

C A N A D A

PROVINCE OF QUEBEC  
DISTRICT OF MONTRÉAL  
LOCALITY OF MONTRÉAL

SUPERIOR COURT  
(Class Actions)

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No: 500-06-001039-201

**WALTER EDWARD DAVIES**

Petitioner

v.

**AIR CANADA**

Respondent

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**APPLICATION FOR AUTHORIZATION TO ADDUCE RELEVANT EVIDENCE  
(ART. 574 CCP)**

TO THE HONOURABLE JUSTICE THOMAS M. DAVIS , S.C.J., THE RESPONDENT  
AIR CANADA RESPECTFULLY SUBMITS AS FOLLOWS:

1. The Respondent Air Canada (the “**Respondent**”) seeks the authorization of this Honourable Court to adduce relevant evidence pursuant to article 574 of the *Code of Civil Procedure* (“**CCP**”).
2. More specifically, the Respondent seeks this Honourable Court’s authorization to adduce as relevant evidence the following:
  - a) The arbitration award and the judgment rendered on judicial review further to a grievance filed on January 28, 2015 by the Canadian Union of Public Employees, Air Canada Component, namely:
    - i) *Air Canada and Canadian Union of Public Employees, Air Canada Component, Grievance CHQ-15-07 : Policy Grievance regarding denial of B1 Travel Passes, award dated April 13, 2018 (Arbitrator Steinberg) (the “**Arbitration Award**”);*
    - ii) *Canadian Union of Public Employees, Air Canada Component v. Air Canada, 2019 ONSC 4613, judicial review rendered on August 1, 2019 (Thorburn, Myers and Favreau JJ) (the “**Judicial Review Judgment**”);*(together, the “**CUPE Judgments**”) copies of which are filed herewith *en liasse* as **Exhibit AC-1**;

- b) A Sworn Statement by Anthony Bursey, Director, Crew Scheduling, at Air Canada, dated September 17, 2020, and the annex in support thereof, a copy of which is filed herewith as **Exhibit AC-2**, namely:
  - i) The collective agreement between Air Canada and The Canadian Union of Public Employees (Airline Division) effective from September 1, 1987 to August 31, 1990 (**Annex A**);
- c) A Sworn Statement by Leslie-Ann Vezina, Director, Employee Travel and Recognition, at Air Canada, dated September 17, 2020, a copy of which is filed herewith as **Exhibit AC-3**;

**I. The Amended Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Petitioner**

- 3. On January 22, 2020, the Petitioner filed an *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Petitioner*, which was later amended on February 26, 2020 (the “**Amended Authorization Application**”), against the Respondent Air Canada on behalf of the following proposed class:

“All retired employees of the Respondent.”

- 4. The proposed class action concerns the travel privileges administered by the Respondent for its unionized and non-unionized employees and eligible retired employees through a system of flight passes, referred to in the Amended Authorization Application as the Free and Reduced-Rate Transportation Plan flight passes (“**FRT Privileges**”).
- 5. It is alleged that the FRT Privileges each carry a priority that, together with an employee’s or retiree’s length of service and other factors, determines whether an employee or an eligible retiree will be allocated space on a given flight and in what order.
- 6. More specifically, the proposed class action concerns the personal travel privileges giving employees and eligible retired employees and certain of their family members access to C2/Y10 FRT Privileges.
- 7. In brief, the Petitioner alleges that the Respondent has diminished the usefulness of C2/Y10 FRT Privileges by awarding to its active employees, from time to time, special personal travel passes carrying a higher priority, thereby eroding the seniority priority of the proposed class members.
- 8. The Petitioner contends that the Respondent has breached an alleged implied contractual obligation towards its retired employees with respect to FRT privileges.

9. The Petitioner further alleges that by awarding to its active employees special personal FRT Privileges of higher priority than the C2/Y10 FRT Privileges, the Respondent is targeting senior citizens in violation of their right to the safeguard of their dignity, and discriminates against the proposed class members on the basis of age.
10. As a result, the Petitioner claims that he and the proposed class members are entitled to injunctive orders, and compensatory and punitive damages.

## **II. The Relevance of the CUPE Judgments**

11. The Amended Authorization Application relies on the general and erroneous assumption that the FRT Privileges are a benefit or a contractual right to which the retired employees of the Respondent are entitled.
12. Indeed, despite the fact that the Petitioner himself alleges that FRT Privileges for personal travel are not mentioned in any labour agreements and have never been negotiated with any union (para. 10 of the Amended Authorization Application), the Petitioner also advances that the FRT Privileges were granted to the retired employees of the Respondent as a right from the beginning of their career (e.g.: paras. 9, 17, 25b), 27, 28, 45b), 54, 55 of the Amended Authorization Application). For instance, the Petitioner alleges that:

“The Respondent now wrongfully takes the position that these flight passes are simply a privilege at the absolute discretion of the Respondent, and therefore, not a continuing obligation owed to the employees. Based on this erroneous premise, the Respondent has unilaterally and without any consideration for the hardship caused to the Class Members, effectively diminished their usefulness by causing to be issued to its active employees an exceedingly large number of priority flight passes such as B1s and C1s to the point that the Petitioner realized in the summer of 2017 that the C2 passes no longer fulfill the requisites to permit a Retiree to reasonably enjoy the use of the FRT flight passes” (para. 12 of the Amended Authorization Application)

13. In this context, the CUPE Judgments (Exhibit AC-1) complete the factual and legal context and serves to correct the erroneous assumption contained in the Amended Authorization Application regarding the nature of the FRT Privileges. Indeed the FRT Privileges for personal travel are neither a benefit nor a contractual right, as recognized by the arbitrator Larry Steinberg in the Arbitration Award *Air Canada and Canadian Union of Public Employees, Air Canada Component* (Grievance CHQ-15-07: Policy Grievance regarding denial of B1 Travel Passes), dated April 13, 2018, and further confirmed by justices Thorburn, Myers and Favreau of the Ontario Superior Court of Justice in the Judicial Review Judgment dated August 1, 2019.
14. The CUPE Judgments (Exhibit AC-1) were rendered further to an arbitration opposing the union to the Respondent concerning the award by Air Canada of three B1/J10 special FRT Privileges per year for 10 years to the members of the

Air Canada Pilots Association following their ratification of a landmark ten-year collective agreement in 2014, the first such long-term agreement negotiated at Air Canada.

15. In his reasons, the arbitrator describes the FRT Privileges program (referred to as the employee travel program in the Arbitration Award) (paras. 17 to 31 of the Arbitration Award) and finds that:
  - a) The Respondent has consistently and zealously maintained that the FRT Privileges for personal travel are privileges (para. 33 of the Arbitration Award);
  - b) The FRT Privileges for personal travel do not guarantee a seat (para. 24 of the Arbitration Award);
  - c) The Respondent has never negotiated the FRT Privileges for personal travel with any union (para. 33 of the Arbitration Award);
  - d) The Respondent has always retained the discretion to change the FRT Privileges for personal travel (para. 33 of the Arbitration Award);
  - e) One aspect of the exercise of the Respondent's discretion is a history of awarding, from time to time, additional special personal travel passes to groups of employees in recognition of various achievements and successes (para. 34 of the Arbitration Award).
16. In the Judicial Review Judgment, judges Thorburn, Myers and Favreau of the Ontario Superior Court of Justice thoroughly review the findings by the arbitrator with regard to the FRT Privileges and dismiss the application for judicial review, thus confirming the Arbitration Award.
17. The findings in the CUPE Judgments (Exhibit AC-1) concerning the FRT Privileges for personal travel are relevant and necessary as they are intrinsically linked to the allegations regarding the nature of the FRT Privileges advanced in the Amended Authorization Application. Indeed, they serve to complete and correct the factual and legal context surrounding the proposed class action, and specifically regarding the very nature of the FRT Privileges themselves. The CUPE Judgment (Exhibit AC-1) are thus relevant and useful to this Honourable Court in its analysis of whether the Amended Authorization Application meets the criteria for the authorization of the class action, and specifically with regard to the appearance of right requirement at article 575 (2) CCP.

### **III. The Relevance of the Sworn Statement of Anthony Bursey**

18. The Amended Authorization Application alleges that the Respondent has breached an alleged implied contractual obligation towards its retired employees with respect to FRT privileges. Indeed, the Petitioner refers on several occasions to the refusal of the Respondent to respect and perform its contractual

obligations (e.g.: paras. 1, 45a), 47, 55, 61c) of the Amended Authorization Application).

19. However, the Petitioner offers no specific details or other palpable information or documentation in support of the source and content of the alleged implied contractual obligation regarding the use of FRT Privileges or with regard to any representations the Petitioner would have himself relied upon regarding the FRT Privileges. He rather relies on the general, vague and unsubstantiated assertions that the Respondent is breaching contractual obligations without providing any contract, agreement or other evidence to support such allegations.
20. In this context, the Sworn Statement of Anthony Bursey, Director, Crew Scheduling, at Air Canada (Exhibit AC-2) serves to provide this Honourable Court with the necessary contractual context applicable to the Petitioner's personal case, which this Honourable Court must consider in its analysis of the authorization criteria.
21. The Sworn Statement of Anthony Bursey (Exhibit AC-2) provides the details and a copy of the collective agreement between Air Canada and The Canadian Union of Public Employees (Airline Division), effective from September 1, 1987 to August 31, 1990 (Annex A), which was applicable the Petitioner at the time of his retirement in October 1987.
22. The Sworn Statement of Anthony Bursey (Exhibit AC-2) also clarifies and confirms that the FRT Privileges for personal travel are not mentioned in the applicable collective agreement and have never been negotiated with the union.
23. In light of the above, the Sworn Statement of Anthony Bursey (Exhibit AC-2) and the collective agreement (Annex A) serve to provide the relevant and necessary contractual context that this Honourable Court requires for its analysis of the authorization criteria, and specifically with regard to the appearance of right requirement pursuant to article 575 (2) CCP,

#### **IV. The Relevance of the Sworn Statement of Leslie-Ann Vezina**

24. While the FRT Privileges administered by the Respondent for its unionized and non-unionized employees and eligible retired employees forms the basis for the proposed class action, the Amended Authorization Application fails to provide any details or the required context regarding the FRT Privileges program as a whole.
25. The program is extensive and complex, and an overview is useful and necessary to assist this Honourable Court in understanding and providing the relevant context in respect of the allegations advanced by the Petitioner in this regard.
26. The Sworn Statement of Leslie-Ann Vezina (Exhibit AC-3) serves this purpose by describing the background information regarding the FRT Privileges, the nature of employee FRT Privileges for personal travel, and the Respondent's use of

special passes to reward employees from time to time. It specifies and clarifies, amongst other things, how the priority attached to FRT Privileges is identified, which retired employees are eligible to receive C2/Y10 FRT Privileges, and how the seniority of a retired employee is established.

27. The Sworn Statement of Leslie-Ann Vezina (Exhibit AC-3) is relevant and useful evidence as it clarifies, explains and completes the vague, ambiguous and incomplete allegations regarding the FRT Privileges which forms the basis of the Amended Authorization Application. It provides the Court with the complete factual matrix regarding the FRT Privileges and will assist this Honourable Court in its analysis of the authorization criteria, and specifically in its determination of whether the Petitioner has established an appearance of right pursuant to article 575 (2) CCP, and also in its consideration of the composition of the proposed class that the Petitioner is seeking to represent.
28. It is thus in the interests of justice and the parties that the Respondent be authorized to submit the relevant evidence described in the present Application in order to complete, correct and explain the allegations in the Amended Authorization Application and to provide this Honourable Court with a complete and comprehensive picture of the factual allegations which are both useful and necessary to assist this Honourable Court in its analysis of the criteria for authorization pursuant to article 575 CCP.
29. The relevant evidence which the Respondent seeks this Court's authorization to submit also satisfies the principle of proportionality required by article 18 CCP: it is proportionate to the nature and to the importance of this proposed national class action.
30. The present Application is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:**

**GRANT** the present *Application for Authorization to Adduce Relevant Evidence*;

**AUTHORIZE** the Respondent Air Canada to adduce the following relevant evidence:

- a) The arbitration award and the judgment rendered on judicial review further to a grievance filed on January 28, 2015 by the Canadian Union of Public Employees, Air Canada Component (Exhibit AC-1), namely:
  - i) *Air Canada and Canadian Union of Public Employees, Air Canada Component*, Grievance CHQ-15-07 : Policy Grievance regarding denial of B1 Travel Passes, award dated April 13, 2018 (Arbitrator Steinberg);
  - ii) *Canadian Union of Public Employees, Air Canada Component v. Air Canada*, 2019 ONSC 4613, judicial review rendered on August 1, 2019 (Thorburn, Myers and Favreau JJ);

- b) A Sworn Statement by Anthony Burse, dated September 17, 2020 (Exhibit AC-2), and the collective agreement between Air Canada and The Canadian Union of Public Employees (Airline Division) effective from September 1, 1987 to August 31, 1990 (Annex A);
- c) A Sworn Statement by Leslie-Ann Vezina, dated September 17, 2020, (Exhibit AC-3);

**THE WHOLE** with legal costs.

Montreal, this September 18, 2020

*Fasken Martineau DuMoulin*

**Fasken Martineau DuMoulin LLP**

Attorneys for the Respondent Air Canada

800 Victoria Square, Suite 3500

P.O. Box 242

Montreal, Quebec H4Z 1E9

Fax number: +1 514 397 7600

**Mtre Sébastien Richemont**

Phone number: +1 514 397 5121

Email: srichemont@fasken.com

**Mtre Noah Boudreau**

Phone number: +1 514 394 4521

Email: nboudreau@fasken.com

**NOTICE OF PRESENTATION**

**ADDRESSEE(S):**

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Mtre Michael Heller  
**Heller and Associates**  
Attorneys for the Petitioner Walter  
Edward Davies  
425, Saint Sulpice  
Montreal, Quebec, H2Y 2V7  
Phone: 514 288-5252 x 103  
Fax: 514 288-7479  
michael@meheller.com

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**TAKE NOTICE** that the present *Application for Authorization to Adduce Relevant Evidence* will be presented for adjudication before the honourable justice Thomas M. Davis S.C.J. of the Superior Court, sitting in civil practice division for the district of Montréal on a date to be determined at a time to be determined at the Montréal courthouse, located at 1 Notre-Dame Street East, Montréal, Quebec, H2Y 1B6, in a room to be determined or by videoconference in a virtual room to be determined.

**DO GOVERN YOURSELVES ACCORDINGLY.**

Montreal, this September 18, 2020

*Fasken Martineau DuMoulin*

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**Fasken Martineau DuMoulin LLP**  
Attorneys for the Respondent Air Canada

800 Victoria Square, Suite 3500  
P.O. Box 242  
Montreal, Quebec H4Z 1E9  
Fax number: +1 514 397 7600

**Mtre Sébastien Richemont**  
Phone number: +1 514 397 5121  
Email: srichemont@fasken.com

**Mtre Noah Boudreau**  
Phone number: +1 514 394 4521  
Email: nboudreau@fasken.com



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**LIST OF EXHIBITS**

- EXHIBIT AC-1:** *Air Canada and Canadian Union of Public Employees, Air Canada Component*, Grievance CHQ-15-07 : Policy Grievance regarding denial of B1 Travel Passes, award dated April 13, 2018 (Arbitrator Steinberg); and  
*Canadian Union of Public Employees, Air Canada Component v. Air Canada*, 2019 ONSC 4613, judicial review rendered on August 1, 2019 (Thorburn, Myers and Favreau JJ)
- EXHIBIT AC-2:** Sworn Statement by Anthony Bursey, Director, Crew Scheduling, at Air Canada dated September 17, 2020, and attached Annex A
- EXHIBIT AC-3:** Sworn Statement by Leslie-Ann Vezina, Director, Employee Travel and Recognition, at Air Canada, dated September 17, 2020

Montréal, this September 18, 2020

*Fasken Martineau DuMoulin*

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**Fasken Martineau DuMoulin LLP**

Attorneys for AIR CANADA

800 Victoria Square, Suite 3500

P.O. Box 242

Montréal, Quebec H4Z 1E9

Fax number: +1 514 397 7600

**Mtre Sébastien Richemont**

Phone number: +1 514 397 5121

Email: [srichemont@fasken.com](mailto:srichemont@fasken.com)

**Mtre Noah Boudreau**

Phone number: +1 514 394 4521

Email: [nboudreau@fasken.com](mailto:nboudreau@fasken.com)