013 due to mechanical problems with Air Canada's own aircraft was "uncontrollable" and as such Air Canada is not liable for the expenses of Mr. Johnson under the *Montreal Convention*

Air Canada's Answer dated January 20, 2016, paras. 16-17

Air Canada also alleges, without any documentary evidence, that in the case of "controllable" delays, the caps set out in the unofficial policies are often exceeded.

Air Canada's Answer dated January 20, 2016, para. 29

Finally, Air Canada challenges the Agency's jurisdiction to grant the sought remedies.

Air Canada's Answer dated January 20, 2016, para. 36

In reply, the Applicants submit, among other things, that:

(a) the unofficial policies (Documents A-1 and A-2) contain exclusions and/or limitations of liability that are not stated in Air Canada's International Tariff, contrary to s. 122 of the *Air Transportation Regulations*;

(b) Air Canada cannot lawfully exonerate itself from liability for all delays caused by "schedule change" or by "irregular operations, uncontrollable situations" as defined by Air Canada, and the cause-and-fault oriented definitions are inconsistent with the *Montreal Convention*'s liability-based regime;

(c) regardless of Air Canada's choice of terminology in its unofficial policies, Air Canada failed to prove the defence set out in Article 19 of the *Montreal Convention*, and as such it is liable for the expenses incurred by Mr. Johnson;

(d) Air Canada presented no documentary evidence with respect to the compensation of passengers affected by "controllable" delays, and failed to address the Applicants' evidence of specific cases of passengers who were refused compensation based on Air Canada's unofficial policies; and

(e) the Agency has jurisdiction to grant the sought remedies, including the corrective measures.

SUBMISSIONS

(a) Contraventions of s. 122 of the *ATR*

1. The "Expense Policy" and "Expense Guidelines" (Documents A-1 and A-2) tendered by Air Canada contain limitations and/or exclusions of liability in the case of delay of passengers caused by "schedule change" or "irregular operations (IROP), uncontrollable situations." For example, the "Expense Policy" states that:

> All compensation is goodwill and costs should never exceed amounts above.
>
> [Emphasis added.]

The "Expense Guidelines" contains a similar statement.

"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1
"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2

2. Air Canada explicitly stated in its Answer to the Application that:

> [...] Air Canada is not bound to provide compensation for delays and/or cancellations that were uncontrollable.

Air Canada's Answer dated January 20, 2016, para. 19

> Limits only apply in the case of goodwill offers where Air Canada is not bound to reimburse passengers.
>
> **Air Canada's Answer dated January 20, 2016, para. 6**

3. Thus, it is undisputed that Air Canada's position, policy and practice is that:

   (a) Air Canada can and does exclude all liability for the expenses incurred by passengers who are delayed because of what Air Canada calls a "schedule change" or "irregular operations (IROP), uncontrollable situations"; and

   (b) Air Canada would reimburse passengers in such cases only as a goodwill measure and only up to the limits set out in the unofficial policies (approx. $130.00 per day).

   Whether Air Canada calls the internal document setting out this policy an "Expense Policy" or "Expense Guidelines" does not alter the fact that Air Canada's agents are directed to strictly adhere to the monetary caps ("should never exceed"; emphasis added).

4. This policy concerns exclusion and/or limits to Air Canada's liability and/or failure of Air Canada to operate the service or failure to operate on schedule, but is not set out in Air Canada's International Tariff.

   Air Canada's Answers dated January 11, 2016, Q2

5. Subsection 122(c) of the *ATR* requires Air Canada to set out in its tariff its policy with respect to limits and exclusions of liability and failure to operate the service or failure to operate on schedule. The policy must be set out in such a manner that "the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning."

   ***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 40**
   ***Air Transportation Regulations*, s. 122(c)**

6. Therefore, Air Canada has contravened s. 122 of the *ATR* by failing to set out in its International Tariff, at the very least:

   (a) the limitation and/or exclusion of liability summarized at paragraph 3 above, and

   (b) the definitions of a "schedule change" and "irregular operations (IROP), uncontrollable situations."

7. Air Canada's policy with respect to delay of passengers caused by what Air Canada calls "controllable" events will be addressed below.

(b) Inconsistency with the *Montreal Convention*

8. Air Canada seeks to circumvent the strict liability regime of the *Montreal Convention* by using a cause-and-fault oriented terminology of "controllable" and "uncontrollable" events and "schedule change." This terminology serves the sole purpose of lending an air of legitimacy to Air Canada's systemic and blatant disregard of its obligation to compensate passengers in accordance with the *Convention*; however, liability does not and cannot depend on the choice of terminology.

(i) Air Canada cannot exclude liability for all "uncontrollable" delays

9. Air Canada's unofficial policies (Documents A-1 and A-2) are based on the erroneous premise that under the *Montreal Convention*, Air Canada is not liable for the damages of delayed passengers unless the delay was caused by "controllable" events. In fact, Air Canada explicitly stated in its Answer to the Application that:

> [...] Air Canada is not bound to provide compensation for delays and/or cancellations that were uncontrollable.
>
> **Air Canada's Answer dated January 20, 2016, para. 19**

10. Part of the mischief is in Air Canada's definition of "controllable" and "uncontrollable":

> Controllable: Any circumstance that Air Canada has direct control or influence over.
>
> Uncontrollable: Any circumstance outside Air Canada's control or influence.
>
> **Air Canada's Answers dated January 19, 2016, Q4**

11. While these definitions might possibly be adequate for a fault-based notion of liability, it is inconsistent with the presumption of liability created by the first sentence of Article 19 of the *Montreal Convention*, and the high threshold for the defence established by its second sentence.

12. Contrary to Air Canada's position, the cause of the delay and whether the airline had a direct control or influence over the cause of the delay does not determine liability:

> [...] In short, the first sentence of Article 19 states clearly that the carrier is liable for delay. Article 19 only brings the carrier's servants and agents into play in terms of avoidance of liability when it has proved that these personnel took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

> [...] what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?
>
> ***Lukács v. United*, 467-C-A-2012, paras. 41-42**
> ***Lukács v. Porter*, 16-C-A-2013, paras. 104-105**

13. The Applicants adopt the Agency's analysis in these two decisions as their own position, and submit that Air Canada cannot exclude liability for damages occasioned by delay in the transportation of passengers on the basis that the delay was caused by "uncontrollable" events, because it falls short of what is necessary in order to establish a defence under Article 19.

14. Therefore, Air Canada's unofficial policies are inconsistent with the *Montreal Convention* in that they purport to exclude and/or limit Air Canada's liability for delay in the transportation of passengers caused by "uncontrollable" events.

(ii) Air Canada cannot exclude liability for delays caused by "schedule change"

15. Air Canada's unofficial policies (Documents A-1 and A-2) also provide that in the case of a delay of passengers caused by a "schedule change," all compensation is goodwill and their amount should never exceed the amounts set out in the unofficial policies (approximately $100.00 per day).

> **"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1**
> **"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2**

16. In practical terms, this means that Air Canada's policy is that the airline is not liable for the damages of passengers who are delayed as a result of a "schedule change," which Air Canada defines as follows:

> [...] a Schedule Change encompasses events that occur beyond 48 hours prior to a passenger's original scheduled departure flight time.
>
> **Air Canada's Answers dated April 6, 2016, para. 13**

17. The Applicants submit that Air Canada cannot avoid liability for damages to passengers who were delayed on the basis that the delay was caused by events that occurred more than 48 hours prior to the passenger's original scheduled departure. As a matter of law, the time when the cause for the delay arose is not recognized as a defence under Article 19 of the *Montreal Convention*. In fact, the longer the time is between the cause of the delay and the scheduled departure, the more time Air Canada has to react and take measures to prevent or mitigate the damage.

18. While there have been numerous attempts by airlines to avoid liability by recasting delay in the transportation of passengers as a "schedule change" (typically using what used to be "Condition 9" on paper tickets) there are a wealth of authorities confirming that liability does not depend on such a choice of terminology.

(a) In *Jones v. Britannia Airways Limited*, the County Court overturned the dismissal of a passenger's claim for damages for delay, which was dismissed by a lower court based on "Condition 9." The County Court held (referring to the *Warsaw Convention*) that:

> It is within that context that I have to consider the terms contained in clauses 9 and 11 of the actual ticket. For as Mr. Jackson, who appears on behalf of the defendants, rightly concedes, those provisions cannot exclude liability under Article 19 because Article 23 provides that shall not be the case, and any provision which has a tendency to relieve the carrier of liability, or to fix a lower sum than is provided for in the convention is to be null and void.
>
> Accordingly, the provisions contained in the ticket, and the provisions contained within the General Conditions of Carriage for Passengers and Baggage cannot, in my judgment, in any way seek to limit or narrow the rights conferred upon the passenger by virtue of inter alia the provisions of Article 19. It seems to me that that was a point which, regretfully, escaped the learned district judge.
>
> ***Jones v. Britannia Airways Limited* (Chester County Ct, 5th November 1998)**

(b) In Canada, the same conclusion was reached in *Assaf c. Air Transat A.T. Inc.*, [2002] J.Q. no 8391, where the court held that "Condition 9" was null and void according to Article 23 of the *Warsaw Convention* (which is identical in its effect to Article 26 of the *Montreal Convention*):

> [11] La condition 9 contredit les articles 19 et 20 (1) de la Convention sous trois rapports essentiels : le devoir de transporter sans retard est remplacé par une simple obligation de faire de son mieux, les heures de départ et d'arrivée indiquées sur le billet sont exclues du contrat et le transporteur s'exonère de toute responsabilité pour les correspondances ainsi que les retards.
>
> [12] Sous ces trois aspects, la condition 9 est nulle par application de l'article 23.
>
> ***Assaf c. Air Transat A.T. Inc.*, [2002] J.Q. no 8391, paras. 11-12**

(c) A similar conclusion was reached in *Zikovsky c. Air France*, 2006 QCCQ 948, where it was held that "Condition 9" both contravenes the *Montreal Convention* and tends to relieve the carrier from performing the essence of the contract.

***Zikovsky c. Air France*, 2006 QCCQ 948, paras. 23 and 30-31**

19. Therefore, Air Canada's unofficial policies are inconsistent with the *Montreal Convention* in that they purport to exclude and/or limit Air Canada's liability for delay in the transportation of passengers caused by a "schedule change."

(c) Liability for the expenses incurred by Mr. Johnson

20. The flaw in Air Canada's cause-and-fault centred terminology is underscored by the airline's argument that it is not liable for Mr. Johnson's expenses because the breakdown of Air Canada's own aircraft was, allegedly, an uncontrollable event.

Air Canada's Answer dated January 20, 2016, paras. 16-17

21. The Applicants submit that Air Canada failed to discharge its burden of proof under Article 19 of the *Montreal Convention*. Air Canada has failed to establish that it has taken all reasonable measures to prevent the breakdown of its aircraft; furthermore, it failed to lead any evidence about what steps it took in the face of the flight cancellation to prevent or mitigate the damage to Mr. Johnson.

(i) Paragraph 6 of the Statement of Mr. Liepins

22. The Applicants ask that the Agency disregard paragraph 6 of the Statement of Mr. Liepins tendered by Air Canada, which is an improper attempt to put forward a conclusion or argument in the guise of evidence.

23. In the alternative, the Applicants ask that the Agency draw adverse inference with respect to paragraph 6 of the Statement of Mr. Liepins, because Air Canada failed to produce any records capable of supporting the conclusion that the "malfunction could not have been detected or prevented by Air Canada," even though the Applicants explicitly requested such productions.

Air Canada's Answers dated April 6, 2016, Q16 and Q17

(ii) The facts

24. The Applicants accept that Flight AC 889 on December 10, 2013 was cancelled due to a mechanical issue.

25. Based on the "Production Permit," the Applicants also accept that the aircraft that was supposed to operate Flight AC 889 on December 10, 2013 (bearing Tail no. 642) has been used for a total of **91384 hours**.

Air Canada's Answers dated April 6, 2016, Document AQ3-1

26. Bearing in mind the average aircraft utilization of approximately 10 hours per day, the aircraft was approximately **25 years old** (91384 / 3650).

(iii) The law

27. In order to exonerate itself from liability under Article 19 of the *Montreal Convention*, the airline must prove that the airline, its servants, and its agents have taken all reasonable measures to prevent the delay or that such measures were not available. For greater clarity, the burden of proof is on the airline.

***Montreal Convention*, Article 19**

28. Mechanical issues affecting only one particular aircraft are not recognized as Force Majeure capable of establishing a defence under Article 19 of the *Montreal Convention*.

***Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11, para. 13**
(citing Louis Jolin: Le droit du tourisme au Québec, 2ème Édition, 2005,
Les Presses de l'Université du Québec, p. 82)

29. Unlike systemic issues affecting all aircraft of a particular model, mechanical issues affecting only one particular aircraft are not beyond the control of the airline:

> [...] the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of that carrier, since the latter is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business.
>
> [Emphasis added.]

***van der Lans v. KLM*, European Court of Justice, Case C-257-14, para. 43**

30. Mechanical issues are inherent to the normal exercise of an air carrier's activity and they must be anticipated by the airline:

> Dans un temps où la mondialisation des voyages et des échanges commerciaux s'accentue de façon considérable de jour en jour, il est raisonnable de s'attendre à une grande régularité de services chez une société aérienne de l'envergure de l'intimée Air Canada. Certes, le transporteur aérien demeure tributaire des phénomènes atmosphériques. En revanche, il doit escompter la possibilité de bris mécaniques et prévoir pour cette raison des solutions efficaces de rechange afin d'assurer le service promis.
>
> [Emphasis added.]

***Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, para. 15**

31. Regardless of the (initial) cause of the delay, in order to exonerate itself from liability under the *Montreal Convention*, the carrier must lead evidence to prove that no reasonable alternative transportation existed for the affected passengers:

> Il ne lui suffisait pas d'affirmer que l'on avait tenté de trouver des sièges sur un vol d'une autre compagnie deux heures plus tard mais que les passagers seraient arrivés de toute façon en retard. Il lui incombait de prouver qu'aucune solution de rechange raisonnable n'existait, par substitution ou autrement, y compris la mise en opération d'un autre appareil. En l'absence d'une telle preuve, la présomption de responsabilité doit jouer contre l'intimée Air Canada.
>
> ***Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, para. 16**

(iv) Application of the law to the facts of the case

32. The breakdown of the aircraft that was designated to operate Flight AC 889 on December 10, 2013 was within Air Canada's control for the following reasons:

(a) There is no evidence to suggest that the breakdown of Air Canada's aircraft was caused by a systemic (manufacturing) issue affecting all aircraft of this model, or by an act of terrorism or sabotage.

(b) Air Canada has full control over its fleet, the aircraft that it uses to operate its flights, and their maintenance.

(c) Air Canada chose to use a **25-year-old** aircraft to operate Flight AC 889 on December 10, 2013.

(d) Just like cars, the older an aircraft is, the more prone it is to mechanical issues. Thus, Air Canada could and should have anticipated the breakdown of the aircraft.

33. There is no evidence that once Flight AC 889 was cancelled, Air Canada took all reasonable measures to transport Mr. Johnson to his destination on the same day nor that it was impossible to do so. Air Canada led no evidence at all about the availability of seats (including in higher classes) on its flights on December 10, 2013 nor about availability of seats on flights of other airlines.

34. Therefore, as in *Quesnel*, Air Canada failed to discharge its burden of proof, and as such it is liable for the expenses incurred by Mr. Johnson. Reimbursement of these expenses is not a "goodwill" measure, but rather a legal obligation, which the Applicants are asking the Agency to recognize and enforce.

(d) Compensation of passengers delayed as a result of "controllable" events

(i) Undisputed facts

35. Air Canada did not dispute that two passengers (unrelated to Mr. Johnson) were denied compensation for their expenses based on its impugned unofficial policies. Thus, Air Canada has accepted that it failed to apply its tariff with respect to these passengers.

Email of Air Canada (February 6, 2014), Document No. 2
Email of Air Canada (November 12, 2014), Document No. 3

36. These undisputed facts alone are sufficient to trigger the Agency's jurisdiction under s. 113.1 of the *ATR* to order corrective measures (which does not require proof of a systemic issue). These facts also provide the evidentiary basis for further inquiry (in the sense of "train of inquiry") into the practices and unofficial policies of Air Canada with respect to compensation of passengers who are delayed as a result of "controllable" events, where Air Canada does not dispute its liability.

(ii) Perjury, fraud, and adverse inference

37. The representations and purported evidence tendered by Air Canada contradict each other, and are false and/or fraudulent:

(a) On the one hand, according to the statement of Ms. Robinson:

> In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded as per the Lead's authorization [...]

Air Canada's Answer dated January 20, 2016, Document A-6, para. 10

(b) On the other hand, Air Canada stated in response to the Applicants' request that it produce documentary evidence (records) pertaining to Ms. Robinson's statement that:

> [...] Air Canada does not keep a register of previously processed passenger refund requests which contains the itemized list of the compensation heads it paid to passengers, and does not keep record of whether these payments were made pursuant to controllable or uncontrollable Delays.

Air Canada's Answers dated April 6, 2016, para. 33

38. These two statements cannot be simultaneously true, because without a register of previously processed claims, Ms. Robinson has no way of knowing whether the recommended limit was "often exceeded."

39. Thus, either Ms. Robinson made her statement without any factual basis, or Air Canada deceived the Agency by claiming to have no records of past claims in order to shield its conduct from scrutiny.

    (a) Due to the statutory obligation to retain records set out in ss. 230 and 248 of the *Income Tax Act*, and in the absence of sworn evidence from Air Canada explaining its failure to retain the records, it is submitted that the Agency should find that Air Canada has fraudulently claimed to have no records of past claims.

    (b) With respect to Ms. Robinson, who is an employee at the mercy of Air Canada, the Applicants submit that it is possible that she merely exaggerated in her statement, and she did not intentionally make a false statement.

40. Either way, the Agency should draw an adverse inference from the failure of Air Canada to produce documentary evidence in support of the bald allegation that the monetary limits set out in the unofficial policies are "often exceeded."

41. Furthermore, although Air Canada has been aware of the Application since November 2015, and it has full control over its own record keeping, it has been unable to produce evidence of even one passenger who received compensation in excess of the limits in the unofficial policies.

42. Therefore, it is submitted that, on balance of probabilities, Air Canada does not compensate passengers who are delayed as a result of "controllable" events in accordance with the *Montreal Convention*, but rather uses its unofficial policies.

43. Even if the Agency were to find that Air Canada applied its tariff correctly with respect to what Air Canada calls "controllable" events, this has no bearing on the questions of law as to whether Air Canada can lawfully exclude and/or limit its liability with respect to "uncontrollable" events and "schedule changes."

44. The Applicants submit that the root of the problem is that the cause-and-fault based categories used by Air Canada (controllable, uncontrollable, and schedule change) are incompatible and inconsistent with the liability regime of the *Montreal Convention*, and are not a proper basis for determining liability under Article 19.

(e) Remedies

(i) The *Cheung v. Westjet* case

45. In *Cheung v. Westjet*, cited by Air Canada, the Panel was concerned that "Even if the Agency had accepted Ms. Cheung's application in its entirety, it would have only captured five air carriers, providing a small proportion of the transborder and international air services market."

***Cheung v. Westjet*, 324-AT-A-2015, para. 62**

46. The concern raised in *Cheung* is not relevant to the present case, because:

(a) the *Montreal Convention* applies equally and uniformly to all airlines; and

(b) the present Application does not seek to impose additional obligations on Air Canada, but rather seeks to enforce the obligations that apply to each and every airline transporting passengers to and from Canada, namely, the *Montreal Convention*.

Thus, it is not necessary to consider the practices of other airlines in order to resolve the present Application.

(ii) Mandate and jurisdiction of the Agency

47. Contrary to what is stated at paragraph 39 of Air Canada's submissions, the mandate of the Agency is different than the mandate of common law courts, whose primary role is to resolve private disputes of individual parties before them. In sharp contrast, the Agency has broad powers to order "corrective measures" that go beyond individual remedies for the complainants before the Agency.

***Lukács v. Air Canada*, 250-C-A-2012, para. 30**

48. Air Canada's argument that the powers under s. 113.1 of the *ATR* are confined to granting remedies to individual complainants flies in the face of the numerous Agency decisions and orders, where the Agency exercised these powers on its own motion, and without the participation of any individual who was adversely affected by the carrier's unlawful conduct.

Decision No. 232-A-2003 (affirmed in *Northwest Airlines Inc. v. CTA*, 2004 FCA 238)
Order No. 2005-A-8

49. More recently, in *Lukács v. WestJet*, the Agency directed WestJet to apply a tariff provision of its international tariff "in a manner consistent with paragraph 3 of Article 36 of the Montreal Convention."

***Lukács v. WestJet*, 420-C-A-2014, para. 23**

50. Less than a year ago, the Agency issued on its own motion a show cause order in which it was contemplating to order SkyGreece to:

> - take immediate corrective measures to properly apply its international tariff for all passengers affected by schedule irregularities, including
>
> – Informing passengers of their options and providing them with a copy of the tariff;
>
> – Implementing forthwith the option chosen by passengers;
>
> – Establishing a 1-800 help line where passengers can be directed to a person who can accept and address their claim; and
>
> – Updating its website to fully explain the measures put in place to address the situation.

Decision No. LET-A-55-2015

51. Based on these authorities, the Applicants submit that the Agency has jurisdiction to grant the sought corrective measures (in fact, even in the absence of an individual complainant).

(iii) Nature of the corrective measures being sought

52. Contrary to what is suggested by Air Canada at paragraph 36 of its submissions, the Applicants are not seeking arbitrary remedies unrelated to Air Canada's tariff. Rather, the Applicants are asking the Agency to order Air Canada to take corrective measures that will ensure compliance with the terms and conditions set out in Air Canada's tariff, namely, compensation of passengers in accordance with the *Montreal Convention*.

53. Contrary to what is suggested by Air Canada at paragraph 37 of its submissions, the Applicants are not asking the Agency to order Air Canada to make any kind of goodwill payments, but only payments that passengers are entitled to by law under the *Montreal Convention*.

54. The Applicants submit that Air Canada has been systematically and improperly denying and/or limiting claims for compensation for delay and misrepresenting the partial payments that it did make as "goodwill." Air Canada has done so based on its unofficial policies (Documents A-1 and A-2), which provide with respect delays caused by "uncontrollable" events and "schedule change" that:

> All compensation is goodwill and costs should never exceed amounts above.

As a result it failed to apply the *Montreal Convention*, which is incorporated into its tariff.

"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1
"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2

55. The unofficial policies tendered by Air Canada (Documents A-1 and A-2) and its answers to the questions directed to it demonstrate that Air Canada has failed to apply the terms and conditions set out in its tariff by applying these unofficial policies, which exclude and/or limit liability in cases that Air Canada defines "uncontrollable" and "schedule change," instead of the provisions of the *Montreal Convention*. The Applicants submit that these definitions are inconsistent with the liability regime of the *Montreal Convention*.

56. The Applicants thus ask the Agency to order corrective measures that require Air Canada to fulfill its obligations under its tariff and the *Montreal Convention*.

57. The scope of the corrective measures sought is confined to undoing the damage that Air Canada caused to passengers while unjustly enriching itself, and ensuring that passengers receive the compensation that they are lawfully entitled to.

58. Therefore, the nature of the corrective measures being sought by the Applicants is similar to the ones contemplated in Decision No. LET-A-55-2015 of the Agency with respect to SkyGreece.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

Cc: Mr. Jean-Francois Bisson-Ross, Counsel - Litigation, Air Canada
(Jean-Francois.Bisson-Ross@aircanada.ca)

Kerianne Wilson, Counsel - Regulatory & Litigation, Air Canada
(kerianne.wilson@aircanada.ca)

Form 10: Position statement

Who should use this form?

An interested person.

Purpose

To provide comments on a dispute proceeding before the Agency.

When should you file this form?

Before the close of pleadings. Prior approval from the Agency is not required to file a position statement.

Refer to section 23 of the Dispute Adjudication Rules for more information.

What happens next?

The position statement will be placed on the public record unless a request for confidentiality is made in accordance with section 31 and accepted by the Agency. The Agency will consider your position statement during its decision-making process.

A person who files a position statement is not a party to the dispute proceeding. You will have no participation rights in the proceeding and you are not entitled to be copied on any further information or submissions filed in the proceeding.

You may, however, be required to respond to questions or information requests from the Agency or, upon request and with prior approval from the Agency, from a party to the dispute proceeding.

Part 1 of 3: Contact Information

Case identification

Name of applicant(s):
Mr. Christopher C. Johnson and Dr. Gábor Lukács

Name of respondent(s):
Air Canada

Case number:
15-05627

Who is filing this form? Required:
I'm filing on behalf of myself

Contact information: Person filing a position statement

First name:
Darren

Last name:
Powell

Street address:
96 Muriel Ave

City:
Toronto

Province/Territory/State:
Ontario

Postal/Zip code:
M4J2Y4

Country:
Canada

Email address:
aussieinca@yahoo.com

Fax:
N/A

Primary telephone

Phone:
+14164655942

Extension:
N/A

Part 2 of 2: Details of the Application

I support the position of: Required:
The applicant

Clearly set out the arguments in support of your response.:
To Whom it may concern, I am writing to you today to document my similar experience to Christopher C. Johnson and Air Canada's failure to properly recompense me for their refusal to properly check me in to both of my confirmed flights on 09 Jan 2016. Their actions of an incorrect checkin, and refusal to correct the error that I made them aware of over two hours before the departure of my first flight, resulted in my unwilling denial of boarding in Frankfurt and significant stress and delay in my return to Toronto. On my return to Toronto, I submitted my CAD$228 expenses that Air Canada had grudgingly accepted to reimburse, but was instead sent a cheque for $120 and informed that this is governed by "guidelines that are used consistently". I believe Air Canada has not abided by the Montreal Convention by the fact that their agents were the direct cause of my inability to board my flight through actions entirely within their control. Furthermore they have taken advantage of only providing telephone support and verbal instructions during their failure to board me, to then renege on their clear agreement to cover my overnight costs, and provide procedural obstacles (refusal to respond to emails, and providing to guidance to further dispute resolution) to prevent me recovering the debt they owed to me. Thankyou for your attention Darren Powell

Do you have supporting documents? Required

I have supporting documents.

If you have documents that you are relying on to support your position statement, you must file them on the same day.

Supporting documents

List the documents you are relying on to support your position statement.:
EmailComplaint-1.pdf

How do I file my documents?

After you submit the form, you will be emailed a link to a secure file transfer

system. You will have an account to manage your documents.

Please upload your files right away.

You can also file documents by fax, courier, or personal delivery.

Personal Information Collection Statement

Please read the Personal Information Collection Statement and click I have read" below (opens in a new window).

I have read and understood the Personal Information Collection Statement:
Yes

Please wait while we submit your form.

Subject: Re: Issue#:ABDA-16VGXST:02/02/2016 16:20:06:Expense Claim **340**

From: Darren (aussieinca@yahoo.com)

To: support@help-aircanada.com;

Date: Wednesday, February 3, 2016 4:37 PM

That is unacceptable, as I was informed by your operator that my full over night expenses would be covered provided I accepted the hotel recommended by Lufthansa. Please forward a draft in the amount of $228.40 as documented. This incident was wholly caused by your employee error even after I raised their mistake they still refused to correct it.

Sent from Samsung Mobile

That is unacceptable, as I was informed by your operator that my full over night expenses would be covered provided I accepted the hotel recommended by Lufthansa. Please forward a draft in the amount of $228.40 as documented. This incident was wholly caused by your employee error even after I raised their mistake they still refused to correct it.

Sent from Samsung Mobile

 -------- Original message -------- From: support@help-aircanada.com
Date:2016-02-03 3:55 PM (GMT-05:00) To: aussieinca@yahoo.com
Subject: Issue#:ABDA-16VGXST:02/02/2016 16:20:06:Expense Claim

==========

Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel

==========

Dear Mr. Powell,

Thank you for your correspondence regarding your recent travel with Air Canada and our Star Alliance partners.

We were sorry to learn of the difficulties experienced in Frankfurt and for the lack of information and assistance received. Please be assured that your comments have been documented for review by the appropriate management teams.

You will soon receive a draft in the amount of $120 CAD which is the standardized amount permitted for one nights' hotel stay and meals. We understand that this does not cover the entirety of your expense and as a measure of goodwill, we are pleased to provide you with an Air Canada Gift Card in the amount of $250 CAD to offset the remainder. Your gift number is: [redacted]

The four digits after the slash '/' represent the Security Code/Pin. Please refer to the information below for complete details of your gift card.

Once again, we apologize for the disruption to your schedule and we hope to have the opportunity to be

of service to you in the near future.

341

Sincerely,
Faye Frances
Customer Relations

ABOUT YOUR AIR CANADA GIFT CARD

Your gift card is activated and ready to use. Simply provide your gift card number at time of payment on www.aircanada.com (Canadian and U.S. editions only) or through the Air Canada Call Centre at 1-888-247-2262.

To pay for the flight, you can use:

One (1) Air Canada Gift Card plus another form of payment if the card's value is less than your grand total; or
Up to two (2) Air Canada Gift Cards if the combined value covers the grand total of your purchase

Additional Terms and Conditions are as follows:

Terms & Conditions
Air Canada Gift Card is redeemable at designated locations. Only for purchase of air travel and ancillary services offered by Air Canada, Air Canada Express and Air Canada rouge operated flights. Maximum two forms of payment combinable on single purchase. Treat card like cash. Stored value not refundable/redeemable for cash, except where required by law. Card may be replaced under certain conditions for a $25.00 fee, subject to applicable law. Use of card constitutes acceptance of all Terms and Conditions. Air Canada reserves the right to change Terms and Conditions without notice.

Frequently Asked Questions can be found at:

http://www.aircanada.com/en/giftcard/faq.html

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

From: aussieinca@yahoo.com
Sent: 02/02/2016 02:20 PM
Subject: Expense Claim

To whom it may concern,
I am following up with the expenses I incurred after your staff caused me to be stranded in Frankfurt overnight on JAN 9th this year.
Timeline
1000:checkin in Stockholm
Checkin attendant checks bags to Frankfurt only. Attendant states that Unable to fix after bags in system and advises me to contact Lufthansa on arrival as 90 minute window is plenty of time to check in again.
1540: touchdown in FRANKFURT.
1555: Terminal A connecting flights agent advises me pick up luggage and checkin via Lufthansa desk

300

342

1605: Lufthansa automated desk 300 advises me to checkin in Terminal B special baggage
Lufthansa manual desk sends me to special baggage
1610: Special baggage sends me to Air Canada desk
1615: Nobody at Air Canada desk
1625: Attempt to checkin at kiosk denied [redacted].
1635: Contact Air Canada Ticketing, she tells me the flight is closed , no possibility to get on. I have to contact Lufthansa ticketing
1645: Lufthansa makes many calls. Air Canada cancelled my booking back in 06Jun (not January JUNE) . After 20mins they advise I contact Air Canada Help line
1730: Store baggage as I cannot carry suitcase, skis, bootbag and carry-on around the airport.
1745: Found outlet to charge phone and commence calling Air Canada for support
1st agent tells me it's my fault and that she cannot help. I must go to Checkin counter and book a flight to Munich at 9pm. I tell her the counter is empty but she does not believe me and terminates call
2nd agent I lose phone connection
3rd agent books me on a flight in the morning through Munich to Toronto. I am told that I must contact Lufthansa who will inform me which hotel I can stay in
2050: Return to Lufthansa ticketing to get advice on Hotel. After a long discussion I am advised to book hotel through Welcome Center. I am also told I should present to security gate before 6am to ensure I make it on flight
2145: Book Hotel Through Welcome center
2200: Catch shuttle to Park Inn and order first food since midday
2245: Update my friends and family who are concerned
0000: Sleep
0430: wake up after very little sleep
0500: take shuttle back to airport and pickup luggage
0530: wait 15mins at unattended oversize baggage counter before another staff member agrees to check my luggage
0600: pass through security, fly to Munich and Toronto
1515(Toronto Time): Arrive at Pearson airport a day late.

Juggling so much luggage through the airport has also aggravated my lower back and I continue to see a physiotherapist for this.

I have attached a scan of my expenses and look forward to hearing how you will compensate for the time, stress and extra costs your multiple errors caused.

Darren Powell

REPEATED

Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel

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One (1) Air Canada Gift Card plus another form of payment if the card's value is less than your grand total; or
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Additional Terms and Conditions are as follows:

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Air Canada Gift Card is redeemable at designated locations. Only for purchase of air travel and ancillary services offered by Air Canada, Air Canada Express and Air Canada rouge operated flights. Maximum two forms of payment combinable on single purchase. Treat card like cash. Stored value not refundable/redeemable for cash, except where required by law. Card may be replaced under certain conditions for a $25.00 fee, subject to applicable law. Use of card constitutes acceptance of all Terms and Conditions. Air Canada reserves the right to change Terms and Conditions without notice.

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Sent: 02/02/2016 02:20 PM
Subject: Expense Claim

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2245: Update my friends and family who are concerned

0000: Sleep

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Darren Powell

From Secretariat.Secretariat@otc-cta.gc.ca Thu Jun 23 15:11:53 2016
Date: Thu, 23 Jun 2016 18:11:44 +0000
From: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>
To: "aussieinca@yahoo.com" <aussieinca@yahoo.com>
Cc: Jean-Francois Bisson-Ross <Jean-Francois.Bisson-Ross@aircanada.ca>, Gabor Lukacs <lukacs@airpassengerrights.ca>, Allison Fraser <Allison.Fraser@otc-cta.gc.ca>
Subject: Johnson and Lukacs v. Air Canada - Case No. 15-05627

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

I have been instructed by the Panel assigned to this case to communicate the following direction:

A Panel of the Canadian Transportation Agency (Agency) has reviewed your Form 10: Position Statement, submitted June 17, 2016, including the supporting documentation.

As stated on Form 10, the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104 (Dispute Adjudication Rules) allow a person to use a position statement to comment on a dispute proceeding before the Agency. However, pursuant to subsection 23(1) of the Dispute Adjudication Rules, and also as set out on the first page of Form 10, a position statement must be filed before the close of pleadings in the dispute proceeding. In Decision No. LET-C-A-24-2016, the applicants were given until 5:00 pm Gatineau local time on June 17, 2016, to file their reply, the reply was filed on that date and, according to paragraph 26(1)(c) of the Rules, pleadings closed on that day. The Agency has determined that your position statement was sent by email to the Agency at 11:42 pm on June 17, 2016. Pursuant to subsection 11(1) of the Dispute Adjudication Rules, it is deemed to be filed on the next business day, namely, June 20, 2016.

The position statement was therefore received after the close of pleadings. It is therefore not accepted for filing and will not be placed on the public record in this proceeding.

Please confirm receipt to all.

Sincerely,

Elizabeth C. Barker

Secrétaire de l’Office des transports du Canada

Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca

Tél. : 819-997-0099 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Secretary of the Canadian Transportation Agency

Canadian Transportation Agency / Government of Canada
secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca

Tel: 819-997-0099 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and DR. GÁBOR LUKÁCS

Moving Parties

– and –

CANADIAN TRANSPORTATION AGENCY and AIR CANADA

Respondents

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: October 21, 2016)

I, Dr. Gábor Lukács, of the City of Halifax in the Regional Municipality of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. I am one of the Moving Parties in the present proceeding. As such, I have personal knowledge of the matters to which I depose, except as to those matters stated to be on information and belief, which I believe to be true.

2. I am an air passenger rights advocate, and I volunteer my time and expertise to the benefit of the travelling public. My activities include:

   (a) filing approximately two dozen successful regulatory complaints with the Canadian Transportation Agency, resulting in airlines being ordered to amend their conditions of carriage and offer better protection to passengers;

(b) promoting air passenger rights through the press and social media;

(c) referring passengers mistreated by airlines to legal information and resources;

(d) offering *pro bono* representation to air passengers in matters before:

i. the Canadian Transportation Agency;

ii. the Nova Scotia Small Claims Court;

iii. the Office of the Privacy Commissioner of Canada; and

iv. the Canadian Human Rights Commission; and

(e) challenging the legality of decisions of the Canadian Transportation Agency before the Federal Court of Appeal.

3. My work and public interest litigation have been recognized by the Federal Court of Appeal in a number of judgments, including:

(a) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, relating to the open court principle in proceedings before the Canadian Transportation Agency;

(b) *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269, relating to denied boarding compensation; and

(c) *Lukács v. Canada (Canadian Transportation Agency)*, 2016 FCA 220, relating to my standing to complain about discrimination against large passengers even though I am not personally affected by the discrimination.

4. On December 3, 2015, Col. Christopher C. Johnson and I filed a joint complaint with the Canadian Transportation Agency to challenge Air Canada's Expense Policy purporting to limit its liability with respect to delay of passengers to $100.00 of hotel costs per night, $7 for breakfast, $10 for lunch, and $15 for dinner, on the basis that:

(a) the Expense Policy is not set out in Air Canada's International Tariff, contrary to s. 122 of the *Air Transportation Regulations*;

(b) the Expense Policy is unreasonable within the meaning of s. 111 of the *Air Transportation Regulations*, because it purports to fix a lower limit of liability than what is set out in the *Montreal Convention*;

(c) since 2013 or earlier, Air Canada has failed to apply the terms and conditions set out in its tariff, applying the Expense Policy and/or other unofficial policies instead of the provisions of the *Montreal Convention*, contrary to s. 110(4) of the *Air Transportation Regulations*; and

(d) Col. Johnson was adversely affected by and incurred expenses as a result of Air Canada's failure to apply the terms and conditions set out in its tariff.

5. Col. Johnson and I are seeking leave to appeal Decision No. 286-C-A-2016 of the Canadian Transportation Agency, dismissing our complaint, and four (4) interlocutory decisions that were made in the course of the proceeding.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on October 21, 2016.

Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and
DR. GÁBOR LUKÁCS

Moving Parties

– and –

CANADIAN TRANSPORTATION AGENCY and
AIR CANADA

Respondents

MOTION RECORD OF THE MOVING PARTIES

Motion for Leave to Appeal, Rule 352

VOLUME 2

Memorandum of Fact and Law

COL. CHRISTOPHER C. JOHNSON

Kanata, ON

ccjohnson@sympatico.ca

Moving Party

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

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

Allan Matte
Tel: (819) 994 2226
Fax: (819) 953 9269
Email: *Allan.Matte@otc-cta.gc.ca*

Solicitor for the Respondent,
Canadian Transportation Agency

AND TO: **AIR CANADA**
7373 Côte Vertu Boulevard West
Saint Laurent, QC H4S 1Z3

Jean-François Bisson-Ross
Tel: (514) 422 5813
Fax: (514) 422 5829
Email: *jean-francois.bisson-ross@aircanada.ca*

Solicitor for the Respondent,
Air Canada

TABLE OF CONTENTS OF VOLUME 2

Court File No.:

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 MOVING PARTIES

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Moving Parties are seeking leave to appeal Decision No. 286-C-A-2016 [Final Decision] of the Canadian Transportation Agency [Agency], dismissing their complaint concerning Air Canada's systemic breach of its obligations to delayed passengers under the *Montreal Convention*. They are also seeking leave, if separate leaves are necessary, to appeal four interlocutory decisions that were made by the Agency in the course of the proceeding.

2. The *Montreal Convention* is an international treaty that has the force of law in Canada, being Schedule VI to the *Carriage by Air Act*. It imposes a regime of strict liability on airlines with respect to delay of passengers, and a non-removable liability cap of approximately **CAD$8,500**. The *Convention* places the burden of proof on the airline to rebut the presumption of liability and establish an affirmative defence.

***Montreal Convention*, Articles 19, 22(2), 26** **App. A, p. 409**

3. In sharp contrast with the obligations and liability limit set out in the *Montreal Convention*, Air Canada has been using an Expense Policy and other similar "internal documents" to determine the amount of compensation it pays to delayed passengers; they contain schedules such as the following, which limit the compensation to **less than 2%** of the cap set out in the *Convention*:

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

Air Canada's Expense Policy **Tab 6, p. 130**

Air Canada's Expense Guidelines **Tab 15, p. 211**

4. In the Final Decision, the Agency dismissed the joint complaint of the Moving Parties about Air Canada evading its obligations under the *Montreal* Convention by using such and similar policies systematically, and in the specific case of Col. Johnson.

5. The Moving Parties submit that the Agency erred in law, denied them procedural fairness, fettered its discretion, and rendered unreasonable decisions by, among other things:

(a) barring all evidence about the systemic nature of the complaint;

(b) misinterpreting the *Montreal Convention*; and

(c) granting Air Canada's request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]**.

B. AIR CANADA SHORTCHANGED COL. JOHNSON

6. Col. Christopher C. Johnson, one of the Moving Parties, was scheduled to fly from London, UK to Ottawa on Flight AC 889 on December 10, 2013. His flight was first delayed for more than four hours with passengers on board, and then was cancelled.

Johnson Statement, paras. 1-3 **Tab 3, p. 44**

7. The reason for the cancellation of his flight was mechanical failure in the 25-year-old aircraft that Air Canada had assigned to Flight AC 889.

Air Canada's Answers dated April 6, 2016, Document AQ3-1 **Tab 17, p. 218**

8. Based on the assurance that Air Canada would provide him with overnight accommodation and meals, Johnson volunteered to stay in London for the night and to be transported to Ottawa the next day. He was directed by Air Canada's agents to collect his checked baggage and to wait outside the Arrivals Area for a van to take volunteers to a local hotel where he and the other volunteers would be provided with a room and meal vouchers.

Johnson Statement, paras. 5-6 **Tab 3, p. 44**

9. Johnson did as he was told and waited outside the Arrivals Area for almost 30 minutes, but he saw neither a van nor anyone else from the group of 20 volunteers who would be staying in London.

Johnson Statement, para. 7 **Tab 3, p. 45**

10. He then re-entered the terminal, and asked an airport attendant to contact any Air Canada staff who might still be available, but the attendant was unable to locate any.

Johnson Statement, para. 8 **Tab 3, p. 45**

11. Johnson then contacted Air Canada Reservations in Montreal, and spoke to an Air Canada agent. The agent was unable to reach any Air Canada staff at Terminal 3 in London. She advised Johnson to seek his own accommodation and dinner, and then seek reimbursement from Air Canada after the fact.

Johnson Statement, para. 9 **Tab 3, p. 45**
Air Canada's answer (January 20, 2016), para. 13 **Tab 9, p. 147**

12. Johnson did as Air Canada's agent advised him, reserved a room at the Holiday Inn at London Heathrow, and incurred out-of-pocket expenses in the amount of $461.77 for his accommodation, and $69.79 for his dinner.

Johnson Statement, paras. 10-11 **Tab 3, p. 45**

13. On December 22, 2013, Air Canada refused to reimburse Johnson for the full amount of his out-of-pocket expenses on the basis that:

> In an delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim. For meals we allow $7 for breakfast, $10 lunch and $15 for dinner. [Emphasis Added.]

Johnson Statement, Exhibit "E" **Tab 3, p. 59**

14. In a subsequent correspondence, Air Canada wrote to Johnson that:

> In the event a customers travel plans are disrupted, Air Canada does provide assistance towards the cost of hotel and meals. To be consistent, we follow a guideline so that all customers are treated equally. We realize you have requested an exception to this policy, however, to allow this can be seen as discriminatory to those customers who received the normal assistance.
>
> [Emphasis added.]

Johnson Statement, Exhibit "K" **Tab 3, p. 95**

15. Eventually, Air Canada reimbursed Johnson $222.00, leaving him out of pocket for $309.56.

Johnson Statement, Exhibit "M" **Tab 3, p. 102**

C. RECURRENT AND SYSTEMIC ISSUE

16. Air Canada's refusal to fully reimburse Johnson for the out-of-pocket expenses he incurred as a result of delay in his transportation was not an isolated incident; rather, it is a recurrent pattern, demonstrating a systemic issue.

17. On February 6, 2014, Air Canada quoted the same "policy" in an email to Mr. Albert Leatherman, a delayed passenger unrelated to Johnson:

> The maximum amount we cover for hotel is $100.00 CAD, breakfast $10.00 CAD and dinner $15.00 CAD.

Complaint, Document No. 2 **Tab 4, p. 120**

18. On November 12, 2014, Air Canada wrote to Ms. Michele Fiona Allen, another delayed passenger unrelated to Johnson:

> [...] in accordance with our policy, passengers not provided meal vouchers at the airport may claim up to $15.00 CAD for dinner, $10.00 CAD for lunch and $7.00 CAD for breakfast. If you could kindly forward your original meal receipts, we would be happy to reimburse you up to the maximum allowable amount.
>
> [Emphasis added.]

Complaint, Document No. 3 **Tab 4, p. 122**

19. Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein were delayed by sixty-five (65) hours while travelling with Air Canada, and were out-of-pocket for a total of $633.91 for accommodation and meals as a result. They sought reimbursement for their out-of-pocket expenses, and explicitly identified the *Montreal Convention* as the basis for their claim. Air Canada refused to reimburse the full amount of their expenses, and on April 29, 2016, wrote to the Rubensteins:

> The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.

Statement of Dr. Rubenstein **Tab 20, p. 243**

Statement of Ms. Rubenstein **Tab 21, p. 276**

20. Mr. Darren Powell was stranded in Frankfurt, and was told that Air Canada would cover his full accommodation costs. When he sought reimbursement for the $228 of expenses that he incurred, on February 3, 2016, Air Canada wrote to him:

> You will soon receive a draft in the amount of $120 CAD which is the standardized amount permitted for one nights' hotel stay and meals.
>
> [Emphasis added.]

Position statement & documents of Mr. Powell **Tab 27, p. 340**

21. The recurrence of the dollar amounts in these communications is not a coincidence. Air Canada has been using an Expense Policy **[Tab 6, p. 130]** and other similar "internal documents" **[Tab 15, p. 211]** to determine the amount of compensation payable to passengers; they contain schedules such as the following:

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

D. LEGISLATIVE CONTEXT

(i) *Montreal Convention*

22. The *Montreal Convention* is an international treaty, signed by over 120 states including Canada and the UK, governing certain aspects of the rights of passengers travelling internationally, including the liability of airlines in the event of a delay. The *Montreal Convention* has the force of law in Canada by virtue of subsection 2(2.1) of the *Carriage by Air Act*.

***Carriage by Air Act*, s. 2(2.1)** **App. A, p. 401**

23. Article 19 of the *Montreal Convention* imposes a regime of strict (but not absolute) liability on airlines with respect to delay of passengers. The airline is presumed to be liable for damages occasioned by delay of passengers up to a monetary limit set out in the *Convention*. The burden of rebutting the presumption of liability and establishing an affirmative defence is on the airline:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

***Montreal Convention*, Article 19** **App. A, p. 409**

24. Since 2009, the liability limit provided by the *Montreal Convention* in the event of delay of passengers has been 4,694 SDR, which is approximately **CAD$8,500**. (The limit of 4,150 SDR provided by Article 22(2) has been reviewed and updated in accordance with Article 24.)

***Montreal Convention*, Article 22(2)** **App. A, p. 410**

25. A key feature of the *Montreal Convention* is that the liability regime and limits set out in it cannot be lawfully contracted out:

> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

***Montreal Convention*, Article 26** **App. A, p. 412**

(ii) Regulatory scheme

26. Air carriers operating international flights to and from Canada are required to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is the contract of carriage between the passengers and the air carrier.

***Air Transportation Regulations*, s. 110** **App. A, p. 389**
***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 20** **Tab 40, p. 572**

27. The tariff of an air carrier must clearly state the terms and conditions with respect to an enumerated list of core areas, including “limits of liability respecting passengers and goods”; “exclusions from liability respecting passengers and goods”; and “procedures to be followed, and time limitations, respecting claims.”

***Air Transportation Regulations*, s. 122(c)(x)-(xii)** **App. A, p. 392**

28. All terms and conditions of carriage established by an air carrier are required to be “just and reasonable.”

***Air Transportation Regulations*, s. 111** **App. A, p. 390**
***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 22** **Tab 40, p. 573**

29. The Agency is a federal regulator and quasi-judicial tribunal created by the *Canada Transportation Act*. Parliament conferred upon the Agency broad powers with respect to the contractual terms and conditions that are imposed by airlines on passengers travelling internationally, to and from Canada.

***Canada Transportation Act*, s. 86(1)(h)** **App. A, p. 397**

30. The Agency may disallow any tariff or tariff rule that fails to be just and reasonable, and then it may substitute the disallowed tariff or tariff rule with another one established by the Agency itself.

***Air Transportation Regulations*, s. 113** **App. A, p. 391**

***Lukács v. Canada (CTA)* 2015 FCA 269, para. 23** **Tab 40, p. 574**

31. The Agency may also direct a carrier who fails to apply the terms and conditions set out in its tariff to take corrective measures and to compensate affected passengers.

***Air Transportation Regulations*, s. 113.1** **App. A, p. 391**

(iii) Air Canada's International Tariff

32. Air Canada's International Tariff Rule 55(B)(5)(a) provides that:

> For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

Complaint, Document No. 4 **Tab 4, p. 125**

33. Air Canada explicitly acknowledged that its Expense Policy **[Tab 6]** is not set out in its International Tariff.

Air Canada's answers (January 11, 2016), Q2 **Tab 6, p. 132**

E. PROCEEDINGS BEFORE THE AGENCY

(i) Complaint

34. On December 3, 2015, Johnson and Lukács filed a complaint with the Canadian Transportation Agency against Air Canada alleging that:

(a) since 2013 or earlier, Air Canada has been shortchanging the public and limiting its liability with respect to delay of passengers to the amounts set out in the Expense Policy, contrary to the explicit language of the *Montreal Convention* and Air Canada's International Tariff; and

(b) Johnson was adversely affected by and incurred expenses as a result of Air Canada's failure to comply with the *Convention* with respect to his delay on December 10-11, 2013.

As remedies, they sought corrective measures to bring Air Canada into compliance with the *Montreal Convention* and its own tariff, and an order directing Air Canada to reimburse Johnson for the outstanding $309.56.

Complaint **Tab 4, p. 107**

(ii) Air Canada's answer

35. Air Canada argued in response to the complaint that:

(a) Air Canada was not liable for the expenses of Johnson, because the mechanical failure of its 25-year-old aircraft "could not have been detected and controlled by Air Canada," and it took all reasonable measures in making a pre-departure check (para. 16);

(b) the Expense Policy **[Tab 6, p. 130]** contains mere recommendations and "do[es] not constitute Air Canada's policy for passenger claims, which are rather reviewed on a case by case basis" (paras. 21-22); and

(c) the amounts set out in the Expense Policy and other similar internal documents are "often exceeded" (para. 22).

Air Canada's answer (January 20, 2016) **Tab 9, p. 147**

(iii) Confidentiality Decision

36. On January 20, 2016, Air Canada requested that the Agency treat its Expense Policy **[Tab 6, p. 130]** and Expense Guidelines **[Tab 15, p. 211]** confidentially, and not place them on public record.

Air Canada's request for confidentiality **Tab 10, p. 179**

37. Johnson and Lukács objected to the request, which unnecessarily limits the public access guaranteed by the open court principle.

Opposition to the request for confidentiality **Tab 11, p. 184**

38. On February 24, 2016, in Decision No. LET-C-A-6-2016, the Agency erred in law and made an unreasonable decision by granting Air Canada's request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]** (referenced as A-2), while correctly denying the request with respect to the Expense Policy **[Tab 6, p. 130]** (referenced as A-1).

Decision No. LET-C-A-6-2016 **Tab 13, p. 199**

(iv) Refusals Decision

39. On April 8, 2016, Johnson and Lukács requested the Agency to compel Air Canada:

(a) to produce the Expense Guidelines **[Tab 15, p. 211]** in its entirety, including the portion about expenses of bumped passengers;

(b) to state whether it was denying liability for the expenses of passengers who are delayed as a result of a schedule change; and

(c) to provide particulars of Air Canada's allegation that the limits set out in its Expense Policy are "often exceeded."

Written questions (March 18, 2016)	**Tab 16, p. 214**
Request to compel answers and productions	**Tab 18, p. 230**

40. On May 4, 2016, the Agency denied the request to compel answers and productions, with reasons to follow. According to the reasons contained in the Final Decision, the Agency erred in law, denied Johnson and Lukács procedural fairness, and rendered an unreasonable decision in holding that:

(a) the requested information was not relevant (paras. 18, 22, 32);

(b) the requests were disproportionate (paras. 17, 22, 34); and

(c) under s. 230 of the *Income Tax Act*, Air Canada had no obligation to keep the requested records (para. 33).

Decision dated May 4, 2016	**Tab 19, p. 241**
Final Decision, paras. 7-36	**Tab 1, p. 3**

(v) Exclusion of Evidence Decision No. 1

41. On May 17, 2016, Johnson and Lukács requested to adduce the witnessed statements of Dr. Rubenstein and Ms. Rubenstein, who recently suffered similar treatment at the hands of Air Canada as Johnson did in 2013.

Statement of Dr. Rubenstein	**Tab 20, p. 243**
Statement of Ms. Rubenstein	**Tab 21, p. 276**
Request to adduce evidence	**Tab 22, p. 302**

42. On June 10, 2016, in Decision No. LET-C-A-24-2016, the Agency erred in law, denied Johnson and Lukács procedural fairness, and rendered an unreasonable decision in denying the request to adduce the evidence.

Decision No. LET-C-A-24-2016	**Tab 25, p. 315**

(vi) Exclusion of Evidence Decision No. 2

43. On June 17, 2016, Mr. Darren Powell submitted to the Agency a "Position Statement" with supporting documents relating to the complaint of Johnson and Lukács. Mr. Powell's statement and documents indicated that he was also a victim of Air Canada applying its Expense Policy instead of the *Montreal Convention*.

Position statement & documents of Mr. Powell	**Tab 27, p. 340**

44. On June 23, 2016, the Agency erred in law, fettered its discretion, denied Johnson and Lukács procedural fairness, and rendered an unreasonable decision by excluding the submission of Mr. Powell on the sole basis that it was submitted at 11:42 pm on June 17, 2016, some 6 hours and 42 minutes late.

Decision dated June 23, 2016	**Tab 28, p. 346**

(vii) Final Decision

45. On September 21, 2016, in Decision No. 286-C-A-2016, the Agency dismissed the complaint of Johnson and Lukács. The Agency erred in law and rendered an unreasonable decision by, among other things:

(a) refusing to consider the emails sent by Air Canada to Mr. Leatherman and Ms. Allen on the basis that they were hearsay (para. 73);

(b) failing to give effect to the presumption of liability under Article 19 of the *Montreal Convention* with respect to the incidents where Air Canada led no evidence to rebut the presumption (para. 73);

(c) making inconsistent findings, including attributing evidence to Johnson that is not in the record and explicitly denying the existence of evidence that is in the record (para. 50);

(d) holding that checking an aircraft prior to every flight is sufficient to meet the "all reasonable measures" defence of the *Montreal Convention* (para. 51);

(e) holding that offering accommodation and meals without actually providing same is sufficient to meet the "all reasonable measures" defence of the *Montreal Convention* (para. 54); and

(f) placing a duty of care on the passenger and not the airline with respect to alternative travel arrangements (para. 55).

PART II – STATEMENT OF THE POINTS IN ISSUE

46. The question to be decided on the present motion is whether this Honourable Court should grant Johnson and Lukács leave to appeal.

PART III – STATEMENT OF SUBMISSIONS

47. The main issue underpinning the complaint of Johnson and Lukács is that Air Canada has been systematically shortchanging and breaching its obligations to delayed passengers under the *Montreal Convention*. The individual case of Johnson is only one piece of this jigsaw puzzle.

48. Most recently, this Honourable Court held that:

(a) The role of the Agency is not only to provide redress to individual passengers, but also to ensure that policies pursued by the legislator are carried out.

(b) It is incumbent on the Agency to intervene at the earliest possible opportunity to prevent harm and damage to the public, rather than merely compensating those who have been affected after the fact.

***Lukács v. Canada (CTA)*, 2016 FCA 220, paras. 19 & 26** **Tab 41, pp. 590 & 592**

49. Johnson and Lukács are seeking the appellate intervention of this Honourable Court because the Agency not only failed to carry out its mandate with respect to the systemic issue they raised, but also proactively swept it under the rug by barring all evidence supporting the existence of a systemic issue.

A. JURISDICTION OF THIS HONOURABLE COURT

50. Every decision, order, rule or regulation of the Agency may be appealed to this Honourable Court on a question of law or a question of jurisdiction with the leave of the Court.

***Canada Transportation Act*, s. 41(1)** **App. A, p. 395**

51. The general rule is that interlocutory, procedural decisions made by a tribunal in the course of a proceeding must be challenged after the final decision has been rendered, as part of the appeal from the final decision. Furthermore, the time period for appealing such interlocutory decisions does not begin until the final decision has been rendered.

***Zündel v. Canada (Human Rights Commission)*, [2000] 4 FC 255, paras. 10-13, 17** **Tab 45, p. 636**

52. Thus, the proposed appeal from the Final Decision is the appropriate procedure and time to challenge the four interlocutory decisions. Furthermore, in light of the rationale for the aforementioned general rule, the time period to seek leave to appeal from the Procedural Decisions (if a separate leave is necessary) did not begin until the Final Decision was rendered.

53. In 2014, this principle was followed by this Honourable Court in granting leave to appeal from a final decision and two interlocutory decisions of the Agency relating to British Airways' denied boarding compensation policy.

***Lukács v. CTA & British Airways*, File No. 14-A-37** **Tab 38, p. 559**

B. DENIAL OF PROCEDURAL FAIRNESS AND FETTERING OF DISCRETION

54. The right of a party to be heard entails the right to lead evidence, and imposes a duty on the decision-maker to consider the totality of the evidence. The Agency breached this duty by first barring all evidence unfavourable to Air Canada relating to the systemic nature of the issue raised in the complaint, and then concluding that Johnson and Lukács failed to prove what they alleged.

55. The standard of review for procedural fairness issues is correctness.

***Air Canada v. Greenglass*, 2014 FCA 288, para. 26** **Tab 31, p. 440**

(i) Exclusion of emails sent by Air Canada to passengers

56. The Agency erred in law, applied a double standard, denied Johnson and Lukács procedural fairness, and made an unreasonable decision by excluding the emails sent by Air Canada to Mr. Leatherman and Ms. Allen:

> Firstly, these emails constitute hearsay and therefore we would not consider them.

Final Decision, para. 73 **Tab 1, p. 19**

57. First, the emails are not hearsay, because Air Canada acknowledged having sent them, and did not dispute their content.

Air Canada's answers (January 11, 2016), Q2 **Tab 6, p. 132**

58. Second, the longstanding practice of the Agency, which is not a court, has been to admit emails tendered by Air Canada, even if they constituted hearsay. The Agency provided no reasons for excluding "hearsay" evidence unfavourable to Air Canada, while having admitted favourable ones in the past.

***Azar v. Air Canada*, LET-C-A-180-2012, pp. 26-29** **Tab 32, pp. 472-475**

(ii) Exclusion of Evidence Decision No. 2

59. On June 17, 2016, at 11:42 pm, Mr. Powell submitted to the Agency a position statement and supporting documents with respect to the complaint of Johnson and Lukács:

> [...] I am writing to you today to document my similar experience to Christopher C. Johnson and Air Canada's failure to properly recompense me [...]

Position statement & documents of Mr. Powell **Tab 27, p. 340**

60. The Agency erred in law, fettered its discretion, denied Johnson and Lukács procedural fairness, applied a double standard, and made an unreasonable decision in excluding the position statement of Mr. Powell on the sole basis that it was submitted 6 hours and 42 minutes after the 5:00 pm deadline.

Decision dated June 23, 2016 **Tab 28, p. 346**

61. First, the Agency fettered its discretion by applying its rules of procedures "mechanically," without acknowledging the flexibility that they provide and the power of the Agency to accept late submissions.

***Lukács v. CTA*, 2015 FCA 200, para. 7** **Tab 39, p. 564**

62. Second, the Agency's decision is unreasonable, because the delay of 6 hours and 42 minutes in the submission of Mr. Powell's documents could not possibly have caused any prejudice.

63. Third, the Agency denied Johnson and Lukács procedural fairness and applied a double standard, because it has been the longstanding practice of the Agency to excuse minor delays with respect to Air Canada's submissions.

***Burns v. Air Canada*, 163-C-A-2007, para. 7** **Tab 33, p. 482**

(iii) Exclusion of Evidence Decision No. 1

64. The Agency erred in law, denied Johnson and Lukács procedural fairness, applied a double standard, and made an unreasonable decision in refusing to admit the witnessed statements (which are equivalent to sworn affidavits before the Agency) of the Rubensteins.

Decision No. LET-C-A-24-2016 **Tab 25, p. 315**

65. First, the Agency applied the wrong legal principles in superimposing the jurisprudence with respect to rebuttal evidence and re-opening cases on the regulatory regime put in place by Parliament. The Agency is not a court, but an administrative body that has important inquisitorial powers for the purpose of protecting the public at large, not just the parties before it.

***Canada Transportation Act*, s. 37** **App. A, p. 395**

***Lukács v. Canada (CTA)*, 2016 FCA 220, paras. 19, 20, 26** **Tab 41, pp. 590 & 592**

66. Second, the Agency applied a double standard in considering the emails sent by Air Canada to the Rubensteins for the truth of their content in the face of the witnessed statements of both passengers to the contrary:

> 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.
>
> [Emphasis added.]

Decision No. LET-C-A-24-2016, p. 5 **Tab 25, p. 319**

67. Third, the statements of the Rubensteins that “they were delayed and that Air Canada did not offer accommodation” and that Air Canada refused

to compensate them were clearly and obviously relevant to the question of whether Air Canada continued to deny claims contrary to the *Montreal Convention*, which was before the Agency.

68. Finally, the Agency erred in law with respect to the threshold for admitting the evidence. The evidence need not be conclusive. Whether Air Canada had any evidence in response is not relevant to determining whether to admit the statements of the Rubensteins.

(iv) Refusals Decision

69. The Agency erred in law, denied Johnson and Lukács procedural fairness, and made an unreasonable decision in refusing to compel Air Canada:

> (Q9) to produce the Expense Guidelines **[Tab 15, p. 211]** in its entirety, including the portion about expenses of bumped passengers;
>
> (Q12) to state whether it was denying liability for the expenses of passengers who are delayed as a result of a schedule change; and
>
> (Q18) to provide particulars of Air Canada's allegation that the limits set out in its Expense Policy are "often exceeded."

Decision dated May 4, 2016 — **Tab 19, p. 241**
Final Decision, paras. 7-36 — **Tab 1, p. 3**

70. First, the Agency erred in law by holding that the complaint of Johnson and Lukács was confined to delays caused by "schedule irregularities." It is apparent on the face of the complaint that it was challenging Air Canada's conduct without restriction to a specific cause of delay.

Complaint, Document No. 2 — **Tab 4, p. 120**
Final Decision, paras. 16-17 — **Tab 1, p. 5**

71. Second, the Agency erred in law in determining the relevance of production Q9 and question Q12 based on the aforementioned erroneous finding of law as to the scope of the complaint.

Final Decision, paras. 18 & 22 **Tab 1, pp. 5-6**

72. Delay of passengers can come in many shapes and forms, including as a result of "schedule change" or bumping (involuntary denied boarding), and the *Montreal Convention* applies to the rights of such passengers. Thus, as a matter of law, Q9 and Q12 were relevant to whether Air Canada has been evading its obligations under the *Convention*. Furthermore, the Agency unreasonably held that requiring Air Canada to answer these would be disproportionate; there was no evidence that doing so would have been onerous for Air Canada.

***Lukács v. Air Canada*, 250-C-A-2012, para. 34** **Tab 36, p. 519**

73. ***Question 18.*** First, the Agency erred in law and engaged in circular reasoning by relying on the evidence of Ms. Robinson (Manager, Customer Relations) in support of the the reliability of the very same evidence, which question Q18 was aiming to challenge. The reasons provided suggest that the Agency had made up its mind to accept the evidence of Ms. Robinson even before Johnson and Lukács had an opportunity to test the evidence.

Final Decision, para. 8 **Tab 1, p. 8**

74. Second, the Agency erred in law with respect to the issue of relevance. Air Canada claimed that it "often" paid compensation to passengers in excess of the miniscule amounts set out in the Expense Policy **[Tab 6]**, while the Expense Policy states that the compensation paid "should never exceed" the ones in the schedules. Thus, Johnson and Lukács were entitled to evidence as to:

(a) whether Air Canada was labelling most delays as "uncontrollable" to evade liability; and

(b) whether, in cases that Air Canada considers "controllable," it was following the maximum amounts set out in the Expense Policy or the *Montreal Convention*.

Final Decision, para. 9 **Tab 1, p. 9**

75. Third, the Agency erred in law in interpreting the *Income Tax Act* concerning the obligation of Air Canada to retain records and books. Section 230 requires corporations, including Air Canada, to retain records and books for six (6) years from the end of the last taxation year to which the records and books relate. Section 248 defines "record" as:

> "record" includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form;
>
> [Emphasis added.]

***Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), ss. 230-248** **Tab 6, pp. 428-431**

76. "Records" that Air Canada is required to keep under the *Income Tax Act* include the receipts submitted by passengers with claims, and all related information. Air Canada provided no evidence that it would be onerous to retrieve these records, or their summaries, from its accounting department, which must have most if not all information necessary for answering question Q18.

77. Finally, the Agency misstated the substance of its own Decision No. LET-C-A-173-2009, which reads as follows:

> 5. For the most recent 6-month period for which data are available, WestJet is requested to advise the average amount of compensation tendered to passengers travelling domestically for damage to, or loss or delay in delivery of baggage. During the same period, did WestJet tender an amount to a passenger in excess of $250? If so, how many times did this occur, and what were the individual amounts?
>
> ***Lukács v. WestJet*, LET-C-A-173-2009, p. 2** **Tab 42, p. 596**

78. Given that the Agency required WestJet to compile information about the amounts of compensation that it was paying to passengers in relation to loss, delay, or damage to baggage (which does require categorizing expenses), the Agency's decision of refusing to do the same with respect to the compensation paid by Air Canada in relation to delay of passengers is unreasonable.

C. THE AGENCY ERRED IN INTERPRETING THE MONTREAL CONVENTION

79. The *Montreal Convention* balances the rights of passengers and airlines by imposing a presumption of liability on the airlines in relation to delays, but limiting the liability arising under the presumption to approximately $8,500. The liability cannot be contracted out (Article 26), and an airline can exonerate itself from liability only if proves that it has taken "all reasonable measures" necessary to prevent damage to passengers or that no such measures were available; most importantly, the burden of proof is on the airline, not the passengers.

> ***Montreal Convention*, Articles 19, 22(2), 26** **App. A, p. 409**

80. Although nothing turns on standard of review, it is submitted that the standard should be correctness, because the *Montreal Convention* is an international treaty that is interpreted by the courts of all 120 signatory states.

(i) Systemic issue

81. Air Canada did not dispute that Mr. Leatherman and Ms. Allen were delayed, but were refused full compensation for their expenses based on the Expense Policy. Instead, Air Canada argued that:

> The reference to a Policy in refusing to reimburse the totality of expenses claimed by two other passengers does not equate to a systematic denial of expenses in controllable situations.
>
> **Air Canada's answer (January 20, 2016), para. 22** **Tab 9, p. 149**
>
> **Complaint, Document Nos. 2 & 3** **Tab 4, pp. 120 & 122**

82. The Agency refused to consider the emails that Air Canada sent to these two passengers, and as an alternative position held that:

> [...] even if they were admissible, in order to conclude in these cases that Air Canada is applying a policy that purports to limit its liability with respect to delay, the Agency would have to be in the position to conclude that there was an obligation to compensate these passengers for the expenses claimed, and that Air Canada applied a policy to limit its liability in this regard. In both cases, it is not known whether Air Canada or its agents did everything that could reasonably be required to avoid the damage incurred as a result of the delay.
>
> **Final Decision, para. 73** **Tab 1, p. 19**

83. The Agency erred in law and misinterpreted the *Montreal Convention* by failing to give effect to the presumption of liability prescribed by Article 19, and failing to place the burden of proof on Air Canada. The legal effect of this presumption is that in the absence of exonerating evidence, Air Canada is automatically liable for the damages of the passengers. Johnson and Lukács were not required to establish the absence of an affirmative defence. Instead, it was up to Air Canada to lead evidence to establish such a defence, and Air Canada chose not to do so.

84. Thus, in the absence of any evidence exonerating Air Canada from liability with respect to Mr. Leatherman and Ms. Allen, the only possible outcome was that Air Canada is liable for the damages of these two passengers under the *Montreal Convention*. Consequently, it was not open for the Agency to find that Air Canada has complied with its obligations under its tariff. Therefore, the Final Decision is unreasonable.

Final Decision, para. 75 **Tab 1, p. 19**

85. In addition, the Agency erred in law and rendered an unreasonable decision by failing to address the systemic issue of Air Canada using the cause-and-fault oriented classification of "controllable" and "uncontrollable" events and "schedule change" to determine whether to compensate passengers for their delay-related expenses. This classification is inconsistent with the liability-based regime of the *Montreal Convention*. Although the Agency acknowledged the lengthy submissions of Johnson and Lukács on this point, its reasons are silent with respect to the issue.

Final Decision, paras. 66-69 **Tab 1, pp. 17-18**

(ii) The individual case of Col. Johnson

86. ***Preliminary matter: Error apparent on the face of the decision.*** The Agency contradicted itself at para. 50 of the Final Decision in stating that:

> Mr. Johnson's evidence is that the other passengers were able to obtain transportation to the hotel, hotel rooms, and meal vouchers, but that he was not. He does not explain how this happened.

First, in paragraph 39 of the Final Decision, the Agency explicitly acknowledged the explanation of Johnson. Second, Johnson neither did nor could give evidence relating to the fate of other passengers.

Final Decision, para. 39 **Tab 1, p. 10**

87. ***Liability for delay caused by mechanical failure.*** The Agency erred in law in concluding at para. 51 of the Final Decision that the routine checking of the aircraft prior to every flight is sufficient to meet the "all reasonable measures" defence of the *Montreal Convention*. This interpretation would mean that airlines are virtually never liable for delay of their passengers caused by mechanical failure of the aircraft, and thus would render Article 19 of the *Montreal Convention* devoid of any meaning. This interpretation flies in the face of both Canadian and European case law holding that mechanical issues are inherent to the normal operation of airlines, and must be anticipated by the airline.

> [...] the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of that carrier, since the latter is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business.
>
> [Emphasis added.]

***van der Lans v. KLM*, European Court of Justice, Case C-257-14, para. 43**	**Tab 35, p. 510**
***Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11, para. 13**	**Tab 34, p. 495**
***Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, paras. 15-16**	**Tab 43, p. 603**

88. ***Damages "occasioned by delay" and duty of care.*** The Agency erred in law and rendered an unreasonable decision by failing to give effect to the phrase "occasioned by delay" in Article 19, and concluding at para. 55 that Johnson's damages were not "the result of the delay."

89. The typical damages of delayed passengers include accommodation and meals; yet neither of these are directly and immediately caused by the delay. For example, passengers could sleep at the airport, and missing a few meals might not be detrimental to the health of passengers. Yet, these ex-

penses are commonly recognized as “occasioned by delay,” because but for the delay, the passenger would not have incurred them.

90. The Agency erroneously failed to apply the same principle to the expenses incurred by Johnson, who would not have incurred those expenses but for the cancellation of his flight and the subsequent failure of Air Canada to transport him on the same day. Since Air Canada led no evidence that it was impossible to transport Johnson on the same day (for example, on flights of other airlines), Air Canada is liable for his expenses pursuant to Article 19 of the *Montreal Convention*.

***Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, para. 16** **Tab 43, p. 603**

91. Finally, since Johnson did board his original flight on time, from that point on it was Air Canada’s responsibility to look after him, and to ensure that he got the accommodation and meals that Air Canada promised him. Article 20 of the *Montreal Convention* imposes the burden of proof on the airline to show contributory negligence of passengers. Air Canada led no such evidence nor argued contributory negligence on the part of Johnson. Therefore, the Agency’s conclusion that Air Canada was not liable for his expenses is unreasonable and inconsistent with the *Montreal Convention*.

***Montreal Convention*, Article 20** **Tab 4, p. 409**

D. CONFIDENTIALITY DECISION

92. The Agency erred in law and made an unreasonable decision by granting Air Canada’s request for confidentiality with respect to the Expense Guidelines **[Tab 15, p. 211]** (referenced as A-2), while correctly denying the request with respect to the Expense Policy **[Tab 6, p. 130]** (referenced as A-1).

Decision No. LET-C-A-6-2016 **Tab 13, p. 199**

93. First, the two documents are virtually identical in content, although they somewhat differ in form. As such, making one confidential while placing the other on public record defeats common sense and is unreasonable.

94. Second, Air Canada has not consistently treated the information in the Expense Guidelines as confidential; indeed, it has been communicated to passengers, as numerous emails demonstrate.

Complaint, Document Nos. 2 & 3 **Tab 4, pp. 120 & 122**

95. Third, the Agency is subject to the open court principle. The legal test for confidentiality set out by the Supreme Court of Canada in *Sierra Club* requires a "real and substantial risk" that is "well grounded in the evidence" and that the risk must pose a serious threat to an interest that can be expressed in terms of public interest in confidentiality. Since there was no such evidence before the Agency, the Confidentiality Decision was unreasonable, and the document should be placed on public record.

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, paras. 54-55** **Tab 44, p. 623**

E. COSTS

96. Johnson and Lukács respectfully ask the Honourable Court that they be awarded their disbursements in any event of the cause, and if successful, also a moderate allowance for their time, because the present motion and the proposed appeal are in the nature of public interest litigation, and the issues raised in the motion are not frivolous.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62** **Tab 37, p. 558**

***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 43** **Tab 40, p. 579**

PART IV – ORDER SOUGHT

97. The Moving Parties, Col. Christopher C. Johnson and Dr. Gábor Lukács, are seeking an Order:

(a) granting Johnson and Lukács leave to appeal Decision No. 286-C-A-2016 of the Canadian Transportation Agency;

(b) granting Johnson and Lukács leave to appeal, if separate leaves are necessary, the following interlocutory decisions made by the Canadian Transportation Agency:

(1) Decision No. LET-C-A-6-2016, dated February 24, 2016 **[Tab 13, Confidentiality Decision]**;

(2) Decision dated May 4, 2016 **[Tab 19, Refusals Decision]**;

(3) Decision No. LET-C-A-24-2016, dated June 10, 2016 **[Tab 25, Exclusion of Evidence Decision No. 1]**; and

(4) Decision dated June 23, 2016 **[Tab 28, Exclusion of Evidence Decision No. 2]**;

(c) granting Johnson and Lukács costs and/or reasonable out-of-pocket expenses of this motion; and

(d) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 21, 2016

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PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, SOR/88-58,
ss. 110, 111, 113, 113.1, 122

Canada Transportation Act, S.C. 1996, c. 10,
ss. 41 and 86

Carriage by Air Act, R.S.C. 1985, c. C-26,
s. 2

Montreal Convention (Schedule VI to the *Carriage by Air Act*,
R.S.C. 1985, c. C-26)

Federal Courts Rules, S.O.R./98-106,
Rules 352 and 369

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.),
ss. 230 and 248

CASE LAW

Air Canada v. Greenglass, 2014 FCA 288

Azar v. Air Canada, Canadian Transportation Agency,
Decision No. LET-C-A-180-2012

Burns v. Air Canada, Canadian Transportation Agency,
Decision No. 163-C-A-2007

Elharradji c. Compagnie nationale Royal Air Maroc, 2012 QCCQ 11

van der Lans v. KLM, European Court of Justice, Case C-257-14

Lukács v. Canadian Transportation Agency and British Airways,
File No. 14-A-37

CASE LAW (CONTINUED)

Lukács v. Canada (Canadian Transportation Agency),
2014 FCA 76

Lukács v. Canada (Canadian Transportation Agency),
2015 FCA 200

Lukács v. Canada (Canadian Transportation Agency),
2015 FCA 269

Lukács v. Canada (Canadian Transportation Agency),
2016 FCA 220

Quesnel c. Voyages Bernard Gendron inc.,
[1997] J.Q. no 5555

Sierra Club v. Canada (Minister of Finance), 2002 SCC 41

Zündel v. Canada (Human Rights Commission), [2000] 4 FC 255

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Appendix A

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to February 15, 2016

Last amended on December 14, 2012

À jour au 15 février 2016

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overcharged by the air carrier for fares or rates in respect of its air service pursuant to paragraph 66(1)(c) of the Act, the amount of the refunds shall bear interest from the date of payment of the fares or rates by those persons to the air carrier to the date of the Agency's order at the rate of interest charged by the Bank of Canada on short-term loans to financial institutions plus one and one-half percent.

SOR/2001-71, s. 3.

aérien de rembourser des sommes à des personnes ayant versé des sommes en trop pour un service, le remboursement porte intérêt à compter de la date du paiement fait par ces personnes au transporteur jusqu'à la date de délivrance de l'ordonnance par l'Office, au taux demandé par la Banque du Canada aux institutions financières pour les prêts à court terme, majoré d'un et demi pour cent.

DORS/2001-71, art. 3.

DIVISION II

International

Application

108 Subject to paragraph 135.3(1)(d), this Division applies in respect of every air carrier that operates an international service, except an air carrier that operates TPCs, TPNCs or TGCs.

SOR/96-335, s. 55.

Exception

109 An air carrier that operates an international service that serves the transportation requirements of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees and workers is excluded, in respect of the service of those requirements, from the requirements of subsection 110(1).

Filing of Tariffs

110 (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, before commencing the operation of an international service, an air carrier or its agent shall file with the Agency a tariff for that service, including the terms and conditions of free and reduced rate transportation for that service, in the style, and containing the information, required by this Division.

(2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency.

(3) No air carrier shall advertise, offer or charge any toll where

(a) the toll is in a tariff that has been rejected by the Agency; or

SECTION II

Service international

Application

108 Sous réserve de l'alinéa 135.3(1)d), la présente section s'applique aux transporteurs aériens qui exploitent un service international, sauf ceux qui effectuent des VAP, des VAPNOR ou des VAM.

DORS/96-335, art. 55.

Exception

109 Le transporteur aérien est exempté de l'application du paragraphe 110(1) en ce qui concerne l'exploitation d'un service international servant à répondre aux besoins de transport des véritables clients, des véritables employés et des véritables travailleurs d'un hôtel pavillonnaire, y compris le transport des bagages, du matériel et des fournitures de ces personnes.

Dépôt des tarifs

110 (1) Sauf disposition contraire des ententes, conventions ou accords internationaux en matière d'aviation civile, avant d'entreprendre l'exploitation d'un service international, le transporteur aérien ou son agent doit déposer auprès de l'Office son tarif pour ce service, conforme aux exigences de forme et de contenu énoncées dans la présente section, dans lequel sont comprises les conditions du transport à titre gratuit ou à taux réduit.

(2) L'acceptation par l'Office, pour dépôt, d'un tarif ou d'une modification apportée à celui-ci ne constitue pas l'approbation de son contenu, à moins que le tarif n'ait été déposé conformément à un arrêté de l'Office.

(3) Il est interdit au transporteur aérien d'annoncer, d'offrir ou d'exiger une taxe qui, selon le cas :

a) figure dans un tarif qui a été rejeté par l'Office;

b) a été refusée ou suspendue par l'Office.

(b) the toll has been disallowed or suspended by the Agency.

(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

SOR/96-335, s. 56; SOR/98-197, s. 6(E).

111 (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

SOR/93-253, s. 2; SOR/96-335, s. 57.

(4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

(5) Il est interdit au transporteur aérien ou à ses agents d'offrir, d'accorder, de donner, de solliciter, d'accepter ou de recevoir un rabais, une concession ou un privilège permettant, par un moyen quelconque, le transport de personnes ou de marchandises à une taxe ou à des conditions qui diffèrent de celles que prévoit le tarif en vigueur.

DORS/96-335, art. 56; DORS/98-197, art. 6(A).

111 (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

DORS/93-253, art. 2; DORS/96-335, art. 57.

112 (1) All air carriers having joint tolls shall establish just and reasonable divisions thereof between participating air carriers.

(2) The Agency may

(a) determine and fix just and equitable divisions of joint tolls between air carriers or the portion of the joint tolls to be received by an air carrier;

(b) require an air carrier to inform the Agency of the portion of the tolls in any joint tariff filed that it or any other carrier is to receive or has received; and

(c) decide that any proposed through toll is just and reasonable notwithstanding that an amount less than the amount that an air carrier would otherwise be entitled to charge may be allotted to that air carrier out of that through toll.

113 The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

SOR/93-253, s. 2; SOR/96-335, s. 58.

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

(a) take the corrective measures that the Agency considers appropriate; and

(b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

SOR/2001-71, s. 4; SOR/2009-28, s. 1.

114 (1) Every tariff or amendment to a tariff shall be filed with the Agency by the air carrier or by an agent appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(2) Every joint tariff or amendment to a joint tariff shall be filed by one of the air carriers that is a party thereto or by an agent of the air carrier appointed by power of attor-

112 (1) Les transporteurs aériens qui appliquent des taxes pluritransporteurs doivent établir une répartition juste et raisonnable de ces taxes entre les transporteurs aériens participants.

(2) L'Office peut procéder de la façon suivante :

a) déterminer et fixer la répartition équitable des taxes pluritransporteurs entre les transporteurs aériens, ou la proportion de ces taxes que doit recevoir un transporteur aérien;

b) enjoindre à un transporteur aérien de lui faire connaître la proportion des taxes de tout tarif pluritransporteur déposé que lui-même ou tout autre transporteur aérien est censé recevoir ou qu'il a reçue;

c) décider qu'une taxe totale proposée est juste et raisonnable, même si un transporteur aérien s'en voit attribuer une portion inférieure à la taxe qu'il serait autrement en droit d'exiger.

113 L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa a).

DORS/93-253, art. 2; DORS/96-335, art. 58.

113.1 Si un transporteur aérien n'applique pas les prix, taux, frais ou conditions de transport applicables au service international qu'il offre et figurant à son tarif, l'Office peut lui enjoindre :

a) de prendre les mesures correctives qu'il estime indiquées;

b) de verser des indemnités à quiconque pour toutes dépenses qu'il a supportées en raison de la non-application de ces prix, taux, frais ou conditions de transport.

DORS/2001-71, art. 4; DORS/2009-28, art. 1.

114 (1) Les tarifs et leurs modifications doivent être déposés auprès de l'Office par le transporteur aérien ou un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(2) Les tarifs pluritransporteurs et leurs modifications doivent être déposés par l'un des transporteurs aériens participants ou par un agent habilité par procuration à

(a) in the case of passenger transportation, at a fare per person; and

(b) in the case of goods transportation, at a rate per pound, or other specified unit.

SOR/96-335, s. 62.

Charter Tolls

118 (1) Subject to subsection (2), every air carrier operating a non-scheduled international service on a charter basis shall publish all its tolls for those services at a rate per mile, where distance can be measured, or at a rate per hour where distance cannot be measured, which tolls shall be applicable to the entire capacity of the aircraft.

(2) An air carrier that operates a non-scheduled international service on a charter basis may, in lieu of tolls described in subsection (1), establish specific point-to-point flat sum charter prices.

SOR/96-335, s. 63.

Currency

119 All tolls shall be expressed in Canadian currency and may also be expressed in terms of currencies other than Canadian.

Manner of Tariff Filing

120 (1) Tariffs in any medium may be filed with the Agency provided that, where a medium other than paper is to be used, the Agency and the filer have signed an agreement for the processing, storage, maintenance, security and custody of the data base.

(2) Tariffs shall be maintained in a uniform and consistent manner and shall be numbered consecutively with the prefix "CTA(A)" and every issuing air carrier or agent of the carrier shall number tariffs in the carrier's or agent's own series.

SOR/93-253, s. 2(F); SOR/96-335, s. 64.

121 [Repealed, SOR/96-335, s. 64]

Contents of Tariffs

122 Every tariff shall contain

(a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

a) à un prix par personne, pour le transport des passagers;

b) à un taux par livre ou autre unité désignée, pour le transport des marchandises.

DORS/96-335, art. 62.

Taxes d'affrètement

118 (1) Sous réserve du paragraphe (2), les transporteurs aériens qui exploitent un service international à la demande par affrètements doivent publier les taxes de ces services selon un taux par mille lorsque la distance est mesurable et selon un taux à l'heure dans les autres cas, pour la capacité entière de l'aéronef.

(2) Les transporteurs aériens qui exploitent un service international à la demande par affrètements peuvent établir des prix forfaitaires pour les vols affrétés entre des points déterminés, au lieu des taxes visées au paragraphe (1).

DORS/96-335, art. 63.

Devises

119 Les taxes doivent être indiquées en devises canadiennes et peuvent être données en outre en devises étrangères.

Modalités de dépôt

120 (1) Les tarifs peuvent être déposés auprès de l'Office sur tout support. Toutefois, si le support choisi n'est pas le papier, l'Office et le déposant doivent, avant le dépôt, conclure une entente pour le traitement, le stockage, la mise à jour, la sécurité et la garde de la base de données.

(2) Les tarifs doivent être uniformes et cohérents et être numérotés consécutivement, le numéro étant précédé de « OTC(A) ». Le transporteur aérien émetteur ou son agent doit numéroter les tarifs suivant ses propres séries.

DORS/93-253, art. 2(F); DORS/96-335, art. 64.

121 [Abrogé, DORS/96-335, art. 64]

Contenu des tarifs

122 Les tarifs doivent contenir :

a) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

(b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified; and

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

(ii) acceptance of children for travel,

(iii) compensation for denial of boarding as a result of overbooking,

(iv) passenger re-routing,

(v) failure to operate the service or failure to operate on schedule,

(vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(vii) ticket reservation, cancellation, confirmation, validity and loss,

(viii) refusal to transport passengers or goods,

(ix) method of calculation of charges not specifically set out in the tariff,

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

(xii) procedures to be followed, and time limitations, respecting claims.

SOR/93-253, s. 2; SOR/96-335, s. 65.

123 [Repealed, SOR/96-335, s. 65]

Supplements

124 (1) A supplement to a tariff on paper shall be in book or pamphlet form and shall be published only for the purpose of amending or cancelling that tariff.

b) les taxes ainsi que les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes ayant une déficience,

(ii) l'admission des enfants,

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

(iv) le réacheminement des passagers,

(v) l'inexécution du service et le non-respect de l'horaire,

(vi) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(vii) la réservation, l'annulation, la confirmation, la validité et la perte des billets,

(viii) le refus de transporter des passagers ou des marchandises,

(ix) la méthode de calcul des frais non précisés dans le tarif,

(x) les limites de responsabilité à l'égard des passagers et des marchandises,

(xi) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xii) la marche à suivre ainsi que les délais fixés pour les réclamations.

DORS/93-253, art. 2; DORS/96-335, art. 65.

123 [Abrogé, DORS/96-335, art. 65]

Suppléments

124 (1) Les suppléments à un tarif sur papier doivent être publiés sous forme de livres ou de brochures et ne doivent servir qu'à modifier ou annuler le tarif.

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

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Inquiries

Inquiry into complaint

37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

Appointment of person to conduct inquiry

38 (1) The Agency may appoint a member, or an employee of the Agency, to make any inquiry that the Agency is authorized to conduct and report to the Agency.

Dealing with report

(2) On receipt of the report under subsection (1), the Agency may adopt the report as a decision or order of the Agency or otherwise deal with it as it considers advisable.

Powers on inquiry

39 A person conducting an inquiry may, for the purposes of the inquiry,

(a) enter and inspect any place, other than a dwelling-house, or any structure, work, rolling stock or ship that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary; and

(b) exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Review and Appeal

Governor in Council may vary or rescind orders, etc.

40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

Appeal from Agency

41 (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of

Enquêtes

Enquêtes sur les plaintes

37 L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

Délégation

38 (1) L'Office peut déléguer son pouvoir d'enquête à l'un de ses membres ou fonctionnaires et charger ce dernier de lui faire rapport.

Connaissance du rapport

(2) Sur réception du rapport, l'Office peut l'entériner sous forme de décision ou d'arrêté ou statuer sur le rapport de la manière qu'il estime indiquée.

Pouvoirs de la personne chargée de l'enquête

39 Toute personne chargée de faire enquête peut, à cette fin :

a) procéder à la visite de tout lieu autre qu'une maison d'habitation — terrain, construction, ouvrage, matériel roulant ou navire — , quel qu'en soit le propriétaire ou le responsable, si elle l'estime nécessaire à l'enquête;

b) exercer les attributions d'une cour supérieure pour faire comparaître des témoins et pour les contraindre à témoigner et à produire les pièces — objets, livres, plans, cahiers des charges, dessins ou autres documents — qu'elle estime nécessaires à l'enquête.

Révision et appel

Modification ou annulation

40 Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

Appel

41 (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour

jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Report of Agency

Agency's report

42 (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(a) applications to the Agency and the findings on them; and

(b) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Assessment of Act

(2) The Agency shall include in every report referred to in subsection (1) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act.

Tabling of report

(3) The Minister shall have a copy of each report made under this section laid before each House of Parliament on any of the first thirty days on which that House is sitting after the Minister receives it.

1996, c. 10, s. 42; 2013, c. 31, s. 2.

d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Rapport de l'Office

Rapport de l'Office

42 (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Évaluation de la loi

(2) L'Office joint à ce rapport son évaluation de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci.

Dépôt

(3) Dans les trente jours de séance de chaque chambre du Parlement suivant la réception du rapport par le ministre, celui-ci le fait déposer devant elle.

1996, ch. 10, art. 42; 2013, ch. 31, art. 2.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

2000, c. 15, s. 7.1; 2007, c. 19, s. 25.

Prolongation

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

Inclusion dans le rapport annuel

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

2000, ch. 15, art. 7.1; 2007, ch. 19, art. 25.

Regulations

Regulations

86 (1) The Agency may make regulations

(a) classifying air services;

(b) classifying aircraft;

(c) prescribing liability insurance coverage requirements for air services or aircraft;

(d) prescribing financial requirements for each class of air service or aircraft;

(e) respecting the issuance, amendment and cancellation of permits for the operation of international charters;

(f) respecting the duration and renewal of licences;

(g) respecting the amendment of licences;

(h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and

(i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,

(ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,

(iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of

Règlements

Pouvoirs de l'Office

86 (1) L'Office peut, par règlement :

a) classifier les services aériens;

b) classifier les aéronefs;

c) prévoir les exigences relatives à la couverture d'assurance responsabilité pour les services aériens et les aéronefs;

d) prévoir les exigences financières pour chaque catégorie de service aérien ou d'aéronefs;

e) régir la délivrance, la modification et l'annulation des permis d'affrètements internationaux;

f) fixer la durée de validité et les modalités de renouvellement des licences;

g) régir la modification des licences;

h) prendre toute mesure concernant le trafic et les tarifs, prix, taux, frais et conditions de transport liés au service international, notamment prévoir qu'il peut :

(i) annuler ou suspendre des tarifs, prix, taux ou frais,

(ii) établir de nouveaux tarifs, prix, taux ou frais en remplacement de ceux annulés,

(iii) enjoindre à tout licencié ou transporteur de prendre les mesures correctives qu'il estime indiquées et de verser des indemnités aux personnes lésées par la non-application par le licencié ou transporteur des prix, taux, frais ou conditions de

carriage applicable to the service it offers that were set out in its tariffs, and

(iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

(i) requiring licensees to file with the Agency any documents and information relating to activities under their licences that are necessary for the purposes of enabling the Agency to exercise its powers and perform its duties and functions under this Part and respecting the manner in which and the times at which the documents and information are to be filed;

(j) requiring licensees to include in contracts or arrangements with travel wholesalers, tour operators, charterers or other persons associated with the provision of air services to the public, or to make those contracts and arrangements subject to, terms and conditions specified or referred to in the regulations;

(k) defining words and expressions for the purposes of this Part;

(l) excluding a person from any of the requirements of this Part;

(m) prescribing any matter or thing that by this Part is to be prescribed; and

(n) generally for carrying out the purposes and provisions of this Part.

transport applicables au service et qui figuraient au tarif,

(iv) obliger tout licencié ou transporteur à publier les conditions de transport du service international sur tout site Internet qu'il utilise pour vendre ce service;

i) demander aux licenciés de déposer auprès de lui les documents ainsi que les renseignements relatifs aux activités liées à leurs licences et nécessaires à l'exercice de ses attributions dans le cadre de la présente partie, et fixer les modalités de temps ou autres du dépôt;

j) demander aux licenciés d'inclure dans les contrats ou ententes conclus avec les grossistes en voyages, voyagistes, affréteurs ou autres personnes associées à la prestation de services aériens au public les conditions prévues dans les règlements ou d'assujettir ces contrats ou ententes à ces conditions;

k) définir les termes non définis de la présente partie;

l) exempter toute personne des obligations imposées par la présente partie;

m) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

n) prendre toute autre mesure d'application de la présente partie.

Exclusion not to provide certain relief

(2) No regulation shall be made under paragraph (1)(l) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

(3) [Repealed, 2007, c. 19, s. 26]

1996, c. 10, s. 86; 2000, c. 15, s. 8; 2007, c. 19, s. 26.

Exception

(2) Les obligations imposées par la présente partie relativement à la qualité de Canadien, au document d'aviation canadien et à la police d'assurance responsabilité réglementaire en matière de service aérien ne peuvent faire l'objet de l'exemption prévue à l'alinéa (1)l).

(3) [Abrogé, 2007, ch. 19, art. 26]

1996, ch. 10, art. 86; 2000, ch. 15, art. 8; 2007, ch. 19, art. 26.

Advertising regulations

86.1 (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.

Contents of regulations

(2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a

Règlement concernant la publicité des prix

86.1 (1) L'Office régit, par règlement, la publicité dans les médias, y compris dans Internet, relative aux prix des services aériens au Canada ou dont le point de départ est au Canada.

Contenu des règlements

(2) Les règlements exigent notamment que le prix des services aériens mentionné dans toute publicité faite par

CANADA

CONSOLIDATION

CODIFICATION

Carriage by Air Act

Loi sur le transport aérien

R.S.C., 1985, c. C-26

L.R.C. (1985), ch. C-26

Current to February 15, 2016

Last amended on November 4, 2003

À jour au 15 février 2016

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R.S.C., 1985, c. C-26

L.R.C., 1985, ch. C-26

An Act to give effect to certain conventions for the unification of certain rules relating to international carriage by air

Loi visant à donner suite à certaines conventions pour l'unification de certaines règles relatives au transport aérien international

Short title

1 This Act may be cited as the *Carriage by Air Act*.

R.S., c. C-14, s. 1.

Titre abrégé

1 Titre abrégé : « *Loi sur le transport aérien* ».

S.R., ch. C-14, art. 1.

Definition of "party"

1.1 (1) In this Act, *party* includes a High Contracting Party, as defined in Article 40A of the Convention set out in Schedule I.

Définition de « partie »

1.1 (1) Dans la présente loi, *partie* s'entend notamment d'une Haute Partie Contractante, au sens de l'article 40A de la convention figurant à l'annexe I.

Interpretation

(2) For the purposes of this Act, any reference to "agent" in the English version of Schedule I shall be read as a reference to "servant or agent".

1999, c. 21, s. 1.

Interprétation

(2) Pour l'application de la présente loi, il est précisé que le terme « agent », mentionné dans la version anglaise de l'annexe I, s'entend notamment de « servant ».

1999, ch. 21, art. 1.

Implementing Conventions

2 (1) Subject to this section, the provisions of the Convention set out in Schedule I and of the Convention set out in Schedule V, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

Conventions en vigueur

2 (1) Sous réserve des autres dispositions du présent article, les dispositions de la convention figurant à l'annexe I et celles de la convention figurant à l'annexe V, dans la mesure où elles se rapportent aux droits et responsabilités des personnes concernées par le transport aérien — notamment les transporteurs et leurs préposés, les voyageurs, les consignateurs et les consignataires —, ont force de loi au Canada relativement au transport aérien visé par ces dispositions, indépendamment de la nationalité de l'aéronef en cause.

Implementing amendments to Convention

(2) Subject to this section, the provisions of the Convention set out in Schedule I, as amended by the Protocol set out in Schedule III or by the Protocols set out in Schedules III and IV, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

Convention modifiée

(2) Sous réserve des autres dispositions du présent article, les dispositions de la convention figurant à l'annexe I, modifiée soit par le protocole figurant à l'annexe III, soit par les protocoles figurant aux annexes III et IV, dans la mesure où elles se rapportent aux droits et responsabilités des personnes concernées par le transport aérien, ont force de loi au Canada relativement au transport aérien visé par ces dispositions, indépendamment de la nationalité de l'aéronef en cause.

Implementing Convention

(2.1) Subject to this section, the provisions of the Convention set out in Schedule VI, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

Proclamation by Governor in Council

(3) The Governor in Council may from time to time, by proclamation published in the *Canada Gazette*, certify who are the parties to any convention or protocol set out in a schedule to this Act, in respect of what territories they are respectively parties, to what extent they have availed themselves of the Additional Protocol to the Convention set out in Schedule I, which of those parties have made a declaration under the Protocol set out in Schedule III or IV and which of those parties have made a declaration under the Convention set out in Schedule VI.

Reference to territories

(4) Any reference in Schedule I to the territory of any party shall be construed as a reference to the territories subject to its sovereignty, suzerainty, mandate or authority, in respect of which it is a party.

Liability under Convention for death of passenger

(5) Any liability imposed by Article 17 of Schedule I or Article 17 of Schedule VI on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger under any law in force in Canada, and the provisions set out in Schedule II shall have effect with respect to the persons by whom and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced.

Damages in francs to be converted into dollars

(6) Any sum in francs mentioned in Article 22 of Schedule I shall, for the purposes of any action against a carrier, be converted into Canadian dollars at the rate of exchange prevailing on the date on which the amount of any damage to be paid by the carrier is ascertained by a court.

Conversion of francs or SDRs into dollars

(7) For the purposes of subsection (6), the Canadian dollar equivalents of francs or Special Drawing Rights, as

Mise en œuvre de la convention

(2.1) Sous réserve des autres dispositions du présent article, les dispositions de la convention figurant à l'annexe VI, dans la mesure où elles se rapportent aux droits et responsabilités des personnes concernées par le transport aérien — notamment les transporteurs et leurs préposés, les voyageurs, les consignateurs et les consignataires —, ont force de loi au Canada relativement au transport aérien visé par ces dispositions, indépendamment de la nationalité de l'aéronef en cause.

Proclamation par le gouverneur en conseil

(3) Le gouverneur en conseil peut, par proclamation publiée dans la *Gazette du Canada*, attester l'identité des parties à une convention ou un protocole figurant en annexe de la présente loi, les territoires à l'égard desquels elles sont respectivement parties, la mesure dans laquelle elles se sont prévalues des dispositions du protocole additionnel de la convention figurant à l'annexe I, ainsi que l'identité des parties qui ont fait une déclaration en vertu du protocole figurant aux annexes III ou IV ou en vertu de la convention figurant à l'annexe VI.

Mention des territoires

(4) Toute mention, à l'annexe I, du territoire d'une partie vaut mention des territoires sur lesquels elle exerce sa souveraineté, sa suzeraineté, son mandat ou son autorité et au nom desquels elle est partie.

Responsabilité en cas de décès d'un passager

(5) L'article 17 de l'annexe I et l'article 17 de l'annexe VI, qui fixent la responsabilité d'un transporteur en cas de décès d'un passager, se substituent aux règles de droit pertinentes en vigueur au Canada. Les dispositions énoncées à l'annexe II sont exécutoires en ce qui concerne tant les personnes par qui et pour le compte desquelles réparation peut être obtenue au titre de la responsabilité ainsi imposée que les modalités de mise en œuvre de celle-ci.

Conversion en dollars des dommages-intérêts en francs

(6) Les sommes mentionnées en francs à l'article 22 de l'annexe I sont, aux fins des actions intentées contre les transporteurs, converties en dollars canadiens au taux de change en vigueur le jour où le tribunal fixe le montant des dommages-intérêts à payer par le transporteur.

Conversion en dollars des francs et des droits de tirage spéciaux

(7) Pour l'application du paragraphe (6), l'équivalent, en dollars canadiens, des sommes exprimées en droits de tirage spéciaux ou en francs, aux termes de l'article 22 de

SCHEDULE VI

(Subsections 2(2.1), (3) and (5) and 3(2) and section 4)

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:

CHAPTER I

General Provisions

Article 1 — Scope of Application

1 This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2 For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the

ANNEXE VI

(paragraphes 2(2.1), (3) et (5) et 3(2) et article 4)

Convention pour l'unification de certaines règles relatives au transport aérien international

RECONNAISSANT l'importante contribution de la Convention pour l'unification de certaines règles relatives au transport aérien international, signée à Varsovie le 12 octobre 1929, ci-après appelée la « Convention de Varsovie » et celle d'autres instruments connexes à l'harmonisation du droit aérien international privé,

RECONNAISSANT la nécessité de moderniser et de refondre la Convention de Varsovie et les instruments connexes,

RECONNAISSANT l'importance d'assurer la protection des intérêts des consommateurs dans le transport aérien international et la nécessité d'une indemnisation équitable fondée sur le principe de réparation,

RÉAFFIRMANT l'intérêt d'assurer le développement d'une exploitation ordonnée du transport aérien international et un acheminement sans heurt des passagers, des bagages et des marchandises, conformément aux principes et aux objectifs de la Convention relative à l'aviation civile internationale faite à Chicago le 7 décembre 1944,

CONVAINCUS que l'adoption de mesures collectives par les États en vue d'harmoniser davantage et de codifier certaines règles régissant le transport aérien international est le meilleur moyen de réaliser un équilibre équitable des intérêts,

LES ÉTATS PARTIES À LA PRÉSENTE CONVENTION SONT CONVENUS DE CE QUI SUIT :

CHAPITRE I

Généralités

Article 1 — Champ d'application

1 La présente convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transport aérien.

2 Au sens de la présente convention, l'expression *transport international* s'entend de tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux États parties, soit sur le territoire d'un seul État partie si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas un État partie. Le transport sans une telle escale entre deux points du territoire d'un seul État partie n'est

territory of another State is not international carriage for the purposes of this Convention.

3 Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4 This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 — Carriage Performed by State and Carriage of Postal Items

1 This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2 In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3 Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

pas considéré comme international au sens de la présente convention.

3 Le transport à exécuter par plusieurs transporteurs successifs est censé constituer pour l'application de la présente convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats, et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans le territoire d'un même État.

4 La présente convention s'applique aussi aux transports visés au Chapitre V, sous réserve des dispositions dudit chapitre.

Article 2 — Transport effectué par l'État et transport d'envois postaux

1 La présente convention s'applique aux transports effectués par l'État ou les autres personnes juridiques de droit public, dans les conditions prévues à l'article 1.

2 Dans le transport des envois postaux, le transporteur n'est responsable qu'envers l'administration postale compétente conformément aux règles applicables dans les rapports entre les transporteurs et les administrations postales.

3 Les dispositions de la présente convention autres que celles du paragraphe 2 ci-dessus ne s'appliquent pas au transport des envois postaux.

CHAPTER II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3 — Passengers and Baggage

1 In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2 Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

3 The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

CHAPITRE II

Documents et obligations des Parties relatifs au transport des passagers, des bagages et des marchandises

Article 3 — Passagers et bagages

1 Dans le transport des passagers, un titre de transport individuel ou collectif doit être délivré, contenant :

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'un même État partie et si une ou plusieurs escales sont prévues sur le territoire d'un autre État, l'indication d'une de ces escales.

2 L'emploi de tout autre moyen constatant les indications qui figurent au paragraphe 1 peut se substituer à la délivrance du titre de transport mentionné dans ce paragraphe. Si un tel autre moyen est utilisé, le transporteur offrira de délivrer au passager un document écrit constatant les indications qui y sont consignées.

3 Le transporteur délivrera au passager une fiche d'identification pour chaque article de bagage enregistré.

4 The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

5 Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4 — Cargo

1 In respect of the carriage of cargo, an air waybill shall be delivered.

2 Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5 — Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the weight of the consignment.

Article 6 — Document Relating to the Nature of the Cargo

The consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

Article 7 — Description of Air Waybill

1 The air waybill shall be made out by the consignor in three original parts.

2 The first part shall be marked “for the carrier”; it shall be signed by the consignor. The second part shall be marked “for the consignee”; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

4 Il sera donné au passager un avis écrit indiquant que, lorsque la présente convention s'applique, elle régit la responsabilité des transporteurs en cas de mort ou de lésion ainsi qu'en cas de destruction, de perte ou d'avarie des bagages, ou de retard.

5 L'inobservation des dispositions des paragraphes précédents n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente convention, y compris celles qui portent sur la limitation de la responsabilité.

Article 4 — Marchandises

1 Pour le transport de marchandises, une lettre de transport aérien est émise.

2 L'emploi de tout autre moyen constatant les indications relatives au transport à exécuter peut se substituer à l'émission de la lettre de transport aérien. Si de tels autres moyens sont utilisés, le transporteur délivre à l'expéditeur, à la demande de ce dernier, un récépissé de marchandises permettant l'identification de l'expédition et l'accès aux indications enregistrées par ces autres moyens.

Article 5 — Contenu de la lettre de transport aérien ou du récépissé de marchandises

La lettre de transport aérien ou le récépissé de marchandises contiennent :

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'un même État partie et qu'une ou plusieurs escales sont prévues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) la mention du poids de l'expédition.

Article 6 — Document relatif à la nature de la marchandise

L'expéditeur peut être tenu pour accomplir les formalités nécessaires de douane, de police et d'autres autorités publiques d'émettre un document indiquant la nature de la marchandise. Cette disposition ne crée pour le transporteur aucun devoir, obligation ni responsabilité.

Article 7 — Description de la lettre de transport aérien

1 La lettre de transport aérien est établie par l'expéditeur en trois exemplaires originaux.

2 Le premier exemplaire porte la mention « pour le transporteur »; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention « pour le destinataire »; il est signé par l'expéditeur et le transporteur. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après acceptation de la marchandise.

3 The signature of the carrier and that of the consignor may be printed or stamped.

4 If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 8 — Documentation for Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 9 — Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 10 — Responsibility for Particulars of Documentation

1 The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2 The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3 Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

3 La signature du transporteur et celle de l'expéditeur peuvent être imprimées ou remplacées par un timbre.

4 Si, à la demande de l'expéditeur, le transporteur établit la lettre de transport aérien, ce dernier est considéré, jusqu'à preuve du contraire, comme agissant au nom de l'expéditeur.

Article 8 — Documents relatifs à plusieurs colis

Lorsqu'il y a plusieurs colis :

a) le transporteur de marchandises a le droit de demander à l'expéditeur l'établissement de lettres de transport aérien distinctes;

b) l'expéditeur a le droit de demander au transporteur la remise de récépissés de marchandises distincts, lorsque les autres moyens visés au paragraphe 2 de l'article 4 sont utilisés.

Article 9 — Inobservation des dispositions relatives aux documents obligatoires

L'inobservation des dispositions des articles 4 à 8 n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente convention, y compris celles qui portent sur la limitation de responsabilité.

Article 10 — Responsabilité pour les indications portées dans les documents

1 L'expéditeur est responsable de l'exactitude des indications et déclarations concernant la marchandise inscrites par lui ou en son nom dans la lettre de transport aérien, ainsi que de celles fournies et faites par lui ou en son nom au transporteur en vue d'être insérées dans le récépissé de marchandises ou pour insertion dans les données enregistrées par les autres moyens prévus au paragraphe 2 de l'article 4. Ces dispositions s'appliquent aussi au cas où la personne agissant au nom de l'expéditeur est également l'agent du transporteur.

2 L'expéditeur assume la responsabilité de tout dommage subi par le transporteur ou par toute autre personne à l'égard de laquelle la responsabilité du transporteur est engagée, en raison d'indications et de déclarations irrégulières, inexactes ou incomplètes fournies et faites par lui ou en son nom.

3 Sous réserve des dispositions des paragraphes 1 et 2 du présent article, le transporteur assume la responsabilité de tout dommage subi par l'expéditeur ou par toute autre personne à l'égard de laquelle la responsabilité de l'expéditeur est engagée, en raison d'indications et de déclarations irrégulières, inexactes ou incomplètes insérées par lui ou en son nom dans le récépissé de marchandises ou dans les données enregistrées par les autres moyens prévus au paragraphe 2 de l'article 4.

Article 11 — Evidentiary Value of Documentation

1 The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2 Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 12 — Right of Disposition of Cargo

1 Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2 If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3 If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4 The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 13 — Delivery of the Cargo

1 Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2 Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

Article 11 — Valeur probante des documents

1 La lettre de transport aérien et le récépissé de marchandises font foi, jusqu'à preuve du contraire, de la conclusion du contrat, de la réception de la marchandise et des conditions du transport qui y figurent.

2 Les énonciations de la lettre de transport aérien et du récépissé de marchandises, relatives au poids, aux dimensions et à l'emballage de la marchandise ainsi qu'au nombre des colis, font foi jusqu'à preuve du contraire; celles relatives à la quantité, au volume et à l'état de la marchandise ne font preuve contre le transporteur que si la vérification en a été faite par lui en présence de l'expéditeur, et constatée sur la lettre de transport aérien, ou s'il s'agit d'énonciations relatives à l'état apparent de la marchandise.

Article 12 — Droit de disposer de la marchandise

1 L'expéditeur a le droit, à la condition d'exécuter toutes les obligations résultant du contrat de transport, de disposer de la marchandise, soit en la retirant à l'aéroport de départ ou de destination, soit en l'arrêtant en cours de route lors d'un atterrissage, soit en la faisant livrer au lieu de destination ou en cours de route à une personne autre que le destinataire initialement désigné, soit en demandant son retour à l'aéroport de départ, pour autant que l'exercice de ce droit ne porte préjudice ni au transporteur, ni aux autres expéditeurs et avec l'obligation de rembourser les frais qui en résultent.

2 Dans le cas où l'exécution des instructions de l'expéditeur est impossible, le transporteur doit l'en aviser immédiatement.

3 Si le transporteur exécute les instructions de disposition de l'expéditeur, sans exiger la production de l'exemplaire de la lettre de transport aérien ou du récépissé de la marchandise délivré à celui-ci, il sera responsable, sauf son recours contre l'expéditeur, du préjudice qui pourra être causé par ce fait à celui qui est régulièrement en possession de la lettre de transport aérien ou du récépissé de la marchandise.

4 Le droit de l'expéditeur cesse au moment où celui du destinataire commence, conformément à l'article 13. Toutefois, si le destinataire refuse la marchandise, ou s'il ne peut être joint, l'expéditeur reprend son droit de disposition.

Article 13 — Livraison de la marchandise

1 Sauf lorsque l'expéditeur a exercé le droit qu'il tient de l'article 12, le destinataire a le droit, dès l'arrivée de la marchandise au point de destination, de demander au transporteur de lui livrer la marchandise contre le paiement du montant des créances et contre l'exécution des conditions de transport.

2 Sauf stipulation contraire, le transporteur doit aviser le destinataire dès l'arrivée de la marchandise.

3 If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14 — Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15 — Relations of Consignor and Consignee or Mutual Relations of Third Parties

1 Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2 The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16 — Formalities of Customs, Police or Other Public Authorities

1 The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2 The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

3 Si la perte de la marchandise est reconnue par le transporteur ou si, à l'expiration d'un délai de sept jours après qu'elle aurait dû arriver, la marchandise n'est pas arrivée, le destinataire est autorisé à faire valoir vis-à-vis du transporteur les droits résultant du contrat de transport.

Article 14 — Possibilité de faire valoir les droits de l'expéditeur et du destinataire

L'expéditeur et le destinataire peuvent faire valoir tous les droits qui leur sont respectivement conférés par les articles 12 et 13, chacun en son nom propre, qu'il agisse dans son propre intérêt ou dans l'intérêt d'autrui, à condition d'exécuter les obligations que le contrat de transport impose.

Article 15 — Rapports entre l'expéditeur et le destinataire ou rapports entre les tierces parties

1 Les articles 12, 13 et 14 ne portent préjudice ni aux rapports entre l'expéditeur et le destinataire, ni aux rapports mutuels des tierces parties dont les droits proviennent de l'expéditeur ou du destinataire.

2 Toute clause dérogeant aux dispositions des articles 12, 13 et 14 doit être inscrite dans la lettre de transport aérien ou dans le récépissé de marchandises.

Article 16 — Formalités de douane, de police ou d'autres autorités publiques

1 L'expéditeur est tenu de fournir les renseignements et les documents qui, avant la remise de la marchandise au destinataire, sont nécessaires à l'accomplissement des formalités de douane, de police ou d'autres autorités publiques. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces renseignements et pièces, sauf le cas de faute de la part du transporteur ou de ses préposés ou mandataires.

2 Le transporteur n'est pas tenu d'examiner si ces renseignements et documents sont exacts ou suffisants.

CHAPTER III

Liability of the Carrier and Extent of Compensation for Damage

Article 17 — Death and Injury of Passengers — Damage to Baggage

1 The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2 The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3 If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4 Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 18 — Damage to Cargo

1 The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2 However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

CHAPITRE III

Responsabilité du transporteur et étendue de l'indemnisation du préjudice

Article 17 — Mort ou lésion subie par le passager — Dommage causé aux bagages

1 Le transporteur est responsable du préjudice survenu en cas de mort ou de lésion corporelle subie par un passager, par cela seul que l'accident qui a causé la mort ou la lésion s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement ou de débarquement.

2 Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés, par cela seul que le fait qui a causé la destruction, la perte ou l'avarie s'est produit à bord de l'aéronef ou au cours de toute période durant laquelle le transporteur avait la garde des bagages enregistrés. Toutefois, le transporteur n'est pas responsable si et dans la mesure où le dommage résulte de la nature ou du vice propre des bagages. Dans le cas des bagages non enregistrés, notamment des effets personnels, le transporteur est responsable si le dommage résulte de sa faute ou de celle de ses préposés ou mandataires.

3 Si le transporteur admet la perte des bagages enregistrés ou si les bagages enregistrés ne sont pas arrivés à destination dans les vingt et un jours qui suivent la date à laquelle ils auraient dû arriver, le passager est autorisé à faire valoir contre le transporteur les droits qui découlent du contrat de transport.

4 Sous réserve de dispositions contraires, dans la présente convention le terme « bagages » désigne les bagages enregistrés aussi bien que les bagages non enregistrés.

Article 18 — Dommage causé à la marchandise

1 Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de la marchandise par cela seul que le fait qui a causé le dommage s'est produit pendant le transport aérien.

2 Toutefois, le transporteur n'est pas responsable s'il établit, et dans la mesure où il établit, que la destruction, la perte ou l'avarie de la marchandise résulte de l'un ou de plusieurs des faits suivants :

a) la nature ou le vice propre de la marchandise;

b) l'emballage défectueux de la marchandise par une personne autre que le transporteur ou ses préposés ou mandataires;

c) un fait de guerre ou un conflit armé;

d) un acte de l'autorité publique accompli en relation avec l'entrée, la sortie ou le transit de la marchandise.

3 The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4 The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19 — Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 20 — Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 21 — Compensation in Case of Death or Injury of Passengers

1 For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2 The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

3 Le transport aérien, au sens du paragraphe 1 du présent article, comprend la période pendant laquelle la marchandise se trouve sous la garde du transporteur.

4 La période du transport aérien ne couvre aucun transport terrestre, maritime ou par voie d'eau intérieure effectué en dehors d'un aéroport. Toutefois, lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve du contraire, résulter d'un fait survenu pendant le transport aérien. Si, sans le consentement de l'expéditeur, le transporteur remplace en totalité ou en partie le transport convenu dans l'entente conclue entre les parties comme étant le transport par voie aérienne, par un autre mode de transport, ce transport par un autre mode sera considéré comme faisant partie de la période du transport aérien.

Article 19 — Retard

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.

Article 20 — Exonération

Dans le cas où il fait la preuve que la négligence ou un autre acte ou omission préjudiciable de la personne qui demande réparation ou de la personne dont elle tient ses droits a causé le dommage ou y a contribué, le transporteur est exonéré en tout ou en partie de sa responsabilité à l'égard de cette personne, dans la mesure où cette négligence ou cet autre acte ou omission préjudiciable a causé le dommage ou y a contribué. Lorsqu'une demande en réparation est introduite par une personne autre que le passager, en raison de la mort ou d'une lésion subie par ce dernier, le transporteur est également exonéré en tout ou en partie de sa responsabilité dans la mesure où il prouve que la négligence ou un autre acte ou omission préjudiciable de ce passager a causé le dommage ou y a contribué. Le présent article s'applique à toutes les dispositions de la convention en matière de responsabilité, y compris le paragraphe 1 de l'article 21.

Article 21 — Indemnisation en cas de mort ou de lésion subie par le passager

1 Pour les dommages visés au paragraphe 1 de l'article 17 et ne dépassant pas 100 000 droits de tirage spéciaux par passager, le transporteur ne peut exclure ou limiter sa responsabilité.

2 Le transporteur n'est pas responsable des dommages visés au paragraphe 1 de l'article 17 dans la mesure où ils dépassent 100 000 droits de tirage spéciaux par passager, s'il prouve :

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22 — Limits of Liability in Relation to Delay, Baggage and Cargo

1 In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2 In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3 In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4 In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5 The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6 The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and

a) que le dommage n'est pas dû à la négligence ou à un autre acte ou omission préjudiciable du transporteur, de ses préposés ou de ses mandataires, ou

b) que ces dommages résultent uniquement de la négligence ou d'un autre acte ou omission préjudiciable d'un tiers.

Article 22 — Limites de responsabilité relatives aux retards, aux bagages et aux marchandises

1 En cas de dommage subi par des passagers résultant d'un retard, aux termes de l'article 19, la responsabilité du transporteur est limitée à la somme de 4 150 droits de tirage spéciaux par passager.

2 Dans le transport de bagages, la responsabilité du transporteur en cas de destruction, perte, avarie ou retard est limitée à la somme de 1 000 droits de tirage spéciaux par passager, sauf déclaration spéciale d'intérêt à la livraison faite par le passager au moment de la remise des bagages enregistrés au transporteur et moyennant le paiement éventuel d'une somme supplémentaire. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il prouve qu'elle est supérieure à l'intérêt réel du passager à la livraison.

3 Dans le transport de marchandises, la responsabilité du transporteur, en cas de destruction, de perte, d'avarie ou de retard, est limitée à la somme de 17 droits de tirage spéciaux par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une somme supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

4 En cas de destruction, de perte, d'avarie ou de retard d'une partie des marchandises, ou de tout objet qui y est contenu, seul le poids total du ou des colis dont il s'agit est pris en considération pour déterminer la limite de responsabilité du transporteur. Toutefois, lorsque la destruction, la perte, l'avarie ou le retard d'une partie des marchandises, ou d'un objet qui y est contenu, affecte la valeur d'autres colis couverts par la même lettre de transport aérien ou par le même récépissé ou, en l'absence de ces documents, par les mêmes indications consignées par les autres moyens visés à l'article 4, paragraphe 2, le poids total de ces colis doit être pris en considération pour déterminer la limite de responsabilité.

5 Les dispositions des paragraphes 1 et 2 du présent article ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du transporteur, de ses préposés ou de ses mandataires, fait soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés ou de mandataires, la preuve soit également apportée que ceux-ci ont agi dans l'exercice de leurs fonctions.

6 Les limites fixées par l'article 21 et par le présent article n'ont pas pour effet d'enlever au tribunal la faculté d'allouer en outre, conformément à sa loi, une somme correspondant à

of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23 — Conversion of Monetary Units

1 The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2 Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1 500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of Article 22; 15 000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3 The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

tout ou partie des dépens et autres frais de procès exposés par le demandeur, intérêts compris. La disposition précédente ne s'applique pas lorsque le montant de l'indemnité allouée, non compris les dépens et autres frais de procès, ne dépasse pas la somme que le transporteur a offerte par écrit au demandeur dans un délai de six mois à dater du fait qui a causé le dommage ou avant l'introduction de l'instance si celle-ci est postérieure à ce délai.

Article 23 — Conversion des unités monétaires

1 Les sommes indiquées en droits de tirage spéciaux dans la présente convention sont considérées comme se rapportant au droit de tirage spécial tel que défini par le Fonds monétaire international. La conversion de ces sommes en monnaies nationales s'effectuera, en cas d'instance judiciaire, suivant la valeur de ces monnaies en droit de tirage spécial à la date du jugement. La valeur, en droit de tirage spécial, d'une monnaie nationale d'un État partie qui est membre du Fonds monétaire international, est calculée selon la méthode d'évaluation appliquée par le Fonds monétaire international à la date du jugement pour ses propres opérations et transactions. La valeur, en droit de tirage spécial, d'une monnaie nationale d'un État partie qui n'est pas membre du Fonds monétaire international, est calculée de la façon déterminée par cet État.

2 Toutefois, les États qui ne sont pas membres du Fonds monétaire international et dont la législation ne permet pas d'appliquer les dispositions du paragraphe 1 du présent article, peuvent, au moment de la ratification ou de l'adhésion, ou à tout moment par la suite, déclarer que la limite de responsabilité du transporteur prescrite à l'article 21 est fixée, dans les procédures judiciaires sur leur territoire, à la somme de 1 500 000 unités monétaires par passager; 62 500 unités monétaires par passager pour ce qui concerne le paragraphe 1 de l'article 22; 15 000 unités monétaires par passager pour ce qui concerne le paragraphe 2 de l'article 22; et 250 unités monétaires par kilogramme pour ce qui concerne le paragraphe 3 de l'article 22. Cette unité monétaire correspond à soixante-cinq milligrammes et demi d'or au titre de neuf cents millièmes de fin. Les sommes peuvent être converties dans la monnaie nationale concernée en chiffres ronds. La conversion de ces sommes en monnaie nationale s'effectuera conformément à la législation de l'État en cause.

3 Le calcul mentionné dans la dernière phrase du paragraphe 1 du présent article et la conversion mentionnée au paragraphe 2 du présent article sont effectués de façon à exprimer en monnaie nationale de l'État partie la même valeur réelle, dans la mesure du possible, pour les montants prévus aux articles 21 et 22, que celle qui découlerait de l'application des trois premières phrases du paragraphe 1 du présent article. Les États parties communiquent au dépositaire leur méthode de calcul conformément au paragraphe 1 du présent article ou les résultats de la conversion conformément au paragraphe 2 du présent article, selon le cas, lors du dépôt de leur instrument de ratification, d'acceptation ou d'approbation de la présente convention ou d'adhésion à celle-ci et chaque fois qu'un changement se produit dans cette méthode de calcul ou dans ces résultats.

Article 24 — Review of Limits

1 Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2 If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3 Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25 — Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26 — Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 24 — Révision des limites

1 Sans préjudice des dispositions de l'article 25 de la présente convention et sous réserve du paragraphe 2 ci-dessous, les limites de responsabilité prescrites aux articles 21, 22 et 23 sont révisées par le dépositaire tous les cinq ans, la première révision intervenant à la fin de la cinquième année suivant la date d'entrée en vigueur de la présente convention, ou si la convention n'entre pas en vigueur dans les cinq ans qui suivent la date à laquelle elle est pour la première fois ouverte à la signature, dans l'année de son entrée en vigueur, moyennant l'application d'un coefficient pour inflation correspondant au taux cumulatif de l'inflation depuis la révision précédente ou, dans le cas d'une première révision, depuis la date d'entrée en vigueur de la convention. La mesure du taux d'inflation à utiliser pour déterminer le coefficient pour inflation est la moyenne pondérée des taux annuels de la hausse ou de la baisse des indices de prix à la consommation des États dont les monnaies composent le droit de tirage spécial cité au paragraphe 1 de l'article 23.

2 Si la révision mentionnée au paragraphe précédent conclut que le coefficient pour inflation a dépassé 10 %, le dépositaire notifie aux États parties une révision des limites de responsabilité. Toute révision ainsi adoptée prend effet six mois après sa notification aux États parties. Si, dans les trois mois qui suivent cette notification aux États parties, une majorité des États parties notifie sa désapprobation, la révision ne prend pas effet et le dépositaire renvoie la question à une réunion des États parties. Le dépositaire notifie immédiatement à tous les États parties l'entrée en vigueur de toute révision.

3 Nonobstant le paragraphe 1 du présent article, la procédure évoquée au paragraphe 2 du présent article est applicable à tout moment, à condition qu'un tiers des États parties exprime un souhait dans ce sens et à condition que le coefficient pour inflation visé au paragraphe 1 soit supérieur à 30 % de ce qu'il était à la date de la révision précédente ou à la date d'entrée en vigueur de la présente convention s'il n'y a pas eu de révision antérieure. Les révisions ultérieures selon la procédure décrite au paragraphe 1 du présent article interviennent tous les cinq ans à partir de la fin de la cinquième année suivant la date de la révision intervenue en vertu du présent paragraphe.

Article 25 — Stipulation de limites

Un transporteur peut stipuler que le contrat de transport peut fixer des limites de responsabilité plus élevées que celles qui sont prévues dans la présente convention, ou ne comporter aucune limite de responsabilité.

Article 26 — Nullité des dispositions contractuelles

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente convention.

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.

Article 28 — Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Article 29 — Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30 — Servants, Agents — Aggregation of Claims

1 If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2 The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3 Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 31 — Timely Notice of Complaints

1 Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accor-

Article 27 — Liberté de contracter

Rien dans la présente convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport, de renoncer aux moyens de défense qui lui sont donnés en vertu de la présente convention ou d'établir des conditions qui ne sont pas en contradiction avec les dispositions de la présente convention.

Article 28 — Paiements anticipés

En cas d'accident d'aviation entraînant la mort ou la lésion de passagers, le transporteur, s'il y est tenu par la législation de son pays, versera sans retard des avances aux personnes physiques qui ont droit à un dédommagement pour leur permettre de subvenir à leurs besoins économiques immédiats. Ces avances ne constituent pas une reconnaissance de responsabilité et elles peuvent être déduites des montants versés ultérieurement par le transporteur à titre de dédommagement.

Article 29 — Principe des recours

Dans le transport de passagers, de bagages et de marchandises, toute action en dommages-intérêts, à quelque titre que ce soit, en vertu de la présente convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente convention, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. Dans toute action de ce genre, on ne pourra pas obtenir de dommages-intérêts punitifs ou exemplaires ni de dommages à un titre autre que la réparation.

Article 30 — Préposés, mandataires — Montant total de la réparation

1 Si une action est intentée contre un préposé ou un mandataire du transporteur à la suite d'un dommage visé par la présente convention, ce préposé ou mandataire, s'il prouve qu'il a agi dans l'exercice de ses fonctions, pourra se prévaloir des conditions et des limites de responsabilité que peut invoquer le transporteur en vertu de la présente convention.

2 Le montant total de la réparation qui, dans ce cas, peut être obtenu du transporteur, de ses préposés et de ses mandataires, ne doit pas dépasser lesdites limites.

3 Sauf pour le transport de marchandises, les dispositions des paragraphes 1 et 2 du présent article ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du préposé ou du mandataire, fait soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement.

Article 31 — Délais de protestation

1 La réception des bagages enregistrés et des marchandises sans protestation par le destinataire constituera présomption, sauf preuve du contraire, que les bagages et marchandises ont

dance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2 In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3 Every complaint must be made in writing and given or dispatched within the times aforesaid.

4 If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 32 — Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 33 — Jurisdiction

1 An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2 In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3 For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4 Questions of procedure shall be governed by the law of the court seised of the case.

été livrés en bon état et conformément au titre de transport ou aux indications consignées par les autres moyens visés à l'article 3, paragraphe 2, et à l'article 4, paragraphe 2.

2 En cas d'avarie, le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de sept jours pour les bagages enregistrés et de quatorze jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra être faite au plus tard dans les vingt et un jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition.

3 Toute protestation doit être faite par réserve écrite et remise ou expédiée dans le délai prévu pour cette protestation.

4 À défaut de protestation dans les délais prévus, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci.

Article 32 — Décès de la personne responsable

En cas de décès de la personne responsable, une action en responsabilité est recevable, conformément aux dispositions de la présente convention, à l'encontre de ceux qui représentent juridiquement sa succession.

Article 33 — Juridiction compétente

1 L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'un des États Parties, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

2 En ce qui concerne le dommage résultant de la mort ou d'une lésion corporelle subie par un passager, l'action en responsabilité peut être intentée devant l'un des tribunaux mentionnés au paragraphe 1 du présent article ou, eu égard aux spécificités du transport aérien, sur le territoire d'un État partie où le passager a sa résidence principale et permanente au moment de l'accident et vers lequel ou à partir duquel le transporteur exploite des services de transport aérien, soit avec ses propres aéronefs, soit avec les aéronefs d'un autre transporteur en vertu d'un accord commercial, et dans lequel ce transporteur mène ses activités de transport aérien à partir de locaux que lui-même ou un autre transporteur avec lequel il a conclu un accord commercial loue ou possède.

3 Aux fins du paragraphe 2 :

a) « accord commercial » signifie un accord autre qu'un accord d'agence conclu entre des transporteurs et portant sur la prestation de services communs de transport aérien de passagers;

b) « résidence principale et permanente » désigne le lieu unique de séjour fixe et permanent du passager au moment de l'accident. La nationalité du passager ne sera pas le facteur déterminant à cet égard.

4 La procédure sera régie selon le droit du tribunal saisi de l'affaire.

Article 34 — Arbitration

1 Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2 The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3 The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4 The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35 — Limitation of Actions

1 The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2 The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36 — Successive Carriage

1 In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2 In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3 As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 37 — Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Article 34 — Arbitrage

1 Sous réserve des dispositions du présent article, les parties au contrat de transport de fret peuvent stipuler que tout différend relatif à la responsabilité du transporteur en vertu de la présente convention sera réglé par arbitrage. Cette entente sera consignée par écrit.

2 La procédure d'arbitrage se déroulera, au choix du demandeur, dans l'un des lieux de compétence des tribunaux prévus à l'article 33.

3 L'arbitre ou le tribunal arbitral appliquera les dispositions de la présente convention.

4 Les dispositions des paragraphes 2 et 3 du présent article seront réputées faire partie de toute clause ou de tout accord arbitral, et toute disposition contraire à telle clause ou à tel accord arbitral sera nulle et de nul effet.

Article 35 — Délai de recours

1 L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter de l'arrivée à destination, ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.

2 Le mode du calcul du délai est déterminé par la loi du tribunal saisi.

Article 36 — Transporteurs successifs

1 Dans les cas de transport régis par la définition du paragraphe 3 de l'article 1, à exécuter par divers transporteurs successifs, chaque transporteur acceptant des voyageurs, des bagages ou des marchandises est soumis aux règles établies par la présente convention, et est censé être une des parties du contrat de transport, pour autant que ce contrat ait trait à la partie du transport effectuée sous son contrôle.

2 Au cas d'un tel transport, le passager ou ses ayants droit ne pourront recourir que contre le transporteur ayant effectué le transport au cours duquel l'accident ou le retard s'est produit, sauf dans le cas où, par stipulation expresse, le premier transporteur aura assuré la responsabilité pour tout le voyage.

3 S'il s'agit de bagages ou de marchandises, le passager ou l'expéditeur aura recours contre le premier transporteur, et le destinataire ou le passager qui a le droit à la délivrance contre le dernier, et l'un et l'autre pourront, en outre, agir contre le transporteur ayant effectué le transport au cours duquel la destruction, la perte, l'avarie ou le retard se sont produits. Ces transporteurs seront solidairement responsables envers le passager, ou l'expéditeur ou le destinataire.

Article 37 — Droit de recours contre des tiers

La présente convention ne préjuge en aucune manière la question de savoir si la personne tenue pour responsable en vertu de ses dispositions a ou non un recours contre toute autre personne.

CHAPTER IV

Combined Carriage

Article 38 — Combined Carriage

1 In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2 Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

CHAPITRE IV

Transport intermodal

Article 38 — Transport intermodal

1 Dans le cas de transport intermodal effectué en partie par air et en partie par tout autre moyen de transport, les dispositions de la présente convention ne s'appliquent, sous réserve du paragraphe 4 de l'article 18, qu'au transport aérien et si celui-ci répond aux conditions de l'article 1.

2 Rien dans la présente convention n'empêche les parties, dans le cas de transport intermodal, d'insérer dans le titre de transport aérien des conditions relatives à d'autres modes de transport, à condition que les stipulations de la présente convention soient respectées en ce qui concerne le transport par air.

CHAPTER V

Carriage by Air Performed by a Person Other Than the Contracting Carrier

Article 39 — Contracting Carrier — Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40 — Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Article 41 — Mutual Liability

1 The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment

CHAPITRE V

Transport aérien effectué par une personne autre que le transporteur contractuel

Article 39 — Transporteur contractuel — Transporteur de fait

Les dispositions du présent chapitre s'appliquent lorsqu'une personne (ci-après dénommée « transporteur contractuel ») conclut un contrat de transport régi par la présente convention avec un passager ou un expéditeur ou avec une personne agissant pour le compte du passager ou de l'expéditeur, et qu'une autre personne (ci-après dénommée « transporteur de fait ») effectue, en vertu d'une autorisation donnée par le transporteur contractuel, tout ou partie du transport, mais n'est pas, en ce qui concerne cette partie, un transporteur successif au sens de la présente convention. Cette autorisation est présumée, sauf preuve contraire.

Article 40 — Responsabilité respective du transporteur contractuel et du transporteur de fait

Sauf disposition contraire du présent chapitre, si un transporteur de fait effectue tout ou partie du transport qui, conformément au contrat visé à l'article 39, est régi par la présente convention, le transporteur contractuel et le transporteur de fait sont soumis aux règles de la présente convention, le premier pour la totalité du transport envisagé dans le contrat, le second seulement pour le transport qu'il effectue.

Article 41 — Attribution mutuelle

1 Les actes et omissions du transporteur de fait ou de ses préposés et mandataires agissant dans l'exercice de leurs

shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2 The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Article 42 — Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

Article 43 — Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 44 — Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 45 — Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against

fonctions, relatifs au transport effectué par le transporteur de fait, sont réputés être également ceux du transporteur contractuel.

2 Les actes et omissions du transporteur contractuel ou de ses préposés et mandataires agissant dans l'exercice de leurs fonctions, relatifs au transport effectué par le transporteur de fait, sont réputés être également ceux du transporteur de fait. Toutefois, aucun de ces actes ou omissions ne pourra soumettre le transporteur de fait à une responsabilité dépassant les montants prévus aux articles 21, 22, 23 et 24. Aucun accord spécial aux termes duquel le transporteur contractuel assume des obligations que n'impose pas la présente convention, aucune renonciation à des droits ou moyens de défense prévus par la présente convention ou aucune déclaration spéciale d'intérêt à la livraison, visée à l'article 22 de la présente convention, n'auront d'effet à l'égard du transporteur de fait, sauf consentement de ce dernier.

Article 42 — Notification des ordres et protestations

Les instructions ou protestations à notifier au transporteur, en application de la présente convention, ont le même effet qu'elles soient adressées au transporteur contractuel ou au transporteur de fait. Toutefois, les instructions visées à l'article 12 n'ont d'effet que si elles sont adressées au transporteur contractuel.

Article 43 — Préposés et mandataires

En ce qui concerne le transport effectué par le transporteur de fait, tout préposé ou mandataire de ce transporteur ou du transporteur contractuel, s'il prouve qu'il a agi dans l'exercice de ses fonctions, peut se prévaloir des conditions et des limites de responsabilité applicables, en vertu de la présente convention, au transporteur dont il est le préposé ou le mandataire, sauf s'il est prouvé qu'il a agi de telle façon que les limites de responsabilité ne puissent être invoquées conformément à la présente convention.

Article 44 — Cumul de la réparation

En ce qui concerne le transport effectué par le transporteur de fait, le montant total de la réparation qui peut être obtenu de ce transporteur, du transporteur contractuel et de leurs préposés et mandataires quand ils ont agi dans l'exercice de leurs fonctions, ne peut pas dépasser l'indemnité la plus élevée qui peut être mise à charge soit du transporteur contractuel, soit du transporteur de fait, en vertu de la présente convention, sous réserve qu'aucune des personnes mentionnées dans le présent article ne puisse être tenue pour responsable au-delà de la limite applicable à cette personne.

Article 45 — Notification des actions en responsabilité

Toute action en responsabilité, relative au transport effectué par le transporteur de fait, peut être intentée, au choix du demandeur, contre ce transporteur ou le transporteur contractuel ou contre l'un et l'autre, conjointement ou séparément. Si

only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 46 — Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

Article 47 — Invalidity of Contractual Provisions

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

Article 48 — Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

CHAPTER VI

Other Provisions

Article 49 — Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 50 — Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

l'action est intentée contre l'un seulement de ces transporteurs, ledit transporteur aura le droit d'appeler l'autre transporteur en intervention devant le tribunal saisi, les effets de cette intervention ainsi que la procédure qui lui est applicable étant réglés par la loi de ce tribunal.

Article 46 — Juridiction annexe

Toute action en responsabilité, prévue à l'article 45, doit être portée, au choix du demandeur, sur le territoire d'un des États parties, soit devant l'un des tribunaux où une action peut être intentée contre le transporteur contractuel, conformément à l'article 33, soit devant le tribunal du domicile du transporteur de fait ou du siège principal de son exploitation.

Article 47 — Nullité des dispositions contractuelles

Toute clause tendant à exonérer le transporteur contractuel ou le transporteur de fait de leur responsabilité en vertu du présent chapitre ou à établir une limite inférieure à celle qui est fixée dans le présent chapitre est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions du présent chapitre.

Article 48 — Rapports entre transporteur contractuel et transporteur de fait

Sous réserve de l'article 45, aucune disposition du présent chapitre ne peut être interprétée comme affectant les droits et obligations existant entre les transporteurs, y compris tous droits à un recours ou dédommagement.

CHAPITRE VI

Autres dispositions

Article 49 — Obligation d'application

Sont nulles et de nul effet toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence.

Article 50 — Assurance

Les États parties exigent que leurs transporteurs contractent une assurance suffisante pour couvrir la responsabilité qui leur incombe aux termes de la présente convention. Un transporteur peut être tenu, par l'État partie à destination duquel il exploite des services, de fournir la preuve qu'il maintient une assurance suffisante couvrant sa responsabilité au titre de la présente convention.

Article 51 — Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 52 — Definition of Days

The expression "days" when used in this Convention means calendar days, not working days.

CHAPTER VII

Final Clauses

Article 53 — Signature, Ratification and Entry into Force

1 This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2 This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organisation. For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organisation.

3 This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.

4 Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.

5 Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.

6 This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of

Article 51 — Transport effectué dans des circonstances extraordinaires

Les dispositions des articles 3 à 5, 7 et 8 relatives aux titres de transport ne sont pas applicables au transport effectué dans des circonstances extraordinaires en dehors de toute opération normale de l'exploitation d'un transporteur.

Article 52 — Définition du terme « jour »

Lorsque dans la présente convention il est question de jours, il s'agit de jours courants et non de jours ouvrables.

CHAPITRE VII

Dispositions protocolaires

Article 53 — Signature, ratification et entrée en vigueur

1 La présente convention est ouverte à Montréal le 28 mai 1999 à la signature des États participant à la Conférence internationale de droit aérien, tenue à Montréal du 10 au 28 mai 1999. Après le 28 mai 1999, la Convention sera ouverte à la signature de tous les États au siège de l'Organisation de l'aviation civile internationale à Montréal jusqu'à ce qu'elle entre en vigueur conformément au paragraphe 6 du présent article.

2 De même, la présente convention sera ouverte à la signature des organisations régionales d'intégration économique. Pour l'application de la présente convention, une « organisation régionale d'intégration économique » est une organisation constituée d'États souverains d'une région donnée qui a compétence sur certaines matières régies par la Convention et qui a été dûment autorisée à signer et à ratifier, accepter, approuver ou adhérer à la présente convention. Sauf au paragraphe 2 de l'article 1, au paragraphe 1, alinéa b), de l'article 3, à l'alinéa b) de l'article 5, aux articles 23, 33, 46 et à l'alinéa b) de l'article 57, toute mention faite d'un « État partie » ou « d'États parties » s'applique également aux organisations régionales d'intégration économique. Pour l'application de l'article 24, les mentions faites d'« une majorité des États parties » et d'« un tiers des États parties » ne s'appliquent pas aux organisations régionales d'intégration économique.

3 La présente convention est soumise à la ratification des États et des organisations d'intégration économique qui l'ont signée.

4 Tout État ou organisation régionale d'intégration économique qui ne signe pas la présente convention peut l'accepter, l'approuver ou y adhérer à tout moment.

5 Les instruments de ratification d'acceptation, d'approbation ou d'adhésion seront déposés auprès de l'Organisation de l'aviation civile internationale, qui est désignée par les présentes comme dépositaire.

6 La présente convention entrera en vigueur le soixantième jour après la date du dépôt auprès du dépositaire du tren-

ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.

7 For other States and for other Regional Economic Integration Organisations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

8 The Depositary shall promptly notify all signatories and States Parties of:

(a) each signature of this Convention and date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;

(c) the date of entry into force of this Convention;

(d) the date of the coming into force of any revision of the limits of liability established under this Convention;

(e) any denunciation under Article 54.

Article 54 — Denunciation

1 Any State Party may denounce this Convention by written notification to the Depositary.

2 Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

Article 55 — Relationship with Other Warsaw Convention Instruments

This Convention shall prevail over any rules which apply to international carriage by air:

1 between States Parties to this Convention by virtue of those States commonly being Party to

(a) the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

(b) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);

(c) the *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier*, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

(d) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage*

tième instrument de ratification, d'acceptation, d'approbation ou d'adhésion et entre les États qui ont déposé un tel instrument. Les instruments déposés par les organisations régionales d'intégration économique ne seront pas comptés aux fins du présent paragraphe.

7 Pour les autres États et pour les autres organisations régionales d'intégration économique, la présente convention prendra effet soixante jours après la date du dépôt d'un instrument de ratification, d'acceptation, d'approbation ou d'adhésion.

8 Le dépositaire notifiera rapidement à tous les signataires et à tous les États parties :

a) chaque signature de la présente convention ainsi que sa date;

b) chaque dépôt d'un instrument de ratification, d'acceptation, d'approbation ou d'adhésion ainsi que sa date;

c) la date d'entrée en vigueur de la présente convention;

d) la date d'entrée en vigueur de toute révision des limites de responsabilité établies en vertu de la présente convention;

e) toute dénonciation au titre de l'article 54.

Article 54 — Dénonciation

1 Tout État partie peut dénoncer la présente convention par notification écrite adressée au dépositaire.

2 La dénonciation prendra effet cent quatre-vingt jours après la date à laquelle le dépositaire aura reçu la notification.

Article 55 — Relation avec les autres instruments de la Convention de Varsovie

La présente convention l'emporte sur toutes règles s'appliquant au transport international par voie aérienne :

1) entre États parties à la présente convention du fait que ces États sont communément parties aux instruments suivants :

a) *Convention pour l'unification de certaines règles relatives au transport aérien international*, signée à Varsovie le 12 octobre 1929 (appelée ci-après la Convention de Varsovie);

b) *Protocole portant modification de la Convention pour l'unification de certaines règles relatives au transport aérien international signée à Varsovie le 12 octobre 1929*, fait à La Haye le 28 septembre 1955 (appelé ci-après le Protocole de La Haye);

c) *Convention complémentaire à la Convention de Varsovie, pour l'unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel*, signée à Guadalajara le 18 septembre 1961 (appelée ci-après la Convention de Guadalajara);

d) *Protocole portant modification de la Convention pour l'unification de certaines règles relatives au transport aé-*

by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

(e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2 within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

Article 56 — States with More Than One System of Law

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3 In relation to a State Party which has made such a declaration:

(a) references in Article 23 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State; and

(b) the reference in Article 28 to "national law" shall be construed as referring to the law of the relevant territorial unit of that State.

Article 57 — Reservations

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

(a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or

(b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

rien international signée à Varsovie le 12 octobre 1929 amendée par le Protocole fait à La Haye le 28 septembre 1955, signé à Guatemala le 8 mars 1971 (appelé ci-après le Protocole de Guatemala);

e) Protocoles additionnels n^{os} 1 à 3 et Protocole de Montréal n ^{o} 4 portant modification de la Convention de Varsovie amendée par le Protocole de La Haye ou par la Convention de Varsovie amendée par le Protocole de La Haye et par le Protocole de Guatemala, signés à Montréal le 25 septembre 1975 (appelés ci-après les Protocoles de Montréal); ou

2) dans le territoire de tout État partie à la présente convention du fait que cet État est partie à un ou plusieurs des instruments mentionnés aux alinéas a) à e) ci-dessus.

Article 56 — États possédant plus d'un régime juridique

1 Si un État comprend deux unités territoriales ou davantage dans lesquelles des régimes juridiques différents s'appliquent aux questions régies par la présente convention, il peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que ladite convention s'applique à toutes ses unités territoriales ou seulement à l'une ou plusieurs d'entre elles et il peut à tout moment modifier cette déclaration en en soumettant une nouvelle.

2 Toute déclaration de ce genre est communiquée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Dans le cas d'un État partie qui a fait une telle déclaration :

a) les références, à l'article 23, à la « monnaie nationale » sont interprétées comme signifiant la monnaie de l'unité territoriale pertinente dudit État;

b) à l'article 28, la référence à la « loi nationale » est interprétée comme se rapportant à la loi de l'unité territoriale pertinente dudit État.

Article 57 — Réserves

Aucune réserve ne peut être admise à la présente convention, si ce n'est qu'un État partie peut à tout moment déclarer, par notification adressée au dépositaire, que la présente convention ne s'applique pas :

a) aux transports aériens internationaux effectués et exploités directement par cet État à des fins non commerciales relativement à ses fonctions et devoirs d'État souverain;

b) au transport de personnes, de bagages et de marchandises effectué pour ses autorités militaires à bord d'aéronefs immatriculés dans ou loués par ledit État partie et dont la capacité entière a été réservée par ces autorités ou pour le compte de celles-ci.

EN FOI DE QUOI les plénipotentiaires soussignés, dûment autorisés, ont signé la présente convention.

DONE at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols.

2001, c. 31, s. 5.

FAIT à Montréal le 28 e jour du mois de mai de l'an mil neuf cent quatre-vingt-dix-neuf dans les langues française, anglaise, arabe, chinoise, espagnole et russe, tous les textes faisant également foi. La présente convention restera déposée aux archives de l'Organisation de l'aviation civile internationale, et le dépositaire en transmettra des copies certifiées conformes à tous les États parties à la Convention de Varsovie, au Protocole de La Haye, à la Convention de Guadalajara, au Protocole de Guatemala et aux Protocoles de Montréal.

2001, ch. 31, art. 5.

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

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Material in the Possession of a Tribunal

Material in possession of a tribunal

350 Rules 317 to 319 apply to appeals and motions for leave to appeal, with such modifications as are necessary.

New Evidence on Appeal

New evidence on appeal

351 In special circumstances, the Court may grant leave to a party to present evidence on a question of fact.

Motions for Leave to Appeal

Leave to appeal

352 (1) Unless the Court orders otherwise, where leave to appeal is required, it shall be obtained on a motion brought in writing.

Respondents and service

(2) On a motion under subsection (1) the moving party shall name as respondents all persons referred to in rule 338 and personally serve all persons referred to in rule 339.

Motion record

353 (1) Unless the Court orders otherwise, a party bringing a motion for leave to appeal shall serve the motion record and file an electronic copy of or three paper copies of that record.

Content of motion record

(2) A motion record referred to in subsection (1) shall contain, on consecutively numbered pages and in the following order,

(a) the order in respect of which leave to appeal is sought and any reasons, including dissenting reasons, given in respect of that order;

(b) the pleadings and any other material that is necessary for the hearing of the motion;

(c) an affidavit that sets out any facts relied on in the motion that do not appear on the Court file; and

Obtention de documents en la possession d'un office fédéral

Demande de transmission

350 Les règles 317 à 319 s'appliquent aux appels et aux requêtes en autorisation d'appeler, avec les adaptations nécessaires.

Présentation de nouveaux éléments de preuve

Nouveaux éléments de preuve

351 Dans des circonstances particulières, la Cour peut permettre à toute partie de présenter des éléments de preuve sur une question de fait.

Requête en autorisation d'appeler

Requête en autorisation

352 (1) Sauf ordonnance contraire de la Cour, si une autorisation est requise pour interjeter appel, une requête à cet effet est présentée par écrit.

Signification de l'avis de requête

(2) La personne qui présente un avis de requête visé aux termes du paragraphe (1) désigne à titre d'intimé les personnes qui seraient désignées comme intimées selon la règle 338 et le signifie à personne aux personnes visées à la règle 339.

Dossier de requête

353 (1) Sauf ordonnance contraire de la Cour, la partie qui présente une requête en autorisation d'appeler signifie son dossier de requête et en dépose une copie électronique ou trois copies papier.

Dossier de requête

(2) Le dossier de la requête en autorisation d'appeler contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après :

a) l'ordonnance pour laquelle l'autorisation d'en appeler est demandée ainsi que les motifs, le cas échéant, y compris toute dissidence;

b) les actes de procédure ou autres documents nécessaires pour l'audition de la requête;

c) un affidavit établissant les faits invoqués au soutien de la requête qui ne figurent pas au dossier de la Cour;

Contents of motion record

(2) The motion record of a respondent to a motion shall contain, on consecutively numbered pages and in the following order,

(a) a table of contents;

(b) all affidavits and other material to be used by the respondent on the motion that is not included in the moving party's motion record;

(c) subject to rule 368, the portions of any transcripts on which the respondent intends to rely;

(d) subject to rule 366, written representations; and

(e) any other filed material not contained in the moving party's motion record that is necessary for the hearing of the motion.

SOR/2009-331, s. 6; SOR/2013-18, s. 13; SOR/2015-21, s. 28.

Contenu du dossier de réponse

(2) Le dossier de réponse contient, sur des pages numérotées consécutivement, les éléments suivants dans l'ordre indiqué ci-après :

a) une table des matières;

b) les affidavits et autres documents et éléments matériels dont l'intimé entend se servir relativement à la requête et qui ne figurent pas dans le dossier de requête;

c) sous réserve de la règle 368, les extraits de toute transcription dont l'intimé entend se servir et qui ne figurent pas dans le dossier de requête;

d) sous réserve de la règle 366, les prétentions écrites de l'intimé;

e) les autres documents et éléments matériels déposés qui sont nécessaires à l'audition de la requête et qui ne figurent pas dans le dossier de requête.

DORS/2009-331, art. 6; DORS/2013-18, art. 13; DORS/2015-21, art. 28.

Memorandum of fact and law required

366 On a motion for summary judgment or summary trial, for an interlocutory injunction, for the determination of a question of law or for the certification of a proceeding as a class proceeding, or if the Court so orders, a motion record shall contain a memorandum of fact and law instead of written representations.

SOR/2002-417, s. 22; SOR/2007-301, s. 8; SOR/2009-331, s. 7.

Mémoire requis

366 Dans le cas d'une requête en jugement sommaire ou en procès sommaire, d'une requête pour obtenir une injonction interlocutoire, d'une requête soulevant un point de droit ou d'une requête en autorisation d'une instance comme recours collectif, ou lorsque la Cour l'ordonne, le dossier de requête contient un mémoire des faits et du droit au lieu de prétentions écrites.

DORS/2002-417, art. 22; DORS/2007-301, art. 8; DORS/2009-331, art. 7.

Documents filed as part of motion record

367 A notice of motion or any affidavit required to be filed by a party to a motion may be served and filed as part of the party's motion record and need not be served and filed separately.

Dossier de requête

367 L'avis de requête ou les affidavits qu'une partie doit déposer peuvent être signifiés et déposés à titre d'éléments de son dossier de requête ou de réponse, selon le cas. Ils n'ont pas à être signifiés et déposés séparément.

Transcripts of cross-examinations

368 Transcripts of all cross-examinations on affidavits on a motion shall be filed before the hearing of the motion.

Transcriptions des contre-interrogatoires

368 Les transcriptions des contre-interrogatoires des auteurs des affidavits sont déposés avant l'audition de la requête.

Motions in writing

369 (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Procédure de requête écrite

369 (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

Request for oral hearing

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if

Demande d'audience

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une

the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

Disposition of motion

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

Abandonment of motion

370 (1) A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

Deemed abandonment

(2) Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

Testimony regarding issue of fact

371 On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

PART 8

Preservation of Rights in Proceedings

General

Motion before proceeding commenced

372 (1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

Réponse du requérant

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Décision

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

Désistement

370 (1) La partie qui a présenté une requête peut s'en désister en signifiant et en déposant un avis de désistement, établi selon la formule 370.

Désistement présumé

(2) La partie qui ne se présente pas à l'audition de la requête et qui n'a ni signifié ni déposé un avis de désistement est réputée s'être désistée de sa requête.

Témoignage sur des questions de fait

371 Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

PARTIE 8

Sauvegarde des droits

Dispositions générales

Requête antérieure à l'instance

372 (1) Une requête ne peut être présentée en vertu de la présente partie avant l'introduction de l'instance, sauf en cas d'urgence.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

CANADA

CONSOLIDATION

CODIFICATION

Income Tax Act

Loi de l'impôt sur le revenu

R.S.C. 1985, c. 1 (5th Supp.)

S.R.C. 1985, ch. 1 (5e suppl.)

NOTE

Application provisions are not included in the consolidated text; see relevant amending Acts.

NOTE

Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées.

Current to September 27, 2016

Last amended on July 1, 2016

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directed that the payment be applied in a manner other than that provided in the collection agreement or made no direction as to its application.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1970-71-72, c. 63, s. 1"228"; 1985, c. 45, s. 118.

impôt que jusqu'à concurrence de la partie du paiement ainsi imputé, même si le contribuable a donné instruction que le paiement soit imputé d'une autre manière que celle que prévoit l'accord de perception ou qu'il n'ait donné aucune instruction quant à l'imputation du paiement.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 1970-71-72, ch. 63, art. 1« 228 »; 1985, ch. 45, art. 118.

Repeal of s. 229

229.1 (1) Section 229 is repealed.

Abrogation de l'art. 229

229.1 (1) L'article 229 est abrogé.

Coming into force

(2) Subsection 229.1(1) shall come into force on a day to be fixed by proclamation.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1986, c. 6, s. 119.

Entrée en vigueur

(2) Le paragraphe (1) entre en vigueur à la date fixée par proclamation.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 1986, ch. 6, art. 119.

General

Records and books

230 (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

Records and books

(2) Every qualified donee referred to in paragraphs (a) to (c) of the definition *qualified donee* in subsection 149.1(1) shall keep records and books of account — in the case of a qualified donee referred to in any of subparagraphs (a)(i) and (iii) and paragraphs (b) and (c) of that definition, at an address in Canada recorded with the Minister or designated by the Minister — containing

(a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;

(b) a duplicate of each receipt containing prescribed information for a donation received by it; and

(c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

Généralités

Livres de comptes et registres

230 (1) Quiconque exploite une entreprise et quiconque est obligé, par ou selon la présente loi, de payer ou de percevoir des impôts ou autres montants doit tenir des registres et des livres de comptes (y compris un inventaire annuel, selon les modalités réglementaires) à son lieu d'affaires ou de résidence au Canada ou à tout autre lieu que le ministre peut désigner, dans la forme et renfermant les renseignements qui permettent d'établir le montant des impôts payables en vertu de la présente loi, ou des impôts ou autres sommes qui auraient dû être déduites, retenues ou perçues.

Livres de comptes et registres

(2) Chaque donataire reconnu visé aux alinéas a) à c) de la définition de *donataire reconnu* au paragraphe 149.1(1) doit tenir des registres et des livres de comptes — à une adresse au Canada enregistrée auprès du ministre ou désignée par lui, s'il s'agit d'un donataire reconnu visé aux sous-alinéas a)(i) ou (iii) ou aux alinéas b) ou c) de cette définition — qui contiennent ce qui suit :

a) des renseignements sous une forme qui permet au ministre de déterminer s'il existe des motifs de révocation de l'enregistrement de l'organisme ou de l'association en vertu de la présente loi;

b) un double de chaque reçu, renfermant les renseignements prescrits, visant les dons reçus par l'organisme ou l'association;

c) d'autres renseignements sous une forme qui permet au ministre de vérifier les dons faits à l'organisme ou à l'association et qui donnent droit à une déduction ou à un crédit d'impôt aux termes de la présente loi.

Idem, lawyers

(2.1) For greater certainty, the records and books of account required by subsection 230(1) to be kept by a person carrying on business as a lawyer (within the meaning assigned by subsection 232(1)) whether by means of a partnership or otherwise, include all accounting records of the lawyer, including supporting vouchers and cheques.

Minister's requirement to keep records, etc.

(3) Where a person has failed to keep adequate records and books of account for the purposes of this Act, the Minister may require the person to keep such records and books of account as the Minister may specify and that person shall thereafter keep records and books of account as so required.

Limitation period for keeping records, etc.

(4) Every person required by this section to keep records and books of account shall retain

(a) the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and

(b) all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.

Electronic records

(4.1) Every person required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period referred to in subsection 230(4).

Exemptions

(4.2) The Minister may, on such terms and conditions as are acceptable to the Minister, exempt a person or a class of persons from the requirement in subsection 230(4.1).

Exception where no return filed

(5) Where, in respect of any taxation year, a person referred to in subsection 230(1) has not filed a return with the Minister as and when required by section 150, that person shall retain every record and book of account that is required by this section to be kept and that relates to that taxation year, together with every account and

Idem, avocats

(2.1) Il est entendu que les registres et les livres de comptes qui doivent, en vertu du paragraphe (1), être tenus par une personne exploitant une entreprise consistant dans l'exercice de la profession d'avocat (au sens du paragraphe 232(1)) en société de personnes ou autrement comprennent tous les registres comptables de l'avocat, y compris les pièces justificatives et les chèques.

Ordre du ministre quant à la tenue de registres

(3) Le ministre peut exiger de la personne qui n'a pas tenue les registres et livres de compte voulus pour l'application de la présente loi qu'elle tienne ceux qu'il spécifie. Dès lors, la personne doit tenir les registres et livres de compte qui sont ainsi exigés d'elle.

Durée de conservation

(4) Quiconque est requis, sous le régime du présent article, de tenir des registres et livres de comptes doit conserver :

a) les registres et livres de comptes, de même que les comptes et pièces justificatives nécessaires à la vérification des renseignements contenus dans ces registres et livres de comptes, dont les règlements prévoient la conservation pour une période déterminée;

b) tous les autres registres et livres de comptes mentionnés au présent article de même que les comptes et pièces justificatives nécessaires à la vérification des renseignements contenus dans ces registres et livres de comptes pendant les six ans qui suivent la fin de la dernière année d'imposition à laquelle les documents se rapportent.

Registres électroniques

(4.1) Quiconque tient des registres, comme l'en oblige le présent article, par voie électronique doit les conserver sous une forme électronique intelligible pendant la durée de conservation visée au paragraphe (4).

Dispense

(4.2) Le ministre peut, selon des modalités qu'il estime acceptables, dispenser une personne ou une catégorie de personnes de l'exigence visée au paragraphe (4.1).

Exception : défaut de production d'une déclaration

(5) La personne visée au paragraphe (1) et qui n'a pas produit auprès du ministre, pour une année d'imposition, la déclaration de revenu prévue par l'article 150, de la manière et à la date prévues à cet article, doit conserver les registres et livres de comptes exigés par le présent article et qui se rapportent à cette année de même que les

voucher necessary to verify the information contained therein, until the expiration of six years from the day the return for that taxation year is filed.

comptes et pièces justificatives nécessaires à la vérification des renseignements contenus dans ces registres et livres de comptes pendant les six ans qui suivent la date à laquelle la déclaration de revenu pour cette année est produite auprès du ministre.

Exception where objection or appeal

(6) Where a person required by this section to keep records and books of account serves a notice of objection or where that person is a party to an appeal to the Tax Court of Canada under this Act, that person shall retain every record, book of account, account and voucher necessary for dealing with the objection or appeal until, in the case of the serving of a notice of objection, the time provided by section 169 to appeal has elapsed or, in the case of an appeal, until the appeal is disposed of and any further appeal in respect thereof is disposed of or the time for filing any such further appeal has expired.

Exception : opposition ou appel

(6) Une personne tenue par le présent article de tenir des registres et livres de comptes et qui signifie un avis d'opposition ou est partie à un appel devant la Cour canadienne de l'impôt en vertu de la présente loi doit conserver les registres, livres de comptes, comptes et pièces justificatives nécessaires à l'examen de l'opposition ou de l'appel jusqu'à l'expiration du délai d'appel prévu à l'article 169 en cas de signification d'un avis d'opposition, ou, en cas d'appel, jusqu'au prononcé sur l'appel et sur tout autre appel en découlant ou jusqu'à l'expiration du délai prévu pour interjeter cet autre appel.

Exception where demand by Minister

(7) Where the Minister is of the opinion that it is necessary for the administration of this Act, the Minister may, by registered letter or by a demand served personally, require any person required by this section to keep records and books of account to retain those records and books of account, together with every account and voucher necessary to verify the information contained therein, for such period as is specified in the letter or demand.

Exception : demande du ministre

(7) Le ministre peut exiger de la part de toute personne obligée de tenir des registres et livres de comptes en vertu du présent article, par demande signifiée à personne ou par lettre recommandée, la conservation des registres et livres de comptes de même que des comptes et pièces justificatives nécessaires à la vérification des renseignements contenus dans ces registres et livres de comptes, pour la période y prévue, lorsqu'il est d'avis que cela est nécessaire pour l'application de la présente loi.

Permission for earlier disposal

(8) A person required by this section to keep records and books of account may dispose of the records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, before the expiration of the period in respect of which those records and books of account are required to be kept if written permission for their disposal is given by the Minister.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 230; 1994, c. 21, s. 105; 1998, c. 19, s. 227; 2011, c. 24, s. 70; 2013, c. 34, s. 352(F).

Autorisation de se départir plus tôt des documents

(8) Le ministre peut autoriser par écrit une personne à se départir des documents qu'elle doit conserver aux termes du présent article avant la fin de la période fixée sous le régime de celui-ci.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. L.R. (1985), ch. 1 (5e suppl.), art. 230; 1994, ch. 21, art. 105; 1998, ch. 19, art. 227; 2011, ch. 24, art. 70; 2013, ch. 34, art. 352(F).

Records re monetary contributions - *Canada Elections Act*

230.1 (1) Every agent authorized under the *Canada Elections Act* to accept monetary contributions referred to in that Act shall keep records, sufficient to enable each monetary contribution within the meaning assigned by subsection 127(4.1) that they receive and the expenditures that they make to be verified, (including a duplicate of the receipt referred to in subsection 127(3) for each of those monetary contributions) at

Registres des contributions monétaires : *Loi électorale du Canada*

230.1 (1) Tout agent autorisé par la *Loi électorale du Canada* à accepter des contributions monétaires visées par cette loi tient des registres propres à permettre le contrôle de chaque contribution monétaire, au sens du paragraphe 127(4.1), qu'il reçoit et des dépenses qu'il engage, y compris un double du reçu visé au paragraphe 127(3) délivré pour chacune de ces contributions. Les registres sont tenus :

provincial SIFT tax rate of a SIFT trust or a SIFT partnership for a taxation year means the prescribed amount determined in respect of the SIFT trust or SIFT partnership for the taxation year; (*taux d'imposition provincial des EIPD*)

public corporation has the meaning assigned by subsection 89(1); (*société publique*)

public foundation has the meaning assigned by section 149.1; (*fondation publique*)

public market has the same meaning as in subsection 122.1(1); (*marché public*)

qualified donee has the meaning assigned by subsection 149.1(1); (*donataire reconnu*)

qualifying environmental trust has the meaning assigned by subsection 211.6(1); (*fiducie pour l'environnement admissible*)

qualifying share has the meaning assigned by subsection 192(6); (*action admissible*)

qualifying trust annuity has the meaning assigned by subsection 60.011(2); (*rente admissible de fiducie*)

recognized derivatives exchange means a person or partnership recognized or registered under the securities laws of a province to carry on the business of providing the facilities necessary for the trading of options, swaps, futures contracts or other financial contracts or instruments whose market price, value, delivery obligations, payment obligations or settlement obligations are derived from, referenced to or based on an underlying interest; (*bourse reconnue en instruments financiers dérivés*)

recognized stock exchange means

(a) a designated stock exchange, and

(b) any other stock exchange, if that other stock exchange is located in Canada or in a country that is a member of the Organisation for Economic Co-operation and Development and that has a tax treaty with Canada; (*bourse de valeurs reconnue*)

record includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form; (*registre*)

crédit d'impôt pour des activités de recherche scientifique et de développement expérimental Relativement à un contribuable, pour une année d'imposition, s'entend au sens du paragraphe 127.3(2). (*scientific research and experimental development tax credit*)

date d'échéance de production Le jour où un contribuable est tenu de produire sa déclaration de revenu en vertu de la partie I pour une année d'imposition ou le jour où il serait tenu de la produire s'il avait un impôt à payer pour l'année en vertu de cette partie. (*filing-due date*)

date d'échéance du solde En ce qui concerne l'année d'imposition d'une société de personnes intermédiaire de placement déterminée, la date limite où celle-ci est tenue de produire une déclaration pour l'année aux termes de l'article 229 du *Règlement de l'impôt sur le revenu*. (*SIFT partnership balance-due day*)

date d'exigibilité du solde L'une des dates suivantes applicable à un contribuable pour une année d'imposition :

a) si le contribuable est une fiducie, le 90e jour suivant la fin de l'année;

b) si le contribuable est un particulier décédé après le 31 octobre de l'année et avant le 1er mai de l'année d'imposition suivante, le jour qui suit son décès de six mois;

c) dans les autres cas où le contribuable est un particulier, le 30 avril de l'année d'imposition suivante;

d) si le contribuable est une société :

(i) le jour qui suit de trois mois le jour où l'année d'imposition (appelée ***année courante*** au présent sous-alinéa) prend fin, si, à la fois :

(A) un montant a été déduit en application de l'article 125 dans le calcul de l'impôt payable par la société en vertu de la présente partie pour l'année courante ou pour son année d'imposition précédente,

(B) la société est, tout au long de l'année courante, une société privée sous contrôle canadien,

(C) selon le cas :

(I) dans le cas d'une société qui n'est associée à aucune autre société au cours de l'année courante, son revenu imposable pour l'année d'imposition précédente, calculé avant la prise en compte des conséquences fiscales futures

paragraph) of the capital stock of a corporation issued after December 15, 1987 or acquired after June 15, 1988 are derived primarily from dividends received on taxable RFI shares of the capital stock of another corporation, and

(ii) it may reasonably be considered that the share was issued or acquired as part of a transaction or event or series of transactions or events one of the main purposes of which was to avoid or limit the application of Part IV.1,

the share shall be deemed at that time to be a taxable RFI share; (*action particulière à une institution financière*)

tax-indifferent investor, at any time, means a person or partnership that is at that time

(a) a person exempt from tax under section 149,

(b) a non-resident person, other than a person to which all amounts paid or credited under a synthetic equity arrangement or a specified synthetic equity arrangement may reasonably be attributed to the business carried on by the person in Canada through a permanent establishment (as defined by regulation) in Canada,

(c) a trust resident in Canada (other than a specified mutual fund trust) if any of the interests as a beneficiary under the trust is not a *fixed interest* (as defined in subsection 251.2(1)) in the trust (in this definition referred to as a *discretionary trust*),

(d) a partnership more than 10% of the fair market value of all interests in which can reasonably be considered to be held, directly or indirectly through one or more trusts or partnerships, by any combination of persons described in paragraphs (a) to (c), or

(e) a trust resident in Canada (other than a specified mutual fund trust or a discretionary trust) if more than 10% of the fair market value of all interests as beneficiaries under the trust can reasonably be considered to be held, directly or indirectly through one or more trusts or partnerships, by any combination of persons described in paragraph (a) or (c); (*investisseur indifférent relativement à l'impôt*)

taxpayer includes any person whether or not liable to pay tax; (*contribuables*)

10/8 policy means a life insurance policy (other than an annuity) where

(a) an amount is or may become

e) un mécanisme visé par règlement. (*employee benefit plan*)

régime de prestations supplémentaires de chômage S'entend au sens du paragraphe 145(1). (*supplementary unemployment benefit plan*)

régime enregistré d'épargne-études ou ***REEE*** S'entend au sens du paragraphe 146.1(1). (*registered education savings plan* or *RESP*)

régime enregistré d'épargne-invalidité ou ***REEI*** S'entend au sens du paragraphe 146.4(1). (*registered disability savings plan* or *RDSP*)

régime enregistré d'épargne-retraite ou ***REER*** S'entend au sens de ***régime enregistré d'épargne-retraite*** au paragraphe 146(1). (*registered retirement savings plan* or *RRSP*)

régime enregistré de prestations supplémentaires de chômage S'entend au sens du paragraphe 145(1). (*registered supplementary unemployment benefit plan*)

régime privé d'assurance-maladie Contrat d'assurance pour frais d'hospitalisation, frais médicaux, ou les deux, régime d'assurance-maladie, régime d'assurance-hospitalisation ou régime combiné d'assurance-maladie et hospitalisation qui ne sont établis ou prévus :

a) ni par une loi provinciale établissant un régime d'assurance-santé au sens de l'article 2 de la *Loi canadienne sur la santé*;

b) ni par une loi fédérale ou son règlement, autorisant l'établissement d'un régime d'assurance-maladie ou d'un régime d'assurance-hospitalisation au profit des employés du fédéral et des personnes à leur charge ainsi que des personnes à la charge des membres de la Gendarmerie royale du Canada et de la force régulière, dans le cas où ces employés ou membres, nommés au Canada, servent à l'étranger. (*private health services plan*)

registre Sont compris parmi les registres les comptes, conventions, livres, graphiques et tableaux, diagrammes, formulaires, images, factures, lettres, cartes, notes, plans, déclarations, états, télégrammes, pièce justificatives et toute autre chose renfermant des renseignements, qu'il soient par écrit ou sous toute autre forme. (*record*)

réglementaire et expressions comportant le mot « règlement » Ont le même sens que « prescrit ». (*prescribed*)

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and
DR. GÁBOR LUKÁCS

Moving Parties

– and –

CANADIAN TRANSPORTATION AGENCY and
AIR CANADA

Respondents

MOTION RECORD OF THE MOVING PARTIES

Motion for Leave to Appeal, Rule 352

VOLUME 3

Appendix "B" – Book of Authorities

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Moving Party

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Moving Party

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Case Name:

Air Canada v. Greenglass

Between
Air Canada, Appellant, and
Marley Greenglass and Canadian Transportation Agency, Respondents

[2014] F.C.J. No. 1286

2014 FCA 288

Docket: A-405-13

Federal Court of Appeal
Montréal, Quebec

Nadon, Gauthier and Scott JJ.A.

Heard: October 7, 2014.
Judgment: December 9, 2014.

(50 paras.)

Administrative law -- Natural justice -- Hearings -- Procedural rights and requirements -- Right to be heard -- Responses and submissions -- Appeal by Air Canada from the ruling rendered by Canadian Transportation Agency allowed -- Respondent suffered allergic reaction to dog in cabin on passenger flight and applied to Agency challenging Air Canada's policy of allowing dogs in cabin -- Agency ordered Air Canada to develop and implement policies and procedures necessary to comply with series of accommodation measures -- Decision breached procedural fairness by misleading directions in two opening pleading decisions causing Air Canada to fail in making submissions regarding alternative accommodation, undue obstacle and undue hardship -- Matter remitted for reconsideration.

Transportation law -- Air transportation -- Regulation -- Federal -- Persons with disabilities -- Canadian Transportation Agency -- Appeal by Air Canada from the ruling rendered by Canadian Transportation Agency allowed -- Respondent suffered allergic reaction to dog in cabin on passenger flight and applied to Agency challenging Air Canada's policy of allowing dogs in cabin -- Agency ordered Air Canada to develop and implement policies and procedures necessary to comply

with series of accommodation measures -- Decision breached procedural fairness by misleading directions in two opening pleading decisions causing Air Canada to fail in making submissions regarding alternative accommodation, undue obstacle and undue hardship -- Matter remitted for reconsideration.

Appeal by Air Canada from a decision by the Canadian Transportation Agency (CTA) in favour of the respondent, Greenglass. The respondent was allergic to dogs. She was seated on a flight directly behind a passenger accompanied by a dog. The respondent experienced an allergic reaction that caused her flight to be delayed and required several days of recovery. She applied to the CTA, challenging Air Canada's policy allowing the carriage of pet dogs in aircraft cabins. The CTA ordered Air Canada to develop and implement policies and procedures necessary to comply with a series of accommodation measures, including seating separation requirements, booking priority rules, and, in some instances, a ban on dogs in the cabin in certain circumstances. Air Canada appealed.

HELD: Appeal allowed. Air Canada was denied procedural fairness in the course of two opening pleading decisions in which the CTA attempted to set the ground rules for adjudication of the respondent's application. Due to conflicting and misleading directions in the decisions regarding evidence and submissions, Air Canada was prevented from submitting evidence on a number of crucial issues, such as obstacle and appropriate accommodation for individuals with a dog allergy disability. In the absence of evidence from Air Canada, the CTA concluded that accommodation measures ordered in a cat allergy decision were appropriate to address the needs of individuals who were allergic to dogs. Fairness and justice required that Air Canada be given the opportunity to make submissions with regard to alternative accommodation, undue obstacle, and undue hardship. The CTA's final decision was set aside and returned for reconsideration.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 172(1)

Counsel:

Patrick Girard, Patrick Désalliers, for the Appellant.

Andray Renaud, Simon-Pierre Lessard, for the Respondent Canadian Transportation Agency.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 NADON J.A.:-- On August 2, 2013, the Canadian Transportation Agency (the Agency) rendered its Final Decision (Decision No. 303-AT-A-2013 or the "Final Decision") concerning the application of Mrs. Marley Greenglass (the applicant) made pursuant to subsection 172(1) of the *Canada Transportation Act*, S.C. 1996, c.10 (the *Act*) against Air Canada's policy which allows the carriage of pet dogs in aircraft cabins particularly as it affects individuals, such as the applicant, who have an allergy to dogs. At paragraphs 62 to 68 of the Final Decision, the Agency ordered Air Canada to comply with the following accommodation measures:

> **CONCLUSION**
>
> [62] The Agency therefore orders Air Canada to develop and implement the policies and procedures necessary to provide the following appropriate accommodation and to provide the requisite training to its staff to ensure the provision of the appropriate accommodation.
>
> **With respect to dogs carried as pets**
>
> [63] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:
>
> * a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and pet dogs, including during boarding and deplaning and between their seat and a washroom; or
>
> * a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.
>
> [64] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:
>
> * a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.
>
> [65] When advance notification of less than 48 hours is provided by persons with

a dog allergy disability, a ban on pet dogs is to be provided if no person travelling with a pet dog has already booked their travel on the selected flight. If a person travelling with a pet dog has already been booked on the flight, persons with a dog allergy disability must be provided with the same flight ban accommodation within 48 hours on the next flight available on which there is no person with a pet dog already booked. If the next available flight is beyond the 48-hour period, persons with a dog allergy disability must be given priority and provided with the accommodation measures applicable when the 48-hour advance notice is given by the person with a dog allergy disability.

With respect to service dogs

[66] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:

* a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and service dogs, including during boarding and deplaning and between their seat and a washroom.

[67] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:

* give the booking priority to whoever of the person with a dog allergy disability and the person travelling with a service dog first completed their booking. A person with a dog allergy disability and a person travelling with a service dog will not be accepted on the same flight using an aircraft that does not have HEPA filters or which does not provide 100 percent unrecirculated fresh air.

[68] Air Canada has until September 16, 2013 to comply with this order.

2 On October 10, 2013, Pelletier J.A. granted leave to Air Canada to appeal the Agency's Final Decision and on November 29, 2013, Air Canada filed its Notice of Appeal.

3 The facts underlying this appeal are simple. In short, on a flight from Toronto to Phoenix, Arizona, the applicant was seated in a row directly behind a passenger accompanied by a dog. The

presence of the dog caused "health issues" for the applicant, resulting in her flight being delayed. She took medication and put on a charcoal filter mask to prevent things from getting worse. Ultimately, the dog was moved, but by that time the applicant was feeling unwell and had to increase her medication throughout the flight. During the flight, the applicant had a second "attack" and it took her several days to recover.

4 On February 7, 2012, the applicant filed her application against Air Canada's policy providing for the carriage of pets in aircraft cabins as it relates to her dog allergy.

5 On March 6, 2012, the Agency adjourned her application pending the adjudication of a decision in an investigation into WestJet, Air Canada and Air Canada Jazz's policies with respect to persons whose allergy to cats results in a disability for the purposes of the *Act*.

6 On June 14, 2012, the Agency issued its final decision regarding cat allergies (the "Cat Allergy Decision"). As part of this decision, the Agency determined the appropriate accommodation measures that the airlines had to adopt for persons allergic to cats (Decision No. 227-AT-A-2012).

I. The Decision under Review

7 In addition to its Final Decision, the Agency made three other decisions which are relevant to this appeal as they form part and parcel of the Final Decision. These decisions are referred to as: the Initial Opening Pleading Decision, rendered on January 16, 2013; the Second Opening Pleading Decision, given on March 7, 2013; and the Show Cause Decision, rendered on June 5, 2013. A brief review of these decisions is necessary to fully understand the Final Decision and the issues which arise in this appeal.

A. *The Initial and Second Opening Pleading Decisions*

8 On January 16, 2013, the Agency opened pleadings in the applicant's application and gave her an opportunity to complete her application following which Air Canada would have the opportunity to file a response.

9 The Initial Opening Pleading Decision (this decision is numbered No. LET-AT-A-10-2013) set out a three step process for resolving applications through formal adjudication: first, the applicant would have to establish that she was a person with a disability for the purposes of the *Act*; second, the applicant would have to establish that she had encountered an "obstacle", i.e. that she needed, and was not provided with, accommodation; third, the Agency would determine whether the obstacle was an undue obstacle and whether corrective measures were therefore required to eliminate it.

10 With respect to the third step, the Agency explained that an obstacle will not be considered "undue" if the service provider can justify its existence by showing that the removal of the obstacle would be unreasonable, impractical or impossible, such that any formal accommodation would

cause the service provider undue hardship.

11 The Initial Opening Pleading Decision found, on a preliminary basis, that the accommodation measures ordered by the Agency in the Cat Allergy Decision constituted the appropriate accommodation needed to meet the disability-related needs of persons who are disabled by an allergy to dogs.

12 The Agency asked the applicant to provide a letter or medical certificate from a physician or allergist giving answers to a number of questions posed by the Agency. The Agency also requested that the applicant describe in detail how Air Canada's policy to allow the carriage of pets in the aircraft cabin affected her ability to engage in air travel.

13 The applicant did not respond to the Initial Opening Pleading Decision as required. Consequently, the Agency closed her file (this decision is numbered No. LET-AT-A-28-2013).

14 On February 21, 2013, the applicant resubmitted her application and informed the Agency that she was seeking the same accommodation which the Agency provided for those suffering from cat allergies in its Cat Allergy Decision.

15 On March 7, 2013, the Agency reopened the applicant's file and sent the Second Opening Pleading Decision to the parties (this decision is numbered No. LET-AT-A-46-2013). In this decision, the Agency again set out the findings in the Cat Allergy Decision and noted the applicant's request that the accommodation measures adopted in that decision be provided to individuals with a dog allergy disability.

16 On April 4, 2013, Air Canada filed its response to the Second Opening Pleading Decision in which it raised the issue of its obligations with respect to service dogs. On April 7, 2013, the applicant filed a reply to Air Canada's submissions and pleadings were considered closed.

B. *Show Cause Decision*

17 On June 5, 2013, the Agency issued its Show Cause Decision (this decision is numbered No. LET-AT-A-82-2013) in which it made three final determinations and one preliminary determination.

18 First, the Agency determined that the applicant was a person with a disability within the meaning of the *Act*. Second, it determined that the same accommodation which it provided to individuals in the Cat Allergy Decision was appropriate in this case. The Agency noted that Air Canada had submitted an internet article from the website "My Health News Daily" (published on July 26, 2012) which indicated that there were differences between cat and dog dander. More particularly, the article indicated that cat protein was so small and light that it could remain airborne for many hours. The article then quoted Dr. Mark Larche, Immunology Professor at McMaster University, to the effect that dog allergens do not remain airborne in the same way that cat allergens

do. Based on this article, Air Canada submitted that the five row seating separation between cats and individuals with an allergy to cats, as recommended in the Cat Allergy Decision, may not be necessary for persons with a dog allergy.

19 The Agency dismissed this argument in the following terms at paragraph 46 of the Show Cause Decision:

> Although the article submitted by Air Canada states that dog allergens are different than cat allergens in terms of the manner that they stay airborne, Air Canada did not file any evidence that specifies how the airborne features of dog allergens differ from those of cat allergens and the implications of any differences for persons with a dog allergy disability. Air Canada has not filed reasons that would support a finding that different measures are required to meet the needs of persons with a dog allergy disability as compared to those with a cat allergy disability based on differences in the manner in which the allergens stay airborne. Moreover, Air Canada provided no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent fresh air would not rid the cabin of such particles.

20 The Agency therefore concluded that, when at least 48 hours advance notification was provided by persons with a dog allergy disability (or best efforts were made when less than 48 hours notice is given), the appropriate accommodation with respect to service dogs was a seating separation of a minimum five rows between dogs and individuals with a dog allergy on aircraft with either High Efficiency Particulate Air (HEPA) filters or which provide for 100 percent unrecirculated fresh air. For non-HEPA or unrecirculated fresh air aircraft (such as Bombardier Dash 8's), the appropriate accommodation was to provide the booking priority to whomever completed their booking first, whether it be the individual with the service dog or the person suffering from a dog allergy.

21 Third, the Agency concluded that Air Canada's current policy with respect to the carriage of dogs in aircraft cabins constituted an obstacle to the mobility of individuals with a dog allergy, including the applicant.

22 Lastly, the Agency preliminarily concluded that Air Canada's policy relating to the carriage of dogs in the aircraft cabin constituted an undue obstacle to the applicant's mobility and that of other individuals suffering from a dog allergy. The Agency requested that Air Canada show cause why this preliminary finding should not be finalized and the applicant was provided with the opportunity to reply to any submissions made in that regard by Air Canada.

C. *Final Decision*

23 In its Final Decision, the Agency finalized its preliminary finding from the Show Cause Decision with respect to Air Canada's policy constituting an undue obstacle to the applicant's

mobility and that of other persons with a dog allergy. Before reaching its conclusion, the Agency refused to consider the additional submissions made by Air Canada with respect to the Agency's determination in the Show Cause Decision concerning the appropriate accommodation in this case. In brief, Air Canada argued that a key report, namely that of Dr. Sussman entitled "Report Addendum: Cat and Dog Dander in the Aircraft Cabin, May 23, 2008" referred to in both the Show Cause Decision and the Cat Allergy Decision, needed to be amended in order to take account of the specific situation of individuals with a dog allergy. Similarly, the Agency refused to consider further submissions made by the applicant concerning the need to amend Dr. Sussman's report.

24 The main part of the Final Decision addressed the interpretation and application of a set of regulations from the United States Department of Transportation entitled *Nondiscrimination on the Basis of Disability in Air Travel*, 14 C.F.R. $S 382 (2008) (the "U.S. Regulations"). Because of the conclusion which I have reached with regard to Air Canada's arguments on procedural fairness, I need not address nor discuss the Agency's findings on specific components of the U.S. Regulations.

II. Appellant's Submissions

25 Air Canada makes a number of submissions as to why this appeal should be allowed. It says that the Agency reversed the burden of proof and made a decision in the absence of evidence, thus violating procedural fairness. It also argues that the Agency's refusal to consider its arguments regarding alternative appropriate accommodation violated procedural fairness. Lastly, it argues that the decision is unreasonable in that the effect of the Final Decision is that Air Canada will be forced to discriminate against people requiring service dogs in a manner that is specifically prohibited by the U.S. Regulations. Again, because of the conclusion that I have reached on the procedural fairness issue, I need not address Air Canada's last submission.

III. Standard of Review

26 As indicated above, I intend to restrict my analysis to the procedural fairness issues raised by Air Canada. In this respect, there can be no doubt that these issues must be assessed against a standard of correctness (See *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paragraphs 79 and 83).

IV. Analysis

27 In my view, the procedural fairness issues which Air Canada raises stem mainly from the wording of the Initial and Second Opening Pleading Decisions by which the Agency attempted to set the 'ground rules' pursuant to which it would adjudicate the applicant's application. As it turned out, the process resulted in a denial of procedural fairness to Air Canada. It goes without saying that this result was not intentional. However, in the end, it appears that form took over substance and the process became rigid and inflexible. Air Canada was prevented from submitting evidence on a number of crucial issues such as obstacle and appropriate accommodation. This situation occurred by reason of the approach taken by the Agency and the manner in which it communicated its 'game

plan' to the parties.

28 Because I conclude that in the particular circumstances of this case Air Canada was deprived of procedural fairness, I would allow this appeal. My reasons for so concluding are as follows.

29 I begin with page 10 of Appendix A of the Initial Opening Pleading Decision where the Agency informed the parties that it was the applicant's burden to establish her need for accommodation and that her need was not met by Air Canada's policy. The text found at page 10 of Appendix A is as follows:

> It is the Applicant's responsibility to provide sufficiently persuasive evidence to establish their need for accommodation and to prove that this need was not met. The standard of evidence that applies to this burden of proof is the balance of probabilities.

30 The Agency repeated this statement at paragraph 37 of the Show Cause Decision.

31 This theme was reiterated by the Agency in a decision (Decision No. 430-AT-A-2011) rendered on December 15, 2011, which forms part and parcel of its Cat Allergy Decision where, at paragraph 225, it said that "the Applicants have not provided persuasive evidence that seat row separation is ineffective and the burden, at the obstacle phase, lies upon them to show that this is the case".

32 The above language suggests that it was up to the applicant to prove her need for accommodation and that her need had not been met by Air Canada. However, at page six of the Initial Opening Pleading Decision, the Agency appears to be saying something different. There it states that the applicant must establish her need for accommodation if that need differs from the Agency's preliminary finding of appropriate accommodation in the Cat Allergy Decision. In other words, the Agency seems to be saying that the applicant need not do anything unless she wants accommodation other than what the Agency found in the Cat Allergy Decision. The relevant passages read as follows:

- The applicant will have until February 6, 2013 to establish that she is a person with a disability, and that she requires an accommodation measure that is different from the Agency's preliminary finding of appropriate accommodation to meet her disability-related needs and those of persons with a disability as a result of their allergies to dogs, should this be her view;

- The respondent will have until February 20, 2013 to respond to the applicant's submissions on disability and obstacle/appropriate accommodation, and to file undue hardship arguments with respect to the

> Agency's preliminary finding of appropriate accommodation and any other alternative suggested by the applicant and to propose another form of accommodation;
>
> - The applicant will then have until February 25, 2013 to file a reply.

33 To make matters slightly more complicated, at page two of the Second Opening Pleading Decision, which allowed the applicant to reinstitute her application, after indicating that the applicant was requesting the same accommodation provided in the Cat Allergy Decision, the Agency proceeded to inform Air Canada that it had until March 28, 2013 (this date was extended to April 4, 2013) to file submissions in response to the applicant's submissions on disability and obstacle/appropriate accommodation and to file undue hardship arguments. The relevant passages read as follows:

> On February 21, 2013, Mrs. Greenglass filed the attached application and Disability Assessment Form in regards to her allergy to dogs. Mrs. Greenglass requests that the aforementioned accommodation determined by the Agency for persons with a cat allergy disability be provided by Air Canada to persons with a dog allergy disability.
>
> The respondent has until March 28, 2013 to respond to the applicant's submissions on disability and obstacle/ appropriate accommodation, and to file undue hardship arguments with respect to the Agency's preliminary finding of appropriate accommodation and to propose another form of accommodation, following which the applicant will have until April 4, 2013 to file a reply.

34 The difference in substance between the two texts reproduced immediately above is that, at the time of the Initial Opening Pleading Decision, the applicant had not indicated that she was adopting the accommodation described by the Agency in the Cat Allergy Decision, whereas at the time of the Second Opening Pleading Decision, she had done so.

35 Air Canada argues that the Agency reversed the burden of proof when it allowed the applicant to import the Cat Allergy Decision without any supporting arguments or evidence. It submits a number of legal arguments in support of this position. I am far from convinced, on the authorities, that Air Canada's assertion is correct. However, I am satisfied that Air Canada was misled by the two opening pleading decisions, the relevant passages of which I have already reproduced. More particularly, the implication of the Agency's direction to Air Canada that it would have to respond to the applicant's submissions by March 28, 2013 is that there would actually be submissions made by the applicant on the questions of obstacle/appropriate accommodation.

36 With hindsight, it is clear to me that the Agency considered that the applicant had already

made her submissions when she adopted the accommodation determined in the Cat Allergy Decision. Therefore, Air Canada should not have waited for the applicant's submissions, but should have responded to the accommodation measures determined by the Agency in the Cat Allergy Decision on the understanding that those measures had been put forward by the applicant and that they would be adopted by the Agency unless rebutted.

37 However, also with the benefit of hindsight, it is obvious to me that Air Canada plainly misunderstood the Agency's opening pleading decisions and did not, prior to the rendering of the Show Cause Decision, adduce any evidence concerning obstacle/appropriate accommodation other than the internet article described above.

38 I am satisfied that Air Canada understood that the applicant was obliged to demonstrate why she required the measures prescribed by the Agency in the Cat Allergy Decision, i.e. a seat separation of at least five rows on planes with HEPA filters or with systems which provide 100 percent unrecirculated fresh air and the exclusion of all dogs from the planes without such systems, and not a different form of accommodation. As the applicant adduced no evidence, Air Canada did not adduce the evidence which it says it could have produced to counter the importation of the Cat Allergy Decision. In particular, Air Canada argues that it would have submitted evidence to the effect that less disruptive measures could be implemented to accommodate both those travelling with dogs and those suffering from dog allergies. However, as events unfolded, that evidence was not submitted because of the Agency's refusal to entertain it.

39 The only evidence which Air Canada did adduce was the internet article. In the Show Cause Decision, the Agency considered that article and held that it did not explain how the airborne features of dog allergens differed from those of cat allergens and the consequences or implications of any difference for persons such as the applicant. Therefore, there was no evidence to support the view that different measures of accommodation would suffice to meet the needs of persons with a dog allergy disability. The Agency further held that there was also no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent unrecirculated fresh air would not rid the cabin of such particles.

40 In the absence of any evidence on the part of Air Canada, the Agency concluded that the accommodation measures which it had ordered in the Cat Allergy Decision constituted the appropriate accommodation needed to address the needs of persons who were disabled by reason of an allergy to dogs, whether they be service dogs or pets.

41 After finding that Air Canada's policy with respect to the carriage of dogs in an aircraft cabin constituted an obstacle to the applicant's mobility and that of other persons with a dog allergy, the Agency turned to the question of whether the obstacle was undue. To this question, it gave a preliminary answer which was that Air Canada's policy constituted an undue obstacle to the mobility of the applicant and of other persons with a dog allergy disability. Consequently, at paragraph 89 of the Show Cause Decision, the Agency indicated that it would provide Air Canada

with an opportunity to submit evidence with regard to this preliminary finding. It stated, at paragraph 90, that "Air Canada is required to show cause why the Agency should not finalize its preliminary finding with respect to undue obstacle regarding the appropriate accommodation to be provided to persons with a disability due to an allergy to dogs".

42 In response, Air Canada made detailed submissions regarding the operational conflict that the Agency's proposed accommodation created with the U.S. Regulations and further argued that the burden created by those measures was undue since less intrusive measures could be put in place while still fulfilling the needs of persons such as the applicant. More particularly, Air Canada argued that as its goal was to minimize situations where it would have to displace or remove a passenger from a flight, particularly where that person was a person with a disability, it intended to propose alternatives with regard to the carriage of dogs on board aircrafts that were not equipped with HEPA-type filters.

43 Air Canada concluded its submissions by requesting that the Agency remove its conclusion in the Show Cause Decision that a person with a dog allergy disability and a service dog could not be accepted on the same aircraft if that aircraft did not have HEPA filters or did not provide 100 percent unrecirculated fresh air.

44 However, in its Final Decision, the Agency refused to consider the above submissions on the ground that they had not been filed within the time given to Air Canada to do so. The Agency explained that it had given Air Canada an opportunity to provide evidence and submissions regarding the question of obstacle and appropriate accommodation when it rendered its Second Opening Pleading Decision, adding that the purpose of the Show Cause Decision was not to give Air Canada a second chance to address the same question, but rather to allow it to comment on the Agency's preliminary finding of undue obstacle. Consequently, Air Canada's submissions, as well as those made by the applicant on the same topic, were deemed out of time and, as a result, not considered.

45 Thus Air Canada was unable, for all intents and purposes, to either adduce evidence or provide submissions with regard to the important questions of obstacle and appropriate accommodation. Air Canada argues, and I agree entirely, that the Agency's rationale seems to have been that the undue character of the proposed accommodation could be examined in a vacuum independent of the existence of other possibly less intrusive remedies.

46 It appears to me that in the grander scheme of things, fairness required that Air Canada be given the opportunity to make submissions with regard to alternative accommodation, even at the "undue obstacle" stage of the Agency's inquiry. It is safe to say that had the Agency allowed Air Canada to make these submissions, they would not have had any impact on the applicant's application other than to the extent that different measures of accommodation might have been found.

47 It is clear that there was a breakdown in communications between Air Canada and the

Agency. Air Canada understood from the two opening pleading decisions that it was to respond to the applicant's submissions on, *inter alia*, obstacle and appropriate accommodation. When the applicant made no submissions, Air Canada believed that it had nothing to which it needed to respond. This explains why it submitted practically no evidence other than an internet article. This, in due course, led to further procedural problems.

48 I have no hesitation in saying that common sense has not prevailed in the present matter. The Agency determined important issues, not only for the applicant and all those having dog allergies, but also for Air Canada. It did so without the benefit of any real evidence being adduced by the parties and, more particularly, by Air Canada. This was the result of Air Canada's apparent difficulty in fully understanding the meaning of the various directions given by the Agency in its opening pleading decisions.

49 Had common sense prevailed, one would have expected the Agency, at some point in time, to realize that it was disposing of these important issues without, in effect, the full participation of Air Canada. I concede, as I must, that the Agency is entitled to establish its rules and procedures. However, in the end, the rules and procedures are there to serve the interests of justice. In my view, justice in this case required that Air Canada be given the opportunity of adducing evidence on the issues of obstacle, appropriate accommodation and undue hardship. That has not really taken place in this case.

V. Disposition

50 Consequently, I would allow the appeal, set aside the Final Decision, rendered by the Agency on August 2, 2013 and return the matter to the Agency for reconsideration in the light of these reasons. In view of the particular circumstances of this case, I would not make any order as to costs.

NADON J.A.
GAUTHIER J.A.:-- I agree.
SCOTT J.A.:-- I agree.

Office des transports du Canada

Canadian Transportation Agency

LET-C-A-180-2012

December 12, 2012

File No. M4120-3/12-02098

BY FACSIMILE: 514-422-5839

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Dr. Rima Azar
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Dear Madam/Sir:

Re: Complaint by Dr. Rima Azar

This refers to the complaint by Dr. Rima Azar dated April 10, 2012 respecting: damages due to baggage delay; certain portions of Rule 89 of Air Canada's international tariff governing denied boarding compensation; Dr. Azar's entitlement to denied boarding compensation; and, cost awards.

On July 18, 2012, the Canadian Transportation Agency (Agency) opened pleadings respecting Dr. Azar's complaint, and on August 31, 2012, Air Canada filed its answer.

On September 10, 2012, Dr. Azar filed a motion pursuant to section 32 of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (General Rules) seeking the following: an order directing Air Canada to produce the complete Passenger Name Report (PNR) of Dr. Azar; an order to strike out certain alleged prejudicial and/or misleading and/or inadmissible portions of Air Canada's August 31, 2012 answer; an order directing Air Canada to respond to additional questions regarding the case; and, an order that Dr. Azar may file her reply to Air Canada's answer within 15 days after the determination of the motion and receipt of Air Canada's responses to the additional questions, whichever is later.

In Decision No. LET-C-A-140-2012 dated September 12, 2012, the Agency, pursuant to subsection 20(3) of the General Rules, ordered Air Canada to provide the complete PNR of Dr. Azar. In addition, the Agency, pursuant to paragraph 18(*a*) of the General Rules, ordered Air Canada to provide a non-redacted version of Annex F to its August 31, 2012 answer. Finally, the Agency directed that, pursuant to subsection 20(1) of the General Rules, Air Canada respond to each question posed by Dr. Azar. Air Canada was provided until September 24, 2012 to submit the above information, and Dr. Azar was provided until October 1, 2012 to file her reply including her final reply to the pleadings.

On September 24, 2012, Air Canada filed its response with the Agency and requested that Annex E (confidential document) be considered confidential. On the same date, Air Canada provided Dr. Azar with its submission with the confidential document deleted, and requested that prior to transmitting the confidential document to Dr. Azar and her acting representative, they sign a Confidentiality and Non-Disclosure Undertaking.

On September 27, 30 and October 1, 2012, Dr. Azar filed the following motions seeking:

- **Motion 1:** an order directing Air Canada to provide full and adequate responses to questions Q37 and Q38, and that the confidential document be placed on the public record.
- **Motion 2**: an order directing Air Canada to provide full and adequate responses to the questions posed by Dr. Azar on September 10, 2012, an order striking out certain alleged prejudicial and/or misleading portions of Air Canada's August 31, 2012 answer, and an order directing Air Canada to respond to follow-up questions.
- **Motion 3**: a decision on Dr. Azar's request for an order to strike out certain alleged prejudicial and/or misleading and/or inadmissible portions of Air Canada's August 31, 2012 answer, or as an alternative, direct Air Canada to file a sworn affidavit by Raja Saadeh and allow for a cross-examination of Mr. Saddeh under oath.

In Decision No. LET-C-A-145-2012 dated October 1, 2012, Air Canada was provided until October 5, 2012 to reply to Dr. Azar's request for disclosure of the confidential document in Motion 1. In the same Decision, Air Canada was provided until October 9, 2012 to file its written answer to Motion 1, and October 12, 2012 to file its written answer to Motions 2 and 3. Dr. Azar was provided five days from the receipt of Air Canada's answers to Motions 2 and 3 to file her written replies.

On October 4, 2012, Air Canada provided its response to Dr. Azar's request for disclosure of the confidential document in Motion 1.

On October 5, 2012, Air Canada requested an extension of 10 days to submit its written answers to Motions 2 and 3, and in Decision No. LET-C-A-150-2012, the Agency granted the extension until October 22, 2012, and until November 6, 2012 for Dr. Azar to file her replies. On October 22, 2012, Air Canada provided its written answers to Motions 2 and 3, and on November 6, 2012, Dr. Azar provided her replies to Motions 2 and 3.

The purpose of this Decision is to address Motions 1, 2, and 3.

STATUTORY PROVISIONS

The legislative provisions relevant to this Decision are set out in the Appendix.

MOTION 1

Background

In its response to Decision No. LET-140-C-A-2012, Air Canada requested that, pursuant to section 23 of the General Rules, the confidential document pertaining to denied boarding statistics over the past two-year period, be kept confidential.

In her motion of September 27, 2012, Dr. Azar contested Air Canada's claim for confidentiality and requested an order directing Air Canada to provide full and adequate responses to questions Q37 and Q38, and to place the confidential document on the public record.

In its October 4, 2012 submission, Air Canada maintains that the request for it to provide full and adequate responses to Q37 and Q38 is now moot as Air Canada has provided the Agency the responses, on a confidential basis, and has requested that Dr. Azar and her representative sign Undertakings prior to the information being transmitted.

Pursuant to subsection 24(2) of the General Rules, the Agency must first determine whether the document in respect of which a claim for confidentiality is made is relevant to the proceeding. If it is determined that the document is not relevant, then pursuant to subsection 24(3) of the General Rules, the Agency may order that the document be withdrawn and will not order its disclosure. However, if the Agency determines that the document is relevant, then pursuant to subsection 24(2) of the General Rules, it must assess whether any specific direct harm would likely result from its disclosure or whether any demonstrated specific direct harm is sufficient to outweigh the public interest in having it disclosed.

Should it determine that the document is relevant and that the specific direct harm likely to result from disclosure justifies a claim for confidentiality, then pursuant to subsection 24(4) of the General Rules, the Agency has a range of disclosure options, from ordering that the document not be placed on the public record, to ordering that it be kept confidential but allowing for partial disclosure or disclosure to specific parties or their representatives, and ordering full public disclosure.

Issues

The issues to be determined are:

(i) whether the confidential document for which Air Canada requests confidentiality is relevant to the proceeding;

(ii) if so, if any specific direct harm would likely result from the disclosure of the confidential document; and

(iii) if so, whether the specific direct harm is sufficient to outweigh the interest in disclosing the said document.

Issue (i): Relevance of the confidential document filed by Air Canada

The confidential document filed by Air Canada involves data pertaining to denied boarding statistics over the most recent two-year period. Specifically, Air Canada provided information regarding the total number of passengers, the number of passengers who were denied boarding, the number of passengers who were voluntarily and involuntarily denied boarding, the percentage of total passengers denied boarding, and the percentage of those voluntarily denied boarding out of the total number of passengers denied boarding on flights from Canada to Europe and from Europe to Canada.

Dr. Azar asserts that the confidential document in question is relevant to the present case and given that it was tendered in response to questions Q37 and Q38, it appears that the document would contain the percentage of passengers who were denied boarding on Air Canada flights departing from Canada to Europe and from Europe to Canada in the years 2010, 2011, and 2012.

The relevance of any particular information requested to be disclosed in a proceeding is determined, in large measure, by considering whether that information relates to the matter in dispute, and whether the information might usefully advance a party's position on a particular issue.

In this case, the Agency is of the opinion that the confidential document is relevant and is of assistance in the determination of this matter as the scope of the complaint is limited to information with respect to flights from Canada to Europe and from Europe to Canada.

Given the foregoing, the Agency will now consider if any specific direct harm would likely result from the disclosure of the confidential document and, if so, whether any demonstrated specific direct harm is sufficient to outweigh the public interest in having it disclosed.

Issues (ii) and (iii): Specific direct harm

Specific direct harm is clear, identifiable harm to a party's public reputation and/or commercial interests which results directly from disclosure to the public. As per the test for confidentiality established by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, it requires the presence of a real and substantial risk which is well grounded in the evidence.

Positions of the parties

In its response to Decision No. LET-C-A-140-2012, Air Canada submits that the content of the confidential document includes internal confidential information that is extremely commercially sensitive and that this information has consistently been treated in a confidential manner by Air Canada. Air Canada further submits that if the information at issue were to be disclosed, it could significantly affect Air Canada's competitive position in the marketplace, and may result in unquantifiable damages which will affect Air Canada's reputation.

In her motion of September 27, 2012, Dr. Azar argues that Air Canada has not tendered any evidence of specific direct harm that would likely result from the disclosure of the confidential document, that information of this nature is not treated as confidential by Air Canada or other carriers, and there is a public interest in disclosing the document as the consequences to passengers who are denied boarding affects the entire travelling public.

Dr. Azar submits that in its August 31, 2012 submission, Air Canada voluntarily tendered similar information to that requested in questions Q37 and Q38 respecting the percentage of passengers who were denied boarding on Air Canada flights internationally.

In addition, Dr. Azar points out that in the United States, 14 CFR Part 250.10 imposes an obligation on large carriers to report their denied boarding statistics on flight segments originating in the United States.

Air Canada advises that it has continuously treated denied boarding numbers as confidential, that it does not file these numbers with the U.S. Department of Transportation, and that this information is not required to be disclosed in Canada (or even Europe).

In its October 4, 2012 submission, Air Canada reiterates the confidential nature of the document, and claims that providing denied boarding percentages in the submissions of August 31, 2012, was in no way an admission that the actual denied boarding numbers are not confidential.

Air Canada also states that its percentages of passengers who are denied boarding are low and should its denied boarding numbers be disclosed and consumers were not able to compare them to other carriers' denied boarding numbers on the same routes (given that Air Canada would be the only carrier in Canada obliged to disclose these numbers), then the disclosure would put it at an unfair competitive advantage. Air Canada maintains that as a result, consumers would have no baseline to determine whether Air Canada's denied boardings impact a significant amount of passengers, which in turn could significantly impact its reputation. Furthermore, Air Canada contends that should its competitors have access to this information, they could use it to Air Canada's detriment.

In her October 9, 2012 reply to the motion, Dr. Azar claims that there is a misunderstanding about what was requested in questions Q37 and Q38 and that she never sought the actual denied boarding numbers, but only percentages of denied boarding, which have not been treated as confidential by Air Canada as noted in its August 31, 2012 submission.

Dr. Azar further questions the basis of Air Canada's claim that its denied boarding percentages are low and submits that either Air Canada is in possession of "extremely commercially sensitive" information about its competitors (which is highly improbable), or it made the statement based on information that is publicly available. Dr. Azar submits that on a balance of probabilities, the statement is based on information about denied boarding percentages of its competitors that is publicly available and that information of this nature is not treated as commercially sensitive by Air Canada's competitors.

With respect to Air Canada's claim regarding consumers not having a "baseline" with which to compare the denied boarding figures of Air Canada, Dr. Azar disputes this claim and submits that consumers have access to the same public information that was available to Air Canada to conclude that its percentages of passengers who are denied boarding are low. She further submits that it is unreasonable to assume that consumers who care about such figures are so ignorant as not to reach the same conclusion that Air Canada did (about its percentages being low), if that is indeed the case.

Dr. Azar submits that while Air Canada oversells its domestic flights, its main domestic competitor, WestJet, does not engage in such practices. According to Dr. Azar, this public knowledge does not seem to have had any significant impact on Air Canada's market share in the domestic market and she points out that Air Canada still has 55 percent of the domestic scheduled capacity market. Accordingly, Dr. Azar submits that even a situation whereby the competitor's denied boarding figures are consistently zero, it would not dissuade passengers from flying with Air Canada, and Air Canada's contentions to the contrary are lacking any support in the evidence on record.

Therefore, Dr. Azar argues that that there is no evidence on record that would support a finding that disclosure of the confidential document would do any damage to Air Canada's reputation, and in fact, the evidence supports that no such damage would be sustained.

Regarding the claim that competitors could use the information to Air Canada's detriment, Dr. Azar notes that in Decision No. LET-P-A-67-2011, *Jackson v. Air Canada*, where the Agency was called upon to rule on a request for confidentiality similar to the one in the present complaint, the Agency found that:

> The Federal Court and Federal Court of Appeal have been requiring specific evidence; general statements of the nature presented by Air Canada do not suffice. In Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works & Government Services), 2003 FCT 254 (Fed. T.D.), affirmed 2004 FCA 214 (F.C.A.)(leave to appeal refused 2005 SCC), the Federal Court reviewed the evidence, including the supplementary affidavit, and concluded that, aside from general statements of possible harm, the applicant had failed to provide insight as to how the competitors might use the record so that the applicant would sustain a reasonable expectation of probable harm if the records in question were released. There existed insufficient evidence to conclude that there was a basis to establish financial loss or prejudice to the applicant, or financial gain to a competitor. In the present case, there is no evidence filed by Air Canada supporting a finding that a competitor could use the statement to its advantage and to Air Canada's detriment.

As in the *Jackson* case, Dr. Azar maintains that there is no evidence on the record to explain how competitors of Air Canada could possibly use the information found in the confidential document to Air Canada's detriment and that the word "could" used by Air Canada reflects the speculative nature of this argument which, according to Dr. Azar, is lacking any factual foundation.

Analysis

With respect to Dr. Azar's argument that the information tendered voluntarily in Air Canada's August 31, 2012 answer is substantially similar information to that requested in questions Q37 and Q38, the Agency notes that this information was presented by Air Canada regarding its international flights, while the current request is for the release of segment-specific information. The Agency is of the opinion that such information is not substantially similar or directly comparable to information provided in Air Canada's August 31, 2012 answer and that it could be considered more commercially sensitive than the information publicly disclosed for all international flights.

The Agency does not agree with Dr. Azar's arguments regarding the basis on which Air Canada claimed its denied boarding percentages are low and notes that she has not provided evidence to support that statement was made on the basis of publically available information.

With respect to Dr. Azar's comparison to WestJet in the Canadian domestic market, the Agency notes that the scope of the complaint is limited to flights between Canada and Europe where Air Canada's competitors may be engaging in overselling practices. The Agency is of the opinion that should this information be made public, consumers would not be in a position to make comparisons to other carriers' denied boarding compensation amounts on the same routes, the result of which may negatively impact Air Canada's reputation, or be used by its competitors to its detriment.

The Agency further notes that Dr. Azar, the party who requested disclosure, is not a competitor in the air transport industry and finds that the disclosure of the document for which Air Canada claims confidentiality will not result in specific direct harm to Air Canada provided that appropriate disclosure parameters are in place so that competitors in the marketplace will not have access to the document at issue.

Conclusion: Motion 1

Pursuant to paragraph 24(4)(*d*) of the General Rules, the Agency orders that not later than December 17, 2012, Air Canada provide to Dr. Azar and her representative an undertaking for signature, that Dr. Azar and her representative submit the signed Undertaking to Air Canada by not later than December 20, 2012, that Air Canada provide the confidential document to Dr. Azar and her representative by not later than December 27, 2012, and that the document not be placed on the public record.

MOTION 2

Background

On September 30, 2012, Dr. Azar filed a motion seeking, among other things, an order directing Air Canada to provide full and adequate responses to the questions of Dr. Azar, and an order directing Air Canada to respond to certain follow-up questions.

Issues

(i) Should the Agency compel Air Canada, pursuant to subsection 20(3) of the General Rules, to respond to Dr. Azar's questions Q34, Q36, and Q39 to Q46 on the basis that the responses to those questions are relevant to the Agency's consideration of the reasonableness of Air Canada's Tariff Rule 89 (Part 1)(E)(2)?

(ii) Should the Agency compel Air Canada, pursuant to subsection 20(3) of the General Rules, to respond to Dr. Azar's questions Q22, Q27, Q30, and Q31 on the basis that the responses to those questions are relevant to the Agency's consideration of Dr. Azar's claim that she is entitled to denied boarding compensation?

Submissions

General

Dr. Azar claims that the widely accepted test for relevance, is the "train of inquiry" test articulated more than a century ago in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), where Brett, L.J. was called upon to interpret the phrase "a document relating to any matter in question in the action":

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

Dr. Azar submits that this test is still current and observes that in *Smithkline Beecham Animal Health Inc. v. Canada,* 2002 FCA 229, Sharlow, J.A., the "train of inquiry" test was used to determine the relevance of questions asked during discovery. Dr. Azar also observes that the "train of inquiry" test was most recently affirmed by the Federal Court of Appeal (FCA) in *Her Majesty the Queen v. Lehigh Cement Limited* (2011 FCA 120) *(Her Majesty v. Lehigh Cement Limited).*

Dr. Azar maintains that in order to determine whether a question directed at Air Canada is relevant, the Agency ought to consider whether its content may directly or indirectly enable her to advance her own case or to damage the case of Air Canada.

Air Canada maintains that the "train of inquiry" test which was applied by the FCA in *Her Majesty v. Lehigh Cement Limited* applies to situations in which moving parties are seeking information in the context of examinations on discovery and that the nature of examinations on discovery is, as recognized by caselaw, quite broad, and broader than the context of the present case, where documents are effectively filed before the Agency. Air Canada notes that the FCA also considered the application of the "train of inquiry" test in *Grand River Enterprises Six Nations Ltd. v. Her Majesty the Queen* (2011 FCA 212) (*Grand River Enterprises Six Nations Ltd. v. Her Majesty the Queen*) and submits that a mere suspicion that requested information may lead to additional arguments, is insufficient to entail the application of the "train of inquiry" test and observes that in distinguishing the outcome of *Grand River Enterprises Six Nations Ltd. v. Her Majesty the Queen* from *Her Majesty the Queen v. Lehigh Cement Limited,* the Federal Court of Appeal noted that an unsupported suspicion or hunch ought not to provide a basis for a "train of inquiry" as this would amount to a fishing expedition.

Air Canada submits that in the present case, there has been no evidence presented that would point to an inference that the requested information would establish an improper determination of denied boarding compensation amounts and requests that should the Agency determine that the information is relevant in accordance with the "train of inquiry" test, it should exercise its discretion to disallow these questions as applied in *Her Majesty the Queen v. Lehigh Cement Limited* and *Sanafi-Aventis Canada Inc. v. Laboratoire Riva Inc.* (2011 FC 1469)(*Sanofi-Aventis Canada v. Laboratoire Riva).*

Air Canada further notes that in *Grand River Enterprises Six Nations Ltd. v. Her Majesty the Queen* the FCA did not grant the request for disclosure of certain publically available information and this reasoning should notably be applied to questions Q27, Q34, Q40 and Q44 in the present case.

Dr. Azar maintains that the nature, scope, and purpose of questions directed by a party to another under the Agency's General Rules 19 and 20 is akin to those of interrogatories in a discovery process in a proceeding before a court and in certain circumstances, be even broader than the scope of discoveries, because of the difference in its role and mandate. According to Dr. Azar, the "train of inquiry" test is applicable to determining the relevance of questions directed to a party and whether a party should be compelled by the Agency to answer the questions.

Dr. Azar contends that Air Canada's main justification for refusing to answer certain questions is the claim that these questions constitute a "fishing expedition". According to Dr. Azar, it appears that certain findings of law in *Grand River Enterprises Six Nations Ltd. v. Her Majesty the Queen* have escaped Air Canada's attention, most notably in paragraph 14, and overlooked paragraph 17 of the reasons:

> There is one further consideration. Even where relevance is established, the Tax Court retains discretion to disallow a question. One circumstance where a question may be disallowed is where there are other means of obtaining the information sought.

Dr. Azar also notes that at paragraph 38 in *R. v. Arp*, [1998]3 SCR 339 (R. v. Arp), the Supreme Court of Canada defined relevance as follows:

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". [...]As a consequence, there is no minimum probative value required for evidence to be relevant.

Dr. Azar further notes that relevance of evidence is explained, *In The Law of Evidence*, as follows:

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that Proposition would appear to be in the absence of that evidence. To identify logically irrelevant evidence, ask, "Does the evidence assist in proving the fact that my opponent is trying to prove?

Dr. Azar observes that in *Lukács v. Air Canada,* Decision No. LET-C-A-154-2012, where the Agency stated that some Canadian courts have interpreted the notion of relevance without referring to the "train of inquiry" test and agrees with the interpretation of relevance in *Commission de la santé et de la sécurité du travail v. The Queen,* 2000 CanLII 16617 (FC), and submits that her earlier submissions concerning the "train of inquiry" test are consistent with the Agency's review of the law in Decision No. LET-C-A-154-2012.

Issue (i): Should the Agency compel Air Canada, pursuant to subsection 20(3) of the General Rules, to respond to Dr. Azar's questions Q34, Q36, and Q39 to Q46 on the basis that the responses to those questions are relevant to the Agency's consideration of the reasonableness of Air Canada's Tariff Rule 89 (Part 1)(E)(2)?

Submissions: Question Q34

Air Canada submits that the information requested is not in the possession or control of Air Canada and directs Dr. Azar to the tariffs of the carriers.

Dr. Azar claims that the above representation is at odds with Air Canada's September 24, 2012 submission, where it claims that it fixes denied boarding compensation amounts on the benchmark against other carriers' policies and that on a balance of probabilities, it is more probable that Air Canada is in possession of the requested information.

Air Canada submits that Dr. Azar can determine what these amounts are based on publicly available tariffs and information and points out that it never implicitly claimed to be in possession of this information and was referring to benchmarking other carrier's policies such as WestJet, Porter Airlines Inc., Air Transat A.T. Inc. carrying on business as Air Transat and Sunwing Airlines Inc.

Air Canada notes that certain carriers appear to have denied boarding compensation amounts for travel originating from Canada and highlights the fact that regulation, rather than adjudication, would best address the inconsistent denied boarding policies implemented by carriers operating out of Canada.

Air Canada maintains that it has proposed an increase in its denied boarding amounts, and submits that carriers operating between Canada and countries outside of Europe are also considered competitors on Canada to Europe flight segments, and given that passengers would be subject to the same denied boarding amounts as those strictly travelling to Europe, it considers the denied boarding compensation amounts of such carriers as well.

Submissions: Question Q36

Air Canada points out that this question concerns carriers that operate between Canada and Europe, and not necessarily between Canada and members of the European Union, and that subject to carriers being party to a Transatlantic Joint Venture with Air Canada, every carrier that offers for sale an air service on routings between Canada and Europe, including with connections in third countries, is a potential competitor to Air Canada.

Dr. Azar submits that the above response does not answer the question and she clarifies that the question seeks to determine the extent to which a carrier is a competitor of Air Canada on certain routes. More specifically, Dr. Azar is seeking to distinguish major competitors from minor ones using scientific methods and quantities. Dr. Azar submits, as an example, that Air Berlin is a competitor of Air Canada to a lesser extent than British Airways or Air France and she is seeking information regarding European scheduled capacity market share and any other quantity that may indicate the extent to which another carrier is a competitor of Air Canada. Dr. Azar claims that this information is necessary and relevant in order to attribute adequate weight to the denied boarding policies of Air Canada's competitors and meets the "train of inquiry" test, because it may help her to advance the case that Air Canada's denied boarding compensation amounts are unreasonable.

Air Canada maintains that it is not in a position to quantify to what extent a carrier is a competitor of Air Canada and submits that it faces competition from a range of traditional network carriers, charter carriers, low-cost model carriers, including U.S. network carriers competing against Air Canada by flying Canadian passengers through their U.S. hubs to destinations in international markets.

Dr. Azar states that the question has been effectively answered by Air Canada, but that it refuses to answer the second part of the question, which requests that Air Canada produce information concerning the market shares of various carriers. Dr. Azar asserts that this information is relevant because it will prove or disprove her claim that only a negligible portion of Air Canada's competitors on routes between Canada and Europe do not follow the compensation scheme established by Regulation (EC) 261/2004, and will tend to increase the probability that Air Canada's current denied boarding compensation policy is unreasonable, and that changing it would not adversely affect its ability to meet its commercial obligations.

Submissions: Question Q39

Air Canada maintains that it cannot provide the information requested by Dr. Azar regarding strict fare amounts in question Q39 as it does not keep records of such information and it points out that its determination of denied boarding compensation amounts are based on the average international economy fare which are inclusive of all air transportation charges (Air Canada imposed surcharges), as defined by the Agency in the proposed *Regulations amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations (Amended Regulations)* and that the only items of the total price that were not included are third party imposed fees.

Dr. Azar struggles to understand the objection to question Q39 given that Air Canada seems to have answered precisely that question in the table on page 7 of Air Canada's September 24, 2012 submission.

Air Canada states that it did not provide an answer to question Q39, as the averages provided by Air Canada in its September 24, 2012 submission were inclusive of carrier imposed charges, and that based on Dr. Azar's submission of September 30, 2012, Air Canada understands its response to question Q39 was satisfactory.

Submissions: Questions Q40 to Q44

Air Canada maintains that it cannot provide the information requested by Dr. Azar in question Q40 regarding the total price averages as it does not keep records of such information. Air Canada submits that its determination of denied boarding compensation amounts are based on the average international economy fare which are is inclusive of all air transportation charges (Air Canada imposed surcharges), as defined by the Agency in the proposed *Regulations amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations (Amended Regulations)* and that the only items of the total price that were not included are third party imposed fees. Air Canada adds that the information requested by Dr. Azar under questions Q41 to Q44 is not relevant as it has already addressed how it determines its international denied boarding amounts.

According to Air Canada, due to the sheer volume of passengers travelling on its flights, the average fare is calculated by taking the total amount of revenue from international economy travel and dividing it by the number of revenue passengers and it is from this information that it makes its commercial decisions regarding the amount of international denied boarding amounts. Air Canada further submits that in the calculation of average international economy fares, it included full economy fares (i.e. the highest priced economy fares) in order to ensure that the compensation offered is equal or higher to the actual fare paid. Air Canada states that for the majority of passengers being denied boarding, it uses an average economy domestic fare which is higher than what it would be if only the domestic economy fares had been considered.

Air Canada submits that the calculations Dr. Azar is seeking involve determining the amount paid by each passenger on routes between Canada and Europe and comparing it to the arithmetic mean of the fares paid over a certain period of time. Air Canada maintains that this involves specific calculations and the creation of a data compilation that currently does not exist and even if it were to have such a compilation, Dr. Azar cannot require it to calculate such standard deviations and average deviations.

Air Canada argues that it is a well-established legal principle that in order to require the production of a document or information, said document or information must exist. Air Canada observes in *Mutuelle du* Canada, *Compagnie d'Assurance sur la vie v.* [1987] R.D.J. 192 *(La Mutuelle),* the Quebec Court of Appeal agreed with the judge of first instance who had rejected its request to obtain a complete list of particular data. Air Canada points out that the judge rejected the request and concluded that to order the transmission of such information "should be exercised with discretion particularly inasmuch as it is [sic] imposes a serious inconvenience upon citizens corporate or otherwise." Air Canada submits that the respondents were not in possession of the requested list and even if they had all the data that would allow them to compute such a list, *La Mutuelle*'s request was rejected.

In addition to the reasons set out above, Air Canada asserts that the information requested under questions Q41 to Q44 is irrelevant because the standard and average deviation of its fares over the past years is irrelevant to its determination of how denied boarding compensation amounts are established and the information requested constitutes information that it is not required to transmit as it would involve the creation of specific database compilations and calculations.

According to Dr. Azar, Air Canada represented in its September 24, 2012 submission that it does not keep records of such information. Dr. Azar also points out that Air Canada stated that it does not keep on record the total price paid by passengers, inclusive of third party imposed fees. Dr. Azar maintains that this statement is a *prima facie* admission of a serious breach of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Income Tax Act), as section 230 of the Income Tax Act requires corporations to retain records and books for six years from the end of the last taxation year.

Dr. Azar submits that it is highly improbable that Air Canada discarded records that it was required to retain for six years under Section 230 and in the absence of evidence to the contrary, the Agency ought to assume and find that it has always fully complied with section 230 and the Income Tax Act in general. Consequently, Dr. Azar submits that the Agency should find that, on a balance of probabilities, all records of Air Canada within the meaning of the Income Tax Act have been retained, and are available for the past six taxation years, that is, for 2012, 2011, 2010, 2009, 2008, 2007, and 2006.

Dr. Azar points out that under section 15 of the General Rules, a party may request the production of a document that an opposing party has referred to and according to section 18 of the General Rules, the Agency may order a party to provide it with any additional information, particulars or documents that it considers necessary, and subject to confidentiality, may provide it to other parties in the proceeding.

With respect to the production of information in databases in the *La Mutuelle* case cited by Air Canada, Dr. Azar notes that this case was decided 25 years ago, and clearly predates the technological development that society has undergone since 1987. Dr. Azar contends that the case can be easily distinguished from the present one as the issue in *La Mutuelle* was about the production of information in the possession of third parties, who are not parties to the litigation, pursuant to Article 402 of the Quebec *Code of Civil Procedure*, R.S.Q., and in the present case, Air Canada is not a third party and the information sought is in its possession and control.

Dr. Azar further observes that in the case of *Industries GDS Inc. v. Carbotech Inc.* four issues, as identified by the court were: (1) absence of evidence for the existence of the sought documents; (2) the sought documents were not in the possession of the parties; (3) the request amounts to a "fishing expedition"; and (4) the requests are repetitive or redundant. Dr. Azar argues that this can be distinguished from the case at bar, because the information sought is in the possession and control of Air Canada (unless Air Canada contravened the Income Tax Act) and the questions in issue are also very specific, and are far from amounting to a fishing expedition, or from being repetitive or redundant.

Dr. Azar submits that *R.G. v. Commission administrative des régimes de retraite et d'assurances*, which concerned an application under Quebec legislation governing freedom and access to information, does not assist Air Canada's position because of the substantial difference between the Quebec legislation at issue and the General Rules.

Dr. Azar also makes note of *Guzha v. Eclipse Colour & Imaging Corp.* which concerns issues related to affidavit of documents in a simplified procedure, and she fails to see the relevance of this authority to the case at bar.

Dr. Azar states that a substantial portion of documents in the possession of corporations are no longer stored as hard copies, but rather as electronic documents in large databases and that these databases are stored as machine readable records, and the only way to retrieve and inspect documents from them is to create a query.

Dr. Azar submits that the "total price" paid by passengers is the total charge on Air Canada receipts and/or invoices and appears as revenue on its books while the portion payable to third parties appears as liability, and given that Air Canada has fully complied with the Income Tax Act, a copy of every receipt and/or invoice issued for the past six taxation years must be available at its place of business. Dr. Azar adds that these records show the amount of fare, surcharges, and any other taxes that each and every passenger travelling on Air Canada between Canada and Europe paid between 2006 and 2012, and submits that it is reasonable to assume that the records are found in Air Canada's databases.

Dr. Azar does not dispute Air Canada's evidence about how it establishes its denied boarding compensation amounts; however, she disputes that these methods are reasonable and/or lead to reasonable amounts and she claims that questions Q40 to Q44 are relevant to determining the reasonableness of Air Canada's denied boarding compensation amounts.

Dr. Azar notes that on August 31, 2012, Air Canada provided average international economy cabin fares for the years 2004-2012 and on September 24, 2012, provided similar figures for itineraries between Canada and Europe. While Dr. Azar considers this information valuable, she maintains that averages alone can be misleading as they are "blind" to the dispersion of the numbers, and other statistical quantities are necessary in order to express the dispersion of the data.

Dr. Azar submits that questions Q41 and Q43 seek vital statistical information about Air Canada's economy fares on itineraries between Canada and Europe and seeks information about the dispersion of the fares compared to the averages provided. Dr. Azar adds that answers to questions Q41 and Q43 may show that the dispersion is high, and the averages do not adequately reflect the fares paid by passengers which may, in turn, support a finding that Air Canada's method for establishing its denied boarding compensation amounts is unreasonable.

Dr. Azar argues that given Air Canada's statement that the items of total price that were not included in the calculation are third party imposed fees, the averages provided by Air Canada do not reflect the total price paid by passengers, but only the portion that is a revenue for Air Canada. Dr. Azar submits that these figures are not comparable with the American regime of denied boarding compensation which is based on a notion of "fare" that includes all taxes and fees and surcharges required to obtain the service (14 CFR 250.1):

> Fare means the price paid for air transportation including all mandatory taxes and fees. It does not include ancillary fees for optional services.

Dr. Azar claims that obtaining statistical quantities about Air Canada's economy cabin "total prices" between Canada and Europe, would allow both her and the Agency to better compare Air Canada's method for establishing denied boarding compensation amounts with the American regime and may enable Dr. Azar to make further arguments to show that its method is unreasonable. Consequently, Dr. Azar asserts that the information about the "total prices" of Air Canada between Canada and the European Union meets the "train of inquiry" test, and questions Q40, Q42, and Q44 are relevant.

Dr. Azar also asserts that based on the principles of *Shields Fuels Inc. v. More Marine Ltd.*, 2008 FC 947, Air Canada ought to be compelled to answer questions Q41 and Q43 in full.

Air Canada advises that it did not provide an answer to question Q39 as the averages provided in its September 24, 2012 submission were inclusive of carrier imposed charges within the meaning of the proposed section 135.5 of the *Amended Regulations*, and that the averages strictly accounting for fare amounts would be lower than what was provided.

Air Canada contends that questions Q40 to Q44, are beyond the scope of relevance as it has already established how it determines its denied boarding amounts and would not meet the "train of inquiry" test as the questions clearly constitute an attempt to fish for arguments based on a mere suspicion that this would advance Dr. Azar's case. Air Canada argues that as set forth by the FCA in *Grand River Enterprises Six Nations Ltd. v. Her Majesty the Queen,* questions of this type that are based on mere suspicions should be rejected.

Air Canada maintains that its denied boarding compensation amounts are based on the current international economy average fares, and apply to all passengers who are denied boarding without discrimination based on fare paid by a particular passenger, in accordance with the principles set out in *Del Anderson v. Air Canada,* Decision No. 666-C-A-2001. As such, Air Canada confirms that the information requested in questions Q40 to Q44 was not considered when determining denied boarding compensation amounts, and submits that it is within its commercial discretion to determine what these levels are based on, as long as they are not unreasonable or unduly discriminatory. Therefore, Air Canada maintains that there is no undue discrimination as these compensation amounts do not discriminate between fares paid and that regarding reasonableness, the Agency already determined in *Del Anderson v. Air Canada,* that the amount of compensation, which it recognized was unrelated to fares paid, was not unreasonable.

Dr. Azar accepts Air Canada's evidence that it has not considered other statistical quantities in setting denied boarding amounts, but this acceptance does not render the practice reasonable and she submits that it is unreasonable for Air Canada to set its denied boarding compensation amounts based on a single statistical quantity, namely, the average of certain figures.

Dr. Azar notes that in Decision No. LET-C-A-154-2012, the Agency directed Air Canada to answer questions similar to questions Q40 to Q44 in the context of Air Canada's domestic operations and denied boarding compensation policy and claims that she is seeking only statistical quantities that can easily be calculated from the data in Air Canada's possession.

Regarding questions Q41 and Q43, Dr. Azar points out that they are identical in nature to questions Q1 and Q2 considered by the Agency in Decision No. LET-C-A-154-2012, and that based on the Agency's findings, she submits that the statistical quantities requested in questions Q41 and Q43 are relevant, and Air Canada ought to be directed to answer these questions.

Regarding questions Q40, Q42 and Q44, Dr. Azar points out that they are identical in nature to question Q5 considered by the Agency in Decision No. LET-C-A-154-2012, and that the figures provided by Air Canada in the present case are not comparable with the American regime of denied boarding compensation, which is based on a notion of "fare" that includes all taxes and fees and surcharges required to obtain the service. Therefore, Dr. Azar submits that the statistical quantities requested in questions Q40, Q42, and Q44 are relevant, and Air Canada ought to be directed to answer these questions.

Submissions: Question Q45

Dr. Azar submits that question Q45 is relevant to the proceeding as Air Canada is seeking to narrow down the group of competitors, which in turn affects those carriers that its denied boarding compensation amounts are compared with.

Air Canada advises that it has entered into a transatlantic joint venture, effective January 2010, with United Air Lines, Inc. and Deutsche Lufthansa Aktiengesellschaft (Lufthansa German Airlines) (including affiliated carriers) through which it provides customers with more choice through code sharing and streamlined services on routings between North and Central America, and Africa, India, Europe and the Middle East.

Air Canada advises that further information associated with the "nature and scope" of the transatlantic joint venture is grossly beyond the scope of the present case and there is no association between the nature and scope of a joint venture relationship and the reasonableness of Air Canada's denied boarding compensation amounts.

Submissions: Question Q46

Dr. Azar submits that question Q46 is relevant to the present case because these carriers, according to Air Canada, have such close ties with Air Canada that they are not considered competitors. Therefore, Dr. Azar submits that Air Canada has all the information about these partners, including their denied boarding compensation policies. Dr. Azar claims that these carriers are in a very similar position to Air Canada and it is her understanding that they have substantially different denied boarding compensation amounts vs. Air Canada, and nevertheless are able to meet their commercial obligations.

Therefore, Dr. Azar contends that the answers to this question meet the "train of inquiry" test and may assist her in demonstrating that Air Canada's denied boarding compensation amounts are unreasonable, and consequently advance her own case.

Air Canada requests that Q46 be withdrawn as the carriers subject to this question are included in the list of carriers referred to in Q34, which has been answered.

Issue (ii): Should the Agency compel Air Canada, pursuant to subsection 20(3) of the General Rules, to respond to Dr. Azar's questions Q22, Q27, Q30, and Q31 on the basis that the responses to those questions are relevant to the Agency's consideration of Dr. Azar's claim that she is entitled to denied boarding compensation?

Submissions: Question Q22

According to Air Canada, full access to its codes for reasons of delay and their related IATA codes were not supported in any reason by Dr. Azar that would justify the relevancy of such information in the context of the present case and in addition to being confidential and commercially sensitive, such information is outside the scope of the present case and does not bring further clarity to the events that affected Dr. Azar's travels.

Dr. Azar disagrees with Air Canada's claim that the requested information is confidential and commercially sensitive and provided a printout of a posting on a public forum, where information purporting to precisely answer question Q22 was posted in December 2011.

Air Canada does not admit to the authenticity of the posting on the public forum as it does not contain complete information. Air Canada claims that it treats these codes confidentially as they are internal codes not available to the public.

Dr. Azar submits that question Q22 meets the "train of inquiry" test and seeks a list of all possible entries that could appear in the "DLY RSN" section of such reports and is relevant in order to draw conclusions about what was not the reason for the delay of Flight AC8941, which in turn may support Dr. Azar's case that she is entitled to denied boarding compensation.

Air Canada states that it has provided full responses regarding Dr. Azar's travels and it claims that the "train of inquiry test" would not justify disclosure of the requested information as this would be considered a fishing expedition to determine additional arguments not related to the circumstances surrounding the delay of her flight.

Dr. Azar points out that on September 24, 2012, Air Canada confirmed that "DLY RSN" means the reason for the delay of the flight, and that "EQI" appearing under "DLYRSN" for Flight AC8941 means "Aircraft Rotation" and she contends that the range of possible codes that can be entered under "DLY RSN" provides additional information on the reasons for the delay of Flight AC8941, and may increase the probability that the delay was caused by Air Canada, and not circumstances beyond its control.

Submissions: Question Q27

Air Canada contends that the information requested in question Q27 regarding the distance in meters between the gates of arrival and departure, the creation of a marked "diagram" and the determination of the speed of the moveable sidewalk is not relevant to the present proceeding for the Agency to make a determination on whether Dr. Azar is entitled to denied boarding compensation. Air Canada adds that the information requested is not in its possession or control and it directed Dr. Azar to the Toronto Airport Authority.

Dr. Azar points out that in its August 31, 2012 submission, Air Canada claimed that she was not able to successfully make her connecting Flight AC880 and needed to make a terminal change, travel a very long distance, and go through two document checkpoints. In response to questions Q23 to Q26, Air Canada retracted its claim concerning the need to make a terminal change and go through two document checkpoints, but continued to claim that Dr. Azar needed to travel a very long distance. Dr. Azar maintains that question Q27 is relevant because it may prove that the representation of the distance travelled is inaccurate, which in turn will damage Air Canada's case to show that she missed her connection, and will advance the case of Dr. Azar to show that she was denied boarding.

Dr. Azar submits that the aim of this question is to replace the subjective opinion of "a very long distance" with objective facts pertaining to the distance travelled and therefore meets the "train of inquiry" test. In the alternative, Dr. Azar submits that the Agency ought to strike out Air Canada's representations about the distance between the departure and arrival gates pursuant to paragraph 14(3)(*b*) of the General Rules as being prejudicial and/or irrelevant to the proceeding. Air Canada submits that as clearly evidenced on a map provided in its September 24, 2012 submission, the gates in questions are the furthest gates from one another within Terminal 1 and that the request does not meet the "train of inquiry" test and should be dismissed based on the principles set out in *Sanofi-Aventis Canada v. Laboratoire Riva* and in *Her Majesty the Queen v. Lehigh Cement Limited.*

Dr. Azar maintains that question Q27 is directly related to a fact in issue pleaded by Air Canada, which Dr. Azar disputes and the answer will tend to increase or diminish the probability of the existence of the fact alleged by Air Canada and therefore, meets the test for relevance established by the Supreme Court of Canada in *R. v. Arp*.

Dr. Azar argues that the map provided by Air Canada does not answer question Q27 and is unusable as evidence as it lacks a crucial feature required for measuring distances: a scale. Dr. Azar adds that the precise layout of a terminal, including distances between points and/or a scale, is vital operational information that every carrier operating at an airport must have for its daily operations and it is therefore highly improbable that Air Canada does not have this information.

Submissions: Questions Q30 and Q31

Air Canada submits that for security reasons, carriers are obliged to apply restrictions to the handling of checked baggage, and disclosure to any member of the public would effectively compromise their integrity. Air Canada adds that it is not allowed to discuss the details imposed by one government with another government, even if they are on either end of the same flight. Therefore, Air Canada argues that it cannot set out the reasons under which a passengers' baggage may be transported on a flight other than the passenger and submits that such information is not relevant to the present case.

Dr. Azar points out that Air Canada's argument regarding its inability to comply with a production order on the grounds that it is forbidden by foreign legislation was considered and rejected by the Supreme Court of Canada in *Hunt v. T&N plc*, [1993]4 SCR 289 in the context of the extraterritorial effect of a Canadian provincial legislation in another Canadian province.

Dr. Azar maintains that questions Q30 and Q31 are directly related to whether "transit security restrictions" had anything to do with Dr. Azar being denied boarding. In addition, Dr. Azar submits that Air Canada refers twice to such restrictions and the references are no more than innuendo, which serve the sole purpose of creating prejudice. Dr. Azar adds that Air Canada alludes to transit security restrictions without providing any explanation as to how these restrictions may have affected her travel and she disputes that transit security restrictions had anything to do with her being denied boarding.

Dr. Azar maintains that the issue of transit security restrictions is relevant as Air Canada wishes to rely on them to advance its own position and if the questions are not relevant, they ought to be retracted and/or struck from the record. Therefore, Dr. Azar submits that questions Q30 and Q31 meet the "train of inquiry" test in that they may damage Air Canada's case.

Air Canada counters that a mere suspicion that the answers to these questions "may damage" Air Canada is not sufficient in order to engender the application of the "train of inquiry" test.

ANALYSIS

Air Canada maintains that the information sought by Dr. Azar under questions Q22, Q27, Q30, Q31, Q34, Q36, and Q39 to Q46 does not constitute relevant information, and on that basis, did not respond to those questions. The Agency therefore has to decide, as per subsection 20(3) of the General Rules, whether questions should be answered in full, in part, or not at all. For that, the Agency must determine if the questions posed are relevant.

Dr. Azar has referred to the case of *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* (Peruvian Guano Decision), where the Australian High Court developed the "train of inquiry" test, which can be summarized as follows: if the document "contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or damage the case of his adversary", then the document is relevant.

In Decision No. LET-C-A-154-2012, the Agency established the test to use when making a determination on the relevancy of evidence. The Agency noted that in order to make a determination on the relevancy of evidence, the Agency must:

1. examine the nature of what is claimed; and then
2. look at whether the question to be answered or the evidence that is to be produced/disclosed show, or at least tends to show, or increase or diminish the probability of the existence of the fact related to what is claimed.

If the answer to the second question is positive, the question/evidence is relevant. At this point, the Agency retains discretion to decide to disallow a relevant question/document where responding to it would place undue hardship on the answering party, where there is any other alternative information, or where the question forms part of a "fishing expedition".

The Agency will now address the relevancy of the questions posed by Dr. Azar to the Agency's consideration of the present matter.

Issue (i): Should the Agency compel Air Canada, pursuant to subsection 20(3) of the General Rules, to respond to Dr. Azar's questions Q34, Q36, and Q39 to Q46 on the basis that the responses to those questions are relevant to the Agency's consideration of the reasonableness of Air Canada's Tariff Rule 89 (Part 1)(E)(2)?

In her complaint, Dr. Azar challenged, among other things, the reasonableness of Air Canada's Tariff Rule 89 (Part 1)(E)(2), which governs the amount of denied boarding compensation. This Tariff Rule provides that:

> Subject to the provisions of (E)(1)(a), Air Canada will tender liquidated damages in the amounts in cash or credit voucher good for travel on Air Canada as follows: Caribbean/Bermuda to Canada, compensation by cash is equal to the value of coupons remaining to an online or interline destination, or next stopover points, maximum is CAD 200.00. Compensation by MCO (credit voucher) is equal to twice the value of coupon remaining to an online or interline destination or next stopover point, minimum is CAD 100.00, maximum is CAD 500.00. From Venezuela, compensation to passengers must equal 25% of the value of the ticket to be paid by cash, by electronic bank transfer, cheque, or in accordance with an agreement signed with the passenger, with travel vouchers or other services.

	Draft	MCO
Canada to Mexico/Mexico to Canada	CAD 100.00	CAD 200.00
Canada to all other destinations	CAD 200.00	CAD 500.00
Asia to Canada (excluding Japan and Korea)	CAD 300.00	CAD 600.00
Japan to Canada (cash only)	JPY 30,000	n/a
Seoul to Canada (cash only) Y Class	USD 400.00	n/a
Seoul to Canada (cash only) J Class	USD 600.00	n/a
South America/South Pacific to Canada	CAD 200.00	CAD 500.00
Sao Paulo to Toronto	USD 750.00	USD 1500.00

Considering what the Agency has stated in previous decisions that in order to determine whether a term or condition of carriage applied by a carrier is "reasonable" within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), a balance must be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations, do the questions posed by Dr. Azar show or at least tend to show, or increase or diminish the probability, that the amount of denied boarding compensation tendered by Air Canada is unreasonable?

Question Q34. What are the denied boarding compensation policies of Air France, Alitalia, Austrian Airlines, British Airways, Condor, Czech Airlines, Finnair, Icelandair, LOT Polish Airlines, Lufthansa, KLM, SAS Scandinavian Airlines, SATA Air Acores, Swiss, and TAP Portugal on flights departing from Canada to Europe?

The Agency has considered the submissions of both Air Canada and Dr. Azar regarding question Q34 and is of the opinion that while the information requested in Q34 may allow Dr. Azar to demonstrate whether Tariff Rule 89 (Part 1)(E)(2) is just and reasonable, the Agency will disallow the question as there is alternative information which is accessible through publicly available tariffs. The Agency therefore disallows question Q34.

Question Q36. Is there a way to quantify to what extent a carrier is a competitor of Air Canada on routes between Europe and Canada? If so, provide that quantity for each of Air France, Alitalia, Austrian Airlines, British Airways, Condor, Czech Airlines, Finnair, Icelandair, LOT Polish Airlines, Lufthansa, KLM, SAS Scandinavian Airlines, SATA Air Acores, Swiss, TAP Portugal, and any other carrier that Air Canada considers a competitor on routes between Europe and Canada.

The Agency has considered the submission of Air Canada regarding competitor carriers operating between Canada and Europe, and agrees that every carrier offering for sale an air service on routings between Canada and Europe is a potential competitor of Air Canada and that determining the extent to which each carrier is a competitor would not be necessary or relevant to the present case. In addition, the Agency is of the opinion that ordering Air Canada to respond to question Q36 would be similar to a fishing expedition to determine additional scientific arguments and quantities which are not relevant to its determination on the reasonableness of Tariff Rule 89 (Part 1)(E)(2). The Agency therefore finds that question Q36 is not relevant.

Question Q39. What is the average of Air Canada's international economy fares on itineraries between Europe and Canada in each of the years 2004-2012?

Air Canada did not provide an answer to question Q39, as according to Air Canada, the averages it provided in its September 24, 2012 submission were inclusive of carrier imposed charges and not strictly the fare, but that based on Dr. Azar's submission of September 30, 2012, Air Canada understands its response to Q39 was satisfactory. The Agency notes that there were no further arguments made by Dr. Azar regarding question Q39. Therefore, the Agency concludes that this question is moot.

Question Q41. What is the standard deviation of Air Canada's international economy fares on itineraries between Europe and Canada in each of the years 2004-2012?

Question Q43. What is the average deviation of Air Canada's international economy fares on itineraries between Europe and Canada in each of the years 2004-2012?

The Agency has considered the submissions of Air Canada that the data requested by Dr. Azar regarding the standard and average deviation of Air Canada's average international economy fares over the years 2004 to 2012 is irrelevant to the determination as to how Air Canada establishes denied boarding compensation amounts. The Agency does not agree with Air Canada as the fares paid by passengers over these years represent important data that the Agency would need to examine when making its determination on the reasonableness of Tariff Rule 89 (Part 1)(E)(2). The Agency is of the opinion that a full and adequate response to the questions will allow Dr. Azar to fully inform herself of the nature of Air Canada's position on that issue.

Furthermore, the Agency agrees with the submissions of Dr. Azar that the statistical quantities requested may enable her to demonstrate that Air Canada's reliance solely on averages may show or tend to show, or increase or diminish the probability, that the amount of denied boarding compensation is unreasonable. The Agency finds, therefore, that questions Q41 and Q43 are relevant.

Question Q40. What is the average of Air Canada's international economy cabin "total prices" on itineraries between Europe and Canada (within the meaning of the proposed s. 135.5 of ATR) in each of the years 2004-2012?

Question Q42. What is the standard deviation of Air Canada's international economy cabin "total prices" on itineraries between Europe and Canada (within the meaning of the proposed section 135.5 of ATR) in each of the years 2004-2012?

Question Q44. What is the average deviation of Air Canada's international economy cabin "total prices" (within the meaning of the proposed s. 135.5 ATR) on itineraries between Europe and Canada in each of the years 2004-2012?

The Agency finds that Dr. Azar has made a convincing argument that questions Q40, Q42, and Q44 are relevant given Air Canada's concession that the only items of total price that were not included in the calculation of its average international economy fare were third party imposed fees. Thus, the averages do not reflect the total price paid by passengers for the transportation, but only the portion that is revenue for Air Canada.

The Agency is of the view that full and adequate responses to questions Q40, Q42, and Q44 may enable her to demonstrate that the total price paid by passengers may show or tend to show, or increase or diminish the probability, that the amount of denied boarding compensation provided for under Tariff Rule 89 (Part 1)(E)(2) is unreasonable. The Agency therefore finds that questions Q40, Q42, and Q44 are relevant.

Question Q45. Provide details about the nature and scope of the "Transatlantic Joint Venture" referred to by Air Canada in its September 24, 2012 submission, how it differs from a simple code-sharing agreement, and in what way does it makes parties to it non-competitors to each other?

The Agency has considered the submissions of Air Canada and agrees with its claim that further information associated with its transatlantic joint venture is grossly beyond the scope of the present case. The Agency is of the opinion that the requested information is not relevant to its determination on the reasonableness of Tariff Rule 89 (Part 1)(E)(2). In addition, the Agency is of the opinion that the information would be a fishing expedition to determine additional arguments not related to the circumstances surrounding the reasonableness of the Tariff. The Agency therefore finds that question Q45 is not relevant.

Question Q46. What are the denied boarding compensation policies of Lufthansa, Swiss, and Austrian Airlines?

The Agency has considered the submissions of both Air Canada and Dr. Azar regarding question Q46 and is of the view that while the information requested in question Q46 may allow Dr. Azar to demonstrate whether Tariff Rule 89 (Part 1)(E)(2) is just and reasonable, the Agency will disallow the question as there is alternative information which is accessible through publicly available tariffs. The Agency therefore disallows question Q46.

Issue (ii): Should the Agency compel Air Canada, pursuant to subsection 20(3) of the General Rules, to respond to Dr. Azar's questions Q22, Q27, Q30, and Q31 on the basis that the responses to those questions are relevant to the Agency's consideration of Dr. Azar's claim that she is entitled to denied boarding compensation?

The Agency notes that regarding questions Q22, Q27, Q30 and Q31, it must determine whether the questions show or at least tend to show, or increase or diminish the probability, that Dr. Azar is entitled to denied boarding compensation.

Question Q22. Provide a copy of Air Canada's list of codes for "DLY RSN" with their meaning and the corresponding IATA code.

The Agency has considered the submissions of Air Canada and agrees that access to its codes for reasons of delay and their related IATA codes were not supported in any reason by Dr. Azar that would justify the relevancy of the information in the context of the present case. In addition, given that Dr. Azar submits that she is seeking information to draw conclusions about what was not the reason for the delay of Flight AC8941, the Agency is of the opinion that the information would not show, or at least tend to show, or increase or diminish the probability of the existence of the fact to what is claimed. The Agency therefore finds that question Q22 is not relevant.

Question Q27. What was the distance, in metres, between the gate of arrival for Flight AC8941 and the gate of departure for Flight AC880 on February 18, 2011?

The Agency has considered the submissions of Air Canada and agrees that the information requested in question Q27 is not relevant for the Agency to make a determination on whether Dr. Azar is entitled to denied boarding compensation. The Agency is of the opinion that in no way would this information show, or at least tend to show, or increase or diminish the probability of the existence of the fact related to what is claimed. The Agency therefore finds that question Q27 is not relevant.

Question Q30. What are the "transit security restrictions" referred to by Air Canada in its August 31, 2012 submission?

Question Q31. How is it possible that Flight AC876 left with Dr. Azar on board, but without her baggage?

The Agency has considered the submissions of both Air Canada and Dr. Azar regarding questions Q30 and Q31 and is of the opinion that these questions are not necessary or relevant for the Agency to make a determination as to whether Dr. Azar was denied boarding and therefore entitled to denied boarding compensation. More specifically, the Agency does not find that information regarding transit security or information respecting Dr. Azar's baggage would show, or at least tends to show, or increase or diminish the probability of the existence of the fact related to what is claimed. The Agency therefore finds that questions Q30 and Q31 are not relevant.

Conclusion: motion 2

1. The Agency concludes that questions Q40 to Q44 are relevant, and orders Air Canada to respond in full to those questions by December 19, 2012.
2. The Agency concludes that questions Q22, Q27, Q30, Q31, Q36, and Q45 are not relevant.
3. The Agency disallows questions Q34 and Q46.
4. The Agency concludes that question Q39 is moot.
5. Dr. Azar must file her final reply to the pleadings within 10 business days after the receipt of the full responses to questions Q40 to Q44 by Air Canada.

MOTION 3

Background

Dr. Azar filed a motion on September 10, 2012, seeking, among other things, an order to strike out certain alleged prejudicial and/or misleading and/or inadmissible portions of Air Canada's August 31, 2012 answer. In her motion, Dr. Azar requested that Annex F (and any reference to it) be struck from the record as Annex F, an anonymous e-mail with the names and e-mail addresses of the senders and recipients redacted, contains inadmissible hearsay in support of its position. In Decision No. LET-C-A-140-2012, the Agency ordered Air Canada to provide a non-redacted version of Annex F to its August 31, 2012 answer.

On September 24, 2012, Air Canada submitted Annex B, the unredacted version of Annex F, in response to Decision No. LET-C-A-140-2012.

On October 1, 2012, Dr. Azar submitted a motion, similar to that filed on September 10, 2012, seeking, among other things, a decision on her request for an order to strike out both Annex F and B from the record, or alternatively, to direct Air Canada to file a sworn affidavit by Raja Saadeh and allow Dr. Azar to cross-examine Raja Saadeh under oath.

Issue

The issue to be determined is whether the Agency should grant Dr. Azar's request for an order to strike out both Annexes F and B from the record, or alternatively, direct Air Canada to file a sworn affidavit by Raja Saadeh and allow Dr. Azar to cross-examine Raja Saadeh under oath.

Positions of the parties

In the October 1, 2012 motion, Dr. Azar claims that Annexes F and B are a chain of two e-mails in which a person claiming to be "Raja Saadeh" sent an e-mail message to "canada manager" and "tony kharrat" and "George Stephan". According to Dr. Azar, the e-mail appears to have been forwarded by "Cherif Gemayel, Manager Canada" to an Air Canada representative.

Dr. Azar argues that it is not possible to know whether a person by the name of "Raja Saadeh" exists at all, or whether this person was aware that the email would be used as evidence in a legal proceeding. Dr. Azar claims that the fact that the Air Canada representative received Annexes F and B does not prove the authenticity or the truth of its lower portion, to which the Air Canada representative was not a direct recipient.

While Dr. Azar does not dispute that the Air Canada representative received an e-mail containing certain statements in Annexes F and B, she claims that there is no evidence on the record that these statements are actually true.

Therefore, Dr. Azar submits that Annexes F and B are inadmissible, prejudicial, constitute double hearsay, and ought to be struck from the record. In support of her claim, Dr. Azar points out the decision of the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57, which according to Dr. Azar, is the leading decision on hearsay evidence. Dr. Azar submits that the law established by the Supreme Court of Canada on this point was summarized by the British Columbia Court of Appeal in *R. v. Post*, 2007, BCCA 123 at paragraph 47 and the most important among these principles are the following:

> (i) A hearsay statement is an out-of-court statement adduced to prove the truth of its contents, in the absence of a contemporaneous opportunity to cross-examine the declarant.
> (ii) Hearsay evidence is presumptively inadmissible.
> (iii) A hearsay statement may be admitted for its truth if it is shown to be both necessary and reliable.
> (iv) The onus of establishing, on a balance of probability, both necessity and reliability is on the person who seeks to adduce the evidence.

Dr. Azar contends that the content of Annexes F and B are double (multiple) hearsay and fall within the definition of double hearsay as defined in Black's Law Dictionary.

Dr. Azar claims that the content of Annexes F and B constitutes hearsay and is inadmissible as evidence unless Air Canada demonstrates, on a balance of probabilities, that it is necessary and reliable. Dr. Azar also submits that the only credible evidence on the record is her statements submitted under affidavit, which were available for cross-examination by Air Canada and which Air Canada chose not to contest her evidence.

Dr. Azar notes that given the highly prejudicial nature of Annexes F and B and that it appears to contradict Dr. Azar's sworn evidence, should the Agency not strike it from the record, Air Canada should be directed to file a sworn affidavit by Raja Saadeh and allow for cross-examination of Raja Saadeh under oath.

With respect to the admissibility of Annexes F and B, in its October 22, 2012 submission, Air Canada submits that rather than proceeding by way of cross-examination, the Agency should direct Dr. Azar to answer specifically which expenses were covered by Middle East Airlines (MEA) as a part of the complaint.

Air Canada maintains that the evidence produced under Annexes F and B ought to be kept on file without embarking on cross-examinations, and it submits that if the Agency decides that Annexes F and B be stricken from the record, it should consider MEA's publically available International Passenger Rules and Fares Tariff, at Rule 55 (B)(6)(e) and direct Dr. Azar, pursuant to section 21 of the General Rules, to specifically establish which expenses have already been covered by MEA.

In her November 6, 2012 submission, Dr. Azar argues that the Agency granted Dr. Azar's request to be permitted to file her reply in the main proceeding after the outstanding motions are determined by the Agency. Therefore, every issue not raised by Dr. Azar in her motions, including the issue of facts related to expenses claimed are not currently before the Agency.

In addition to the authorities already cited in support of her motion, Dr. Azar submits that she would like to rely on an authority that was cited in Decision No. LET-C-A-154-2012, *Commission de la santé et de la sécurité du travail v. The Queen*:

> [39] The hearsay rule has been defined as follows, at page 156 of The Law of Evidence in Canada:
>
> > Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.
>
> [40] At page 157, the authors add:
>
> > Special attention has been given to hearsay as being particularly fraught with untrustworthiness because its evidential value rests on the credibility of an out-of-court asserter who is not subject to the oath, cross-examination or a charge of perjury. As Dickson J. stated in R. v. Abbey:

> The main concern of the hearsay rule is the veracity of the statements made. The principal justification for the exclusion of hearsay evidence is the abhorrence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross-examination. Testimony under oath and cross-examination has been considered to be the best assurances of the truth of the statements of facts presented.

As indicated in her October 1, 2012 motion, Dr. Azar submits that hearsay evidence is presumptively inadmissible, but may be admitted for its truth if it is shown to be both necessary and reliable and claims that the onus of establishing, on a balance of probabilities, both necessity and reliability is on the person who seeks to adduce the evidence.

Dr. Azar maintains that Air Canada has not: responded to her arguments regarding the law of evidence on hearsay, disputed that Annexes F and B are double (multiple) hearsay, made any submissions in support of the admissibility of Annexes F and B, and provided any arguments to counter her alternative request that Raja Saadeh be cross-examined under oath. Additionally, Dr. Azar argues that Air Canada has therefore failed to discharge its burden of proof required for admitting hearsay evidence.

Regarding the request that Dr. Azar provide details regarding the expenses already covered by MEA, Dr. Azar submits that Air Canada was provided with a fair opportunity to present evidence and make submissions and it did so on August 31, 2012. Dr. Azar adds that Air Canada ought to have directed its question to Dr. Azar before or at the time it filed its answer, not nearly two months later.

Analysis

In arguing that Annexes F and B are hearsay, Dr. Azar has relied on paragraphs 39 and 40 of the case *Commission de la santé et de la sécurité du travail v. The Queen* (C.S.S.T). The Agency understands that the proposition made by the Court in the C.S.S.T. case refers to statements made by a witness in an oral hearing where the witness who filed the statement could be called to testify *viva-voce* and be cross-examined afterwards. The Agency's proceedings however, are paper proceedings where everything is done in writing and where the Agency has no obligation to order that any particular facts relating to a proceeding be supported by an affidavit. In light of this, as the Court noted in the C.S.S.T. case, the importance is what weight the Agency will give to a statement, if any:

> [36] It should be noted that the relevance of evidence adds nothing to its probative value at trial. Even if a document is admitted in evidence, the trier of facts must still determine at trial whether the document has probative value. At page 26 of *The Law of Evidence in Canada*, the authors refer to *R. v. Morris*, [1983] 2 S.C.R. 190, state:
>
> ...

> Although McIntyre J. agreed that the probative value of this evidence was low, it was an error for the judge to confuse relevance with weight. (....) Yet the clipping was nevertheless still relevant evidence and it should have been put before the trier of fact. The trier of law determines if the evidence is relevant. The trier of fact determines what, if any, weight is to be given to it. Obviously, where the judge is the trier of both fact and law the distinction becomes blurred and the weight to be given the evidence becomes paramount consideration. Without relevance the evidence can have no weight.

In light of the foregoing, regarding the September 10 and October 1, 2012 notices of motion, the Agency finds that Dr. Azar has not presented any convincing arguments as to why the Agency should order Air Canada to strike out certain alleged prejudicial and/or misleading and/or inadmissible portions of Air Canada's August 31, 2012 submission, or as to why it should order Air Canada to file an affidavit and order that the witness be cross-examined.

Conclusion: Motion 3

The Agency therefore dismisses the motion and will give the information appropriate weight, if any, in its final deliberation.

SUMMARY OF CONCLUSIONS

Motion 1:

Pursuant to paragraph 24(4)(*d*) of the General Rules, the Agency orders that not later than December 17, 2012, Air Canada provide to Dr. Azar and her representative the Undertaking for signature , that Dr. Azar and her representative submit the Undertaking to Air Canada by not later than December 20, 2012, that Air Canada provide the confidential document to Dr. Azar and her representative by not later than December 27, 2012, and that the document not be placed on the public record.

Motion 2:

1. The Agency concludes that questions Q40 to Q44 are relevant, and orders Air Canada to respond in full to those questions by December 19, 2012.
2. The Agency concludes that questions Q22, Q27, Q30, Q31, Q36, and Q45 are not relevant.
3. The Agency disallows questions Q34 and Q46.
4. The Agency concludes that question Q39 is moot.
5. Dr. Azar must file her final reply to the pleadings within 10 business days after the receipt of the full responses to questions Q40 to Q44 by Air Canada.

Motion 3:

The Agency dismisses the motion and will give the information appropriate weight, if any, in its final deliberation.

Should you have any questions, you may contact Allison Fraser by telephone at 819-994-7571, by facsimile at 819-953-7910, or by e-mail at allison.fraser@otc-cta.gc.ca..

Sincerely,

Cathy Murphy
Secretary

BY THE AGENCY:

Geoffrey C. Hare
Member

J. MARK MACKEIGAN
Member

Encl.

Canadian Transportation Agency General Rules

18. The Agency may, by order,

(*a*) require that a party provide it with any additional information, particulars or documents that the Agency considers necessary;
(*b*) require that, subject to sections 23 to 26, any information, particulars or documents obtained under paragraph (*a*) be made available for inspection by, or be provided to, any other party to the proceeding; and
(*c*) postpone its consideration of an application until the information, particulars or documents are filed with the Agency and until the Agency determines that the information, particulars or documents so filed constitute a reasonable response to the Agency's order.

19. A party to a proceeding may direct questions to any other party if the party files with the Agency, and serves on the other parties, a copy of the questions along with the reasons for them and their relevance to the proceeding.

20. (1) A party to whom questions have been directed under section 19 shall, within the period that the Agency directs,

(*a*) serve the party who directed the questions with a full and adequate response to each question;
(*b*) file a copy of the response with the Agency; and
(*c*) serve copies of the response on the other parties.

(2) If a party to whom questions have been directed does not provide a complete and adequate response and contends that a question is not relevant or that the information requested is of a confidential nature or is not available, the party's response shall set out its reasons in support of that contention, and include any alternative available information that the party considers would be of assistance to the party who directed the questions.

(3) If a party who directed questions is not satisfied that the response is complete or adequate, the party may request the Agency to order that the questions be answered in full, and the Agency may order that the questions be answered in full or in part, or not at all.

23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

(2) No person shall refuse to file a document on the basis of a claim for confidentiality alone.

(3) A claim for confidentiality in respect of a document shall be made in accordance with subsections (4) to (9).

(4) A person making a claim for confidentiality shall file

(*a*) one version of the document from which the confidential information has been deleted, whether or not an objection has been made under paragraph (5)(*b*); and
(*b*) one version of the document that contains the confidential information marked "contains confidential information" on the top of each page and that identifies the portions that have been deleted from the version of the document referred to in paragraph (*a*).

(5) A person making a claim for confidentiality shall indicate

(*a*) the reasons for the claim, including, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to the person making the claim for confidentiality if the document were disclosed; and
(*b*) whether the person objects to having a version of the document from which the confidential information has been removed placed on the public record and, if so, shall state the reasons for objecting.

(6) A claim for confidentiality shall be placed on the public record and a copy shall be provided, on request, to any person.

(7) A person contesting a claim for confidentiality shall file with the Agency

(*a*) a request for the disclosure of the document, setting out the relevance of the document, the public interest in its disclosure and any other reason in support of the request; and
(*b*) any material that may be useful in explaining or supporting those reasons.

(8) A person contesting a claim for confidentiality shall serve a copy of the request for disclosure on the person making the claim.

(9) The person making a claim for confidentiality may, within five days after being served with a request for disclosure, file a reply with the Agency and serve a copy of the reply on the person who made the request for disclosure.

24. (1) The Agency may dispose of a claim for confidentiality on the basis of

(*a*) documents filed with the Agency or oral evidence heard by it;
(*b*) documents or evidence obtained at a conference if the matter has been referred to a conference under section 35; or
(*c*) documents or evidence obtained through depositions taken before a member or officer of the Agency or any other person appointed by the Agency.

(2) The Agency shall place a document in respect of which a claim for confidentiality has been made on the public record if the document is relevant to the proceeding and no specific direct harm would likely result from its disclosure or any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed.

(3) If the Agency determines that a document in respect of which a claim for confidentiality has been made is not relevant to a proceeding, the Agency may order that the document be withdrawn.

(4) If the Agency determines that a document in respect of which a claim for confidentiality has been made is relevant to a proceeding and the specific direct harm likely to result from its disclosure justifies a claim for confidentiality, the Agency may

(*a*) order that the document not be placed on the public record but that it be maintained in confidence;
(*b*) order that a version or a part of the document from which the confidential information has been removed be placed on the public record;
(*c*) order that the document be disclosed at a hearing to be conducted in private;
(*d*) order that the document or any part of it be provided to the parties to the proceeding, or only to their solicitors, and that the document not be placed on the public record; or
(*e*) make any other order that it considers appropriate.

32. (1) Except for section 14 (request to amend), section 23 (claim for confidentiality), sections 27 and 28 (request for postponement or adjournment), section 29 (request for a stay), section 61 (motions made during an oral hearing) and subsection 68(2) (filing a pleading after a reply), any request that arises in the course of a proceeding and requires an order or decision of the Agency shall be brought before the Agency by motion and shall be initiated by a written notice of motion.

(2) A notice of motion may be in any form that contains a clear and concise statement of the facts, the relief sought and the grounds for seeking the relief.

(3) A notice of motion shall be filed with the Agency, and the party filing the notice of motion shall serve a copy of the notice on the other parties.

(4) Within 10 days after receiving a notice of motion, a party may file a written answer to it with the Agency and shall serve a copy of it on the other parties.

(5) Within five days after receiving an answer to its notice of motion, the party may file a written reply to the answer with the Agency and shall serve a copy of the reply on the other parties.

(6) If a party intends to submit a document in support of a notice of motion or an answer or a reply to it, the document shall accompany the notice, answer or reply, and the party shall file the document with the Agency and serve a copy of it on the other parties.

(7) Subject to section 61, the Agency shall dispose of a motion in writing.

Decision No. 163-C-A-2007

April 4, 2007

IN THE MATTER OF a complaint filed by Claudia Burns with respect to Air Canada's application of conditions in respect of future travel with the carrier due to the events that occurred on June 17, 2006 on Air Canada Flight No. AC891 from Rome, Italy to Toronto, Ontario, Canada.

File No. M4120-3/06-06263

Complaint

[1] On September 21, 2006, Claudia Burns filed with the Complaint Investigations Division the complaint set out in the title. On October 20, 2006, due to the regulatory nature of the matter, the complaint was referred to the Canadian Transportation Agency (hereinafter the Agency) for its consideration.

[2] On November 7, 2006, Mrs. Burns was asked to confirm whether she wished to pursue this matter before the Agency. By letter dated November 15, 2006, Mrs. Burns consented to having her complaint submitted to the Agency.

[3] The Agency opened the pleadings on November 17, 2006.

[4] On January 17, 2007, Air Canada filed its answer, including an opinion by the carrier's Medical Director with respect to Mrs. Burns' condition, and on January 26, 2007, Mrs. Burns filed her reply.

[5] On February 7, 2007, Mrs. Burns filed additional comments. In its Decision No. LET-C-A-34-2007 dated February 22, 2007, the Agency determined that these comments were not relevant and necessary to its consideration of this matter, and returned the submission to Mrs. Burns.

[6] Pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, the Agency is required to make its decision no later than 120 days after the application is received unless the parties agree to an extension. The parties have agreed to an extension of the statutory deadline until April 4, 2007.

Preliminary matter

[7] Although Air Canada filed its answer after the prescribed deadline, the Agency, pursuant to section 5 of the *Canadian Transportation Agency General Rules*, SOR/2005-35, accepts this submission as being relevant and necessary to its consideration of this matter.

Issue

[8] The issue to be addressed is whether Air Canada has properly applied the terms and conditions of carriage concerning refusal to transport specified in its International Passenger Rules and Fares Tariff, NTA (National Transportation Agency)(A) No. 458 (hereinafter the Tariff), as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the ATR (Air Transportation Regulations)).

Positions of the parties

[9] Mrs. Burns submits that she has Meniere's disease, a condition which makes her susceptible to certain types of repetitive movement in her visual field, often causing, among other things, vertigo, dizziness and vomiting. Mrs. Burns states that she and her husband were seated in row 27 of Flight No. AC891, departing from Rome on June 17, 2006, and that the seats were directly in front of a large television screen. Mrs. Burns maintains that from the commencement of the video safety presentation, the image on the screen continually rolled, causing her to feel dizzy, and that she asked a flight attendant to address this matter as she could not tolerate the motion. As Mrs. Burns was interrupting the safety demonstration, she was asked to wait until it was completed at which time her concerns would be addressed.

[10] Mrs. Burns asserts that she complied with the flight attendant's instructions to remain seated quietly until the safety demonstration was over. Thereafter, the flight attendant moved her to an empty seat a few rows behind row 27; this seat was, however, no better as she was still able to see the screen image continually rolling, causing her to experience further dizziness and nausea.

[11] Mrs. Burns states that in response to her request to block the rolling image on the screen,

the flight attendants placed papers in front of the projector light, but removed them when another passenger commented about a potential fire hazard. Mrs. Burns claims that, at that point, she suggested sitting in a crew seat or in the galley area, but the chief flight attendant told her it was unsafe and refused to solicit a volunteer to switch seats with her.

[12] Mrs. Burns states that, as a last resort, she suggested that she could find somewhere to sit on the floor facing backwards or sideways, and that a flight attendant replied "do what you like". Mrs. Burns adds that she proceeded to sit on the floor in a "cubbyhole" immediately behind the Executive Class section, but was advised by a flight attendant from the section in front that she had to move for safety reasons. Mrs. Burns asserts that she broke down in tears and a flight attendant asked a gentleman she knew personally in the Hospitality Class section to agree to give his seat to Mrs. Burns.

[13] Mrs. Burns acknowledges that, given the circumstances in which she found herself, she was "demanding" and "not particularly pleasant to deal with" when she interacted with the flight attendants.

[14] Although Mrs. Burns suggested in her original letter of complaint to Air Canada that the unstable screen image brought on symptoms of Meniere's disease, she now submits that she believes that she was suffering from an attack of motion sickness, possibly activated by her Meniere's disease, and apologizes to Air Canada for the incorrect diagnosis of her symptoms.

[15] Mrs. Burns notes that Air Canada has advised her that it will not accept her for transport unless she receives prior medical clearance from the carrier, and provides written assurance that she is prepared to comply with the instructions given by Air Canada's aircraft crew.

[16] Mrs. Burns contends that the conditions imposed by Air Canada were in response to her letter of complaint to the carrier. Mrs. Burns asserts that had she not complained to Air Canada, the carrier would not have taken any action, unless behavioural incidents occurred in the future.

[17] Air Canada maintains that Mrs. Burns exhibited disruptive behaviour on Flight No. AC891. An in-flight report completed by the carrier's Service Director, a copy of which was provided to the Agency, indicates that Mrs. Burns refused to stay in her seat during the video safety demonstration, and interfered with the crew's duties prior to take-off as well as several times after take-off.

[18] Air Canada submits that the crew on Flight No. AC891 was helpful in trying to

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accommodate Mrs. Burns, and that they acted in compliance with safety regulations when they denied Mrs. Burns' requests to sit in a seat reserved for staff during take-off and landing or in the service galley area.

[19] Air Canada states that the Aircraft Maintenance Report, a copy of which was provided to the Agency, indicates that the video screen rolled during the first hour of Flight No. AC891 on June 17, 2006. Air Canada advises that such malfunctions can occur regardless of regular maintenance of video equipment.

[20] Air Canada asserts that in the opinion of its Medical Director, when an incident occurs on a flight as a result of a passenger's Meniere's disease, this passenger should be subject to clearance by Air Canada's Medical Desk.

[21] Air Canada filed a medical report by the carrier's Medical Director[1] which states, in part, that "As the Air Canada Medical Director specialized in Aviation Medicine, it is my opinion that when an incident occurs on a flight as a result of a passenger's Meniere's then his/her approval for further travel should be subject to Medical Clearance by Air Canada's medical desk. In the case of Meniere's disease, an individual should not fly until his/her symptoms from this impairment is resolved."

[22] Air Canada contends that it has properly applied its Tariff Rule 25 pertaining to refusal to transport because of prohibited conduct by requesting that Mrs. Burns provide a written assurance that she is willing to follow the aircraft crew's instructions before being accepted for future travel on Air Canada and Jazz Air LP, as represented by its general partner, Jazz Air Holding GP Inc. carrying on business as Air Canada Jazz.

[23] With respect to the matter of medical clearance, Air Canada maintains that such clearance is for the passenger's own safety, as well as that of other passengers and the crew.

Applicable legislative and regulatory provisions

[24] The Agency's jurisdiction over the present complaint is set out in subsection 110(4) and section 113.1 of the ATR (Air Transportation Regulations).

Subsection 110(4) of the ATR (Air Transportation Regulations) provides that:

> Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

Section 113.1 of the ATR (Air Transportation Regulations) provides that:

> Where a licensee fails to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs, the Agency may
>
> (*a*) direct the licensee to take corrective measures that the Agency considers appropriate; and
>
> (*b*) direct the licensee to pay compensation for any expense incurred by a person adversely affected by the licensee's failure to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs.

The tariff provisions

[25] Rule 25 of the Tariff governing the terms and conditions of carriage in effect on June 17, 2006 states, in part, that:

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Rule 25AC REFUSAL TO TRANSPORT - LIMITATIONS OF CARRIER

[...]

II. **PASSENGER'S CONDUCT - REFUSAL TO TRANSPORT PROHIBITED CONDUCT & SANCTIONS**

(A) **PROHIBITED CONDUCT**:

Without limiting the generality of the foregoing, the following constitutes prohibited conduct where it may be necessary, in the reasonable discretion of the carrier, to take action to ensure the physical comfort or safety of the person, other passengers (in the future and present) and/or the carrier's employees; the safety of the aircraft; the unhindered performance of the crew members in their duty aboard the aircraft; or the safe and adequate flight operations:

[...]

(3) The person's conduct involves any unusual hazard or risk to self or to other persons or to property;

(4) the person fails to observe the instructions of carrier and its employees, including instructions to cease prohibited conduct;

(5) the person is unable/unwilling to sit in the seat with the seatbelt fastened;

[...]

(B) **SANCTIONS**:

Where, in the exercise of its reasonable discretion, the carrier decides that the passenger has engaged in prohibited conduct described above, the carrier may impose any combination of the following sanctions:

(1) removal of the passenger at any point;

(2) probation. The carrier may stipulate that the passenger is to follow certain probationary conditions, such as not to engage in prohibited conduct, in order for the carrier to provide transport to said passenger. Such probationary conditions may be imposed for any length of time, which, in the exercise of the carrier's reasonable discretion, is necessary to ensure the passenger's continued compliance in continued avoidance of prohibited conduct, and

(3) refuse to transport the passenger. The length of such refusals to transport may range from a one-time to an indefinite up to lifetime ban. The length of refusal period will be in the carrier's reasonable discretion, and will be for a period commensurate with the nature of the prohibited conduct and until the carrier is satisfied that the passenger no longer constitutes a threat to the safety of other passengers, crew or the aircraft or to the comfort of the other passengers or crew; the unhindered performance of the crew members in their duty aboard the aircraft; or the safe and adequate flight operations.

The following conduct will automatically result in an indefinite ban, up to a lifetime ban:

(a) the person continues to interfere with the performance of a crew member's duties notwithstanding verbal warnings by the crew to stop such behaviour;

(b) the person injures or subjects to a credible threat of injury a crew member or other passenger;

(c) the person has a conduct that requires an unscheduled landing and/or the use of restraints such as ties or handcuffs;

(d) the person repeats a prohibited conduct after receiving a notice of probation as mentioned in (2) above;

These remedies are without prejudice to carrier's other rights and recourses, namely to seek recovery of any damage resulting from the prohibited conduct or as otherwise provided in the carrier's tariffs, including the recourse provided in the Aeroplan Member's Guide or the filing of criminal or statutory charges.

Analysis and findings

[26] In making its findings, the Agency has carefully considered all of the evidence submitted by the parties during the pleadings. The Agency has also examined the terms and conditions of carriage specified in the Tariff concerning Air Canada's refusal to transport passengers, and its liability in such situations.

[27] Pursuant to subsection 110(4) of the ATR (Air Transportation Regulations), an air carrier shall, *inter alia*, apply the terms and conditions of carriage specified in its tariff.

[28] When a complaint is filed with the Agency, the complainant must, on a preponderance of the evidence, establish that the air carrier has failed to apply, or has inconsistently applied,

the terms and conditions of carriage appearing in the applicable tariff.

[29] Rule 25 II of Air Canada's Tariff includes a list of prohibited forms of conduct where it may be necessary, in the reasonable discretion of the carrier, to apply one or more sanctions to ensure, among other things, the physical comfort or safety of the person, passengers and crew. The Agency notes that one of the prohibited forms of conduct identified in Rule 25 II A(3) is conduct which involves any unusual hazard or risk to one's self or other persons or property.

[30] In her complaint, Mrs. Burns stated that she has Meniere's disease, a condition which can cause vertigo, dizziness and nausea that can lead to vomiting, the necessity for the person to lie flat on his or her back, and the inability to walk without assistance. She submitted that while she was on board Flight No. AC891, she suffered an attack of motion sickness, possibly activated by Meniere's disease, due to a malfunctioning video monitor. Air Canada advised that because of Mrs. Burns' condition, the carrier's Medical Desk must approve her future travel, and that such approval is necessary for the passenger's own safety as well as the safety of all other passengers and the crew on board the flight.

[31] On the basis of the evidence on file, particularly with respect to Mrs. Burns' medical condition, the Agency is of the opinion that Mrs. Burns has failed to demonstrate, on a preponderance of the evidence, that Air Canada has not properly applied the terms and conditions of carriage appearing in Rule 25 II A(3) of the Tariff in requiring Mrs. Burns to obtain medical clearance from the carrier before undertaking future travel.

[32] The Agency is of the opinion that given the requirement for Air Canada to ensure safe and adequate flight operations for both the crew and the passengers, the sanction imposed on Mrs. Burns is reasonable under the circumstances. In light of the foregoing, the Agency hereby dismisses the complaint.

Members

- Guy Delisle
- Mary-Jane Bennett
- Baljinder Gill

Rulings

Go back to Rulings (/decisions)

Date modified:

2012-04-25

COUR DU QUÉBEC

« Division des petites créances »

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE HULL
LOCALITÉ DE GATINEAU
« Chambre civile »

N° : 550-32-018447-109

DATE : 10 janvier 2012

SOUS LA PRÉSIDENCE DE L'HONORABLE RICHARD LAFLAMME, J.C.Q.

ABDELAZIZ ELHARRADJI
[...]
Gatineau (Québec) [...]
Partie demanderesse
c.
COMPAGNIE NATIONALE ROYAL AIR MAROC
75, rue Sherbrooke Ouest
Montréal (Québec) H2X 1X2
Partie défenderesse

JUGEMENT

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[1] Le demandeur réclame à la défenderesse la somme de 7 000 $ en raison des inconvénients subis suite au retard du vol Casablanca-Montréal opéré par la défenderesse. Celle-ci conteste le bien-fondé de la demande en plaidant avoir pris tous les moyens pour honorer son engagement malgré la grève des pilotes de la compagnie.

De plus, elle soulève le règlement du tarif international des passagers qui stipule que les horaires ne sont qu'à titre indicatif et ne sont pas garantis.

I. LES FAITS

[2] Le ou vers le 23 mai 2009, le demandeur procède à l'achat de billets d'avion pour lui, sa conjointe et ses deux jeunes enfants en vue d'un voyage au Maroc. Selon le billet électronique déposé en preuve, le demandeur a transigé avec l'agence de voyages Travelnet inc. de Montréal. La compagnie émettrice du billet est Royal Air Maroc (ci-après RAM). Le vol de départ est prévu pour le 26 juin 2009 alors que le retour est prévu le 15 août 2009. Il choisit le vol devant arriver à Montréal à 18h35 puisqu'il pouvait avoir une correspondance en autocar à 20h05 pour revenir à son domicile de Gatineau.

[3] Tel que supposé, le demandeur et sa famille s'envolent pour Casablanca le 26 juin 2009. C'est au retour que le voyage se complique. Le 13 juillet 2009, les pilotes de la RAM débutent le déclenchement de grèves intermittentes. Plus particulièrement, les vols à destination de New York et de Montréal commencent à être perturbés par cette grève le 1er août 2009. Or le 15 août 2009, le demandeur communique avec la RAM à quatre ou cinq reprises durant la journée afin de s'assurer que son vol est toujours prévu à l'heure soit à 15h50. Il ne voulait pas se déplacer inutilement avec ses jeunes enfants à l'aéroport situé qu'à 10 minutes de son domicile marocain. On l'informe que le vol sera retardé d'environ 60 minutes.

[4] Le demandeur témoigne que lorsque le vol 206 a été appelé, il s'est présenté à la porte du départ. On l'informe qu'il ne peut monter à bord de ce vol et qu'il devra attendre le prochain vers 20 heures. La représentante de la RAM témoigne que ce vol est finalement parti en direction de New York vers 17h00 en raison des chambardements dus à la grève des pilotes. Le demandeur et sa famille ont été replacés sur le vol 208 en direction de Montréal. L'avion a décollé à 20h05 pour arriver à Montréal à minuit. À sa descente d'avion, le demandeur exige qu'on lui trouve une solution puisqu'il n'y a plus d'autocar en direction de Gatineau ou Ottawa à cette heure. Le représentant de la RAM qui se trouvait à l'aéroport à ce moment n'a pas été d'un grand secours à la famille du demandeur. Celui-ci dit avoir dormi à l'aéroport jusqu'au lendemain matin puisque tout était fermé. Son témoignage est plutôt évasif sur les démarches faites à cet égard. La représentante de la RAM, qui travaille également à l'aéroport, témoigne que les agents de sécurité ne tolèrent pas personne dans l'aéroport après les heures et encore moins ceux qui voudraient y passer la nuit. Le demandeur ajoute que sa conjointe était malade et les enfants avaient besoin de lait. Le demandeur décrit la maladie de sa conjointe comme étant un choc nerveux, de la fatigue due au fait que les enfants n'arrêtaient pas de pleurer. Aucun rapport médical ne soutient quelconque maladie.

[5] À titre de dommages subis en raison du retard, outre la nuit infernale vécue à l'aéroport avec sa conjointe et ses jeunes enfants de 4 ans et demi et 1 an et demi, il a

manqué un important rendez-vous avec une dame. Outre le nom de cette personne, il ne spécifie pas en quoi ce rendez-vous manqué lui a occasionné troubles et inconvénients.

[6] La représentante de la RAM témoigne que la grève des pilotes est survenue en haute saison. La RAM a dû louer des avions en Europe de l'Est afin d'honorer ses engagements. Souvent les équipages ne parlaient ni français ni anglais. Quant aux vols du 15 août 2009, elle indique que la RAM a dû acheminer les passagers sur des Airbus de moindre capacité que les Boeing 767 habituellement utilisés. Afin d'accommoder le plus de passagers possibles, le vol 206 est plutôt parti en direction de New York puis le suivant, vers Montréal (vol 208). L'important pour RAM était de rendre tous les passagers à leur destination.

[7] La défenderesse ajoute que le tarif de la RAM déposé à l'Office des transports du Canada prévoit que les horaires sont approximatifs et ne sont pas garantis, sans compter qu'ils ne font pas partie du contrat de transport.

II. ANALYSE ET DISCUSSIONS

[8] En 2009, le Maroc n'était pas signataire de la *Convention pour l'unification de certaines règles relatives au transport aérien international* (la "*Convention de Montréal*"). Toutefois, la jurisprudence[1] et les auteurs[2] ont déjà déterminé que la Convention doit recevoir application lorsque le point de départ et le point de destination est le même soit Montréal. Cette interprétation semble conforme au paragraphe 2 de l'article 1 de la Convention qui définit le champ d'application comme suit :

> 2. Au sens de la présente convention, l'expression *transport international* s'entend de tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux États parties, soit sur le territoire d'un seul État partie si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas un État partie. Le transport sans une telle escale entre deux points du territoire d'un seul État partie n'est pas considéré comme international au sens de la présente convention. (notre soulignement)

[9] La réclamation du demandeur contre RAM est donc assujettie à la *Convention de Montréal* qui régit la responsabilité contractuelle ou extracontractuelle du transporteur aérien international. Cette *Convention* est intégrée au droit canadien et

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[1] Croteau c. Air Transat AT inc., 2007 QCCA 737 ; Neudorfer c. Swiss International Air Lines, 2011 QCCQ 8664

[2] Paul S. DEMPSEY et Michael MILDE, *International Air Carrier Liability : the Montreal Convention of 1999*, Montréal, McGill University, 2005, p. 68-69.; John D. Holding, *Canadian Manual of International Air Carriage,* 2005, Toronto, Irwin Law, p. 9.

québécois par la *Loi sur le transport aérien*[3] qui, par son annexe VI, l'incorpore à ses dispositions.

[10] L'article 19 et les paragraphes 1 et 5 de l'article 22 de la Convention prévoient ce qui suit:

Article 19

Retard

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre. (notre soulignement)

Article 22

Limites de responsabilité relatives aux retards,
aux bagages et aux marchandises

1. En cas de dommage subi par des passagers résultant d'un retard, aux termes de l'article 19, la responsabilité du transporteur est limitée à la somme de 4 150 droits de tirage spéciaux par passager.

5. Les dispositions des paragraphes 1 et 2 du présent article ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du transporteur, de ses préposés ou de ses mandataires, fait soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés ou de mandataires, la preuve soit également apportée que ceux-ci ont agi dans l'exercice de leurs fonctions.

[11] Par ailleurs, les articles 26 et 29 stipulent :

Article 26

Nullité des dispositions contractuelles

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente convention.

Article 29

Principe des recours

[3] R.S.C. 1985, c-14.

> Dans le transport des passagers, de bagages et de marchandises, toute action en dommages-intérêts, à quelque titre que ce soit, en vertu de la présente convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente convention, sans préjudicie de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. Dans toute action de ce genre, on ne pourra pas obtenir de dommages-intérêts punitifs ou exemplaires ni de dommages à un titre autre que la réparation.

[12] Les obligations de RAM sont aussi déterminées par les termes et conditions du contrat de transport et de leurs règles tarifaires. Ces dernières prévoient que les horaires apparaissant sur les indicateurs ou ailleurs sont approximatifs et ne sont pas garantis. Ils ne font aucunement partie du contrat de transport. Les horaires sont assujettis aux changements sans préavis et les transporteurs n'assument aucune responsabilité lorsqu'une correspondance est ratée. Toutefois, il va sans dire qu'une telle clause va à l'encontre de l'article 19 de la Convention. La jurisprudence a statué unanimement pour la prévalence de l'article 19.

[13] Dans son ouvrage *Droit du tourisme au Québec*[4], le professeur Jolin s'exprime ainsi sur les principes dégagés par l'article 19 de la Convention :

> « Pour se dégager de sa responsabilité, le transporteur aérien doit prouver qu'il a pris, lui ou ses préposés, "toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre" (article 19 de la C.V.). Ce n'est donc pas une obligation de moyens, mais bien une obligation de résultat dont le transporteur ne peut s'exonérer, à toutes fins pratiques, qu'en prouvant la force majeure. Dans l'appréciation de la force majeure, il faut analyser les faits de chaque cause, mais les juges ont tendance à restreindre la portée de ce moyen d'exonération: les bris mécaniques ne sont généralement pas considérés comme une force majeure, mais les conditions climatiques peuvent l'être ainsi qu'une grève d'employés. » (notre soulignement)

[14] Comme l'écrivait le juge David Cameron dans l'affaire Bensimon c. Agence de voyages Travelocity.ca[5] :

> [48] La défense de diligence raisonnable disponible au transporteur diffère du moyen de disculpation prévu à l'article 1470 du *Code civil du Québec* en cas d'obligation de résultat, soit la force majeure. La disculpation prévue à l'article 19 dépend de mesures prises ou qui sont impossibles à prendre pour éviter le dommage. Le passager n'a pas le fardeau de démontrer que le retard est dû à une faute. La disculpation du transporteur ne s'attache pas plus à la preuve d'une absence de faute ou d'un cas de force majeure comme cause de l'événement de retard. C'est plutôt la preuve des moyens pris pour éviter le

[4] JOLIN, Louis, *Le droit du tourisme au Québec*, 2ème Édition, 2005, Les Presses de l'Université du Québec, p.82

[5] Bensimon c. Agence de voyages Travelocity.ca, 2008 QCCQ 12778

> dommage qui résulte de ce retard (ou l'impossibilité d'en prendre) qui constitue l'objet de la défense.[6] (notre soulignement)

[15] Quant au dommage, la Convention de Montréal impose, au premier alinéa de l'article 22 la limitation suivante :

> ARTICLE 22 — LIMITES DE RESPONSABILITÉ RELATIVES AUX RETARDS, AUX BAGAGES ET AUX MARCHANDISES
>
> 1. En cas de dommage subi par des passagers résultant d'un retard, aux termes de l'article 19, la responsabilité du transporteur est limitée à la somme de 4 150 droits de tirage spécial par passager.

[16] Le demandeur doit prouver les dommages et le montant ne pas dépasser la somme de 4 150 $ droits de tirage spéciaux par passager.

[17] Les dommages punitifs ou exemplaires sont exclus. Il en est de même pour les dommages découlant d'un préjudice psychologique[7].

[18] Dans la présente affaire, il est indéniable que l'horaire de vol n'a pas été respecté par RAM. Le vol du demandeur a décollé avec environ 4h15 minutes de retard. L'arrivée tardive à Montréal a eu comme fâcheuse conséquence que le demandeur et sa famille n'ont pu prendre un car en direction de Gatineau/Ottawa. Il est utile de souligner que cette correspondance n'a rien à voir avec le billet émis par RAM et qu'il ne s'agissait pas d'un service offert par RAM.

[19] À la base, RAM avait une obligation de résultat à l'égard du demandeur, soit le transporter avec diligence à Montréal conformément au contrat de transport.

[20] Pour s'exonérer de sa responsabilité au sens de l'article 19 de la Convention, RAM devait faire la démonstration des mesures prises pour éviter les dommages. Certes, la grève des pilotes doit être prise en compte. Mais comme l'écrivait le juge Cameron précité : [l]*a disculpation du transporteur ne s'attache pas plus à la preuve d'une absence de faute ou d'un cas de force majeure comme cause de l'événement de retard. C'est plutôt la preuve des moyens pris pour éviter le dommage qui résulte de ce retard (ou l'impossibilité d'en prendre) qui constitue l'objet de la défense.*

[21] RAM a pris des moyens raisonnables pour acheminer le demandeur à destination, et ce, malgré le contexte difficile de la grève des pilotes. Toutefois, le retard d'un vol avec une arrivée à une heure aussi tardive qu'en l'espèce a davantage d'impact qu'une arrivée en plein jour. Un délai d'un peu plus de 4 heures 15 peut paraître banal au premier coup d'œil. L'arrivée à destination a lieu à une heure tardive au point où il était presque impossible pour le demandeur de recevoir quelconque service. Le

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[6] Voir à cet effet l'analyse du Juge Martin Hébert dans l'affaire *Joann Zaor et Judith Pigeon* c. *Air Canada*, 2006 QCCQ 1796.

[7] Croteau c. Air Transat AT inc., 2007 QCCA 737

transporteur devait prendre les moyens raisonnables pour empêcher des dommages ou à tout le moins les atténuer, une fois à destination. Le soir du 15 août 2009, le préposé de la RAM n'a pas pris les moyens pour empêcher les dommages découlant d'un retard additionnel causé par l'absence d'autocar à cette heure. Le demandeur voyageait avec de jeunes enfants. En ce sens, le demandeur a droit à une indemnisation, mais certainement pas à la hauteur de ce qu'il réclame.

[22] Pour le reste, le demandeur n'a pas convaincu de façon prépondérante quant à l'importance du rendez-vous manqué prévu le 16 août 2009 et surtout que des dommages directs en ont découlé. Selon l'article 2803 C.c.Q., il lui appartenait de faire la preuve de ses dommages selon la balance des probabilités.

[23] Afin d'évaluer la valeur de l'indemnité à accorder, il y a lieu de retenir le témoignage de Madame Miliani, représentante de RAM qui aurait vraisemblablement déboursé le prix d'une course en taxi vers Gatineau jusqu'à concurrence de 500 $ par adulte afin de minimiser les inconvénients subis liés au retard du vol 208. Le Tribunal opine qu'une telle offre aurait dû être présentée par le préposé de RAM lorsque le demandeur lui a demandé de l'aide lors de l'arrivée tardive de l'appareil. Ainsi, le Tribunal fixe arbitrairement à 1 000 $ l'indemnité à laquelle a droit le demandeur.

[24] Quant aux frais judiciaires, la partie qui succombe doit habituellement les supporter. Toutefois, comme la réclamation du demandeur était largement exagérée, RAM était bien fondée à la contester, du moins en partie. Dans un tel contexte, chaque partie paiera ses frais judiciaires.

POUR CES MOTIFS, LE TRIBUNAL :

ACCUEILLE PARTIELLEMENT la demande du demandeur ;

CONDAMNE la défenderesse à payer au demandeur la somme de 1 000 $ avec intérêts au taux de 5% l'an et l'indemnité additionnelle prévue à l'article 1619 du Code civil du Québec à compter de la date de la mise en demeure soit le 19 août 2009;

CHAQUE partie payant ses frais judiciaires.

_____

RICHARD LAFLAMME, J.C.Q.

Date d'audience : 20 décembre 2011

JUDGMENT OF THE COURT (Ninth Chamber)

17 September 2015 (*)

(Reference for a preliminary ruling — Air transport — Passengers' rights in the event of delay or cancellation of a flight — Regulation (EC) No 261/2004 — Article 5(3) — Denied boarding and cancellation — Long flight delay — Compensation and assistance to passengers — Extraordinary circumstances)

In Case C-257/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (Netherlands), made by decision of 29 April 2014, received at the Court on 28 May 2014, in the proceedings

Corina van der Lans

v

Koninklijke Luchtvaart Maatschappij NV,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, J. Malenovský (Rapporteur) and M. Safjan, Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2015,

after considering the observations submitted on behalf of:

– Koninklijke Luchtvaart Maatschappij NV, by P. Eijsvoogel, P. Huizing, R. Pessers and M. Lustenhouwer, advocaten,

– the Netherlands Government, by M. Bulterman and M. Noort, acting as Agents,

– the German Government, by T. Henze and J. Kemper, acting as Agents,

– the French Government, by G. de Bergues, D. Colas, and R. Coesme, and by M. Hours, acting as Agents,

– the Italian Government, by G. Palmieri acting as Agent and C. Colelli, avvocato dello Stato,

– the United Kingdom Government, by L. Christie, acting as Agent, and J. Holmes, Barrister,

– the European Commission, by F. Wilman and N. Yerrell, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

2 The request has been made in proceedings between Ms van der Lans and the airline Koninklijke Luchtvaart Maatschappij NV ('KLM') concerning the latter's refusal to compensate the applicant in the main proceedings for delay to her flight.

Legal context

3 Regulation No 261/2004 includes the following recitals:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

…

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such

circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

4 Article 3(1)(b) of that regulation, entitled 'Scope', provides:

'1. This Regulation shall apply:

...

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.'

5 Article 5 of that regulation provides:

'1. In case of cancellation of a flight, the passengers concerned shall:

...

(c) have the right to compensation by the operating air carrier in accordance with Article 7, ...

...

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

...'

6 Article 7 of Regulation No 261/2004, headed 'Right to compensation', provides:

'1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked:

(a) by two hours, in respect of all flights of 1 500 kilometres or less; or

(b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.'

7 Article 13 of Regulation No 261/2004 provides:

'In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.'

The dispute in the main proceedings and the questions referred for

a preliminary ruling

8 Ms van der Lans had a ticket reservation on a flight operated by KLM. That flight to Amsterdam (Netherlands) was to depart from Quito (Ecuador) on 13 August 2009 at 9.15 local time. However, the flight did not depart until the following day at 19.30 local time. The aircraft used for that flight arrived in Amsterdam with a delay of 29 hours.

9 According to KLM, the delay was due to the fact that at Guayaquil Airport (Ecuador), from which that aircraft should have departed for Amsterdam via Quito and Bonaire (Dutch Antilles), it was discovered during the 'push back', a ground procedure which involves the aircraft being pushed backwards using a vehicle, that one of the aircraft engines did not start due to the lack of fuel feed.

10 According to KLM, it appears from the aircraft technical log that a combination of defects occurred. Two components were defective, namely, the engine fuel pump and the hydro mechanical unit. The components concerned were not available in Guayaquil and had to be flown in from Amsterdam in order to be installed in the aircraft concerned, which took off from Quito with the delay mentioned in paragraph 8 of the present judgment.

11 Those components were not examined further with a view to establishing the cause of the failure as such an examination can be carried out only by their manufacturer.

12 Ms van der Lans brought an action before the Rechtbank Amsterdam (District Court, Amsterdam) seeking compensation of EUR 600 on account of that delay.

13 KLM opposes that claim and relies on the exception provided for in Article 5(3) of Regulation No 261/2004 in case of 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.

14 According to KLM, the defective components had not exceeded their average lifetime. Furthermore, their manufacturer had not provided any specific indication as to which defects might arise if those components reached a certain age. KLM also claims that those components had not been tested before take-off, during the general 'pre-flight check', but that they had been tested during the last 'A Check' carried out about one month before the flight at issue in the main proceedings.

15 Ms van der Lans argues that, in this case, KLM cannot rely on the occurrence of extraordinary circumstances. The delay to that flight was caused by a technical problem. In the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771), the Court held that the resolution of technical

problems is inherent in the exercise of the activity of the air carrier concerned and cannot be classified as extraordinary circumstances.

16 The dispute in the main proceedings concerns the question whether the exception provided for in Article 5(3) of Regulation No 261/2004 may be relied on by KLM in circumstances such as those at issue in the main proceedings.

17 In that connection, the referring court seeks to clarify the interpretation to be given to the expressions 'extraordinary circumstances' and 'all reasonable measures' in that provision, in particular, whether account must be taken, in that regard, of recital 14 in Regulation No 261/2004 and the relevant case-law of the Court, in particular the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771).

18 In those circumstances, the Rechtbank Amsterdam decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'1. How must the concept of "event" in recital 14 of the preamble in Regulation No 261/2004 be interpreted?

2. Having regard to paragraph 22 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771), extraordinary circumstances such as those referred to in recital 14 do not coincide with the occurrences listed as examples in the second sentence of recital 14, occurrences cited as events by the Court of Justice in paragraph 22. Is it correct that the events as referred to in the paragraph 22 of that judgment are not the same as the "event" in recital 14 of the preamble?

3. What should be understood by the concept of extraordinary circumstances which, according to paragraph 23 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771), surround the event and which are "unexpected flight safety shortcomings" as referred to in the aforesaid recital 14 if, in the light of paragraph 22, unexpected flight safety shortcomings cannot themselves constitute extraordinary circumstances but may only produce such circumstances?

4. It is apparent from paragraph 23 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771) that a technical problem can be considered to be covered by "unexpected flight safety shortcomings" and is therefore an "event" within the meaning of paragraph 22 of that judgment; the circumstances surrounding that event may nevertheless be regarded as extraordinary if they relate to an event which is not inherent in the normal exercise of the activities of the air carrier and beyond the actual control of that carrier on account of its nature or origin, as provided in paragraph 23 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771); according to paragraph 24

thereof, the resolution of a technical problem which can be traced back to poor maintenance of an aircraft is inherent in the normal exercise of an air carrier's activity; therefore, according to paragraph 25 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771) such technical problems cannot constitute extraordinary circumstances. It appears to follow from those paragraphs that a technical problem which is covered by "unexpected flight safety shortcomings" is simultaneously an event which may be surrounded by extraordinary circumstances and may itself constitute an extraordinary circumstance. How should paragraphs 22 to 25 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771) be interpreted in order to resolve that apparent contradiction?

5. The words: "inherent in the normal exercise of an air carrier's activity" are consistently interpreted in the case-law of the lower courts as: "associated with the normal activities of the airline" — which is moreover an interpretation which is compatible with the Netherlands word "inherent" (not the authentic text of the judgment) — so that, for example, collisions with birds or ash clouds are also not regarded as events within the meaning of paragraph 23 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771). Other case-law emphasises the words: "and is beyond the actual control of that carrier on account of its nature or origin", likewise in paragraph 23 of that judgment. Must "inherent in" be interpreted as meaning that only events which are within the actual control of the air carrier are covered by that concept?

6. How should paragraph 26 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771) be read, or rather, how should that paragraph be interpreted, in the light of the answer of the Court of Justice to questions 4 and 5?

7. (a) If question 6 is answered to the effect that technical problems which may be considered to be unexpected flight safety shortcomings constitute extraordinary circumstances which may justify invoking Article 5(3) of Regulation No 261/2004 if they arise from an event which is not inherent in the exercise of the activities of the airline and is beyond the actual control of the latter, does that then mean that a technical problem which arose spontaneously and is not attributable to poor maintenance and was moreover not detected during routine maintenance checks (the "A-D Checks" and "the Daily Control") can or cannot constitute an extraordinary circumstance — on the assumption that it could not be detected during the regular maintenance operations — because then no event as referred to in paragraph 26 can be identified and it is therefore also not possible to determine whether such an event is inherent in the exercise of

the activities of the airline and is thus beyond the control of the air carrier?

(b) If question 6 is answered to the effect that technical problems which may be considered to be unexpected flight safety shortcomings are events as referred to in paragraph 22 and the technical problem arose spontaneously and is not attributable to poor maintenance and was moreover not detected during routine maintenance checks ("the A-D Checks" and "the Daily Control"), is that technical problem inherent or not inherent in the exercise of the activities of the airline and is it or is it not thus beyond the actual control of the airline within the meaning of the aforementioned paragraph 26?

(c) If question 6 is answered to the effect that technical problems which may be considered to be unexpected flight safety shortcomings are events as referred to in paragraph 22 of the judgment in *Wallentin-Hermann* (C-549/07, EU:C:2008:771) and the technical problem arose spontaneously and is not attributable to poor maintenance and was moreover not detected during routine maintenance checks ("the A-D Checks" and "the Daily Control"), what circumstances should then surround that technical problem and when should those circumstances be regarded as extraordinary so that they may be relied upon for the purposes of Article 5(3) of Regulation No 261/2004?

8. An air carrier can rely on extraordinary circumstances only if it can prove that the cancellation or delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Is it correct to conclude that the taking of all reasonable measures refers to the avoidance of the occurrence of extraordinary circumstances and not to the taking of measures to keep the delay within the three-hour limit referred to in Article 5(1)(c)(iii) of Regulation No 261/2004 in conjunction with paragraphs 57 to 61 of the judgment in *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716)?

9. In principle, there are two types of measures to limit delays caused by technical problems to a maximum of three hours, namely, on the one hand, holding stocks of spare components in various parts of the world, thus not only at the home base of the air carrier, and, on the other hand, the rebooking of the passengers of the delayed flight. In determining the stock levels which they hold and the places in the world where they do so, may the air carriers have regard to what is customary in the aviation world, including for carriers which are only partially covered by the operation of Regulation No 261/2004?

10. In answering the question whether all reasonable measures were

taken to limit the delay which occurred as a result of technical problems which have an effect on the flight safety shortcomings, must the court take account of circumstances which aggravate the consequences of a delay, such as the circumstance that the aircraft affected by the technical problems, before returning to its home base, must, as in the present case, call at a number of airports, which may result in an accumulation of time lost?'

Consideration of the questions referred for a preliminary ruling

Admissibility

19 The French Government challenges the admissibility of the request for a preliminary ruling on the ground that, in accordance with Article 3(1)(b) thereof, Regulation No 261/2004 is not applicable to the dispute in the main proceedings, since Ecuadorian law already provides for a compensation and assistance scheme for air passengers who are refused boarding or have their flights cancelled or delayed, for which Ms van der Lans is eligible.

20 According to settled case-law, the Court may decline to rule on a question referred for a preliminary ruling by a national court only where, inter alia, it is quite obvious that the provision of EU law referred to the Court for interpretation is incapable of applying (judgment in *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/04, EU:C:2010:309, paragraph 19 and the case-law cited).

21 In that connection, it follows from Article 3(1)(b) of Regulation No 261/2004 that the latter applies to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State provided that, first, the operating air carrier of the flight concerned is an EU carrier and, second, the passengers concerned did not receive benefits or compensation and assistance in that third country.

22 As regards the first of those conditions, it is common ground that KLM is an EU carrier.

23 With respect to the second condition, it must be observed that there are differences between the various language versions of Article 3(1)(b) of Regulation No 261/2004. Certain versions, in particular the Czech, German, English, Italian and Dutch versions, use the words 'obdrželi', 'erhalten', 'received', 'ricevuto' and 'ontvangen'. Thus, they may be read as excluding the application of that regulation only if the passengers concerned have actually obtained the benefits or compensation and assistance in the third country concerned.

24 However, other language versions, such as, in particular, the Spanish ('disfruten de'), French (bénéficient de') and Romanian ('beneficiat de')

suggest instead that the application of Regulation No 261/2004 is excluded at the outset where the passengers concerned are entitled to benefits or compensation and assistance in that third country, regardless of whether or not they actually received them.

25 The need for a uniform interpretation of a provision of EU law means that, where there is divergence between the various language versions of the provision, the latter must be interpreted by reference to the context and purpose of the rules of which it forms part (see, to that effect, judgment in *DR and TV2 Danmark*, C-510/10, EU:C:2012:244, paragraph 45, and *Bark*, C-89/12, EU:C:2013:276, paragraph 40).

26 In that regard, it suffices to state that Regulation No 261/2004, as is clear from recitals 1 and 2 in the preamble thereto, aims to ensure a high level of protection for passengers (see judgments in *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 69, and *Emirates Airlines*, C-173/07, EU:C:2008:400, paragraph 35).

27 Although Article 3(1)(b) of Regulation No 261/2004, read in the light of that objective, does not require it to be proved that the passenger concerned has actually obtained the benefits or compensation and assistance in a third country, the mere possibility of entitlement cannot of itself justify the conclusion that the regulation is not applicable to that passenger.

28 It cannot be accepted that a passenger may be deprived of the protection granted by Regulation No 261/2004 solely on the ground that he may benefit from some compensation in the third country, without any evidence that that compensation corresponds to the purpose of the compensation guaranteed by that regulation or that the conditions to which the beneficiary is subject and the various means of implementing it are equivalent to those provided for by that regulation.

29 It cannot be ascertained from the documents submitted to the Court either whether the purpose of the compensation provided for by the law of the third country concerned corresponds to that of the compensation guaranteed by Regulation No 261/2004 or whether the conditions to which the entitlement to such benefit is subject and the various means of implementing them are equivalent to those provided for by that regulation. It is for the national court to ascertain whether such is the case.

30 In those circumstances, the possibility cannot be ruled out that the provision whose interpretation is requested is applicable in the present case.

31 Accordingly, the reference for a preliminary ruling is admissible.

Substance

32 It should be observed as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court of Justice may have to reformulate the questions referred to it (see, inter alia, judgment in *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraph 25 and the case-law cited).

33 Taking account of that case-law, all 10 questions referred by the national court must be understood as asking essentially whether Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem, such as that at issue in the main proceedings, which occurred unexpectedly, which is not attributable to defective maintenance and which was not detected during regular tests, falls within the definition of 'extraordinary circumstances' within the meaning of that provision and, if so, what the reasonable measures are that the air carrier must take to deal with them.

34 In that regard, it must be observed, first of all, that, pursuant to Article 5(3) of Regulation No 261/2004, an operating air carrier is not obliged to pay compensation in accordance with Article 7 if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

35 Next, it should be recalled that the Court has stated that, since it constitutes a derogation from the principle that passengers have the right to compensation, Article 5(3) must be interpreted strictly (judgment in *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 20).

36 Finally, as regards, more particularly, technical problems encountered by an aircraft, it follows from the case-law of the Court that such problems may be included among 'unexpected flight safety shortcomings', and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin (see, to that effect, judgment in *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 23).

37 Since the functioning of aircraft inevitably gives rise to technical problems, air carriers are confronted as a matter of course in the exercise of their activity with such problems. In that connection, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves,

‘extraordinary circumstances’ under Article 5(3) of Regulation No 261/2004 (see, to that effect, judgment in *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraphs 24 and 25).

38 Nevertheless, certain technical problems may constitute extraordinary circumstances. That would be the case in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism (see, to that effect, judgment in *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 26).

39 In the present case, KLM states — a matter which is for the referring court to ascertain — that the technical problem at issue in the main proceedings consists in an engine failure of the aircraft concerned, due to certain defects in its parts which have not exceeded their average lifetime, and in respect of which the manufacturer has not given any indications as to defects which might arise if they reach a certain age.

40 In that connection, it appears, first of all, as is clear from the preceding paragraph of this judgment, that such a technical problem affects only one particular aircraft. Furthermore, there is no evidence of any kind in the documents before the Court that the manufacturer of the aircraft in the fleet of the air carrier concerned or a competent authority have disclosed, that not only that specific aircraft but also others in the fleet have been affected by a hidden manufacturing defect affecting the safety of flights, which is, in any event for the national court to ascertain. If that were the case, the legal hypothesis mentioned in paragraph 38 of this judgment would not be applicable in the present case.

41 Next, it must be observed, first, that it is true that a breakdown, such as that at issue in the main proceedings, caused by the premature malfunction of certain components of an aircraft, constitutes an unexpected event. Nevertheless, such a breakdown remains intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult or even extreme, it being understood moreover that no component of an aircraft lasts forever.

42 Therefore, it must be held that, in the course of the activities of an air carrier, that unexpected event is inherent in the normal exercise of an air carrier’s activity, as air carriers are confronted as a matter of course with unexpected technical problems.

43 Second, the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of that carrier, since the latter is required to

ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business.

44 Therefore, a technical problem, such as that at issue in the main proceedings, cannot fall within the definition of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004.

45 Lastly, it must be stated that, even assuming that, depending on the circumstances, an air carrier takes the view that it may rely on the fault of the manufacturer of certain defective components, the main objective of Regulation No 261/2004, which aims to ensure a high level of protection for passengers, and the strict interpretation to be given to Article 5(3) of that regulation, preclude the air carrier from justifying any refusal to compensate passengers who have experienced serious trouble and inconvenience from relying, on that basis, on the existence of an 'extraordinary circumstance'.

46 In that regard, it must be recalled that the discharge of obligations pursuant to Regulation No 261/2004 is without prejudice to air carriers' rights to seek compensation from any person who caused the delay, including third parties, as Article 13 of the regulation provides. Such compensation may accordingly reduce or even remove the financial burden borne by carriers in consequence of those obligations (judgment in *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 68 and the case-law cited).

47 It cannot be excluded at the outset that Article 13 of Regulation No 261/2004 may be relied on and applied with respect to a manufacturer which is at fault, in order to reduced or remove the financial burden born by the air carrier as a result of its obligations arising from that regulation.

48 In so far as a technical problem, such as that at issue in the main proceedings, does not fall within the definition of 'extraordinary circumstance', there is no need to give a ruling on the reasonable measures that the air carrier should have taken to deal with the situation, pursuant to Article 5(3) of Regulation No 261/2004.

49 Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem, such as that at issue in the main proceedings, which occurred unexpectedly, which is not attributable to poor maintenance and which was also not detected during routine maintenance checks, does not fall within the definition of 'extraordinary circumstances' within the meaning of that provision.

Costs

512

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 must be interpreted as meaning that a technical problem, such as that at issue in the main proceedings, which occurred unexpectedly, which is not attributable to poor maintenance and which was also not detected during routine maintenance checks, does not fall within the definition of 'extraordinary circumstances' within the meaning of that provision.

[Signatures]

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* Language of the case: Dutch.

DECISION NO. 250-C-A-2012

June 28, 2012

IN THE MATTER OF Decision No. LET-C-A-80-2011 issued in response to a complaint filed by Gábor Lukács against Air Canada.

File No. M4120-3/09-07441

INTRODUCTION

[1] In Decision No. LET-C-A-80-2011 dated August 8, 2011 (Show Cause Decision), the Canadian Transportation Agency (Agency) made preliminary findings with respect to the reasonableness of certain tariff provisions and directed Air Canada, among other matters, to show cause why certain actions should not be taken respecting its International Passenger Rules and Fares Tariff NTA(A) No. 458 (Tariff), in particular Rules 80, 89 and 91(B). The Agency provided Air Canada and Mr. Lukács with the opportunity to address these preliminary findings.

[2] In its submissions dated September 23, 2011, in response to the Show Cause Decision, Air Canada reiterated elements of its response submissions dated March 11, 2010 filed in relation to the complaint, and Air Canada presented additional submissions to outline its position and show cause with respect to the questions formulated by the Agency.

[3] Submissions were filed by Mr. Lukács in response to Air Canada's arguments. For each question raised in the Show Cause Decision, Mr. Lukács indicated that he accepts the Agency's preliminary findings. Although Air Canada was provided with an opportunity to respond to Mr. Lukács' submissions, it did not file further submissions.

[4] In this Decision, the Agency will make its final findings. These will be based on the preliminary findings set out in the Show Cause Decision and on the submissions made by both parties on the complaint filed by Mr. Lukács and in response to the Show Cause Decision. Amongst other matters, the Agency will make a final determination on its preliminary opinion that a circumstance-focussed approach is a reasonable approach to addressing overbooking and cancellation when a passenger's circumstances are made known to Air Canada.

[5] This Decision will address the following four main preliminary findings made in the Show Cause Decision:

1) Overbooking and cancellation constitute delay for the purpose of Article 19 of the *Convention for the Unification of Certain Rules for International Carriage by Air* – Montreal Convention (Convention).

2) Air Canada's Tariff Rule 91(B) which precludes the possibility of reprotection on a flight with any carrier, except those for which an interline agreement has been established, is overly restrictive and such a provision is unreasonable.

3) Air Canada's Tariff Rule 91(B) is unreasonable as it only calls for a refund of the unused portion of a ticket. Tariff Rule 91(B) is unreasonable as it leaves with Air Canada the choice of option for obtaining a refund.

4) Air Canada's existing Tariff Rule 91(B) is unreasonable as it does not state that passengers have rights and remedies outside those named in the Tariff. Existing Tariff Rules 80(C) and 89 are unreasonable as they refer to a sole remedy available to passengers as stated in the Tariff and they set a 30-day time limit for taking legal action.

[6] Mr. Lukács' complaint has raised issues as to whether the impugned tariff provisions are reasonable. A carrier is required to ensure that with respect to international flights, its tariff is just and reasonable within the meaning of subsection 111(1) of the *Air Transportation* Regulations, SOR/88-58, as amended (ATR).

[7] Subsection 111(1) of the ATR states:

> All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

[8] The Agency has stated in previous decisions that in order to determine whether a term or condition of carriage applied by a carrier is "reasonable" within the meaning of subsection 111(1) of the ATR, a balance must be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations[1].

[9] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

[10] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

[1] *Lukács v. Air Canada*, Decision No. 291-C-A-2011.

PRELIMINARY FINDING 1: OVERBOOKING AND CANCELLATION CONSTITUTE DELAY FOR THE PURPOSE OF ARTICLE 19 OF THE CONVENTION.

Show Cause Decision

[11] Article 19 of the Convention states:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[12] By virtue of the *Carriage by Air Act*, R.S.C., 1985, c. C-26, the Convention has the force of law in Canada and governs, among other matters, the liability limitations for delay applicable to international carriage by air for travel to which the Convention applies. The Convention modernizes the liability regime governing international carriage.

[13] Under Article 26 of the Convention, an air carrier may not relieve itself from liability nor fix a lower limit to its liability than that prescribed in the Convention.

[14] A fundamental question raised by Mr. Lukács in this complaint is whether instances of cancellation and overbooking fall within the scope of "delay" as found in Article 19 of the Convention. Air Canada asserts both in response to the initial complaint and in response to the Show Cause Decision that its Tariff provision and Article 19 of the Convention serve two distinct purposes and therefore, Air Canada argues that the legal characterization of "delay" under the Convention is irrelevant.

[15] Mr. Lukács' complaint, because it relates to the substance of Air Canada's Tariff provisions on overbooking and cancellation, initiates an Agency review and determination as to whether the Tariff provisions are reasonable. The Agency must consider such complaints pursuant to subsection 111(1) of the ATR, and in so doing, must consider whether the Tariff is consistent with applicable provisions of the Convention.

[16] As the term "delay" is not defined and its meaning is not clear from the text of Article 19 or the Convention as a whole, the Agency, in the Show Cause Decision, considered supplementary sources as is set out in more detail at paragraphs 23 to 39 of that Decision.

[17] The Agency concluded that although there is contradiction and inconsistency in the meaning to be given the word "delay" as found in Article 19 of the Convention, what is clear is that the intent of Article 19 is to have the meaning of "delay" determined on a case-by-case basis. More particularly, whether a situation of cancellation or overbooking constitutes delay will depend on the particular circumstances of a case as well as the court's interpretation of the questions of fact and law in issue. The Agency further recognized that some courts are setting out specific criteria for assessing whether a particular fact situation falls within the meaning of "delay "as found in Article 19 of the Convention.

[18] The Agency stated that at the core of overbooking and cancellation, the passenger is not in a position to proceed with their journey in the time frame originally established. Accordingly, the Agency expressed the preliminary opinion that overbooking and cancellation that are within the carrier's control constitute delay for the purposes of Article 19 of the Convention.

[19] However, the Agency recognized that there are situations that may fall outside Article 19, namely cases where overbooking and cancellation would constitute non-performance, and that the Agency may provide further clarification in future complaints.

Positions of the parties

[20] Air Canada, in its response to the Show Cause Decision, rejected, on three main grounds, the Agency's preliminary finding that situations of overbooking and cancellation that are within the control of Air Canada constitute delay for the purpose of Article 19 of the Convention.

The relevancy of whether overbooking and cancellation can be characterized as delay under Article 19 of the Convention when considering the validity of Air Canada's Tariff Rule 91(B)

[21] Air Canada is of the view that the issue as to whether overbooking and cancellation constitute delay for the purposes of the Convention is not relevant when considering the validity of Rule 91(B) of Air Canada's Tariff, although the issue is relevant when determining if Article 19 of the Convention applies to a passenger's claim for damages.

Analysis and findings

[22] The Agency agrees with Air Canada that Article 19 of the Convention addresses a carrier's liability in an action in damages brought by a passenger in situations of delay and that Rule 91(B) of Air Canada's Tariff addresses the issue of passenger reprotection in situations of overbooking and cancellation. The two provisions are different. Article 19 of the Convention is of general application to all carriers operating international services that are subject to the Convention and provides for, in appropriate circumstances, the awarding of damages by civil courts. Rule 91(B) sets out the specific terms and conditions of carriage that Air Canada applies in cases of overbooking and cancellation and may be the subject of a complaint concerning whether it has been properly applied and whether it is clear, reasonable or unjustly discriminatory. Further, the damages that might be awarded by a civil court pursuant to Article 19 of the Convention are different than the compensation that can be awarded by the Agency pursuant to the ATR.

[23] The Agency also agrees with Air Canada that Article 27 of the Convention provides that carriers may establish their terms and conditions of carriage as long as they are not in conflict with the Convention. In other words, the provisions of the Convention must be taken into consideration by Air Canada to ensure that there is no conflict between the Convention and Air Canada's Tariff. However, Air Canada, in establishing its terms and conditions of carriage, must also take into consideration the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) and the ATR and, with respect to this particular complaint, the Agency is considering the reasonableness

of the impugned Tariff provisions pursuant to subsection 111(1) of the ATR. As part of this analysis, the Agency may consider the provisions of the Convention as a factor to be taken into consideration when addressing the issue of reasonableness. Past Agency decisions reflect the two distinct ways in which the Convention might be considered: by looking at whether a tariff is in direct contravention of the Convention, thereby rendering the provision null and void and unreasonable[2]; or by referring to the principles of the Convention when considering the reasonableness of a tariff provision.[3]

[24] Accordingly, the Agency is of the opinion that Article 19 of the Convention and Rule 91(B) of Air Canada's Tariff do not exist in isolation of each other, but, rather, the Convention informs a carrier's terms and conditions of carriage both in terms of ensuring no conflict between the Convention and the Tariff and, where appropriate, in terms of considering the issue of reasonableness.

[25] It is clear that Article 19 of the Convention imposes on a carrier liability for damage occasioned by delay in the carriage of, amongst other matters, passengers, but a carrier will not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures. As the Agency stated in the Show Cause Decision, with a presumption of liability for delay against a carrier, there is a concomitant obligation for a carrier to mitigate such liability and address the damage which has or may be suffered by a passenger as a result of delay. In addition, Article 19 of the Convention provides a carrier with a defence to the liability if it can show that it took, or it was impossible to take, all reasonable measures to avoid the damage caused by the delay. Accordingly, a tariff provision that is drafted in such a way as to allow a carrier to do less than taking all reasonable measures necessary to avoid damage to its passengers could be inconsistent with the principles of Article 19 of the Convention and put into question the tariff's reasonableness, an issue that has been identified by Mr. Lukács in this case. The question of whether overbooking and cancellation come within the scope of "delay" under Article 19 of the Convention will be a factor in the evaluation of the reasonableness of Air Canada's Tariff.

[26] Even if, as Air Canada argues, the courts have applied Article 19 of the Convention in a separate and parallel manner to that of a carrier's tariff provisions respecting reprotection, the Agency, as is set out above, has a mandate to consider the impugned Tariff provisions pursuant to the particular authority given to it in its enabling legislation. As illustrated by past Agency decisions, this often involves a consideration of how the Convention and tariff provisions interact.

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[2] See for example: *Balakrishnan v. Aeroflot*, Decision No. 328-C-A-2007 at para. 20 and *Lukács v. WestJet*, Decision No. 477-C-A-2010 at paras. 39-40 (Leave to appeal to Federal Court of Appeal denied, FCA 10-A-41).

[3] See for example: *Lukács v. WestJet*, Decision No. 313-C-A-2010 and Decision No. LET-C-A-51-2010 .

[27] Air Canada distinguishes the present case from Agency decisions such as *McCabe v. Air Canada*, Decision No. 227-C-A-2008, which it characterizes as addressing tariff issues that fall within the scope of the Convention. In fact, that case considered the Convention both from the perspective of whether the impugned tariff provisions were contrary to the Convention as well as whether they were just and reasonable. That case also illustrates the Agency's mandate to consider tariff issues with reference to the Convention.

[28] Air Canada cites *Primeau v. Air Canada*, Decision No. 171-C-A-2007, in support of its position that the Agency has implicitly recognized the distinction as between Rule 91(B) and Article 19. That Decision of the Agency centered on whether the tariff provision in issue in that case had been properly applied by Air Canada and was just and reasonable. As regards reference to Air Canada's liability pursuant to Article 19 of the Convention, the Agency simply stated that there was no evidence to support damage suffered by the complainant. Accordingly, the Agency does not agree that *Primeau* supports Air Canada's position.

Whether Article 19 of the Convention imposes an obligation on carriers to reroute passengers in certain circumstances on the "fastest available route" where a delay occurs

[29] Air Canada argues against what it characterizes as the Agency's position that the "all reasonable measures" wording found in Article 19 of the Convention creates a positive obligation on the carrier to reprotect passengers, in certain circumstances, by offering a seat on the "fastest available route" regardless of the carrier. Air Canada is of the view that the "all reasonable measures" wording can only be characterized as a defence mechanism that carriers may use in an action for damages in situations of delay. Air Canada refers to the fact that the courts have not evaluated a carrier's tariff provisions by reason of the "all reasonable measures" defence mechanism under Article 19 of the Convention and that legislators from other jurisdictions have also viewed overbooking and cancellation situations separately from aircraft delay.

[30] Unlike a civil court, the Agency has a mandate to consider the impugned Tariff provisions in the context of the Agency's enabling legislation. In the context of this complaint, this requires a consideration of the reasonableness of the subject Tariff provisions which might be quite different from a civil court's consideration. As has been discussed above at paragraphs 18 to 21, the Agency has clearly been given the mandate to review the terms and conditions of carriage established by a carrier from a variety of perspectives, a mandate which may differ from the approach taken in foreign jurisdictions.

Not all incidents of overbooking and cancellation cause delay and damages

[31] In the Show Cause Decision, the Agency recognized that there may be limited situations where overbooking and cancellation do not constitute delay but, in fact, constitute non-performance of the contract and thus would not be subject to the limits of liability set out in the Convention. The Agency at paragraph 42 of the Show Cause Decision recognized that as further complaints, with different fact situations, are brought before the Agency, the Agency will be able to clarify the conditions that constitute non-performance. The Agency adds that there may be situations in which overbooking or cancellation will not cause a passenger any delay at all, for example where the passenger arrives at their destination within the intended timeframe.

[32] Air Canada emphasizes the fact that the drafters of the Convention were aware of the difficulty of defining what constitutes delay and that the courts themselves have had difficulties drawing the line between delay and non-performance of a contract of carriage. This points to the fact that cases where delay might be at issue must be assessed on a case-by-case basis and are dependent on the facts. Accordingly, Air Canada argues that it would be inconsistent for the Agency to assume that situations of overbooking and cancellation are presumed to be a delay and cause damages under the Convention. It is important to note that the Agency did not preliminarily find that Air Canada's Tariff must always assume that overbooking and cancellation constitute delay. However, the Agency is of the opinion that situations of overbooking or cancellation may fall within the definition of delay in Article 19 of the Convention, and that in many cases such situations will constitute delay. Accordingly, Air Canada's Tariff should allow for this where appropriate.

[33] The Agency is also of the opinion that there may be situations where, for example, overbooking does not necessarily constitute delay, such as when no delay occurs or when an event is characterized by non-performance.

Conclusion

[34] The Agency has determined that overbooking and cancellation that are within the carrier's control may be characterized as delay. Accordingly, the Agency is of the opinion that in considering the reasonableness of the impugned Tariff provisions, reference may be made to Article 19 of the Convention.

PRELIMINARY FINDING 2: AIR CANADA'S TARIFF RULE 91(B) WHICH PRECLUDES THE POSSIBILITY OF REPROTECTION ON A FLIGHT WITH ANY CARRIER, EXCEPT THOSE FOR WHICH AN INTERLINE AGREEMENT HAS BEEN ESTABLISHED IS OVERLY RESTRICTIVE AND SUCH A PROVISION IS UNREASONABLE.

Show Cause Decision

[35] The Agency's preliminary finding was that a circumstance-focussed approach is a reasonable approach to addressing overbooking and cancellation when a passenger's circumstances are made known to Air Canada. The Agency stated that the jurisprudence dealing with overbooking

or cancellation takes a circumstance-focussed approach by generally looking to the particular circumstances of a situation to determine whether a carrier took all reasonable measures to avoid the damage caused by delay. For example, the time-sensitive nature of a passenger's purpose of travel is a consideration in applying this approach.

[36] In the Show Cause Decision, the Agency stated that Air Canada's approach of putting a passenger only on its own flights or on another carrier where an interline agreement exists is a carrier-focussed approach to remedying the situation of overbooking and cancellation. The Agency found that Air Canada provided limited evidence about its commercial or operational obligations to justify reprotection only on its own flights or those of a carrier for which an interline agreement exists.

[37] The Agency also stated that this complaint involves a consideration of the reasonableness of Air Canada's Tariff provisions on overbooking and cancellation which, in turn, involves the Agency considering these provisions pursuant to subsection 111(1) of the ATR, while also taking into account Article 19 and ensuring that the Tariff is consistent with the articles of the Convention.

[38] The Agency found that Air Canada's Rule 91(B) provides only a closed list of actions to be taken by Air Canada following overbooking or cancellation.

[39] The Agency therefore directed Air Canada to show cause why its existing Tariff Rule 91(B) should not be found unreasonable as per subsection 111(1) of the ATR.

Positions of the parties

[40] Air Canada submits that Tariff Rule 91(B) is reasonable as drafted, even though it does not provide for finding a flight on the fastest available route in certain circumstances. Air Canada contends that the Tariff provision is (1) clear and collectively applicable, and (2) reasonable considering Air Canada's operations and commercial obligations.

The reprotection mechanism set out in Rule 91(B) is clear and collectively applicable.

[41] Air Canada argues that a tariff should not need to be drafted to address exceptional circumstances. It cites past Agency decisions that recognize that in determining whether a term or condition of carriage is reasonable, the Agency must take into account the fact that air carriers are required to establish and apply terms and conditions designed to apply collectively to all passengers, as opposed to one particular passenger.[4] Air Canada notes that this was specifically recognized in the case of *Lloyd Alter v. Air Canada*, Decision No. 426-C-A-2009, where the Agency found as follows:

[4] Air Canada cites *Del Anderson v. Air Canada*, Decision No. 666-C-A-2001; *Burwash v. Air Canada*, Decision No. 333 C-A-2006 at para. 20; *Wasserman v. Air Transat*, Decision No. 681-C-A-2004 at para. 28.

> [18] Air Canada's policy must apply to a broad range of similar objects and it is not unreasonable that the policy be applied uniformly to the class of objects, notwithstanding that any individual item in the class may have characteristics that differentiate it from the broader category. There may be merit in an employee applying judgment as to whether the exceptional characteristics should exempt the individual item from the treatment or conditions applied to the broad category in which it belongs. However, it is also not unreasonable that an air carrier insist that the policy be applied uniformly for operational reasons. The failure to do so may, in fact, engender unrealistic expectations on the part of a consumer with respect to their future travel.

[42] Air Canada submits that the circumstance-focussed approach is operationally impossible and would create confusion in the application of the Tariff Rule, as the carrier's airport agents would have the responsibility to subjectively determine each affected individual's needs.

[43] Air Canada concludes that the only objective measure to determine a passenger's urgency to travel is to request volunteers, in the case of oversale, leaving all passengers the opportunity to determine the urgency of their travels.

[44] Mr. Lukács disagrees with Air Canada that implementing the Agency's findings would create lack of clarity. He submits that the circumstance-focussed approach means a review of the available ways to reroute a stranded passenger, and consideration of the total delay each would inflict upon them.

[45] He goes on to argue that this analysis need not be subjective. Criteria could easily be established for circumstances that warrant reprotecting a passenger on non-interline airlines, including the following:

(a) The unavailability of seats on interline carriers on the same day, while seats on the same day are available elsewhere;
(b) If interline reprotection results in delay of more than 8 hours, whereas non-interline reprotection results in shorter delay, then a non-interline carrier can be preferred

Analysis and findings

[46] The Agency has considered Air Canada's arguments against drafting a tariff that reflects a circumstance-focussed approach, and has reviewed the *Alter* decision. That case concerned Air Canada's handling fee applicable to all bicycles. The applicant argued that his bicycle folded and was contained in an ordinary bag, which was indistinguishable from any other form of baggage. While he requested that his bicycle receive treatment like any other checked baggage, the Agency found it was reasonable for Air Canada to apply its bicycle policy to all bicycles.

[47] The Agency is of the opinion that there is a distinction to be made between a tariff provision that is drafted to apply to only one passenger or exceptional situations, and a tariff that affords sufficient flexibility to comply with a passenger's right to be subject to reasonable terms and conditions of carriage as well as with the principles set out in the Convention.

[48] In this case, Tariff Rule 91(B) is not dealing with a single rule applicable to a class of objects, as was the case in *Alter*. Rather, Rule 91(B) sets out a list of alternative measures to be taken in the event of overbooking or cancellation. This list of measures necessarily requires the use of discretion and judgment by Air Canada agents: namely, whether rerouting on an Air Canada flight is to be preferred over rerouting on the flight of an interline carrier.

[49] Air Canada explains that its agents exercise certain duties and responsibilities in the event of overbooking and cancellation, including how to adequately reprotect a passenger. The Tariff provision currently requires Air Canada's agents to perform this exercise for each affected passenger's itinerary. The Agency agrees with Mr. Lukács' submission that Air Canada can establish criteria to guide its agents in determining whether to choose a carrier with which an interline agreement exists or not.

[50] Accordingly, the Agency finds that Air Canada has not demonstrated that the circumstance-focussed approach is operationally impossible, nor that in implementing a circumstance-focussed approach, its Tariff would create confusion and not be collectively applicable to all passengers.

Positions of the parties

The Tariff provision is reasonable considering Air Canada's operations and commercial obligations

[51] In the Show Cause Decision, the Agency stated that Air Canada has provided limited proof of the commercial and operational obligations that justify reprotection only on its own flights or those of carriers for which an interline agreement exists.

[52] In response, Air Canada first makes general comments respecting the reasonableness of its Tariff provision. It then goes on to raise three arguments to be considered in the balancing exercise, in favour of the reasonableness of its Tariff provision: the extensiveness of its code share and interline network on international routes; the commercial and competitive disadvantages it would suffer in being required to reprotect passengers on the fastest available route; and, the operational disadvantages that passengers would experience in being reprotected on carriers with which Air Canada has no interline agreement. The Agency will deal with each of these arguments in turn.

(a) General comments concerning the reasonableness of Rule 91(B)

[53] Air Canada cites the cases of *Wasserman v. Air* Transat, Decision No. 681-C-A-2004 and *Primeau*, and argues that the Agency determined in those cases that provisions similar to Air Canada's Tariff Rule 91(B) are reasonable within the meaning of subsection 111(1) of ATR.

[54] Mr. Lukács argues that industry standards have changed since the issuance of *Wasserman*.

Analysis and findings

[55] The Agency is of the opinion that the cases of *Wasserman* and *Primeau* can be distinguished from the present case.

[56] With respect to *Wasserman*, Air Canada is correct in pointing out that the tariff provisions impugned in that Decision were similar to the ones under review now. However, the focus of that complaint differed as the Agency was asked to consider whether a carrier's tariff should require it to reimburse additional expenses incurred by a passenger who makes alternate arrangements as a result of a flight cancellation occurring within 10 days of the scheduled departure date, or to provide a full refund if the passenger cancels their reservation more than 10 days before the scheduled departure date. In that context, the Agency found that a tariff provision that required Air Transat to offer alternate flights or to provide a refund, was reasonable.

[57] In *Primeau*, the Agency was called upon to address the issue of redirection of the flight following a mechanical breakdown of the aircraft. Mr. Primeau's argument was that it was unreasonable for Air Canada's tariff to allow it to divert a flight to an alternate destination for other than weather or mechanical reasons. Again, the issue in that Decision differed from the present complaint.

[58] What is more, in neither case were arguments of the nature of those raised by Mr. Lukács made concerning the applicability of the principles of the Convention.

[59] Air Canada further argues that in *PIAC v. Air Canada*, Decision No. 565-C-A-2008, the Agency concluded that it was reasonable and not discriminatory that Air Canada offer the On My Way product, which rebooks passengers on the next available flight at an additional cost.

[60] The Agency is of the opinion that the *On My Way* program may provide an added benefit to passengers who would want certainty in instances of flight delay without the requirement to justify a circumstance-focussed reason for transportation on the flights of another carrier with which Air Canada has no interline agreement. However, this additional fee service does not detract from the Agency's preliminary opinion that it is unreasonable for Air Canada to take the restrictive approach to reprotection as set out in Tariff Rule 91(B) as a base level in dealing with overbooking and cancellation.

[61] Furthermore, even if the Agency had ruled on a similar issue in the past, the Supreme Court of Canada stated in *IWA v.Consolidated-Bathurst Packaging Ltd.*[5] that members of administrative tribunals like the Agency are not bound by the principle of *stare decisis*. A useful explanation for this may be found in the textbook *Administrative Law in Canada*:

> Tribunals may take into account their previous decisions but should not regard those decisions as binding precedent. The doctrine of stare decisis should not be applied because tribunals should be flexible to adapt to new situations and changing times.
>
> [...]

[5] [1990] 1 S.C.R. 282 at 333.

> This flexibility enables a tribunal to apply the public interest in a way that reflects the evolution of policy and effectively regulates dynamic and ongoing relationships between parties. A tribunal may permit re-litigation and may come to a different conclusion without risk of court interference. However, the importance of stability in an industry requires that a tribunal have good reason for reversing its decisions.
>
> [...]
>
> The principle of *stare decisis* does not apply to tribunals. A tribunal is not bound to follow its own previous decisions on similar issues. Its decisions may reflect changing circumstances and evolving policy in the field it governs.[6]

[62] Finally, Air Canada argues that the cases of *Assaf v. Air Transat A.T. Inc.*, [2002] J.Q. no 8391, *Quesnel v. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555 and *Mohammad* should not be used as an indication of the obligation to carry a passenger on the fastest available route as the courts were not called on to distinguish between interline and non-interline carriers or to analyze the appropriateness under the Convention of only having recourse to carriers with which an interline agreement exists.

[63] Although the Agency did not cite the case of *Quesnel* in its reasoning, the case of *Assaf* was cited as an example of the circumstance-focussed approach adopted by Courts in relation to claims arising from Article 19 of the Convention. The Agency finds this latter case to be relevant to its argument in favour of a circumstance-focussed approach.

[64] The principle emerging from the case of *Mohammad* is that courts will look at whether a flight on another carrier was offered. In fact, the Court referred to the applicable tariff provision as calling for providing carriage on "another carrier" in case of involuntary revised reroutings. The tariff provision was not limited to finding a seat on a carrier with which an interline agreement exists.

[65] In both *Mohammad* and *McMurry v. Capitol Intern. Airways*, 102 Misc. 2d 720 at 722, which was also cited by the Agency in the Show Cause Decision, passengers made alternative arrangements themselves and the carrier was found liable to pay for those arrangements. In other words, the Court considered the passenger's own ability to find a flight on another carrier to be a determining factor as to whether or not the carrier had taken all reasonable measures to avoid delay pursuant to Article 19 of the Convention. The Agency finds this aspect of the cases to be relevant to the issue of reprotection.

[6] *Administrative Law in Canada*, 5th Edition LexisNexis Butterworths 2011 at 103 and 139-141.

Positions of the parties

(b) Reasonableness: the balancing test

(i) The extensiveness of Air Canada's international network

[66] In response to the Show Cause Decision, Air Canada elaborated on earlier submissions by providing information on the extent of its interline network on international routes. Air Canada states that it has 90 interline agreements with other international carriers, which represents 55 percent of carriers departing from Canada on international routes. Air Canada further submits that if one were to exclude non-IATA carriers and carriers that do not operate parallel services to those offered by Air Canada, then it can be said to have interline agreements with 84 percent of carriers.

[67] In addition, Air Canada provides examples of the reprotection options available to passengers through its existing agreements on a variety of international routes.

[68] Air Canada also raises safety and security concerns in reprotecting on non-IATA carriers.

Analysis and findings

[69] The Agency finds that Air Canada's submissions reveal an extensive network of international carriers with which it has interline agreements. This suggests that it is only in rare circumstances that Air Canada may have to consider reprotection on a carrier with which it does not have an interline agreement. The Agency finds that this would mitigate the impact of including such a provision in Air Canada's Tariff.

[70] Air Canada's submissions also reveal that, in the event of delay, its network would allow for numerous reprotection options for passengers. However, Air Canada has not provided a complete explanation of how these options are weighed. In the event of overbooking or cancellation, Air Canada states that a passenger would be placed on one of the following carriers:

1. an Air Canada flight;
2. a flight operated by a code share partner;
3. a flight operated by a STAR Alliance carrier;
4. a flight operated by a carrier with which Air Canada has an interline agreement.

[71] Despite providing numerous examples of reprotection options for international flights, Air Canada has not offered an explanation of how it comes to choose which reprotection option it will pursue. In particular, Air Canada has not explained whether its choice will be based exclusively on the first available flight or the fastest route from among the carriers in its network, or whether other factors will also be considered. Accordingly, the evidence provided by Air Canada does not demonstrate why limiting itself to reprotection on one of its own flights or those of a carrier with which it has an interline agreement is reasonable.

[72] Finally, Air Canada has raised safety and security concerns. In promoting a circumstance-focussed approach, the Agency does not in any way intend that Air Canada should be forced to enter into contracts or engage in practices that are unsafe or that pose a threat to security.

Positions of the parties

(ii) The commercial and competitive disadvantages for Air Canada

[73] Air Canada submits that it would be unreasonable, and financially and operationally onerous, to be obligated to purchase a ticket on an airline with which no interline agreement exists, and thus pay a competitor full fare. In such cases, Air Canada points out that it would not be able to rely on an existing negotiated settlement.

[74] Air Canada further submits that it would be at a significant competitive disadvantage, as it is not an industry practice to purchase a seat on a carrier with which no interline agreement exists. Air Canada argues that should the Agency transform Article 19 of the Convention into a positive obligation to reprotect passengers on the fastest available route in certain circumstances, this obligation would be restricted to Air Canada or to carriers subject to the CTA.

[75] Mr. Lukács states that he accepts that reprotection on non-interline carriers would result in additional expenses for Air Canada, but he maintains that this alone does not justify the reasonableness of Air Canada's existing Tariff provisions. He states that this expense must be weighed against passengers' right to receive transportation services as contracted, as well as the extra profit generated to Air Canada.

[76] Mr. Lukács further submits that in light of Air Canada's evidence of how rare these incidents are and the extreme hardship they cause to passengers, Air Canada's commercial obligations do not justify precluding the possibility of reprotecting passengers on a non-interline carrier in certain circumstances.

[77] With respect to the competitive disadvantage Air Canada would face, Mr. Lukács points out that both WestJet and Air Transat have recently agreed to amend their tariffs to include the possibility of reprotecting passengers on carriers with which they do not have interline agreements.

Analysis and findings

[78] The Agency notes that in response to the Show Cause Decision, Air Canada has provided little additional evidence to further its position concerning the competitive disadvantage it would suffer and the commercial obligations that should be considered by the Agency in assessing the reasonableness of Tariff Rule 91(B). The arguments raised by Air Canada are largely a reiteration of its earlier submissions.

[79] Accordingly, the Agency considers that, in practice, the commercial impact of implementing a circumstance-focussed approach in Air Canada's Tariff would be limited, given the extensiveness of its international interline network. By extension, the competitive disadvantage suffered by Air Canada, if any, would be minimal.

Positions of the parties

(iii) The operational disadvantages to passengers

[80] In support of this argument, Air Canada submits that reprotection is not simple and that it would be operationally unfeasible for Air Canada to buy a seat on the fastest available route, regardless of the carrier.

[81] Air Canada points out that its airport agents do not have the capacity to contract or purchase tickets on other carriers with which it does not have an interline agreement, considering safety and security concerns. In fact, Air Canada points out that agents only handle small amounts of cash (approximately $200) and they do not carry credit cards for which such purchases could be made.

[82] Air Canada further points out that agents would be forced to make a determination as to whether reprotection on the fastest available route would cost more than the capped limit of the Convention, which amounts to approximately $6,500.

[83] Air Canada goes on to argue that interline agreements allow for the orderly transfer of checked baggage and other special handling requirements between the two airlines, and allow a system of tracking and settlement should baggage be delayed.

[84] Further, Air Canada points out that its interline agreements include provisions allowing Air Canada to directly book a passenger on its interline partner's flight. They also allow the settlement of revenue through an IATA set-up, so that a ticket can be issued without immediate concern over payment methods and transfer of funds. In the event of problems with the replacement carrier, it allows for an easier transfer back to another participating airline or the original carrier, whereas if reprotection is made on another carrier with no interline agreement, that airline will be the passenger's sole option.

[85] Mr. Lukács argues that nothing prevents Air Canada from providing credit cards to some airport agents—for example, managers—to purchase tickets on airlines with which Air Canada has no interline agreement.

Analysis and findings

[86] The Agency is of the opinion that in response to the Show Cause Decision, Air Canada has merely repeated arguments that it presented in earlier submissions. These concern the advantages that reprotection on interline carriers offer to passengers with respect to ticket and baggage transfers.

[87] Additional submissions were provided respecting the limited discretion and resources of agents to perform the reprotection services suggested by the Agency.

[88] The Agency is not convinced that, in balancing the rights of passengers against the operational challenges raised by Air Canada, it would be unreasonable to require Air Canada in certain circumstances to consider reprotection on a carrier with which no interline agreement exists. Passengers are able to re-book their own tickets on other carriers at the last minute, and the Agency considers that it is not unreasonable or operationally unfeasible for Air Canada to do the same in the appropriate circumstances.

[89] What is more, the Agency repeats that Article 19 of the Convention refers to taking all measures that could *reasonably* be required for a carrier to avoid the damage caused by delay. It is therefore not in all circumstances that reprotection on the fastest available route will be reasonably required. For example, as the task of reprotecting a passenger requires some time and effort to complete, it is possible that time constraints may make it difficult or impossible to ensure reprotection on the fastest available flight. The Agency acknowledges Air Canada's need for flexibility and discretion in this regard, but also emphasizes that this flexibility and discretion must nevertheless respect the principles of Article 19 of the Convention and the ATR.

Conclusion

[90] The evidence provided by Air Canada suggests that the commercial and operational impediments to allowing for the possibility of reprotection on a carrier with which it has no interline agreement, in the appropriate circumstances, would arise only in limited cases. When balanced against the rights of passengers to be subject to reasonable terms and conditions of carriage, as well as their rights under the Convention, the Agency considers that it is unreasonable for Air Canada to outright preclude this possibility in its Tariff.

[91] The Agency finds that Air Canada has not shown cause why Tariff Rule 91(B)(2) should not be found unreasonable as per subsection 111(1) of the ATR for being too restrictive in dealing with issues of overbooking and cancellation and be drafted in a more open manner that allows for reprotection, in certain circumstances, on carriers with which there is no interline agreement. The Agency therefore finds that Rule 91(B)(2) is unreasonable.

PRELIMINARY FINDING 3: AIR CANADA'S TARIFF RULE 91(B) IS UNREASONABLE AS IT ONLY CALLS FOR A REFUND OF THE UNUSED PORTION OF A TICKET. TARIFF RULE 91(B) IS UNREASONABLE AS IT LEAVES WITH AIR CANADA THE CHOICE OF OPTION FOR OBTAINING A REFUND.

(a) Refunding the unused portion of a ticket

Show Cause Decision

[92] In the Show Cause Decision, the Agency stated that in cases where a delay or cancellation occurs at a connecting point during a trip, with the result that the passenger's travel no longer serves their purpose, that passenger could be required to absorb some of the costs directly associated with their delayed travel if they were only entitled to a partial refund.

[93] In the Show Cause Decision, the Agency stated that Air Canada has not demonstrated why, given its commercial and operational obligations, it cannot refund the entire ticket cost.

[94] Furthermore, the Agency stated that Air Canada has not addressed the question of returning a passenger to their point of origin, within a reasonable time and at no extra cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's original purpose.

[95] The Agency, in the Show Cause Decision, directed Air Canada to demonstrate why that part of Air Canada's existing Tariff Rule 91(B) that allows for a refund of the unused portion of a passenger's ticket only should not be found unreasonable as per subsection 111(1) of the ATR.

Positions of the parties

[96] Air Canada maintains that the consequence of the Agency asserting that it is unreasonable to refund only the unused portion of a ticket, even in situations within Air Canada's control is to make Air Canada responsible for the purpose of a passenger's trip, and results in Air Canada incurring additional costs to refund payment for services already rendered.

[97] Air Canada adds that refunding the unused portion of a ticket is a wide-spread practice throughout the industry, and that it would be at a significant competitive disadvantage if it had to refund more than the unused portion of a ticket, while its competitors continue to refund only the unused portion.

[98] Air Canada indicates that where a passenger's journey is interrupted, whether for a reason beyond or within Air Canada's control, and the passenger elects to continue to their destination by other transportation not arranged by Air Canada, the passenger would only be entitled to the refund of the unused portion of the ticket. Air Canada further indicates that, in practice, where a passenger's journey is interrupted, for reasons within Air Canada's control, by a cancellation or overbooking occurring on an outbound itinerary for an Air Canada operated flight, the passenger will likely receive a full refund when requested. Air Canada provides the following example: if a passenger travelling from Vancouver to London via Toronto experiences a flight interruption in

Toronto that is within Air Canada's control, and the passenger opts to receive a refund and return to their point of origin, Air Canada will return the passenger to Vancouver and provide a full refund, including for the Vancouver-Toronto flights. Air Canada claims these situations are rare and constitute less than 1 percent of refund requests.

[99] Air Canada goes on to argue that it cannot modify its Tariff to address situations that would apply in such limited circumstances, and which depend on a case-by-case analysis, considering the complexity of the passenger's itinerary, the carriers involved on the itinerary, and the country in which the cancellation or overbooking occurred. Air Canada states that including any provision to this effect would cause confusion for the travelling public regarding their rights and would therefore be unclear.

[100] Mr. Lukács claims that Air Canada has made misleading statements concerning industry practice relating to refunds, stating that this is only correct to the extent that it has been a practice of the 20th century. He submits that practices relating to refunding of tickets in situations of overbooking and cancellation have radically changed in the 21st century, by virtue of Article 8(1)(a) of *Regulation (EC) No 261/2004* of the European Union and Article 11 of Decision No. 619 of the Andean Community. Mr. Lukács asserts that both of these documents establish the right of passengers to a full refund, including for the parts of the journey that no longer serve any purpose in relation to the passenger's original travel plan, as well as the right to a return flight to the first point of departure.

[101] Mr. Lukács refers to Air Canada's description of its current practice, as described in its example of a flight interruption on a Vancouver to London flight via Toronto. He states that Air Canada's existing practice is consistent with his position and the current industry practice established by the European Union and Andean Community.

[102] Mr. Lukács further states that Air Canada's admission on this point demonstrates that issuing a full refund where travelled segments no longer serve the passenger's purpose, and transporting the passenger to their point of origin, does not create hardship for Air Canada to comply with its statutory, operational and commercial obligations. Indeed, as Mr. Lukács points out, Air Canada admits that these situations are rare.

[103] Mr. Lukács states that he is seeking the Agency to direct Air Canada to incorporate this existing practice into its Tariff.

[104] Mr. Lukács further argues that incorporating this practice into Air Canada's Tariff would not cause confusion, as Air Canada suggests. He points to Article 8(1)(a) of *Regulation (EC) No 261/2004* as an example of a clear and transparent method of incorporating such a practice into Air Canada's Tariff.

[105] Mr. Lukács submits that Air Canada's Canadian competitors, WestJet and Air Transat, have recently accepted the principles set out by the Agency, and agreed to amend their tariffs to reflect a full refund and transportation to the point of origin, in certain cases. Mr. Lukács also submits that a significant portion of Air Canada's international competitors are subject to at least one of Regulation (EC) No. 261/2004 and Decision No. 619.

[106] Mr. Lukács maintains that Air Canada has not demonstrated any competitive disadvantage. Alternatively, if such disadvantage exists, it is, by Air Canada's own admission, negligible.

Analysis and findings

[107] In response to the Show Cause Decision, Air Canada has raised arguments concerning situations of delay that are both inside and outside its control. The Agency emphasizes, as it did in the Show Cause Decision, that the present complaint is not concerned with delay that is beyond Air Canada's control, but rather with situations that are within the control of Air Canada.

[108] Air Canada has indicated that in practice, in cases where a passenger's trip is interrupted due to delay and the passenger elects to return to their point of origin, Air Canada will return the passenger to their point of origin and provide them, upon request, with a full refund.

[109] The Agency notes that this practice reflects the Agency's preliminary findings in the Show Cause Decision. In particular, the Agency was of the preliminary opinion that in cases where a delay occurs at a connecting point during a trip, with the result that the passenger's travel no longer serves their purpose, payment of only a partial refund might force the passenger to absorb some of the costs directly associated with their delayed travel. Accordingly, the Agency expressed the preliminary opinion that in such cases, providing only a partial refund would be unreasonable.

[110] The Agency agrees with Air Canada's argument that where a delay occurs during travel but a passenger elects to continue on their journey by means of transportation other than with Air Canada, the passenger would not be entitled to a refund of the entire ticket cost if part of their trip served a purpose. For example, if on a trip from Vancouver to London via Toronto, a delay occurred in Toronto and the passenger chose to complete their trip with another carrier, the passenger would not be entitled to a refund of the cost of the Vancouver-Toronto ticket. Indeed, the Agency notes that Mr. Lukács has stated that segments already flown by a passenger that do serve some purpose for the passenger's original travel plan should not be refunded.

[111] Air Canada goes on to state that situations in which a passenger opts to receive a refund and return to their point of origin are rare, constituting less than 1 percent of refund requests. As such, Air Canada argues that it should not be required to modify its Tariff to account for situations that arise in very limited circumstances that depend on a case-by-case analysis, as it may cause confusion for the travelling public.

[112] The Agency does not accept Air Canada's position on this point. Air Canada has admitted in its response to the Show Cause Decision that it is in the practice of providing a full refund in cases where a flight is interrupted and the passenger chooses to return to their point of origin. Nevertheless, Air Canada's Tariff does not reflect this practice. The Agency notes that pursuant to subsection 110(4) of the ATR, a carrier must apply the terms and conditions of carriage as specified in the tariff. The Agency is of the opinion that if Air Canada is engaging in a practice of refunding and returning passengers to their point of origin, this must be reflected in its Tariff. Furthermore, the Agency is of the opinion that Air Canada has not shown why this practice could not be clearly expressed in its Tariff.

[113] The Agency finds that Air Canada has provided no evidence to support its claim that it would be at a competitive disadvantage if it were held to refund more than the unused portion of a ticket while its competitors refund only the unused portion. Air Canada has stated that it already engages in this practice. Moreover, Air Canada has admitted that providing full refunds and returning passengers to their point of origin where travelled segments no longer serve any purpose accounts for less than 1 percent of refund requests. However, the Agency notes that Air Canada has not shown cause why it cannot return passengers to their point of origin "within a reasonable time", as addressed at paragraph 105 of the Show Cause Decision. Accordingly, the Agency has determined that Air Canada has not shown that stating this practice in its Tariff would put it at a significant competitive disadvantage relative to its competitors.

[114] The Agency has determined that Air Canada has not shown cause why existing Tariff Rule 91(B)(3) that allows for a refund of the unused portion of a passenger's ticket only should not be found unreasonable as per subsection 111(1) of the ATR. The Agency therefore finds that Tariff provision is unreasonable.

(b) <u>The passenger's choice of option to obtain a refund</u>

Show Cause Decision

[115] In the Show Cause Decision, the Agency's preliminary finding was that by retaining discretion over the selection of the choice of option in its Tariff provision, Air Canada would retain discretion over whether the passenger will continue travelling or receive a refund, regardless of what works best for the passenger. By retaining such discretion, the Agency stated that Air Canada may be limiting or avoiding the actual damage incurred by a passenger as a result of delay. The Agency was of the preliminary opinion that Air Canada has not demonstrated to the satisfaction of the Agency why, from an operational and commercial perspective, the choice of option could not lie exclusively with the passenger.

[116] Air Canada's Tariff Rule 91(B) sets out the measures it will take in case of flight overbooking or cancellation, and sets out who, as between the carrier and passenger, has discretion to choose between these measures. Currently, Air Canada's Tariff indicates that either Air Canada can choose to provide a refund, or the passenger may request it.

[117] The Agency asked Air Canada to show cause why that part of Air Canada's existing Tariff Rule 91(B) that leaves with Air Canada the choice of option for compensation dealing with an overbooking or cancellation situation should not be found unreasonable as per subsection 111(1) of the ATR.

Positions of the parties

[118] In response to the Show Cause Decision, Air Canada proposes to amend its Tariff provision to delete any reference to its discretion with respect to refunds. In other words, the choice to obtain a refund would be at the sole discretion of the passenger.

[119] Air Canada further proposes to amend Tariff Rule 91(B) in such a manner as to not limit or reduce the passenger's right to claim damages, if any, under the Convention.

[120] Mr. Lukács submits that he agrees with the Agency's findings on this issue, and that while he opposes the existing and proposed forms of Tariff Rule 91(B) for other reasons, he is in agreement with Air Canada's proposed deletion of its own discretion to provide a refund from Rule 91(B).

Analysis and findings

[121] In response to the Agency's Show Cause Decision, Air Canada has not provided any submissions in support of the reasonableness of the choice of option portion of its Tariff provision. Instead, Air Canada proposes to amend its Tariff to reflect the Agency's preliminary findings.

[122] The Agency takes note of Air Canada's proposal to amend Tariff Rule 91(B) in order to give the passenger sole discretion to choose to obtain a refund and that Mr. Lukács has agreed to this proposal.

Conclusion

[123] Accordingly, as Air Canada has provided no arguments in favour of the reasonableness of its Tariff, the Agency finds that Tariff Rule 91(B)(3), as currently drafted, is unreasonable for failing to give the passenger sole discretion to choose to obtain a refund.

[124] The Agency also determines that Air Canada's proposal to leave the choice of option with the passenger is reasonable.

PRELIMINARY FINDING 4: AIR CANADA'S EXISTING TARIFF RULE 91(B) IS UNREASONABLE AS IT DOES NOT STATE THAT PASSENGERS HAVE RIGHTS AND REMEDIES OUTSIDE THOSE NAMED IN THE TARIFF. EXISTING TARIFF RULES 80(C) AND 89 ARE UNREASONABLE AS THEY REFER TO A SOLE REMEDY AVAILABLE TO PASSENGERS AS STATED IN THE TARIFF AND THEY SET A 30-DAY TIME LIMIT FOR TAKING LEGAL ACTION.

Show Cause Decision

[125] The Agency's preliminary finding was that Rule 91(B) of Air Canada's Tariff is unreasonable for failing to indicate the rights a passenger has, both under and outside the Convention.

[126] The Agency was also of the preliminary opinion that Rules 80(C) and 89 are inconsistent with Articles 19 and 22 of the Convention for limiting the carrier's liability to cash or credit voucher amounts, relieving Air Canada of liability in the event such compensation is paid and imposing a 30-day limitation period on legal action. The Agency stated that it was of the preliminary opinion that these provisions are unreasonable.

[127] The Agency, in the Show Cause Decision, affirmed that a passenger should be able to fully understand their rights and remedies in law simply by reading a tariff and without reviewing specific articles of treaties to discern the terms and conditions that apply to that tariff. The Agency also affirmed that tariff language must clearly and plainly set out the rights and remedies of passengers.

[128] The Agency then considered Air Canada's Tariff Rules 91(B), 80(C) and 89 taking into consideration the principles set out in the Show Cause Decision.

Positions of the parties

[129] Air Canada in its response to the Show Cause Decision proposed revised wording for its international Tariff Rules 91(B), 80(C) and 89.

[130] With respect to Rule 91(B) Air Canada made some modifications to address the issue of Air Canada retaining the right to provide a refund and added the following wording: "nothing in the subject Rules shall limit or reduce the passenger's right, if any, to claim damages, if any, under the Convention". Mr. Lukács does not oppose this proposed wording.

[131] The Agency, in the Show Cause Decision, stated that the existing Rule 91(B) does not give any indication of which rights and remedies a passenger might have under the applicable provisions of the Convention and the *Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929* – Warsaw Convention (Warsaw) in the event of overbooking or cancellation. Nor does it indicate that passengers may have rights and remedies at law outside the Convention and Warsaw. The revised wording still does not state that a passenger might have other rights and remedies outside those of the Convention and Warsaw, while the additional wording referring to the Convention might misrepresent to passengers that their rights and remedies are only determined within the context of the Convention and Warsaw, a concern that was expressed by the Agency at paragraph 115 of the Show Cause Decision. The Agency is of the opinion that Air Canada's Tariff should inform passengers that they have rights under the Convention or under the law, when neither the Convention or Warsaw applies. Accordingly, the Agency, with respect to this issue, continues to be of the opinion that Rule 91(B) of Air Canada's Tariff is unreasonable.

[132] Air Canada proposed to revise Tariff Rules 80(C)(1) and 80(C)(2) by eliminating the wording referring to the "passenger's sole remedy" and further clarify the Rules by adding the following wording: "nothing in the subject Rules shall limit or reduce the passenger's right, if any, to claim damages, if any, under the Convention".

[133] The Agency in the Show Cause Decision was of the opinion that these Rules were inconsistent with the liability provisions set out in Articles 19 and 22(1) of the Convention.

[134] Mr. Lukács in his reply states that he agrees with the changes proposed to these Rules.

Analysis and findings

[135] However, the Agency considers that the proposed changes to Rules 80(C)(1) and 80(C)(2), much like Air Canada's proposed changes to Rule 91(B), still fail to inform passengers that they may have rights either under the Convention or Warsaw or under the law, when the Convention or Warsaw does not apply. Accordingly, the Agency, with respect to this issue, also continues to be of the opinion that the changes proposed to Rules 80(C)(1) and 80(C)(2) are unreasonable.

[136] With respect to Rule 89, Air Canada revised the wording of the Rule, including adding the following wording: "nothing in this Part shall limit or reduce the passenger's right, if any, to claim damages, if any, under the Convention". The Agency, in the Show Cause Decision, made a preliminary finding that the Tariff provision which limited Air Canada's liability to the cash or credit voucher amounts stated therein, relieved Air Canada of liability in the event such compensation is paid and imposed a 30-day limitation period on legal action, all of which was not reasonable.

[137] Mr. Lukács opposes the revised wording and the existing wording for a number of reasons including that the revised Rule still makes reference to 30 days, is unclear, ambiguous, unreasonable and self-contradictory. Mr. Lukács asks that the Agency disallow those portions that refer to "passenger options" as being unreasonable and require Air Canada to pay compensation for denied boarding unconditionally and irrespective of the passenger's right to make a claim under the Convention or other cause of action.

[138] Air Canada's proposed revised Tariff provision in essence states that if a passenger is denied boarding as a result of overbooking they will have the option of accepting compensation offered by Air Canada which will relieve the carrier from further liability, subject to the Convention. As discussed in more detail below, this revised Tariff provision is contradictory. Alternatively, the passenger can decline the compensation and seek redress in some other forum, including under the Convention.

[139] With respect to Mr. Lukács' submission that the reference to 30 days in which to accept the compensation offered by Air Canada is significantly shorter than Article 35 of the Convention which states that the right to damages shall be extinguished if an action is not brought within a period of two years, the Agency notes that Air Canada did not revise this part of the Rule or provide any argument contrary to the Agency's preliminary finding in this regard.

[140] In addition, the Agency agrees with Mr. Lukács that the proposed revised wording of Rule 89 is contradictory in parts. The provision would provide that acceptance of denied boarding compensation relieves Air Canada from any further liability for not transporting the passenger as per its ticket reservations and yet it goes on to state that a passenger may have a right to claim damages under the Convention. The Agency is of the opinion that this contradictory and ambiguous wording is unreasonable and contrary to subsection 111(1) of the ATR.

Conclusion

[141] The Agency has determined that Air Canada's proposed revisions to Tariff Rules 80(C)(1), 80(C)(2) and 91(B) are unreasonable as they fail to inform passengers that they may have rights either under the Convention or Warsaw, or under the law, when neither Convention applies.

[142] With respect to Tariff Rule 89, the Agency has determined that:

(a) Air Canada has failed to show cause as to why parts of existing Tariff Rule 89 that limit the passenger's recourses, and set a 30-day time limit for taking legal action in the event of denied boarding, should not be found unreasonable as per subsection 111(1) of the ATR. The Agency therefore finds that Tariff provision unreasonable; and,

(b) the contradictory and ambiguous wording of Tariff Rule 89 renders that Rule unreasonable as per subsection 111(1) of the ATR.

SUMMARY OF CONCLUSIONS

[143] In light of the foregoing, the Agency concludes the following:

1. With respect to preliminary finding 1:

The Agency has determined that overbooking and cancellation that are within Air Canada's control may be characterized as delay. Accordingly, the Agency is of the opinion that in considering the reasonableness of the impugned Tariff provisions, reference may be made to Article 19 of the Convention.

2. With respect to preliminary finding 2:

The Agency has determined that Air Canada has not shown cause why part of Tariff Rule 91(B) should not be found unreasonable as per subsection 111(1) of the ATR for being too restrictive in dealing with issues of overbooking and cancellation and be drafted in a more open manner that allows for reprotection, in certain circumstances, on carriers with which there is no interline agreement. The Agency therefore finds that Rule 91(B)(2) is unreasonable.

3. With respect to preliminary finding 3:

(a) Refunding the unused portion of a ticket

The Agency has determined that Air Canada has not shown cause why that part of its existing Tariff Rule 91(B)(3) that allows for a refund of the unused portion of a passenger's ticket only should not be found unreasonable as per subsection 111(1) of the ATR. The Agency therefore finds that Tariff provision is unreasonable.

(b) The passenger's choice of option to obtain a refund

As Air Canada has provided no arguments in favour of the reasonableness of its Tariff, the Agency has determined that Tariff Rule 91(B)(3), as currently drafted, is unreasonable for failing to give the passenger sole discretion to choose to obtain a refund.

The Agency has also determined that Air Canada's proposal to leave the choice of option with the passenger is reasonable.

4. With respect to preliminary finding 4:

The Agency has determined that Air Canada's proposed revisions to Tariff Rules 80(C)(1), (C)(2) and 91(B) are unreasonable as they fail to inform passengers that they may have rights either under the Convention or Warsaw, or under the law, when neither Convention applies.

With respect to Tariff Rule 89, the Agency has determined that:

(a) Air Canada has failed to show cause as to why parts of existing Tariff Rule 89 that limit the passenger's recourses, and set a 30-day time limit for taking legal action in the event of denied boarding, should not be found unreasonable as per subsection 111(1) of the ATR. The Agency therefore finds that Tariff provision is unreasonable; and,

(b) the contradictory and ambiguous wording of Tariff Rule 89 renders that Rule unreasonable as per subsection 111(1) of the ATR.

ORDER

[144] In this Decision, the Agency has made findings based on the parties' submissions concerning the reasonableness of Air Canada's international Tariff Rules 91(B), 80(C)(1) and (C)(2) and 89. In accordance with those findings, the Agency disallows these Tariff Rules pursuant to paragraph 113(*a*) of the ATR for being unreasonable within the meaning of subsection 111(1) of the ATR.

[145] The Agency orders Air Canada, within 45 days from the date of this Decision, to amend existing Tariff Rules 91(B), 80(C)(1) and 80(C)(2) and 89 to conform with the findings set out in this Decision and to file its amended international Tariff with the Agency.

[146] In making amendments to its international Tariff, the Agency refers Air Canada to the findings and orders set out in Decision Nos. 248-C-A-2012 and 249-C-A-2012 relating to Air Transat's and WestJet's international tariffs.

[147] Finally, Air Canada is ordered, within 45 days from the date of this Decision, to make and file any consequential amendments to its international Tariff that need to be made to respond to the amended new Tariff Rules 91(B), 80(C)(1) and 80(C)(2) and 89.

[148] Pursuant to paragraph 28(1)(*b*) of the CTA, this Order shall come into force when Air Canada complies with the above or in 45 days from the date of this Decision, whichever is sooner.

(signed)

J. Mark MacKeigan
Member

(signed)

John Scott
Member

RULE 80(C) SCHEDULE IRREGULARITY

(1) In the event carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will at its option and as passenger's sole remedy either:
   (a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option;
   (b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes or rerouting; or at carrier's option;
   (c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower or;
   (d) at passenger's option or if carrier is unable to perform the option stated in (A), (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

(2) In the event carrier is a codeshare carrier and the operating carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will, as the passenger's sole remedy, if the operating carrier fails to do so:
   (a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option
   (b) endorse to another carrier or other transportation service, the unused portion of the ticket for purposes of rerouting; or at carrier's option
   (c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower at carrier's option.
   (d) or, at carrier's option or if carrier is unable to perform the option stated in (A) (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

RULE 89-DENIED BOARDING COMPENSATION
PART 1

Applicable between Canada and points in the Caribbean/Bermuda/Mexico/South America/Central America and North Pacific, from CA to all points in Area 2 and from Argentina to Chile. When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule.

RULE 89(PART I)(F) NOTICE PROVIDED TO PASSENGERS

The following written notice shall be provided to all passengers who are involuntarily denied boarding on flights for which they hold confirmed reservations.

[...]

AMOUNT OF DENIED BOARDING COMPENSATION

If you are eligible for denied boarding compensation, you must be offered a cash payment of $200.00 (Canadian currency) or a Credit Voucher good for future travel on AC in the amount of $500.00 (Canadian currency).

EXCEPTION: If you have been denied boarding for flights destined to/from Mexico and are eligible for denied boarding compensation, you must be offered a cash payment of $100 (Canadian currency) or a Credit Voucher good for future travel on Air Canada in the amount of $200 (Canadian currency). Refer to section (E), paragraph (2) of Air Canada General Rule No. 89 for a complete list of exceptions.

[...]

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft or not returning Credit Voucher to AC within 30 days) relieves AC from any further liability caused by our failure to honour your confirmed and ticketed reservations. However, you may decline the payment and seek to recover damages in a court of law or in some other manner within thirty (30) days from the date on which the denied boarding occurred.

PART 2

(Applicable from points in the United States served by AC to points in Canada and points in Areas 2/3 served by AC.)

RULE 89(PART 2)(E)(2) AMOUNT OF COMPENSATION PAYABLE

(a) Subject to the provisions of paragraph (E)(1) of this rule, carrier will tender liquidated damages in the amount of 200 percent of the sum of the values of the passenger's remaining flight coupons of the ticket to the passenger's next stopover (see Rule 135), or if none, to his destination, but not more than USD 400.00 or CAD 484.00, if the carrier arranges for comparable air transportation, or for other transportation accepted, i.e. used by the passenger which, at the time, either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover, or if none, at the airport of the passenger's destination not later than four hours after the planned arrival at the airport of the passenger's next point of stopover, or if there is no next point of stopover, at the airport of the passenger's destination, of the flight on which the passenger holds a confirmed reservation. If the offer of compensation is made by the carrier and accepted by the passenger, such payment shall constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger as a result of the carrier's failure to provide passenger with confirmed reserved space.

NOTE: Subject to the passenger's approval carrier will compensate the passenger with credit valid for the purchase of transportation in lieu of monetary compensation. The credit issued will be for a value equal to or greater than the monetary compensation. Such credit will be non-transferrable, non-refundable and valid for one year from the date of issue.

RULE 89(PART 2)(F)

Carrier shall furnish all passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space a copy of the following written statement:

[...]

AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face values of their ticket coupons, with a USD 200.00 maximum. However, if the airline cannot arrange "alternate transportation" (see below) for the passenger, the compensation is doubled (USD 400.00 one way maximum). The "value" of a ticket coupon is the one way fare for the flight shown on the coupon, including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

"Alternate transportation" is air transportation provided an airline licensed by the C.A.B. or other transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger's next scheduled stopover (of 4 hours or longer) or destination no later than 4 hours after the passenger's originally scheduled arrival time.

[…]

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft within 30 days) relieves AC from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

RULE 91 - ADDITIONAL SERVICE STANDARD COMMITMENTS

Rules 80 and 90, shall be interpreted in accordance with the principles set out below, and adjusted in accordance thereto.

[...]

(B) Given that passengers have a right to take the flight they paid for, if the plane is over-booked or cancelled, Air Canada will:

(1) Find the passenger a seat on another flight operated by Air Canada; or at AC's option

(2) Buy the passenger a seat on another carrier with whom it has a mutual interline traffic agreement; or at passenger's choosing or,

(3) If AC is unable to perform the option stated in (1) or (2) above within a reasonable amount of time, AC will refund the unused portion of the passenger's ticket.

[...]

Case Name:

Lukács v. Canada (Transportation Agency)

Between
Dr. Gábor Lukács, Appellant, and
Canadian Transportation Agency, Respondent

[2014] F.C.J. No. 301

2014 FCA 76

456 N.R. 186

Docket: A-279-13

Federal Court of Appeal
Halifax, Nova Scotia

Dawson and Webb JJ.A. and Blanchard J.A. (ex officio)

Heard: January 29, 2014.
Judgment: March 19, 2014.

(63 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or functions -- Types -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was

reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Statutory interpretation -- Statutes -- Construction -- By context -- Legislative intent -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Appeal by Lukacs from the Canada Transportation Agency's decision to enact a rule (the "quorum rule") that provided that in all proceedings before the Agency, one member constituted a quorum. Prior to the enactment of the quorum rule, two members of the Agency constituted a quorum. The quorum rule was not made with the approval of the Governor in Council. The appellant took the position that the rules governing the conduct of the proceedings before the Agency were regulations within the meaning of s. 36(1) of the Canada Transportation Act and as such could only be made with the approval of the Governor in Council and that as the rules were originally approved by the Governor in Council, they could not be amended without the approval of the Governor in Council. The Agency argued that the quorum rule was a rule respecting the number of members that were required to hear any matter or perform any function of the Agency and, as such, it could be enacted by the Agency pursuant to the Agency's rule-making power in s. 17 of the Act.

HELD: Appeal dismissed. The appropriate standard of review was reasonableness as the issue was whether the Agency properly interpreted its rule-making power contained in its home statute. The Agency's decision to enact the quorum rule pursuant to its rule-making power, so that the approval of the Governor in Council was not required, was reasonable. A contextual analysis of the Canada Transportation Act suggested that rules held a subsidiary position to orders or regulations, which was consistent with the view that rules were created by the Agency on its own initiative, while order came at the end of an adjudicative process and regulations must be approved by the Governor in Council. Furthermore, the interpretation of "rules" as a subset of "regulation" violated the presumption against tautology. Moreover, whenever "rule" appeared in the Act, it was in the context of internal procedural or non-adjudicative administrative matters and wherever "regulation" appeared in the Act it referred to more than internal, procedural matters. In addition, since the Act specifically required Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure but there was no express requirement for the Agency to do so, the application of the expressio unius maxim was consistent with the interpretation that the Agency's rules were not subject to that requirement. Furthermore, under the former Act, the predecessor of the Agency had the power to make rules with the approval of the Governor in Council. Interpreting

the Act so as to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) was consistent with the purpose of the Agency as envisioned in the Act. The fact that the Governor in Council had approved the Rules in 2005 did not mean that the approval of the Governor in Council was required to amend the rules. Firstly, Governor in Council approval in 2005 was an unnecessary step. Secondly, the quorum rule was new and did not rescind or vary any provision of the rules that was previously approved by the Governor in Council.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 4(1), s. 16(1), s. 17, s. 17(a), s. 17(b), s. 17(c), s. 25, s. 25.1(4), s. 29(1), ss. 34-36, s. 34(1), s. 34(2), s. 36(1), s. 36(2), s. 41, s. 54, s. 86(1), s. 86.1, s. 92(3), s. 109, s. 117(2), s. 128(1), s. 163(1), s. 169.36(1), s. 170

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 2.1

Interpretation Act, R.S.C. 1985, c. I-21, s. 2(1), s. 3(3), s. 15(2)(b), s. 35(1)

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, s. 22(1)

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

Counsel:

Dr. Gábor Lukács, the Appellant (on his own behalf).

Simon-Pierre Lessard, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made

with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> * * *
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament. [Emphasis added.]

* * *

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale. [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

* * *

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative

tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *Alberta Teachers'*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 N.R. 340, at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *Council of Canadians with Disabilities v. Via Rail, Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 92 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286, and *Yates v. Newfoundland and Labrador (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317.

20 In my view both decisions are distinguishable. At issue in the first case was whether

regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *Alberta Teachers'* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of"regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> * * *
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte :
>
> ...
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

2. (1) In this Act,

"regulation" means a statutory instrument

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Texte réglementaire :

a) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;

b) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.

Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation"do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the

purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation"in that in some contexts it can include a "rule". Where the word "regulation"can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation"is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to avoid speaking in vain *(Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

* subsection 16(1): dealing with the quorum requirement;
* subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
* subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
* subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
* subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
* subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
* section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
* subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
* subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word"regulations" generally refers to more than merely internal, procedural matters. For example:

* subsection 86(1): the Agency can make regulations relating to air services;
* section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
* subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
* subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;
* subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and
* section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an

Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. Canada*, [2000] F.C.J. No. 894, 257 N.R. 193, at paragraph 12 (F.C.A.).

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act,1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business

before the Agency, including the circumstances in which in camera hearings may be held; and

(*c*) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.

(2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]

* * *

22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

53 Subsection 29(1) of the Act requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005

stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347, at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

62 For these reasons, I would dismiss the appeal. In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

DAWSON J.A.
WEBB J.A.:-- I agree.
BLANCHARD J.A. (*ex officio*):-- I agree.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140806

Docket: 14-A-37

Ottawa, Ontario, August 6, 2014

CORAM: **TRUDEL J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

DR. GÀBOR LUKÀCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY and

BRITISH AIRWAYS PLC

Respondents

ORDER

UPON motion by the moving party, Dr. Gàbor Lukàcs, for leave pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c.10, to appeal:

1. a decision made by the Canadian Transportation Agency dated May 26, 2014 and bearing decision no. 201-C-A-2014; and if and to the extent necessary,

2. decisions made by the Canadian Transportation Agency dated April 16,2014 and bearing decision no. LET-C-A-25-2014, and dated May 2, 2014 and bearing decision no. LET-C-A-29-2014;

AND UPON considering the materials filed by the respondent British Airways PLC in response to the motion;

THIS COURT ORDERS that the moving party's motion for leave to appeal is granted. No order is made as to costs.

"Johanne Trudel"
J.A.

« WWW »
« D.G.N. »

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Appellant, and
Canadian Transportation Agency, Respondent

[2015] F.C.J. No. 1155

[2015] A.C.F. no 1155

2015 FCA 200

258 A.C.W.S. (3d) 1

476 N.R. 399

2015 CarswellNat 4720

Docket: A-357-14

Federal Court of Appeal
Halifax, Nova Scotia

Dawson, Ryer and Near JJ.A.

Heard: September 17, 2015.
Oral judgment: September 17, 2015.

(11 paras.)

Administrative law -- Bodies under review -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Rules -- Appeal by Lukacs from dismissal of his application to quash Rule 41(2) of new Canadian Transportation Agency Rules allowing Agency to stay a decision or order made by it and for order declaring Rules invalid dismissed -- Agency had all powers, rights and privileges vested in a superior court with respect to all matters necessary or proper for exercise of its jurisdiction -- New Rules provided sufficient flexibility to Agency to allow it to adjudicate disputes in manner that fulfilled requirements of procedural fairness and they were within the power conferred upon Agency to make rules.

Appeal by Lukacs from the dismissal of his application for an order quashing Rule 41(2) of the new Canadian Transportation Agency Rules allowing the Agency to stay a decision or order made by it on the basis that the Rule was ultra vires the powers of the Canadian Transportation Agency and to declare the Rules invalid. The appellant argued the Rules were inconsistent with the requirements of procedural fairness.

HELD: Appeal dismissed. Section 25 of the Canada Transportation Act conferred upon the Agency all the powers, rights and privileges that were vested in a superior court with respect to all matters necessary or proper for the exercise of its jurisdiction. As such, Rule 41(2) of the New Rules was not ultra vires the powers of the Agency. The New Rules provided sufficient flexibility to the Agency to allow it to adjudicate disputes in a manner that fulfilled the requirements of procedural fairness and they were within the power conferred upon the Agency to make rules. There was no need for a rule requiring the Agency to give reasons for its orders and decisions as the Agency was bound by common law obligations of procedural fairness, which could include the obligation to give reasons. Allowing proceedings to be determined without an oral hearing did not breach procedural fairness as the New Rules provided for a mechanism by which parties could test the evidence of parties adverse in interest.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 6, s. 25, s. 40, s. 41

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-14

Counsel:

Dr. Gabor Lukacs, for the Appellant (self-represented).

Simon-Pierre Lessard, Tim Jolly, for the respondent.

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

1 DAWSON J.A. (orally):-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question involves the validity of the *Canadian Transportation Agency Rules (Dispute Proceedings and*

Certain Rules Applicable to All Proceedings), SOR/2014-14 (New Rules) made by the Canadian Transportation Agency in accordance with the process contained in the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.

2 On this appeal, the appellant asks that:

i) Paragraphs 41(2)(*b*), (*c*) and (*d*) of the New Rules be quashed on the ground that they are *ultra vires* the powers of the Agency; and

ii) The New Rules be declared invalid to the extent they are unreasonable and inconsistent with the requirements of procedural fairness and so exceed the power conferred on the Agency to make rules respecting the procedures for dealing with matters and business before it.

3 On the second point, the appellant asserts that the New Rules are unreasonable and inconsistent with requirements of procedural fairness to the extent that they:

* provide no opportunity for parties to object to requests for leave to intervene made by non-parties;

* remove the express requirement that the Agency provide reasons for its orders and decisions (a requirement contained in the previous version of the Agency's rules); and,

* allow proceedings to be determined without an oral hearing, while providing no meaningful opportunity to challenge statements made by adverse witnesses and no right to adduce oral evidence.

4 We are all of the view that the appeal should be dismissed. We reach this conclusion for the following reasons.

5 First, paragraphs 41(2)(*b*), (*c*) and (*d*) of the New Rules allow the Agency to stay a decision or order made by it when: a review is being conducted by the Governor in Council pursuant to section 40 of the Act; an application for leave to appeal is made to this Court under section 41 of the Act; or, the Agency considers it just and reasonable to issue a stay. Section 25 of the Act confers upon the Agency "all the powers, rights and privileges that are vested in a superior court" with respect to "all matters necessary or proper for the exercise of its jurisdiction". Superior courts possess inherent jurisdiction to stay their decisions and to otherwise control their process and functions. As this jurisdiction has been conferred upon the Agency, the impugned provisions of subsection 41(2) of the New Rules are not *ultra vires* the powers of the Agency.

6 Next, dealing with the appellant's submissions with respect to the fairness of the New Rules, it is important to situate those concerns in the context of the New Rules in their entirety. The New Rules:

i) Require the Agency to conduct all proceedings in a manner proportionate to the importance and complexity of the issues at stake and the relief claimed (section 4);

ii) 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 (subsection 5(1));

iii) Allow the Agency, at the request of a person, to dispense with compliance with, or vary, any rule at any time and to grant other relief on any terms that will allow for the just determination of the issues (section 6);

iv) Allow the Agency on its own initiative to do anything that may be done at the request of a person (subsection 5(2));

v) Allow a person to request a decision on any issue that arises within a dispute proceeding (subsection 27(1)) and,

vi) Allow a person to request leave to file a document whose filing is not otherwise provided for under the New Rules (subsection 34(1)).

7 Seen in this light, the New Rules provide sufficient flexibility to the Agency to allow it to adjudicate disputes in a manner that fulfils the requirements of procedural fairness and they are within the power conferred upon the Agency to make rules.

8 With respect to the three specific concerns articulated by the appellant, first, under section 6 the Agency may permit a party to file a reply to a request for intervener status, and subsection 34(1) allows a party to seek such relief.

9 Second, there is no need for a rule requiring the Agency to give reasons for its orders and decisions. The Agency is bound by common law obligations of procedural fairness, which can include the obligation to give reasons.

10 Third, the New Rules do provide a mechanism by which parties can test the evidence of

parties adverse in interest. Subsection 24(1) allows a party to request that any party adverse in interest respond to written questions that relate to the matters in dispute or produce documents in its possession or control relevant to the dispute. Section 27 allows a party to request that it examine or cross-examine a witness orally. Subsection 40(1) allows the Agency to require the parties to attend a conference for the purpose of obtaining the admission of certain facts or determining whether the verification of those facts by affidavit should be required (paragraph 40(1)(*d*)) or for the purpose of establishing the procedure to be followed in the dispute proceeding (paragraph 40(1)(*e*)).

11 For these reasons, the appeal will be dismissed. The Agency did not seek costs; no costs will be ordered.

DAWSON J.A.

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Appellant, and
Canadian Transportation Agency and
British Airways PLC, Respondents

[2015] F.C.J. No. 1398

2015 FCA 269

Docket: A-366-14

Federal Court of Appeal
Halifax, Nova Scotia

Dawson, Ryer and Near JJ.A.

Heard: September 15, 2015.
Judgment: November 27, 2015.

(61 paras.)

Transportation law -- Air transportation -- Regulations -- Federal -- Tariffs, rates and service charges -- Appeal by Lukacs from decision of Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers denied boarding due to overbooking allowed -- Agency ordered British Airways to file Proposed Rule that would apply to flights from Canada to EU -- Agency's decision lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from EU and did not address apparent tension between decision and Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada.á

Appeal by Lukacs from a decision of the Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers to whom it denies boarding as a result of overbooking a flight. The appellant had filed a complaint with the Agency alleging that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff were unclear or unreasonable. The appellant argued

that the amount payable under Rule 87(B)(3)(B) should reflect British Airways' obligations under Regulation (EC) which applied to all flights departing from an airport in the UK and operated by European Union airlines with a destination in the UK. The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation on the basis of the Agency's 2013 decision. In the 2013 decision the Agency considered an argument regarding the same EU Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that the Agency was able to enforce. The Agency then provided British Airways with the opportunity to show cause why it should not be required to amend Ruleá87(B)(3)(B) to bring it in conformity with one of three denied boarding compensation schemes listed by the Agency or to propose a new scheme. British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the UK, passengers who were denied boarding would be compensated CAD $400 for delays of zero to four hours and CAD $800 for delays of over four hours. The Agency concluded that the Proposed Rule was unreasonable, as the proposal applied only to flights from Canada to the UK. The Agency therefore concluded that British Airways had failed to show cause and ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the EU.

HELD: Appeal allowed. The Agency appeared to have implicitly decided that it was not necessary for an airline to include in its tariff a provision that clearly set out its obligations with respect to denied boarding compensation for flights departing the EU and coming to Canada. The Agency's 2013 decision offered little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada. The Agency's decision in the present case lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the EU. In addition, there was an apparent tension between the current decision and the Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada.áIt was necessary for the Agency to address this tension and apparent inconsistency directly. The Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada or whether the fact that British Airways passengers from the EU to Canada were covered by Regulation (EC) was sufficient.

Statutes, Regulations and Rules Cited:

Air Transportation Regulations, SOR/88-58, s. 110, s. 111, s. 113, s. 122(c)(iii)

Canada Transportation Act, S.C. 1996, c.á10, s. 41

Appeal From:

An appeal from a decision of the Canadian Transportation Agency dated May 26, 2014, Decision No. 201-C-A-2014.

Counsel:

Dr. Gabor Lukacs, for the Appellant (on his own behalf).

Allan Matte, for the Respondent, Canadian Transportation Agency.

Carol E. McCall, for the Respondent, British Airways PLC.

REASONS FOR JUDGMENT

Reasons for judgment were delivered by Near J.A., concurred in by Ryer J.A. Separate dissenting reasons were delivered by Dawson J.A.

NEAR J.A.:--

I. Introduction

1 The appellant appeals from a May 26, 2014 decision of the Canadian Transportation Agency (the Agency), which concerns the compensation that British Airways must pay to passengers to whom it denies boarding (Decision No. 201-C-A-2014). He contests both the substance of the decision and the fairness of the procedure leading up to it. This Court granted the appellant leave to appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

II. Facts

2 On January 30, 2013, the appellant filed a complaint with the Agency concerning a number of matters involving British Airways. On January 17, 2014, after an exchange of submissions by the parties, the Agency released its decision.

3 Only one of the matters figuring in the January 17, 2014 decision remains at issue in this appeal, namely the matter of "denied boarding compensation". This term refers to the compensation that an airline must pay to passengers to whom it denies boarding as a result of overbooking a flight. The amount that British Airways is required to pay is set out in Rule 87(B)(3)(B) of International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306.

4 In his initial complaint, the appellant argued that Rule 87(B)(3)(B) was unreasonable within the meaning of section 111 of the *Air Transportation Regulations*, SOR/88-58 (the *ATR*). The appellant put forward a number of arguments in support of this submission.

5 First, the appellant argued that the Rule should reflect British Airways' obligations under

European Union Regulation (EC) No. 261/2004, which applies to all flights departing from an airport in the United Kingdom (U.K.) and operated by European Union (E.U.) airlines (air carriers, or carriers) with a destination in the U.K. The appellant maintained that British Airways would not suffer any competitive disadvantage by amending the Rule to reflect the E.U. Regulation. He further submitted that British Airways has complied with the Regulation for flights from the U.K. to Canada, but has failed to comply with the Regulation for flights from Canada to the U.K. The appellant stated that he was not asking the Agency to enforce the E.U. Regulation. Rather, he was asking the Agency to consider the reasonableness of the Rule, and appropriate substitutes, in light of the Regulation.

6 The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation. The Agency based its conclusion on one of its previous decisions, Decision No. 432-C-A-2013 (*Nawrot et al v. Sunwing Airlines Inc.)*, in which it considered an argument regarding the same E.U. Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that it is able to enforce. The relevant paragraph of Decision No. 432-C-A-2013 reads as follows:

> [103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

7 Second, the appellant argued that Rule 87(B)(3)(B) was unreasonable because it was inconsistent with the principle of a flat rate of denied boarding compensation. Rule 87(B)(3)(B) provides that when a passenger is denied boarding to a flight from Canada to the U.K., British Airways will pay the full value of the replacement ticket to the passenger's next stopover, plus between $50 and $200.

8 The Agency concluded that the Rule may be unreasonable within the meaning of subsection 111(1) of the *ATR* because British Airways had not demonstrated how it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation.

9 Third and finally, the appellant argued that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under other laws and, as such, fails to provide passengers with a reasonable opportunity to fully assess their compensation options. The Agency agreed, finding the Rule unreasonable within the meaning of subsection 111(1) of the *ATR* insofar as it purports to provide a "sole remedy" for denied boarding.

10 In the Order issued with its January 17, 2014 decision, the Agency provided British Airways with the opportunity to "show cause" why it should not be required to amend Rule 87(B)(3)(B) to

bring it in conformity with one of three denied boarding compensation schemes listed by the Agency, or to propose a new scheme that the Agency may consider to be reasonable. The Order also stipulated that the appellant would have the opportunity to file comments on British Airways' answer to the show cause Order.

11 On March 17, 2014, British Airways filed its answer. In this answer, British Airways stated that it was choosing to implement one of the four schemes listed in the Order, namely "[t]he regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada)*". British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the U.K., passengers who were denied boarding would be compensated in the amount of CAD$400 in cash or equivalent for delays of zero to four hours, and in the amount of CAD$800 for delays of over four hours.

12 On March 26, 2014, in accordance with the show cause Order, the appellant filed comments in response to the answer given by British Airways.

13 On March 28, 2014, British Airways filed a reply to the appellant's March 26, 2014 submissions. On April 1, 2014, the appellant wrote to the Agency seeking permission to provide submissions in response to British Airways' March 28, 2014 reply.

14 In Decision No. LET-C-A-25-2014, dated April 16, 2014, the Agency struck from the record the submissions made by British Airways on March 28, 2014 and those made by the appellant on April 1, 2014. The Agency also directed the appellant to amend his March 26, 2014 comments by removing any submissions unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

15 On April 23, 2014, the appellant asked the Agency to reconsider its April 16, 2014 decision. On May 2, 2014, in Decision No. LET-C-A-29-2014, the Agency denied the appellant's request for reconsideration. The appellant filed a redacted version of his March 26, 2014 submissions "under protest" shortly thereafter, on May 8, 2014.

16 On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the final decision), the decision at issue in this appeal.

17 In this decision, the Agency first summarized the appellant's response, which was that the Proposed Rule was unreasonable because it only applied to flights from Canada to the U.K., and not to flights from the U.K. to Canada. In support of this argument, the appellant referenced Decision No. 227-C-A-2013 (*Lukacs v. WestJet*), in which the Agency had determined that:

> ... The failure to establish conditions governing denied boarding compensation for flights <u>to and from Canada</u> is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

(At para. 39; emphasis added)

18 In its analysis, the Agency determined that British Airways' Proposed Rule was consistent with the proposal made by Air Canada in Decision No. 442-C-A-2013 in terms of the amount of compensation. However, the Agency determined that, in terms of its application, the Proposed Rule was inconsistent with Air Canada's proposal in Decision No. 442-C-A-2013. Air Canada's proposal applied to flights from Canada to the E.U., whereas British Airways' proposal applied only to flights from Canada to the U.K.

19 The Agency therefore concluded that the Proposed Rule was unreasonable, and that, as a result, British Airways had failed to show cause. The Agency ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the E.U.

III. Legislative Framework

20 Section 110 of the *Air Transportation Regulations* requires air carriers operating international service in Canada to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is a contract between the carrier and its passengers.

21 Paragraph 122(*c*)(iii) of the *ATR* stipulates that carriers are required to include in their tariff terms and conditions relating to denied boarding compensation:

> **122.** Every tariff shall contain
>
> ...
>
> (*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> ...
>
> (iii) compensation for denial of boarding as a result of overbooking,
>
> ...

* * *

122. Les tarifs doivent contenir :

[...]

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

[...]

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

[...]

22 Section 111 of the *ATR* sets out the requirements by which carriers must abide when setting terms and conditions of carriage:

111. (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(*a*) make any unjust discrimination against any person or other air carrier;

(*b*) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(*c*) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under

substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

* * *

111. (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

23 Section 113 of the *ATR* allows the Agency to disallow any tariff, or any portion of a tariff, that does not comply with the requirements of section 111:

113. The Agency may

(*a*) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(*b*) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

* * *

113. L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa *a*).

IV. Positions of the Parties

24 The appellant submits that the Agency's final decision is unreasonable, as it neglects to impose any denied boarding compensation on British Airways flights departing from the E.U., contrary to paragraph 122(*c*)(iii) of the *ATR*. The appellant also submits that the Agency deprived him of a meaningful opportunity to reply to British Airways' response to the show cause Order, and thus breached its duty of procedural fairness.

25 The appellant asks this Court to allow the appeal and to set aside the final decision of the Agency. He also asks the Court to set aside the Agency's procedural decisions, to the extent that these decisions direct the appellant to delete portions of his submissions. The appellant seeks his disbursements in any event of the cause and, if he is successful, a moderate allowance for the time that he devoted to this appeal.

26 The respondent British Airways submits that the Agency's final decision is reasonable, and asks this Court to dismiss the appeal, with costs. The respondent Agency has not provided any written submissions in this appeal.

V. Issues

27 There are two issues in this appeal:

1. Does the substance of the Agency's final decision contain a reversible

error?

2. Did the Agency breach its duty of procedural fairness?

VI. Standard of Review

28 The standard of review applicable to the first issue, the Agency's substantive decision, is reasonableness. The issue of whether British Airways had indeed "shown cause" is a question of mixed fact and law. As such, the standard of review is presumed to be reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 51, [2008] 1 S.C.R. 190). Furthermore, the courts have generally reviewed decisions of the Agency -- an administrative body with specialized expertise -- on a deferential standard (*Canadian National Railway Company v. Canadian Transportation Agency*, 2013 FCA 270 at para. 3, 454 N.R. 125, citing *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 100, [2007] 1 S.C.R. 650).

29 Issues of procedural fairness are reviewable on the correctness standard (*Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502). Correctness is therefore the standard of review applicable to the second issue in this appeal.

VII. Analysis

A. *Reasonableness of the Decision*

30 The appellant submits that the final decision of the Agency is unreasonable because it imposes on British Airways a tariff relating to denied boarding compensation that only covers passengers travelling from Canada to the E.U., and not those travelling from the E.U. to Canada.

31 The appellant submits that this outcome is unreasonable because it is contrary to paragraph 122(*c*)(iii) of the *ATR*, and creates a legal loophole, defeating the purpose for which paragraph 122(*c*)(iii) of the *ATR* was enacted.

32 The appellant submits that paragraph 122(*c*)(iii), which requires carriers to include in their tariff a policy concerning denied boarding compensation, applies to both service from Canada to destinations abroad, and to service from destinations abroad to Canada. The appellant supports this submission by reference to the Agency's Decision No. 227-C-A-2013 (*Lukacs v. WestJet*). The appellant also refers to the more recent Agency Decision No. 148-C-A-2015 (*Ahmad v. Pakistan International Airlines Corporation*). The Agency found in both of these cases that an airline's tariff must include provisions that deal with denied boarding compensation both to and from Canada.

33 As the appellant correctly points out, in Decision No. 227-C-A-2013, the Agency found that a tariff rule that WestJet had proposed was unreasonable because it did not set out compensation for flights to and from Canada. The relevant paragraph which the appellant has relied upon reads as

follows:

> [39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

34 Similarly, in Decision No. 148-C-A-2015 the Agency found as follows:

> [29] As PIA's Tariff does not contain terms and conditions of carriage that clearly state its policy in respect of denied boarding and compensation for denied boarding as a result of overbooking for travel to and from Canada, the Agency finds that PIA contravened paragraph 122(*c*) and subparagraph 122(*c*)(iii) of the ATR.

35 In the case before us the Agency appears to have implicitly decided that it is not necessary for an airline to include in its tariff a provision that clearly sets out its obligations with respect to denied boarding compensation for flights departing the E.U. and coming to Canada. The Agency found that British Airways need not reference E.U. Regulation (EC) No. 261/2004 in its Tariff. It is accepted by all parties to this appeal that British Airways is bound by E.U. Regulation (EC) No. 261/2004 for its flights departing the E.U. to other countries, including Canada.

36 The Agency supported this finding on the basis of its prior Decision No. 432-C-A-2013, in which it stated:

> [103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

37 In my view, the finding in paragraph 103 merely sets forth a policy decision that the Agency will not force an airline to incorporate by reference a provision of another jurisdiction's legislation on the basis that the Agency cannot enforce the provisions of foreign legislation. It does not specifically address whether a tariff must include a provision that deals with denied boarding compensation quite independent of another jurisdiction's legislation for flights to and from Canada.

38 It is instructive to note that British Airways' existing Tariff did in fact cover denied boarding compensation for flights "between points in Canada and points in the United Kingdom served by British Airways" (Rule 87(B)). No clear explanation was provided by the Agency as to why this was no longer required. Further, in Decision No. 432-C-A-2013 at paragraphs 71 and 72, the Agency found that the absence of language providing that passengers affected by denied boarding will be eligible for compensation is unreasonable. In the case before us there is also no language dealing with denied boarding compensation for flights from the E.U. to Canada. It seems to me that Decision No. 432-C-A-2013 offers little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada.

39 In addition, the option chosen by British Airways pursuant to the show cause Order was "The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (Azar v. Air Canada)". While the regime proposed by Air Canada in *Azar v. Air Canada* dealt only with flights from Canada to the E.U. pursuant to the facts of that case, it is important to note that the tariff in respect of which the proposal applied also covers flights from the E.U. to Canada. This is pursuant to Rule 90(A) of Air Canada's tariff regime, which adopts by reference E.U. Regulation (EC) No. 261/2004 for flights originating in the E.U. and Switzerland.

40 The Agency decision in the case before us lacks clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the E.U. In addition, there is an apparent tension between the decision before us and the Agency's prior decisions, which seem to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada. In my view it is necessary for the Agency to address this tension and apparent inconsistency directly. In light of this, in my view this matter should be returned to the Agency for re-determination. The Agency must clearly address how British Airways is to "meet its tariff obligations of clarity" so that "the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning" in situations where the tariff is silent with respect to denied boarding compensation for inbound flights to Canada (Decision No. 432-C-A-2013, referencing Decision No. 344-C-A-2013 (*Lukacs v. Porter Airlines Inc.*)). In particular, the Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada, or whether the fact that British Airways passengers from the E.U. to Canada are covered by E.U. Regulation (EC) No. 261/2004 is sufficient.

B. *Procedural Fairness*

41 The appellant submits that the Agency breached its duty of procedural fairness when it ordered him to redact the majority of his March 26, 2014 submissions. He submits that in doing so, the Agency deprived him of his right to make meaningful submissions in response to British Airways' proposal. Given the decision to refer this matter back to the Agency there is no need to consider the procedural fairness issue raised by the appellant. The Agency is best positioned to

determine the extent of submissions it will require for the redetermination of the issue set out above.

VIII. Conclusion

42 I would allow the appeal and remit the matter to the Agency for redetermination in accordance with these reasons.

43 This Court has previously seen fit to award this appellant his disbursements, on the basis that his appeal was in the nature of public interest litigation and that the issue raised was not frivolous (*Lukacs v. Canada (Transportation Agency*), 2014 FCA 76 at para 62, 456 N.R. 186). I would award the appellant costs in the amount of $250.00 and his disbursements in this Court, such amounts to be payable by British Airways.

NEAR J.A.
RYER J.A.:-- I agree.

44 DAWSON J.A. (dissenting):-- I would dismiss this appeal for the following reasons.

45 As noted by the majority, on January 30, 2013, the appellant, Gabor Lukacs, filed a complaint with the Canadian Transportation Agency. The complaint alleged that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 were unclear and/or unreasonable. Amongst other relief, the appellant requested that the Agency disallow Rule 87(B)(3)(B) of the Tariff and direct British Airways to incorporate into the Tariff the obligations contained in Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004.

46 Regulation (EC) No. 261/2004 deals with compensation to be paid to passengers in the event they are denied boarding. It applies to every flight departing from an airport in the United Kingdom, and every flight operated by a European Union carrier with a destination in the United Kingdom. The appellant argued that British Airways' Tariff should reflect its legal obligation under the regulation.

47 In response, British Airways noted that while it complies with Regulation (EC) No. 261/2004, it would be inappropriate for the Agency to enforce foreign laws by requiring carriers to include provisions of a European regulation in their Canadian contracts of carriage.

48 In his reply to British Airways' response, the appellant:

i) accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to passengers flying from the United Kingdom to Canada;

ii) submitted that British Airways was currently not complying with its

obligations under Regulation (EC) No. 261/2004 with respect to passengers flying from Canada to the United Kingdom;

iii) submitted that the Agency ought to substitute in the relevant portion of the Tariff a provision that reflects British Airways' current practice with respect to denied boarding compensation paid to passengers flying from the United Kingdom to Canada; and

iv) submitted that the Tariff should require British Airways to pay denied boarding compensation to passengers flying from Canada to the United Kingdom in the amounts prescribed by Regulation (EC) No. 261/ 2004.

49 In Decision No. 10-C-A-2014, the Agency rejected the appellant's submissions on Regulation (EC) No. 261/2004, stating at paragraph 113 of the decision that it would "not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation". In reaching this conclusion, the Agency quoted as follows from its earlier Decision No. 432-C-A-2013:

> As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determination on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or had been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

50 The order which accompanied the decision required British Airways "to amend its Tariff and conform to this Order and the Agency's findings set out in [the] Decision".

51 The order went on to provide, at paragraph 144, that:

> [...] the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:
>
> 1. The regime applicable in the United States of America;
>
> 2. The regime proposed by Mr. Lukacs in the proceedings related to

Decision No. 342-C-A-2013;

3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or

4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

52 Decision No. 442-C-A-2013, referred to in the third option offered to British Airways, dealt with the reasonableness of Air Canada's tariff as it related to denied boarding compensation for travel from Canada to the European Union. The Agency found Air Canada's existing denied boarding compensation in connection with flights from Canada to the European Union to be unreasonable. In the result, the Agency ordered Air Canada to amend its tariff by filing its proposed denied boarding compensation amounts for travel from Canada to the European Union.

53 As argued by British Airways, the appellant did not seek leave to appeal Decision No. 10-C-A-2014 (British Airways' memorandum of fact and law at paragraph 18).

54 In response to this decision, British Airways proposed to apply the compensation regime proposed by Air Canada as set out in Agency Decision No. 442-C-A-2013. The text of British Airways' proposed tariff was clear that it applied only to compensation payable for flights from Canada to the United Kingdom. The proposed tariff was silent with respect to compensation payable for flights from the United Kingdom to Canada.

55 The appellant replied to the proposal advanced by British Airways, challenging the reasonableness of the proposal on the ground that it failed to establish conditions governing denied boarding compensation for flights from the United Kingdom to Canada. The appellant submitted that British Airways' proposal purported, albeit implicitly, to exempt it from the obligation to pay denied boarding compensation for flights from the United Kingdom to Canada.

56 Subsequently, in Decision No. LET-C-A-25-2014, the Agency found that parts of the appellant's reply submissions were unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in the proceeding that led to Decision No. 442-C-A-2013. In result, the Agency directed the appellant to refile his reply submissions, deleting all submissions that were unrelated to the denied boarding compensation regime proposed previously by air Canada in the proceeding that led to Decision No. 442-C-A-2013.

57 Later, the Agency dismissed a request that it reconsider this decision (Decision No. LET-C-A-29-2014).

58 From this chronology it is apparent that in Decision No. 10-C-A-2014, the Agency made a final decision that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into its tariff. By allowing British Airways the option to propose the same compensation regime previously proposed by Air Canada, the Agency also made a final decision that British Airways could, as it did, propose a tariff that dealt only with denied boarding compensation amounts for travel from Canada to the United Kingdom.

59 Any challenge to these decisions ought to have been brought as an application for leave to appeal Decision No. 10-C-A-2014. The appellant cannot challenge these decisions under the guise of a challenge to Decision No. 201-C-A-2014.

60 It further follows that the Agency did not breach procedural fairness by ordering that the appellant delete submissions in his final reply that were not relevant to the proposed tariff regime advanced by Air Canada that led to Decision No. 442-C-A-2013. The impugned submissions were not relevant to the remaining issue before the Agency, and it was not unfair for the Agency to ignore them and order that they be removed from the record.

61 For these reasons, I would dismiss the appeal with costs.

DAWSON J.A.

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Appellant, and
Canadian Transportation Agency and Delta Air Lines, Inc.,
Respondents

[2016] F.C.J. No. 971

2016 FCA 220

Docket A-135-15

Federal Court of Appeal
Halifax, Nova Scotia

W.W. Webb, A.F.J. Scott and Y. de Montigny JJ.A.

Heard: April 25, 2016.
Judgment: September 7, 2016.

(32 paras.)

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or function -- Types -- Discretionary powers -- Fettering of -- Practice and procedure -- Parties -- Standing or locus standi -- Appeal by Lukacs from dismissal of complaint by Canadian Transportation Agency allowed -- Appellant filed complaint alleging Delta's policies regarding transportation of obese persons was discriminatory -- Agency dismissed complaint due to lack of personal interest standing, as appellant was not of height or weight that would ever give rise to application of policy -- Agency erred by superimposing general law of standing on regulatory regime, contrary to wording and objective of Canada Transportation Act -- Act expressly provided for any person to bring complaint, reflecting objective of preventing, rather than merely remedying, discriminatory practices -- Air Transportation Regulations, s. 111(2) -- Canada Transportation Act, ss. 37, 67.2(1).

Transportation law -- Air transportation -- Regulation -- Federal -- Complaints about air carriers -- Passengers -- Persons with disabilities -- Canadian Transportation Agency -- Appeal by Lukacs from dismissal of complaint by Canadian Transportation Agency allowed -- Appellant filed

complaint alleging Delta's policies regarding transportation of obese persons was discriminatory -- Agency dismissed complaint due to lack of personal interest standing, as appellant was not of height or weight that would ever give rise to application of policy -- Agency erred by superimposing general law of standing on regulatory regime, contrary to wording and objective of Canada Transportation Act -- Act expressly provided for any person to bring complaint, reflecting objective of preventing, rather than merely remedying, discriminatory practices -- Air Transportation Regulations, s. 111(2) -- Canada Transportation Act, ss. 37, 67.2(1).

Appeal by Lukacs from a decision by the Canadian Transportation Agency dismissing his complaint against Delta Air Lines for discriminatory practices. The appellant filed a complaint with the Agency alleging Delta's practices related to the transportation of obese persons were discriminatory and contrary to law and jurisprudence regarding accommodation of disabilities. The appellant relied on an email from a Delta customer care agent that responded to a concern voiced by Omer, a passenger who felt cramped by a fellow passenger who required additional space. Following the receipt of further submissions, the Agency dismissed the appellant's complaint on a preliminary basis due to a lack of standing. The Agency concluded the appellant lacked sufficient personal interest in the issue, as he was not of a height or weight that would ever give rise to the application of Delta's policy regarding encroachment onto neighbouring seats. The Agency concluded that public interest standing did not extend beyond cases in which constitutionality of legislation or administrative action was at issue. Lukacs appealed.

HELD: Appeal allowed. The Agency retained discretion to screen complaints to ensure, among other things, optimal use of limited resources. However, in finding the appellant lacked standing, the Agency erred by superimposing the general law of standing on its regulatory regime, thereby ignoring the wording of the Act, and its legislative purpose and intent. Provisions of the Act related to complaints used the phrase "any person" in relation to bringing complaints, in contrast with the phrase "person adversely affected" in relation to those who could seek compensation. The use of broad wording for bringing complaints accorded with the policy objective of prevention of harm rather than merely ex-post facto remedies. Read in its contextual and grammatical context, the Act did not limit standing to those with a direct, personal interest in the matter. The Agency's decision was set aside and the matter was returned for determination of the appellant's complaint.

Statutes, Regulations and Rules Cited:

Air Transportation Regulations, SOR/88 58, s. 67, s. 100(1), s. 111, s. 111(2), s. 113

Canada Transportation Act, S.C. 1996, c. 10, s. 5, s. 37, s. 41, s. 65, s. 66, s. 67, s. 67.1, s. 67.1(b), s. 67.2, s. 67.2(1), s. 85.1, s. 86(1)(h)(iii), s. 127, s. 132, s. 132(1), s. 137(2), s. 138, s. 144(3.1), s. 177, s. 178

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), S.O.R./2014 104, Rule 21, Rule 23, Rule 29

Counsel:

Dr. Gabor Lukacs, for the Appellant (On His Own Behalf).

Allan Matte, for the Respondent, Canadian Transportation Agency.

Gerard Chouest, for the Respondent, Delta Air Lines, Inc.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 Y. de MONTIGNY J.A.:-- This is a statutory appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 [the *Act]* of a decision rendered by the Canadian Transportation Agency (the Agency) dismissing a complaint of discriminatory practices filed by Dr. Gabor Lukacs (the appellant) against Delta Air Lines Inc. (the respondent) on the preliminary basis that he lacks standing to bring this complaint.

2 This case essentially raises the issue of standing in proceedings before the Agency. The appellant argues that the Agency applied the wrong legal principles and fettered its discretion in denying him public interest standing to challenge Delta's policies and practices. Having carefully considered the parties' written and oral submissions, I am of the view that the appeal must be granted.

I. Background

3 On August 24, 2014, the appellant filed a complaint with the Agency alleging that certain practices of the respondent relating to the transportation of "large (obese)" persons are discriminatory, contrary to subsection 111(2) of *the Air Transportation Regulations*, SOR/88-58 (the *Regulations)* and also contrary to a previous decision of the Agency concerning the accommodation of passengers with disabilities. The appellant relied on an email dated August 20, 2014 from a customer care agent of Delta responding to a concern of a passenger ("Omer") regarding a fellow passenger who required additional space and who therefore made Omer feel "cramped".

4 In that email, Delta apologized to Omer and set out the guidelines it follows to ensure that large passengers and people sitting nearby are comfortable. It reads as follows:

> Sometimes, we ask the passenger to move to a location in the plane where there's more space. If the flight is full, we may ask the passenger to take a later flight.

> We recommend that large passengers purchase additional seats, so they can avoid being asked to rebook and so we can guarantee comfort for all.
>
> Appellant's Appeal Book, p. 21

5 Since it was not clear to the Agency whether Dr. Lukacs had an interest in Delta's practices on the basis of the facts before it, he was provided with the opportunity to file submissions with the Agency regarding his standing. Dr. Lukacs filed his submissions on September 19, 2014, Delta responded on September 26, 2014, and Dr. Lukacs replied on October 1, 2014. In its Decision No. 425-C-A-2014 dated November 25, 2014, the Agency dismissed Dr. Lukacs' complaint for lack of standing.

II. The impugned decision

6 The Agency first distinguished *Krygier v. Westlet et al.*, Decision No. LET-C-A-104- 2013 *[Krygier]* and *Black v. Air Canada*, Decision No. 746-C-A-2005 *[Black]*, on the basis that the issue in those cases was not the standing of the complainants but the need for a "real and precise factual background". Furthermore, the Agency found that although Dr. Lukacs was not required to be a member of the group discriminated against in order to have standing, he must nonetheless have a "sufficient interest". The use of the term "any person" in the *Act* did not mean that the Agency should determine issues in the absence of the persons with the most at stake. On that basis, the Agency found that, at 6 feet tall and 175 pounds, nothing suggested that Dr. Lukacs himself would ever be subject to Delta's policy regarding large persons that would not be able to sit in their seat without encroaching into the neighbouring seat.

7 With respect to public interest standing, the Agency took note of the three-part test established by the Supreme Court in the trilogy of *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; and *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588. The.Agency further relied on *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 *[Canadian Council of Churches]* and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 *[Finlay]* in expressing the view that public interest standing does not extend beyond cases in which the constitutionality of legislation or the non-constitutionality of administrative action is contested. Such being the case, Dr. Lukacs could not rely on public interest standing to bring his complaint before the Agency.

III. Issues

8 Dr. Lukacs conceded at the hearing that he does not have a direct and personal interest in this case, and as a result he does not claim standing on that basis. The issues upon which the parties disagree can be formulated as follows:

A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2(1) of the *Act* and 111(2) of the *Regulations?*

B. Did the Agency err in finding that public interest standing is limited to cases in which the constitutionality of legislation or the non-constitutionality of administrative action is challenged?

9 As I dispose of the current matter on the basis of the issues raised in the above point A, the following analysis will not address the questions raised in point B.

IV. Relevant statutory provisions

10 Airlines operating flights within, to or from Canada are required to create a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and includes the terms and conditions which are enforceable in Canada (see ss. 67 of the *Act* and 100(1) of the *Regulations).*

11 For the purposes of this proceeding, a few provisions are of particular relevance. The first is section 37 of the *Act*, which grants the Agency the power to inquire into a complaint:

> 37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.
>
> * * *
>
> 37 L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

12 The second, subsection 67.2(1) of the *Act*, sets out the powers of the Agency if it finds terms or conditions in a tariff that are unreasonable or unduly discriminatory:

> 67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.
>
> * * *
>
> 67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre

ou annuler ces conditions et leur en substituer de nouvelles.

13 Lastly, subsection 111(2) of the *Regulations* further expands on prohibited discrimination:

> 111(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,
>
> (a) make any unjust discrimination against any person or other air carrier;
> (b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or
> (c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.
>
> * * *
>
> 111(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :
>
> a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;
> b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;
> c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à Un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

V. The standard of review

14 At its core, this case calls into question the general principles the Agency should apply when determining whether a party has standing to file a complaint under subsection 67.2(1) of the *Act.* Of course, the actual decision of whether to grant standing engages the exercise of discretion, and as such it must be reviewed by this Court on a standard of reasonableness. To the extent that determining the standing requirements for a complaint under subsection 67.2(1) also requires an analysis of the particular requirements of the *Act* and the related statutes and case law, it is also entitled to a high degree of deference.

15 Of course, it could be argued that since Parliament has provided, through legislation, a right of appeal from the Agency to this Court on questions of law, correctness is the applicable standard. Such a view would be mistaken, however, as it is clear since the Supreme Court of Canada decision

in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that the correctness standard will only apply to constitutional questions; questions of law of central importance to the legal system as a whole and that are outside of the adjudicator's expertise; questions regarding the jurisdictional lines between two or more competing specialized tribunals; and the exceptional category of true questions of jurisdiction. The highest Court has repeated on a number of occasions that this is a very narrow exception to the general principle that an adjudicative administrative tribunal's interpretation of its enabling legislation is reviewable on a standard of reasonableness (see, for example, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 33-34, [2011] 3 S.C.R. 654; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 24, [2011] 3 S.C.R. 471; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 55, [2014] 2 S.C.R. 135; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 26-27, [2013] 3 S.C.R. 895; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para. 34, 481 N.R. 25). In my view, the criteria for standing under subsection 67.2(1) does not raise broad questions relating to the Agency's authority, and does not raise a question of central importance to the legal system as a whole; on the contrary, that question falls squarely within the Agency's expertise. As a result, the task of this Court is rather limited and is restricted to determining whether the decision of the Agency falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law.

A. *Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2 (1) of the Act and 111(2) of the Regulations?*

16 As recently stated by this Court in *Lukacs v. Canadian Transport Agency*, 2016 FCA 202 at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency "may" inquire into, hear and determine a complaint. There is no question, therefore, that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources.

17 Counsel for the respondent infers from the permissive (as opposed to mandatory) nature of section 37, the power of the Agency to refuse to inquire into, hear and decide complaints lodged by complainants who do not have standing to bring forward the complaint. It is not clear, however, on what basis the principles governing standing before courts of law ought to be transposed to a regulatory regime supervised and enforced by an administrative body like the Canadian Transportation Agency.

18 The rationale underlying the notion of standing has always been a concern about the allocation of scarce judicial resources and the corresponding need to weed out cases brought by persons who do not have a direct personal legal interest in the matter. Such preoccupations are warranted in a judicial setting, where the objective is to determine the individual rights of private litigants, the

accused and individuals. directly affected by state action (see *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 22, [2012] 2 S.C.R. 524; *Canadian Council of Churches* at p. 249). As such, the general rule required that a person have a sufficient personal interest in the matter to bring a claim forward. The ability to seek declaratory or injunctive relief in the public interest is usually reserved for the Attorney General, who might allow a private individual to bring such a claim only on consent *(Finlay* at para. 17). Similar rules may also be appropriate before a quasi-judicial tribunal, established to dispose of disputes between a citizen and the government or one of its delegated authorities. It is far from clear that these strict rules developed in the judicial context, however, should be applied with the same rigour by an administrative agency mandated to act in the public interest.

19 I agree with the appellant that the Agency erred in superimposing the jurisprudence with respect to standing on the regulatory scheme put in place by Parliament, thereby ignoring not only the wording of the *Act* but also its purpose and intent. In enacting the *Act,* Parliament chose to create a regulatory regime for the national transportation system, and resolved to achieve a number of policy objectives (set out in section 5 of the *Act).* Within that framework, the role of the Agency is not only to provide redress and grant monetary compensation to persons adversely affected by national transportation actors, but also to ensure that the policies pursued by the legislator are carried out.

20 Administrative bodies such as the Agency are not courts. They are part of the executive branch, not the judiciary. Their mandates come in all shapes and sizes, and their role is different from that of a court of law. Often, such bodies are created to provide greater and more efficient access to justice through less formal procedures and specialized decision-makers that may not have legal training. Moreover, not all administrative bodies follow an adversarial model similar to that of courts. If an administrative body has important inquisitorial powers, ensuring that the particular parties before them are in a position to present extensive evidence of their particular factual situations may be less important than in a court of law, where judges are expected to take on a passive role and decide on the basis of the record and arguments presented to them by the parties.

21 For that reason, the Supreme Court of Canada has recognized that the procedure before administrative bodies must be consistent, above all, with their enabling statute, and need not replicate court procedure if their functions are different from that of a traditional court (see *lnnisfil Township v. Vespra Township,* [1981] 2 S.C.R. 145 at pp. 167-168, [1981] A.C.S. No. 73. In a similar vein, the Supreme Court recognizes the importance of the particular statutory regime and the procedural choices made by the administrative body itself when it comes to determining the content of the duty of fairness *(Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paras. 24 and 27, 174 D.L.R. (4th) 193 *[Baker]).* To the extent that courts have exhibited a tendency to impose court-like procedures on administrative bodies in the context of judicial review for breach of procedural fairness obligations in the wake of *Baker,* they have often been met with criticism (see, for example, David Mullan, "Tribunal Imitating Courts - Foolish Flattery or Sound Policy?" (2005) 28 Dal. L.J. 1; Robert Macaulay and James Sprague, *Practice and Procedure*

before Administrative Tribunals, vol. 2 (Toronto: Carswell, 2010) at pp. 901 to 905).

22 Recognition of the particularity of administrative bodies has been reflected as well in decisions on standing and participation rights before administrative bodies. For example, this Court recently considered the particular language of the National Energy Board's enabling statute (most notably, the terms "directly affected", and "relevant information or expertise" used therein), and gave a wide margin of appreciation to the Board in deciding who should participate in its own proceedings. In so doing, this Court recognized the Board's expertise in managing its own process in light of its particular mandate (see *Forest Ethics Advocacy Association v. Canada (National Energy Board),* 2014 FCA 245 at para. 72, [2015] 4 F.C.R. 75).

23 Turning now to the Agency, it has a role both as a specialized economic regulator and a quasi-judicial body that decides matters in an adversarial setting. For example, the Agency has regulation-making powers and specialized enforcement officers with investigative powers that verify compliance of carriers with the *Act* and its relevant regulations (see ss. 177 and 178 of the *Act).* The Agency also hears applications for a variety of licenses and other authorizations and complaints which may, or may not, involve disputes between opposing parties (consider, for instance, air travel complaints under s. 85.1; applications to interswitch railway lines under s. 127; and competitive line rate-setting applications under s. 132).

24 The *Act* distinguishes between "complaints" and "applications", and uses different terminology to describe the types of persons who are entitled to file them. The term "application" is used in Part III of the *Act* on Railway Transportation, and is usually accompanied by a specific descriptor of the party entitled to bring the application. For example, an application to establish competitive line rates is made "[o]n the application of a shipper" (s. 132(1) of the *Act);* an application to determine the carrier's liability is made "on the application of the company" (s. 137(2) of the *Act);* an application regarding running rights and joint track usage may be made by a railway company (s. 138 of the *Act);* and an application to determine the net salvage value of a railway line is made "on application by a party to a negotiation" (s. 144(3.1) of the *Act).* Applications are governed by the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings),* S.O.R./2014-104, which are generally based on an adversarial model, with some variations. Of particular note are Rules 21 and 29 which allow the Agency to grant intervener status to a person that has a "substantial and direct interest", and Rule 23 which allows an "interested person" to file a position statement.

25 In contrast, the term "complaint" is mainly used in Part II - Air Transportation, and is almost always accompanied by the broad phrase "any person" (ss. 65, 66, 67.1, 67.2 of the *Act).* It is particularly telling that the phrase "any person" appearing in section 67.1 and subsection 67.2(1) is used to refer to those complainants who can bring a complaint in writing to the Agency. This is to be contrasted to the phrase "person adversely affected" appearing in subsection 67.l(b) and subparagraph 86(1)(h)(iii), which is more restrictive and determinative of who can seek monetary compensation. The use of those different phrases in the same act must be given effect and is

indicative of Parliament's intention to distinguish between those who can bring a complaint to obtain a personal remedy and those who can bring a complaint as a matter of principle and with a view to ensuring that the broad policy objectives of the *Act,* which includes the prevention of harm, are enforced in a timely manner, not just remedied after the fact.

26 Dr. Lukacs' complaint is brought under subsection 67.2(1). To the extent that this provision is at play (an issue that is not for this Court to decide and which is not the subject of this proceeding), it is incumbent on the Agency to intervene at the earliest possible opportunity, in order to prevent harm and damage that could result from unreasonable and unduly discriminatory terms or conditions of carriage, rather than to merely compensate those who have been affected *expost facto.* This is precisely why the Agency is given the authority not only to compensate individuals who were adversely affected by an airline's conduct (s. 67.l(a)) and to take corrective measures (s. 67.l(b)), but also to disallow any tariff or tariff rule that is found to be unreasonable or unduly discriminatory and then to substitute the disallowed tariff or tariff rule with another one established by the Agency itself *(Regulations,* s. 113).

27 In that perspective, the fact that a complainant has not been directly affected by the fare, rate, charge, or term or condition complained of and may not even meet the requirements of public standing, should not be determinative. If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint. This is not to say, once again, that each and every complaint filed with the Agency has to be dealt with and decided, but that complaints that appear to be serious on their face cannot be dismissed for the sole reason that the person complaining has not been directly and personally affected or does not comply with other requirements of public standing. When read in its contextual and grammatical context, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.

28 This interpretation is indeed consistent with the Agency's own analysis in a number of previous decisions. In *Black,* for example, the respondent submitted that the complainant had not established that he was sufficiently affected by the policies challenged and that he did not have the requisite direct personal interest standing or public interest standing. The Agency dismissed that argument and wrote:

> [...] The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR [Air Transportation Regulations], the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions". The Agency

> further notes that subsection 111(1) of the ATR provides, in part, that "All tolls and terms and conditions of carriage [...] that are established by an air carrier shall be just and reasonable [...]". The Agency is of the opinion that the word "established" does not limit the requirement that terms or conditions of carriage be just and reasonable to situations involving "a real and precise factual background involving the application of terms and conditions", but extends to situations where a person wishes, on principle, to challenge a term or condition that is being offered.
>
> [...]
>
> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.
>
> *Black*, paras. 5 and 7

29 That ruling was followed more recently in *Krygier*. Contrary to the appellant's submissions, these decisions do not only stand for the proposition that the absence of a real and precise factual background does not deprive the Agency of jurisdiction to hear a complaint, but also for the (overlapping) principle that it is not necessary for a complainant to have beenpersonally affected by a term or condition for the Agency to assert jurisdiction under subsection 67.2(1) of the *Act* and section 111 of the *Regulations.*

30 For all of the foregoing reasons, I am of the view that the Agency erred in law and rendered an unreasonable decision in dismissing the complaint of Dr. Lukacs for lack of standing. The Agency does not necessarily have to investigate and decide every complaint and is certainly empowered to dismiss without any inquiry those that are futile or devoid of any merit on their face; it cannot, however, refuse to look into a complaint on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions. In so doing, the Agency unreasonably fettered its discretion.

31 Having so decided, it will not be necessary to address the second, alternative ground of appeal raised by the appellant. The public interest standing is a concept that has been developed in a judicial setting to bring more flexibility to the strict rules of standing. It is meant to ensure that statutes and regulations are not immune from challenges to their constitutionality and legality as a result of the requirement that litigants be directly and personally affected. Such a notion has no bearing on a complaint scheme designed to complement a regulatory regime, all the more so in a context where the administrative body tasked to apply and enforce the regime may act of its own

motion pursuant to sections 111 and 113 of the *Regulations.*

VI. Conclusion

32 For these reasons, I would allow the appeal, set aside Decision No. 425 C-A-2014 of the Canadian Transportation Agency, and direct that the matter be returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint. I would also award the appellant his disbursements in this Court and a modest allowance in the amount of $750, such amounts to be payable by the Agency.

Y. de MONTIGNY J.A.
W.W. WEBB J.A.:-- I agree.
A.F. SCOTT J.A.:-- I agree.

December 3, 2009

File No. M4120-3/09-04027

BY FACSIMILE: (416) 982-3801

WestJet
c/o Bersenas Jacobsen Chouest Thomson Blackburn
33 Yonge Street
Suite 201
Toronto, Ontario
M5E 1G4

Gábor Lukács
208 – 848 Allegheny Drive
Winnipeg, Manitoba
R3T 4X2

Attention: Gerard Chouest

Dear Sirs:

Re: Complaint concerning the limit of liability for baggage applied by WestJet for domestic carriage

This refers to the above-noted complaint dated July 6, 2009 filed by Gábor Lukács, WestJet's answer dated September 22, 2009, and Mr. Lukács' reply dated October 2, 2009.

To enable the Canadian Transportation Agency (Agency) to gain a fuller understanding of this matter, the following questions are posed to WestJet:

1. What methodology did WestJet apply to arrive at a domestic limit of liability of $250 for damage to, or loss or delay in delivery of baggage, and what was the rationale in determining that this amount was reasonable?

2. Many air carriers allow passengers to declare excess valuation for baggage, and for a minimal charge, to increase the carrier's limit of liability to a maximum amount specified by the carrier. Why has WestJet chosen not to introduce excess valuation for domestic carriage?

3. In its submission dated September 22, 2009, WestJet argues in favour of retaining its current limit of liability for the domestic carriage of baggage by stating, in part, that the carrier has a commercial obligation to WestJet's stakeholders to operate its business at a profit. As other carriers, which have higher limits of liability, are confronted by the same imperative, why does WestJet feel that its status justifies a lower limit of liability than these other carriers? In this regard, reference is made to the attached table prepared by Agency staff, setting out the limits of liability for the domestic carriage of baggage for certain Canadian carriers. WestJet is requested to comment on these limits, particularly those limits which are higher than the limit of liability applied by WestJet.

4. In its submission dated September 22, 2009, WestJet notes that incidents involving the carrier's damage to, or loss or delay in delivery of baggage are exceptionally low relative to other carriers. In light of the infrequency of incidents, WestJet is requested to provide a detailed explanation as to how a higher limit of liability will negatively affect the carrier's financial position. In doing so, WestJet is to address the impact if it were to move to a higher amount equivalent to the Montreal Convention or that of its main competitor, Air Canada.

5. For the most recent 6-month period for which data are available, WestJet is requested to advise of the average amount of compensation tendered to passengers travelling domestically for damage to, or loss or delay in delivery of baggage. During this same period, did WestJet tender an amount to a passenger in excess of $250? If so, how many times did this occur, and what were the individual amounts?

WestJet is provided with 20 days from receipt of the present letter to submit its answers to these questions, while serving its submission on Mr. Lukács at the same time. Mr. Lukács shall then have 10 days following receipt of the submission, to file his reply with the Agency, and concurrently serve this reply on WestJet.

Sincerely,

Cathy Murphy
Secretary

BY THE AGENCY:

J. MARK MACKEIGAN
Member

Geoffrey C. Hare
Member

c.c. Lorne Mackenzie

LET-C-A-173-2009

Limits of liability for the domestic carriage of baggage for certain Canadian carriers

Carrier	Limit of liability	Excess valuation*
WestJet	$250 per passenger	Not specified
Air Canada	$1500 per passenger	$0.50 per each $100/Maximum - $2500
Canadian North	$750 per passenger	$0.50 per each $100/Maximum - $1500
Porter Airlines	$1000 per passenger	Not specified
CanJet Airlines	$250 per passenger	Not specified
Bearskin Airlines	$750 per ticket	$5.00 per each $100/Bearskin will not accept for carriage property the declared value of which exceeds $10,000
First Air	$750 per passenger	$0.50 per each $100/Maximum - $1000

* A passenger may pay an additional charge and declare a value higher than the limit of liability specified by an air carrier and up to a maximum established by the carrier.

Intitulé de la cause :

Quesnel c. Voyages Bernard Gendron inc.

PHILIPPE QUESNEL & CLAUDETTE QUESNEL, requérants
c.
VOYAGES BERNARD GENDRON INC., AIR CANADA & CROISIÈRE AMÉRICANADA, intimées

[1997] J.Q. no 5555

No : 760-32-002258-962

Cour du Québec (Chambre civile)
(Petites créances)
District de Beauharnois

L'honorable Raymond P. Boyer, J.C.Q.

le 7 juillet 1997.

(24 paragr.)

Avocats :

Aucun avocat n'est mentionné.

JUGEMENT

1 Les requérants réclament solidairement aux intimés la somme de 2 000 $ à titre de dommages-intérêts à la suite de la perte de trois jours de croisière pendant leur semaine de vacances.

LES FAITS

2 Les requérants ont acheté auprès de l'agence de voyages Bernard Gendron inc. un forfait vacances de croisière AmériCanada, pour la période du 28 janvier au 4 février 1996, qu'ils ont payé 1 746,41 $ chacun. Ce prix comprenait le transport de Montréal au port d'embarquement de Los Angeles ainsi que la croisière proprement dite d'une durée de 7 jours.

3 Une heure avant le départ du vol d'Air Canada à destination de Los Angeles le 28 janvier 1996, le personnel navigant a constaté l'existence d'un problème mécanique. La réparation a demandé sept heures.

LES POSTES DE RÉCLAMATION

4 Au lieu de partir à 10 h comme prévu, le vol 797 d'Air Canada vers Los Angeles a décollé de Dorval à 16

h 46 et a atterri à destination à 20 h 06. Ce délai de 6 h 46 a empêché les requérants d'arriver à temps au port d'embarquement de Los Angeles, endroit d'où partait leur croisière à 16 h 00. Les requérants se sont vus contraints de rejoindre le bateau à Puerto Vallarta, le port d'escale suivant. Ils ont ainsi perdu trois jours de leur croisière. Les requérants tiennent les trois intimées solidairement responsables de leur perte qu'ils répartissent tous les deux ainsi :

PORTION CROISIÈRE

. Jours perdus 1 838 $ x 3/7 787,71 $

. Pourboires payés d'avance : 105 $ x 3/7 45,00 $

. Transport payé et inutilisé : 15 $US 20,94 $

Total par personne : 853,65 $

DÉPENSES ADDITIONNELLES

. Transports à Puerto Vallarta
(aéroport - hôtel - port) 27,93 $

. Hébergement à l'hôtel Continental 279,30 $

. Repas 72,53 $

. Communications téléphoniques 5,85 $

TOTAL pour deux personnes : 385,61 $

TOTAL de la réclamation : 2 092,91 $

LA QUESTION DE LA RESPONSABILITÉ

A-) Quant à l'intimée Air Canada

5 En défense, l'intimée Air Canada plaide que le retard est attribuable à un bris mécanique et que la réparation s'imposait pour des raisons de sécurité du vol. Air Canada invoque également les dispositions d'exclusion de responsabilité contenues au billet de transport délivré aux requérants. Elle invoque sur ce point les décisions suivantes : l'arrêt The Ocean Accident & Guarantee Ltd. et Reliance Insurance Company of Philadelphia[1] c. Air Canada rendu par la Cour d'appel et le jugement de Lafrance c. Voyages Bergeron inc. et Vacances Air Canada et Air Canada[2] rendu par la Cour du Québec. Enfin Air Canada plaide que la fenêtre de correspondance fixée par le voyagiste AmériCanada est insuffisant, eu égard aux aléas modernes de circulation.

a-) Le bris mécanique de l'avion et les impératifs de la sécurité aérienne

6 Le rapport sommaire d'activité journalière mentionne ce qui suit :

> "FIN 213 IN YUL WITH FUEL MIGRATION PROBLEMS AND ESTIMATE CHGS FROM 0900/1000/1200/2359/0600 CAUSED MAJOR DLYS TO THE FOLL: FLT 797 YUL LAX WAS FCSTD 2.00L 1 HR PRIOR DEPT THEN REFCSTD 6.00L WHEN THE ESTIMATE SLIDE AGAIN. THE FLT EVENTUALLY DEPTD 6.6L WAITING THE FIRAV EQP. THE 10J 110Y WERE GIVEN 2 MEAL VOUCHERS WITH 15 PSGRS PRO 411/795 VIA YXZ AND THE REST TRVLD DLYD WITH THE EXCEPTION OF 4 MISSING PSGRS. THE TURN FLT 798 DEPTD 6.43L WITH 11J 120Y PSGRS BOOKED (ON BOARD 13J 72Y)"

7 L'intimée Air Canada a refusé d'indemniser les requérants de leurs dommages causés par le retard du vol et engendrés par le problème de déplacement du carburant. Dans sa lettre de refus, Air Canada s'exprime ainsi :

> "De par la nature même du transport aérien, certaines difficultés techniques sont aussi imprévisibles qu'inévitables et il est parfois difficile d'estimer la durée d'une panne, et quelquefois les réparations se révèlent de plus en plus complexes au fur et à mesure de leur progression, comme ce fut le cas ce jour-là. Aucun transporteur n'est à l'abri de telles irrégularités d'opération."

b-) Préséance de la convention de Varsovie

8 Air Canada appuie aussi son refus sur les conditions mentionnées au titre de transport qui se lisent comme suit :

> "9. Le transporteur s'engage à faire de son mieux pour transporter le passager et les bagages avec une diligence raisonnable. Les heures indiquées sur les horaires ou ailleurs ne sont pas garanties et ne font pas partie du présent contrat. Le transporteur peut, sans préavis, se substituer d'autres transporteurs, utiliser d'autres avions; il peut modifier ou supprimer les escales prévues sur le billet en cas de nécessité. Les horaires peuvent être modifiés sans préavis, le transporteur n'assume aucune responsabilité pour les correspondances."

9 Le Code civil du Québec reconnaît maintenant la validité de cette clause de non responsabilité en l'absence de faute intentionnelle ou de faute lourde (art. 1474). Le contrat accepté fait la loi des parties et les restrictions concernant la responsabilité du transporteur aérien ne sont pas illégales.

10 De plus, la réglementation adoptée en vertu de la Loi sur l'aéronautique (L.R.C., ch. A-3) prévoit une certaine limitation de la responsabilité du transporteur quant au transport des passagers. Le contrat de transport aérien en est un d'adhésion dont le formalisme contractuel quant aux règles et aux conditions de formation est défini par l'autorité réglementaire de l'État. À cet égard, M. le juge Deschênes s'exprimait ainsi dans l'arrêt The Ocean Accident & Guarantee Ltd. et Reliance Insurance Company of Philadelphia c. Air Canada :

> "Cette réglementation - y inclus certaines limites de responsabilité prévues aux tarifs dûment déposés - a été adoptée et publiée conformément à la loi. Elle s'impose aux transporteurs, elle fait partie intégrante du contrat de transport et elle lie tout autant le voyageur dont l'attention est d'ailleurs attirée à la face de chacune des six pages de son billet par la mention non équivoque : "subject to conditions of contract on page 2".
>
> En fait, il faut cesser de se bercer d'illusions et de vouloir transposer au transport aérien de masse des principes qui pouvaient paraître généralement raisonnables autrefois, mais qui ne peuvent trouver application aujourd'hui que dans le domaine privilégié du transport individuel. À l'époque moderne, reconnaissons-le tout net : c'est une fiction que de continuer de parler de "contrat" de transport aérien, au sens d'une libre négociation des conditions qui doivent présider au déplacement du voyageur. En thèse générale, la seule liberté reste à celui-ci, c'est d'accepter ou de refuser de voyager aux conditions déterminées pour lui par d'autres : le contrat de transport est devenu un véritable contrat d'adhésion. C'est là une réalité de la vie que les tribunaux auraient tort de bouder."

11 Par ailleurs, il faut se rappeler que l'arrêt précité concernait un voyage par avion entre Montréal et Toronto, soit entièrement à l'intérieur des frontières canadiennes. La reconnaissance de ces principes doit cependant se faire en l'espèce en tenant compte des dispositions de la Convention de Varsovie puisqu'il s'agit d'un vol entre Montréal et Los Angeles. Les règles de la Convention ont préséance sur les tarifs du transporteur en raison de son article 23 qui énonce que toute clause tendant à exonérer le transporteur de sa responsabilité ou d'établir une limite inférieure à celle fixée par la convention est nulle et de nul effet. Dans ce contexte, il faut se rappeler que le terme "tarif" ne signifie pas seulement "prix" mais vise plutôt la publication contenant les conditions de transport, les taux, règles, règlements et pratiques applicables au transport.

c-) Le fardeau de preuve du transporteur aérien

12 L'article 19 de la Convention de Varsovie fait porter au transporteur aérien une présomption de responsabilité pour le retard, sujette toutefois à une limite monétaire. Il incombe donc au transporteur aérien d'un vol régi par la Convention de prouver qu'il a pris toutes les mesures nécessaires pour éviter les dommages causés par le retard de son vol et que ce retard est dû à des causes indépendantes de sa volonté, telles que des circonstances atmosphériques, avaries du moteur, etc. Si les conditions atmosphériques peuvent créer pendant certaines périodes des empêchements inéluctables de voler, les avaries mécaniques bien qu'inopinées ne sont pas totalement imprévisibles. À preuve les propos mêmes de l'intimée dans l'extrait de lettre citée plus haut :

> "Aucun transporteur n'est à l'abri de telles irrégularités d'opération."

13 Il est indiscutable que le transporteur ne peut se servir d'un avion qui n'est pas en état de voler conformément aux règles de sécurité. Suffit-il d'en faire la constatation pour conclure à l'impossibilité d'exécution de l'obligation assumée et de conclure à l'exonération? À l'évidence non, puisqu'il incombe au débiteur de prouver force majeure (art. 1693 C.c.Q.). D'autre part, aux termes de l'avis qu'elle a remis à ses clients, l'intimée Air Canada s'est en outre engagée à faire de son mieux pour transporter le passager et les

bagages avec une diligence raisonnable. Si on veut attribuer une signification réelle à un tel engagement, il faut tenir que le transporteur s'engage à prendre les mesures raisonnables pour remplir son obligation de rendre à destination son client passager malgré les mésaventures que lui causent les problèmes mécaniques.

14 En acceptant ce contrat de vendre certains sièges de son vol au voyagiste AmériCanada, l'intimée Air Canada devait être consciente de l'importance pour ces passagers de croisière de se rendre à leur port d'embarquement à point nommé. Une fois cette entente conclue avec le voyagiste AmériCanada, Air Canada ne peut plus par conséquent lui faire grief d'avoir fixé un intervalle de correspondance trop court. La question primordiale qui se pose dans un tel contexte est de déterminer la norme des mesures raisonnables à prendre par le transporteur lors d'un bris mécanique.

15 Dans un temps où la mondialisation des voyages et des échanges commerciaux s'accentue de façon considérable de jour en jour, il est raisonnable de s'attendre à une grande régularité de services chez une société aérienne de l'envergure de l'intimée Air Canada. Certes, le transporteur aérien demeure tributaire des phénomènes atmosphériques. En revanche, il doit escompter la possibilité de bris mécaniques et prévoir pour cette raison des solutions efficaces de rechange afin d'assurer le service promis. Ce devoir s'accentue davantage lorsque ce transporteur effectue ce transport à partir de son principal établissement.

16 L'intimée n'a pas fait à l'audience la preuve nécessaire requise pour se décharger de la présomption de responsabilité qui pesait contre elle. Il ne lui suffisait pas d'affirmer que l'on avait tenté de trouver des sièges sur un vol d'une autre compagnie deux heures plus tard mais que les passagers seraient arrivés de toute façon en retard. Il lui incombait de prouver qu'aucune solution de rechange raisonnable n'existait, par substitution ou autrement, y compris la mise en opération d'un autre appareil. En l'absence d'une telle preuve, la présomption de responsabilité doit jouer contre l'intimée Air Canada.

B-) Quant à l'intimée AmériCanada

17 L'obligation contractuelle d'AmériCanada comprenait entre autres éléments celui de fournir un titre de transport valide et susceptible d'exécution dans le cadre du déroulement du forfait vacances. Elle n'était pas tenue elle-même à l'exécution du transport puisqu'elle n'agissait pas à titre de transporteur. Selon Pineau :

> "... le transporteur au sens de la Convention devrait être celui qui émet le billet de passage ou la lettre de transport : c'est, en effet, celui qui s'engage à déplacer le voyageur ou la marchandise et c'est lui seul qui doit assumer la responsabilité telle que prévue par la Convention"[3].

18 Quelles sont les conséquences, à l'égard de l'intimée AmériCanada, de la carence d'Air Canada d'assurer la disponibilité d'avions de remplacement ou la possibilité de solutions de rechange? Débitrice d'une obligation de résultat quant à l'ensemble du forfait vacances, AmériCanada devait expliquer "pourquoi elle avait été dans l'impossibilité de fournir le résultat promis et donc établir que l'inexécution de l'obligation était due à une force majeure[4], à l'acte d'un tiers ou au créancier lui-même"[5]. Pour assimiler le fait d'un tiers qui empêche l'exécution à un cas de force majeure, il faut que cet acte en possède les caractères, soit l'extériorité au champ d'activité propre du débiteur, l'imprévisibilité de l'événement et l'irrésistibilité. En principe, l'absence de départ de l'avion d'Air Canada au moment prévu représentait pour AmériCanada un fail étranger à sa conduite. Ce fait imprévisible était-il irrésistible au point de causer une impossibilité absolue d'exécution de l'obligation d'AmériCanada de faire arriver à temps ses clients au port de d'embarquement? La preuve relative au temps prévu pour la liaison des voyageurs entre l'aéroport et le port ne permet pas de conclure à un délai de correspondance insuffisant. Dès lors, l'impossibilité absolue d'exécution relève de l'acte d'un tiers, Air Canada, et est assimilable à un cas de force majeure.

19 Cette impossibilité pour AmériCanada d'exécuter son obligation a pris fin à 20 h 06, heure de Los Angeles, le 28 janvier 1996. À ce moment-là, AmériCanada devait prendre les moyens requis pour en arriver à un résultat, soit permettre à ses clients de profiter du reste du contrat. La preuve révèle qu'il n'en a rien été. Les requérants ont dû se débrouiller seuls afin de se rendre et de se loger à un hôtel, de faire les démarches pour se rendre à Puerto Vallarta et d'y demeurer jusqu'à la relâche dans ce port de leur bateau de croisière.

Air Canada leur a heureusement fourni gratuitement le transport aérien pour se rendre à cet endroit. L'intimée AmériCanada n'a pas expliqué pourquoi elle avait été dans l'impossibilité de prendre les mesures requises à Los Angeles afin de fournir aux requérants les services auxquels ils avaient droit.

20 La représentante de l'intimée AmériCanada a plaidé que sa société recommandait à ses clients de prendre l'avion la veille de l'embarquement prévu afin d'éviter de tels contretemps. Non seulement cette affirmation est-elle vigoureusement niée par les requérants mais elle est de plus démentie par la publicité même de cette intimée qui indique qu'elle s'occupe de tous les détails du forfait vacances y compris du volet du transport. Comme les titres de transport ne sont délivrés qu'une quinzaine de jours avant le départ, il est évident que l'opportunité ou non d'une prétendue recommandation de départ la veille est sans objet lorsque les détails du voyage ont été finalisés bien antérieurement. Eu égard à son omission fautive et son défaut de fournir la prestation promise[6], l'intimée AmériCanada doit également assumer une part de responsabilité quant aux dommages soufferts par les requérants.

C-) Quant à l'intimée Voyages Bernard Gendron inc.

21 L'agent de voyage qui se sert d'une brochure publicitaire pour vendre un produit en assume la responsabilité. Même s'il n'est pas l'auteur de la brochure ou du dépliant, l'agent assume en quelque sorte la responsabilité du contenu puisqu'il s'en sert dans le cours de son activité. Aux termes des articles 16 et 40 de la Loi sur la protection du consommateur, l'agent de voyages devient donc solidairement responsable[7] de la livraison des biens ou des services prévus au contrat ou dans la publicité[8] ainsi que de leur conformité.

CONCLUSIONS

22 Il y a donc lieu en l'espèce de tenir les trois intimées chacune en partie responsables des dommages subis par les requérants. Il ne peut y avoir de solidarité entre l'intimée Air Canada d'une part et AmériCanada et Voyages Bernard Gendron inc. d'autre part puisque l'objet des obligations était différent, les entreprises étaient distinctes et que l'étendue des obligations n'était pas la même. Par contre, il y a solidarité entre le voyagiste AmériCanada et l'agence de voyages en raison des termes des articles 16 et 40 de la Loi sur la protection du consommateur et 1523 du Code civil du Québec.

23 Eu égard à la preuve, l'intimée Air Canada devra supporter les dommages touchant la perte de la portion "croisière" d'une valeur de 853,65 $ par personne, soit 1 707,30 $. Par ailleurs, les intimées Croisière AmériCanada et les Voyages Bernard Gendron inc. assumeront solidairement les dommages subis par les requérants en tant que dépenses additionnelles de 385,61 $ suite à leur séjour forcé à Puerto Vallarta.

24 POUR CES MOTIFS, LE TRIBUNAL :

ACCUEILLE la requête;

CONDAMNE l'intimée Air Canada à payer aux requérants la somme de 1 707,30 $ avec intérêt légal depuis le 28 octobre 1996, l'indemnité additionnelle prévue à l'article 1619 C.c.Q. et les frais;

CONDAMNE solidairement les intimées Croisière AmériCanada et Les Voyages Bernard Gendron inc. à payer aux requérants la somme de 385,61 $ avec intérêt légal depuis le 28 octobre 1996, l'indemnité additionnelle prévue à l'article 1619 C.c.Q., sans frais.

RAYMOND P. BOYER, J.C.Q.

qp/s/qlnep

1 The Ocean Accident & Guarantee Ltd. et Reliance Insurance Company of Philadelphia, [1975], R.P. 193.

2 Lafrance c. Voyages Bergeron inc. et Vacances Air Canada et Air Canada, 500-32-013719-960, 1997-01-16, C.Q., J. Rouleau.

3 PINEAU Jean. Le contrat de transport terrestre, maritime, aérien. Montréal, Éd. Thémis, 1986, p. 289.

4 Art. 2100, 2e al.

5 BAUDOUIN Jean-Louis, Les obligations, Cowansville, Ed. Yvan Blais, 1983, p. 449, no 799.

6 Idem.

7 Art. 1523 C.c.Q.

8 Art. 41, L.P.C.

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Indexed as:

Sierra Club of Canada v. Canada (Minister of Finance)

Atomic Energy of Canada Limited, appellant;
v.
Sierra Club of Canada, respondent, and
The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, respondents.

[2002] 2 S.C.R. 522

[2002] S.C.J. No. 42

2002 SCC 41

File No.: 28020.

Supreme Court of Canada

2001: November 6 / 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (92 paras.)

Practice -- Federal Court of Canada -- Filing of confidential material -- Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors -- Crown corporation requesting confidentiality order in respect of certain documents -- Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order -- Whether confidentiality order should be granted -- Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown

corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance [page523] by the government triggered s. 5(1)(b) of the Canadian Environmental Assessment Act ("CEAA"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, inter alia, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with Charter principles because a confidentiality order will have a negative effect on the s. 2(b) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[page524]

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to

pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the CEAA, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a Charter right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies [page525] both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow

scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, [2001] 3 S.C.R. 442, 2001 SCC 76; M. (A.) v. Ryan, [1997] 1 S.C.R. 157; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Keegstra, [1990] 3 S.C.R. 697; referred to: AB Hassle v. Canada (Minister of National Health and [page526] Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; Ethyl Canada Inc. v. Canada (Attorney General) (1998), 17 C.P.C. (4th) 278; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77; F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35; Eli Lilly and Co. v. Novopharm Ltd. (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(b), 8, 54, 54(2)(b).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and Peter Chapin, for the appellant.
Timothy J. Howard and Franklin S. Gertler, for the respondent Sierra Club of Canada.
Graham Garton, Q.C., and J. Sanderson Graham, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

IACOBUCCI J.:--

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important [page527] issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and accordingly would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Limited ("AECL") is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the Canadian Environmental Assessment Act, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the

appellant [page528] filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Mr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the Federal Court Rules, 1998, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

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9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order, otherwise it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Mr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 Federal Court Rules, 1998, SOR/98-106

> 151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments Below

A. Federal Court, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought [page530] interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the

objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the [page531] appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

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20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under Rule 151 of the Federal Court Rules, 1998, and Sierra Club cross-appealed the ruling under Rule 312.

22 With respect to Rule 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b) which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under Rule 312.

23 On the issue of the confidentiality order, Evans J.A. considered Rule 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in [page533] the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in AB Hassle v. Canada (Minister of National Health and Welfare), [2000] 3 F.C. 360 (C.A.), where the court took into consideration the relatively small public interest at stake, and Ethyl Canada Inc. v. Canada (Attorney General) (1998), 17 C.P.C. (4th) 278 (Ont. Ct. (Gen. Div.)), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its

undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without [page534] reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence, or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326. There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

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31 Robertson J.A. stated that although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets", this information will not be disclosed during a trial if to do so would

destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a prima facie right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

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33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site plans for nuclear installations were not, for example, posted on a Web site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35 A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the

Federal Court Rules, 1998?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the [page537] freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835. Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the Dagenais framework utilizes overarching Canadian Charter of Rights and Freedoms principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under Rule 151 should echo the underlying principles laid out in Dagenais, although it must be tailored to the specific rights and interests engaged in this case.

39 Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at [page538] religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the Charter. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-Charter common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from R. v. Oakes, [1986] 1 S.C.R. 103. At p. 878 of Dagenais, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In New Brunswick, supra, this Court modified the Dagenais test in the context of the related issue of how the discretionary power under s. 486(1) of the Criminal Code, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": New Brunswick, at para. 33; [page539] however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the Charter. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the Criminal Code, closely mirrors the Dagenais common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
> (b) the judge must consider whether the order is limited as much as possible; and
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in R. v. Mentuck, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case R. v. O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77. In Mentuck, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the Charter. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while Dagenais dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the [page540] accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both Dagenais and New Brunswick was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the Charter than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the Charter and the Oakes test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in Dagenais, but broadened the Dagenais test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully

interpreted so as not to [page541] allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve Charter rights, and that the ability to invoke the Charter is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflec[t] the substance of the Oakes test", we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the Dagenais framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 Mentuck is illustrative of the flexibility of the Dagenais approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with Charter principles, in my view, the Dagenais model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in Dagenais, New Brunswick and Mentuck, granting the confidentiality order will have a negative effect on the Charter right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with Charter principles. [page542] However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order

to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a Charter right, the right to a fair trial generally can be viewed as a fundamental principle of justice: M. (A.) v. Ryan, [1997] 1 S.C.R. 157, at para. 84, per L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone [page543] demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the Charter: New Brunswick, supra, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: New Brunswick, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of Dagenais and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

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(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in Mentuck, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second [page545] branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in Eli Lilly and Co. v. Novopharm Ltd. (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would

impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: AB Hassle v. Canada (Minister of National Health and Welfare) (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed [page546] by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the AB Hassle test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (at para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be [page547] filed. As well, the

majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal, in the sense that, at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese [page548] authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably

alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free [page549] expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a Charter right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: Ryan, supra, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected Charter right, the proper administration of justice calls for a confidentiality order: Mentuck, supra, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and [page550] permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents

contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) Charter right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: New Brunswick, supra, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, [page551] at p. 976; R. v. Keegstra, [1990] 3 S.C.R. 697, at pp. 762-64, per Dickson C.J. Charter jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the Charter: Keegstra, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to Charter principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: Edmonton Journal, supra, at pp. 1357-58, per Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be promoted by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents

with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or [page552] documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would in turn assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would [page553] restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in Edmonton Journal, supra, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic

society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court [page554] principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. [page555] I reiterate the caution given by Dickson C.J. in Keegstra, supra, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity".

86 Although the public interest in open access to the judicial review application as a whole is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in Edmonton Journal, supra, at pp. 1353-54:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

[page556]

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the CEAA, or that it will be able to mount a successful defence in the absence of

these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the [page557] scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under Rule 151 of the Federal Court Rules, 1998.

[page558]

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.
Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.
Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

cp/e/qllls

Indexed as:

Zündel v. Canada (Canadian Human Rights Commission)

Between
Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, the Attorney General of Canada, the Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'nai Brith, appellants, and
Ernst Zündel and Canadian Association for Free Expression Inc., respondents

[2000] F.C.J. No. 678

[2000] A.C.F. no 678

[2000] 4 F.C. 255

[2000] 4 C.F. 255

256 N.R. 125

25 Admin. L.R. (3d) 135

97 A.C.W.S. (3d) 977

Dockets A-258-99, A-269-99

Federal Court of Appeal
Toronto, Ontario

Isaac, Robertson and Sexton JJ.

Heard: April 4, 2000.
Judgment: May 18, 2000.

(18 paras.)

Appeal from the judgment of the Trial Division of the Federal Court of Canada, delivered April 13,

1999 in Docket No. T-1411-98, [1999] F.C.J. No. 503.

Counsel:

Jane S. Bailey, for the appellants, Sabina Citron and the Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for the appellants, Toronto Mayor's Committee on Community and Race Relations.
Richard Kramer, for the appellant, Attorney General of Canada.
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Robyn M. Bell, for the appellant, Simon Weisenthal Centre.
Joel Richler and Judy Chan, for the appellant, Canadian Jewish Congress.
Marvin Kurz, for the appellant, League for Human Rights of B'Nai Brith.
Douglas Christie and Barbara Kulaszka, for the respondent, Ernst Zündel.
Gregory Rhone, for the respondent, Canadian Association for Free Expression Inc.

The judgment of the Court was delivered by

SEXTON J.:--

INTRODUCTION

1 This is an appeal from an application for judicial review of two rulings made by the Canadian Human Rights Tribunal in the course of hearing a human rights complaint made against Mr. Zündel. In the first ruling (A-258-99), the Tribunal ruled that counsel for Mr. Zündel could not engage in a certain line of cross-examination. In the second ruling (A-269-99), the Tribunal refused to qualify a witness tendered by Mr. Zündel as an expert witness. The issue in these appeals is whether Mr. Zündel's applications for judicial review of the Tribunal's rulings are premature on the basis that the rulings are interlocutory decisions made during the course of the Tribunal's proceedings. This set of reasons deals with both appeals and a copy will be placed in each file.

BACKGROUND FACTS

2 Prior to the time that these applications for judicial review were brought, the Canadian Human Rights Tribunal was inquiring into whether an Internet website operated by Mr. Zündel contravened s. 13(1) of the Canadian Human Rights Act.

Ruling at issue in A-258-99

3 During the hearing, counsel for the Canadian Human Rights Commission called a witness

described as "an expert historian in the field of anti-Semitism and Jewish-Christian relations."[1] During the course of cross-examination of that witness, counsel for Mr. Zündel sought to cross-examine the witness on the "truth" of certain statements found on Mr. Zündel's website, which the witness had testified were anti-Semitic.

4 Counsel for the Canadian Human Rights Commission objected to the line of questioning, arguing that the so-called "truth" of the statements was irrelevant, since truth was not a defence to the s. 13(1) complaint at issue before the Tribunal.

5 The Tribunal accepted the Commission's arguments. It held that "questions as to the truth or falsity of the statements found on the Zundel site [i.e. the website at issue] add nothing to our ability to determine the issues before us, and potentially will add a significant dimension of delay, cost and affront to the dignity of those who are alleged to have been victimized by these statements."[2]

Ruling at issue in A-269-99

6 In its second ruling, the Tribunal was asked to qualify a witness tendered by Mr. Zündel as an expert. It declined to do so, holding that an expert witness "must be capable of giving an objective, disinterested and unbiased opinion."[3] The Tribunal held that the witness tendered by Mr. Zündel was not capable of doing so, since it considered his views on anti-Semitism to be "so extreme as to render his opinion well beyond the impartial and objective standard required of an expert."[4] The Tribunal added that the witness did "not bear any of the essential indicia of an expert in the subject area."[5]

7 Mr. Zündel applied to the Federal Court-Trial Division for judicial review of the Tribunal's two rulings.

THE FEDERAL COURT - TRIAL DIVISION'S DECISION

8 In short reasons, the Motions Judge held that he was satisfied that "special circumstances exist to hear the present judicial review applications which are with respect to interlocutory evidentiary decisions."[6] He held that because he had concluded in a related application for judicial review that one of the members who had participated in the two evidentiary rulings was subject to a reasonable apprehension of bias, the two rulings should be quashed.

ANALYSIS

9 In a related appeal (A-253-99), I have concluded that the member who participated in the two evidentiary rulings at issue in this appeal is not subject to a reasonable apprehension of bias. Accordingly, I disagree with the Motion Judge's reasons for allowing Mr. Zündel's applications for judicial review in these matters. Consequently, the interlocutory rulings must be dealt with on an alternative ground.

10 Are the applications for judicial review premature? As a general rule, absent jurisdictional issues, rulings made during the course of a tribunal proceeding should not be challenged until the tribunal's proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute. For example, in the proceedings at issue in this appeal, the Tribunal made some 53 rulings. If each and every one of the rulings was challenged by way of judicial review, the hearing would be delayed for an unconscionably long period. As this Court held in In Re Anti-Dumping Act,[7] "a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal."[8]

11 This rule has been re-affirmed by many courts. Although her remarks were made in the context of criminal proceedings, I think McLachlin J.'s remarks in R. v. Seaboyer[9] are apposite here:

> [...] I would associate myself with the view that appeals from rulings on preliminary enquiries ought to be discouraged. While the law must afford a remedy where one is needed, the remedy should, in general, be accorded within the normal procedural context in which an issue arises, namely the trial. Such restraint will prevent a plethora of interlocutory appeals and the delays which inevitably flow from them. It will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case.[10]

12 In Szczecka v. Canada (Minister of Employment and Immigration),[11] Létourneau J.A. held:

> [...] Unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgment. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses which interfere with the sound administration of justice and ultimately bring it into disrepute.[12]

13 Similarly, in Howe v. Institute of Chartered Accountants of Ontario,[13] the Ontario Court of Appeal held that it was "trite law that the court will only interfere with a preliminary ruling made by an administrative tribunal where the tribunal never had jurisdiction or has irretrievably lost it."[14]

14 Notwithstanding the general rule, counsel for Mr. Zündel argued that the two rulings made by the Tribunal constituted "special circumstances" that warranted immediate judicial review. He argued that the Tribunal's rulings were so significant that they went to the Tribunal's very

jurisdiction.

15 I disagree. The rulings at issue in these appeals are mere evidentiary rulings made during the course of a hearing. Such rulings are made constantly by trial courts and tribunals and if interlocutory appeals were allowed from such rulings, justice could be delayed indefinitely. Matters like bias and a tribunal's jurisdiction to determine constitutional questions or to make declaratory judgments have been held to go to the very jurisdiction of a tribunal and have therefore constituted special circumstances that warranted immediate judicial review of a tribunal's interlocutory decision.[15] By contrast, rulings made by a coroner refusing to permit certain questions to be asked have been considered not to result in the loss of jurisdiction sufficient to warrant immediate judicial review of an interlocutory decision.[16] Similarly, in Doman v. British Columbia (Securities Commission),[17] Huddart J. (as she then was) held that "the fact that an evidentiary ruling may give rise to a breach of natural justice is not sufficient reason for a court to intervene in the hearing process."[18] Huddart J. added:

> I find support for that conclusion in the policy of the appeal courts not to review a judge's ruling under the Charter made during the course of a trial. Substantive rights are at stake, the trial judge can be wrong, evidence may be inadmissible, the decision may be overturned, a new trial may be required, but nothing should be allowed to interfere with the trial process once it has begun.[19]

16 In oral argument, counsel for Mr. Zündel argued that had he waited until the Tribunal determined the merits of the complaint, ss. 18.1(2) of the Federal Court Act would have deprived him of the ability to seek judicial review of the two rulings at issue in this appeal. Subsection 18.1(2) states:

> 18.1(2) Time limitation -- An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Trial Division may, either before or after the expiration of those thirty days, fix or allow.

17 In light of my conclusion that each and every ruling made by a Tribunal in the course of its proceedings cannot be the subject of an application for judicial review, it follows that the word "decision" contained in s. 18.1(2) cannot refer to every interlocutory decision a tribunal makes. A party against whom an interlocutory order has been made is not therefore under an obligation to immediately appeal in order to preserve his rights. In my view, the time period prescribed in s. 18.1(2) of the Federal Court Act does not begin to run until the final decision in the proceedings has been rendered. If the Tribunal's final decision is appealed, any objection to procedures taken during the hearing of the appeal can be raised at that time.

CONCLUSION

18 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999.

SEXTON J.
ISAAC J.:-- I agree.
ROBERTSON J.:-- I agree.

cp/d/qlndn/qlhcs/qlhbb

1 Appeal Book A-258-99, p. 37 XXXX.

2 Ibid., pp. 37 DDDDD-37 EEEEE.

3 Appeal Book A-269-99, p. 234.

4 Ibid., p. 231.

5 Ibid.

6 Ibid., p. 8.

7 [1974] 1 F.C. 22 (C.A.), cited approvingly by this Court in Canada v. Schnurer Estate, [1997] 2 F.C. 545 (C.A.).

8 Ibid., p. 34.

9 [1991] 2 S.C.R. 577.

10 Ibid., p. 641.

11 (1993), 116 D.L.R. (4th) 333 (F.C.A.).

12 Ibid., p. 335. See also People First of Ontario v. Ontario (Niagara Regional Coroner) (1992), 87 D.L.R. (4th) 765 (Ont. C.A.) ("We entirely agree with the Divisional Court that it is undesirable to interrupt inquests with applications for judicial review. Whenever possible, it is best to let the inquest proceed to its resolution and then perhaps, if circumstances dictate, to take judicial proceedings.")

13 (1994), 19 O.R. (3d) 483 (C.A.).

14 Ibid., p. 490.

15 Pfeiffer v. Canada, [1996] 3 F.C. 584 (T.D.).

16 People First of Ontario v. Ontario (Niagara Regional Coroner) (1992), 87 D.L.R. (4th) 765 (Ont. C.A.).

17 (1995), 34 Admin. L.R. (2d) 102 (B.C.S.C.).

18 Ibid., p. 109.

19 Ibid.