

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL  
No: 500-06-001213-228

**SUPERIOR COURT  
(CLASS ACTION CHAMBER)**

**MICHÈLE DUSSAULT,** [REDACTED]

Applicant

v.

**AIR CANADA**, legal person having its head office at 7373 boulevard de la Côte Vertu Ouest, Saint-Laurent, district of Montreal, province of Québec, H4S 1Z3

**AIR CANADA ROUGE**, legal person having its head office at 7373 boulevard de la Côte Vertu Ouest, Saint-Laurent, district of Montreal, province of Québec, H4S 1Z3

**JAZZ AVIATION S.E.C.**, legal person having its head office at 6200 – 100 King Street West, 1 First Canadian Place, Toronto, Ontario, M5X 1B8

Defendants

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**APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND  
APPOINT APPLICANT AS CLASS REPRESENTATIVE**  
(Art. 571 C.C.P. and following)

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**TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT, SITTING IN AND  
FOR THE DISTRICT OF MONTREAL YOUR APPLICANT STATES AS FOLLOWS:**

**OVERVIEW**

1. This application for authorization relates to the Defendants' practice of categorizing flight delays and cancellations as Flight Disruptions within the Defendant's control but "required for safety reasons" where that ostensible safety reason is actually a product of the Defendants' own preventable conduct relating to foreseeable staffing issues. In so categorizing the nature of their own foreseeable staffing issues, the Defendants shift, unlawfully and without a claim of right, the cost and inconvenience flowing directly from their own avoidable conduct onto the Applicant and Class Members.

2. Under the *Air Passenger Protection Regulations*, SOR/2019-150 (the "APPR"), the Applicant and Class Members are entitled to mandatory payments of compensation for inconvenience because they were informed of a flight disruption caused by foreseeable and resistible staffing issues within the defendants control 14 days or less before their original departure time which caused them to reach their destination at least 3 hours later than the arrival time indicated on their ticket.
3. During the Class Period, the Defendants preemptively and systematically miscategorized delays and cancellations caused by crew constraints as Flight Disruptions "within their control but required for safety purposes" and avoided their statutory obligation to pay compensation for inconvenience. As the obligations set out in the APPR form part of the contract concluded between the Class Members and the Defendants, the Defendants' conduct represents their failure to respect the contractual agreement they bound themselves to perform when they offered and sold a ticket for air passenger carriage to the Applicant and Class Members.
4. Through this class action lawsuit, the Applicant and Class Members seek to hold the Defendants to account for their full and proper performance of the contractual obligations set out and agreed upon and seek relief for the Defendants' failure to provide compensation for inconvenience to air passengers affected by flight disruptions caused by controllable and foreseeable staffing issues.

## **PARTIES**

### **A. APPLICANT AND CLASS**

5. The Applicant resides in Carignan, Quebec, and seeks authorization to institute a class proceeding on behalf of themselves and of the following class and consumer sub-class:

All passengers of Air Canada-operated or code-share flights subject to the APPR, between December 15, 2019 and the date this action is authorized as a class action who reached their destination at least 3 hours after scheduled arrival because of a flight disruption resulting from staffing issues or crew constraints, of which they were informed of within 14 days of their scheduled departure time, and for which they were denied compensation for inconvenience by Air Canada on the basis that this flight disruption was required for safety purpose

The "Class Members" and the "Class" and the "Class Period."

All Class Members who are natural persons and purchased their flight for family or personal purposes other than for their business

The "Consumer Sub-Class Members" and the "Consumer Sub-Class."

### **B. DEFENDANTS**

6. The Defendant Air Canada operates passenger flights within Canada ("Domestic Flights") and to or from Canada ("International Flights"), under the authority and requirements of the *Canada Transportation Act*, SC 1996, c 10 and related enactments, such as the APPR.
7. Air Canada is Canada's largest airline and provides a daily average of 500 domestic flights, 400 transborder flights between Canada and the USA, and 147 international flights, as seen on the copy of Air Canada's Corporate Information Webpage, filed in support of this Application as **Exhibit P-1**.
8. Headquartered at 7373 boulevard de la Côte Vertu Ouest, Saint-Laurent, QC, H4S 1Z3, Air Canada operates air transport services in the province of Quebec through the Montreal-Pierre Elliott Trudeau airport, one of their three principal hubs in Canada, as seen on the copy of Air Canada's corporate information retrieved from the Quebec *Registraire des entreprises* (the 'REQ'), **Exhibit P-2**.
9. Owned by Air Canada, the Defendant Air Canada Rouge S.E.C., provides premium services to passengers on Air Canada-operated flights. Air Canada Rouge's elected domicile is located at Air Canada's Headquarters, 7373 boulevard de la Côte Vertu Ouest, Saint-Laurent Québec, H4S 1Z3, as seen on the copy of Air Canada Rouge's corporate information retrieved from the REQ, **Exhibit P-3**.
10. Under a capacity purchase agreement, the Defendant Jazz Aviation S.E.C. operates domestic and transborder airline services on behalf of Air Canada under the brand name Air Canada Express and indicates a principal establishment in the province of Quebec at 740 boulevard de la Côte-Vertu, Station 56, Montréal QC H4Y 1C1, as seen on the copy of Jazz Aviation's corporate information retrieved from the REQ and on the copy of Air Canada's Corporate Information Webpage, both filed in support of this Application as **Exhibits P-4** and **P-1**, respectively.
11. As Air Canada Express, Jazz Aviation S.E.C. operates a daily average of 660 flights amounting to 30,000 passengers carried each day, as seen on the screenshot of Jazz Aviation's Corporate Fact Sheet Webpage, **Exhibit P-5**.
12. Considering the corporate structure as well as the nature of the relationships and service operation agreements in place between Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C., each execute air passenger services on behalf of one another and are considered solidarily liable for the contractual failures and resulting injuries alleged in this claim.
13. Therefore, in this action and Application, Air Canada, Air Canada Rouge S.E.C., and Jazz Aviation S.E.C. are collectively referred to as "Air Canada" and the "Defendants".

## FACTS

### A. APPLICANT'S TRAVEL WITH AIR CANADA

14. On or around March 3, 2022, the Applicant reserved a round-trip cruise from Cape Liberty, New Jersey to Bermuda for herself and her family, her husband, two children and their partners, scheduled for the week of Sunday July 31, 2022, to Saturday July 7, 2022.
15. The Applicant entered a contract of carriage with Air Canada by reserving tickets for herself and her family on an Air Canada-operated flight AC8939 (referred herein as the "Ticket Contract") scheduled to arrive on Saturday July 30, 2022 the day before the cruise's departure to ensure a timely arrival for check-in to the cruise on Sunday morning, as appears on the Applicant's reservation confirmation filed in support of this Application as **Exhibit P-6**.
16. In doing so, the Applicant bound themselves to pay the applicable fare established by Air Canada, for a sum of \$112.47. In return, Air Canada bound themselves to carry the Applicant from their point of origin, Montreal-Pierre Elliott Trudeau (YUL) on July 30, 2022 at 8:25 am ET to their destination, Newark Liberty International Airport, Newark New Jersey (EWR) arriving at 9:59 am ET as it appears on the confirmed booking reservation filed in support of this Application as **Exhibit P-6**.
17. This description of travel set out in the ticket reservation itinerary was essential for the Applicant and her family. As avid cruise travelers, it was paramount that they arrive the day before the scheduled departure of the cruise ship on the Sunday morning.
18. On July 30, 2022, while in a taxi on the way to the airport the Applicant received a text message from Air Canada notifying her that Flight AC8938 YUL-EWR was cancelled due to crew constraints, as seen on the copy of the screen shot of the text message received by the Applicant in support of this Application as **Exhibit P-7**.
19. Indeed, the Flight AC8938 YUL-EWR was cancelled, as appears on the copy of historical flight status of Flight AC8939 YUL-EWR included as **Exhibit P-8**.
20. This text message also notified the Applicant was notified that Air Canada had automatically reserved alternative travel arrangements for her carriage from Montreal to Newark, via a connection through Toronto Flight AC411, as also appears on the copy of the screen shot of the text message received by the Applicant **Exhibit P-7**.
21. The description of the alternative travel arrangement did not conform to the originally scheduled ticket concluded between the Applicant and Air Canada. Under the modified itinerary, the Applicant was scheduled to depart from Montreal at 12:00 pm ET and arrive in Toronto at 1:20 pm ET, as appears on the copy of flight history of Flight AC411 YUL-YYZ filed in support of this action as **Exhibit P-9**.
22. This unilateral modification to the contractual terms by Air Canada meant that the Applicant was scheduled to depart from Montreal more than 3 hours behind original scheduled departure.
23. Moreover, in reality, Flight AC411 YUL-YYZ departed at 1:06 pm ET, more than three hours after the initial scheduled time of arrival at their destination indicated on the original Ticket Contract concluded between the Applicant and Air Canada.

24. The Applicant's son was also automatically rebooked, but instead of the same flight as the Applicant, he was rescheduled on a different flight also connecting through Toronto expected to arrive in Newark at 22:00 pm ET, more than 12 hours after the scheduled time of arrival at their destination indicated on their original Ticket Contract concluded.
  25. This unilateral modification was not satisfactory or an acceptable solution for the Applicant. Their travel needs required that they arrive in Newark in time for the departure time of the cruise and considering that Flight AC411 YUL-YYZ was already delayed when it was offered to them, they were concerned that the rebooked flights would follow a similar pattern and be cancelled.
  26. The Applicant and her family took matters in their own hands and drove to Newark themselves.
  27. During their drive to New Jersey, the Applicant phoned Air Canada and advised the representative of that these alternative travel arrangements were unsatisfactory. The representative from Air Canada reassured the Applicant that they were entitled to a refund for the cost of cancelled flight AC8939.
  28. The Applicant has not been refunded for the applicable fare provided to Air Canada for Flight AC8939 YUL-EWR, cancelled by Air Canada due to crew constraints.
  29. As a result of Air Canada's failure to perform the contract as agreed upon and provide services in conformity with the descriptions set out in the Ticket Contract, the Applicant bore unexpected expenses, such as:
    - a. A total of CAD \$77.33 in gas to drive to their car to New Jersey;
    - b. A total of CAD \$53.25 in food;
    - c. A total of CAD \$232.94 to park her car at the port in New Jersey;
    - d. A total of CAD \$21.36 in tolls;
    - e. A total of CAD \$62.88 in gas to return their car from New Jersey;
- For a total of CAD\$ 447.76, indicated by the charges made to the Applicant's credit card (Z411242354, Z496631118 and Z884679194 GAS; Z051860648 and Z328680800 FOOD; Z877636378 PARKING; and Z328603028 TOLLS) on the copy of their credit card statements filed in support of this Application as **Exhibit P-10** and **Exhibit P-11**.
30. Considering Air Canada's failure to honour their contractual undertakings, as of July 30, 2022, the Applicant was entitled to demand that the obligations incumbent on Air Canada be performed in full, properly and without delay.
  31. As such, on August 8, 2022, the Applicant submitted a claim to Air Canada under the APPR via their online web-form (a "Flight Disruption Claim"), as seen on the copy Air Canada's e-mail confirmation of reception of her claim (case number CAS-4908732-S2X1D6) filed in support of this Application as **Exhibit P-12**.
  32. The above email confirmation assured the Applicant that they would review her claim and get back to her within 30 days.



33. On September 13, 2022, Air Canada denied the Applicant's Flight Disruption Claim citing that the crew constraints causing the cancellation of AC8939 was required for safety reasons:

Based on the information we have collected, the root cause of your disruption was not within the control of the airline or is due to safety-related reasons and therefore regulations do not call for compensation in this case.

As seen on the copy of the email denial from Air Canada dated September 13, 2022, filed in support of this Applicant as **Exhibit P-13**.

34. As seen above, Air Canada's denial does not identify the root cause of the crew constraints and fails to specify whether the cancellation was due to an event within Air Canada's control but required for safety purposes or whether it was due to an event outside of Air Canada's control.
35. In addition to their failure to identify the category of event causing the cancellation, Air Canada is silent about the nature of the crew constraints.
36. From the information provided, the Applicant is left guessing as to how the constraints on the crew were anything other than controllable, foreseeable, and resistible.
37. With such a lack of information, it is impossible for the Applicant to understand how these crew constraints were not foreseeable.
38. Air Canada's denial of the Applicant's Flight Disruption Claim contains no reference to how she may obtain a refund for the cancelled Flight AC8939 YUL-EWR, a service she duly paid the applicable fare for, nor any reference to how to reclaim losses she incurred as a result of Air Canada's failure to perform their contractual obligations as set out in the Ticket Contract.
39. In sum, despite the Applicant's attempt to hold Air Canada to account for their failed performance of the expected contractual obligations, Air Canada swerved accountability by categorizing this crew constraint as an unforeseeable and irresistible event (their categorization of which also ignored to specify whether this event was outside of Air Canada's control or within Air Canada's control but required for safety reasons) and refused to provide the Applicant with compensation for inconvenience, or a refund or a reimbursement of the losses incurred as a result of Air Canada's conduct.
40. The services provided by Air Canada to the Applicant were not conform to the description made of them in the contract.

## **B. CONTENT AND NATURE OF APPLICANT AND AIR CANADA'S TICKET CONTRACT**

41. The Ticket Contract is a contract of adhesion. The nature of Air Canada's commercial power as Canada's largest airline are among the circumstances that made it impossible for the Applicant to negotiate the essential terms and conditions of the contract which were drawn up by Air Canada and standardized. Except for the ability of the Applicant to

exercise an option between different classes service, for example economy class or business class, the stipulated terms were nonnegotiable (art. 1379 CCQ).

42. Moreover, the Ticket Contract is a consumer contract. The Applicant, as a consumer under s. 2 of the *Consumer Protection Act* ("CPA") reserved their Ticket from Air Canada, a merchant under s 2 of the CPA, during their business as Canada's largest airline for a family vacation, a personal and family purpose and not for the purposes of the Applicant's own business (art. 1384 CCQ and art. 2 CPA.).
43. As such, Air Canada is obligated to provide the Applicant with services conform to the description made in the contract, in this case the Ticket Contract (art. 40 CPA).
44. A contract of carriage is a contract by which a carrier (in this case Air Canada), undertakes to carry a person (in this case the Applicant, or the passenger) from one place to another, in return for a price which the passenger undertakes to pay at the agreed time (art. 2030 CCQ).
45. The Applicant and Air Canada are bound to perform the obligations arising from the Ticket Contract according to its express terms drawn up by Air Canada and agreed to by the parties.
46. In concluding a contract of carriage with the Applicant, Air Canada bound themselves to perform the obligations owed to the Applicant described in their tariff respecting flights within Canada ("Domestic Tariff") and in their tariff in respect of flights with a departure or destination outside of Canada ("International Tariff"), as it appears from Rule 5 of Air Canada's Domestic Tariff and International Tariff, respectively **Exhibit P-14** and **Exhibit P-15**.
47. The Domestic and International Tariff (together, the "Tariffs") contain the express terms that bind the Applicant and Air Canada in their contractual relationship.
48. Among the obligations set out in express terms of the Ticket Contract, the Applicant bound themselves to pay the applicable fare established by Air Canada, a sum of \$112.47 to Air Canada. In return, Air Canada bound themselves to carry the Applicant from their point of origin, Montreal at 8:25 am ET to their destination Newark, NJ by 9:59 am ET, as set out in Rule 25 A. (1) of the International Tariff, **Exhibit P-15** and as seen on the Applicant's reservation record, **Exhibit P-6**.
49. A term and condition of the service offered and held out to be provided to the Applicant was the itinerary of their transportation, which as stated above was described as air transportation services departing from Montreal at 8:25 am on July 30, 2022 and arriving in Newark at 9:59 am on July 30, 2022, as stated on their reservation record, see Rule 25(D) of Air Canada's International Tariff, **Exhibit P-15**.
50. In addition, the contractual terms described that prices are non-refundable except if the flight is cancelled as it was in the case of the Applicant's Flight AC8938, see Rule 30(3) of the International Tariff, **Exhibit P-15**.

51. The description of the contract of carriage concluded between the Applicant and Air Canada also sets out that the following services will be provided to the Applicant in the event of a schedule irregularity that is within Air Canada's control:

- a. Air Canada will provide alternate travel arrangements as set out in the APPR. The alternate travel arrangement is deemed to be satisfactory to the passenger unless the passenger advises otherwise prior to the departure of the new travel arrangement. If the passenger refuses such arrangements because they do not accommodate their travel needs and chooses to no longer travel, the passenger is entitled to an Involuntary Refund, in accordance with RULE 100 – REFUNDS and compensation pursuant to APPR if requested within one year of the delay or cancellation;
- b. If passenger has been informed of the delay or cancellation less than 12 hours before the initially scheduled departure, and has been delayed more than two hours after the initial scheduled departing time, Air Canada will provide food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger;
- c. For a Schedule Irregularity lasting overnight, Air Canada will also provide hotel or other reasonable accommodation for out of town passengers that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport, subject to availability;
- d. Compensation

If, due to delay or cancellation within Air Canada's control, passenger arrives with a delay at arrival of three hours or more, Air Canada will provide compensation within accordance of the APPR. Only the operating carrier will provide compensation.

- e. A passenger is not eligible for delay or cancellation compensation under APPR if:
  - i. The passenger was delayed at arrival for reason outside of Air Canada's control or required for safety purposes, such as when the passenger's flight was delayed or cancelled due to weather;
  - ii. The passenger has already been paid denied boarding compensation for the same event;
  - iii. The passenger was informed of the delay or cancellation more than 14 days before the scheduled departure time;
  - iv. The passenger did not submit the claim for compensation under APPR within one year of the delay or cancellation.

As seen in Rule 80(B)(3) of the International Tariff, **Exhibit P-15**.



52. The Involuntary Refunds out in Rule 100 contains a description of how a refund by Air Canada will be provided to the Applicant for unused ticket or portion thereof, including the following:
- a. An Involuntary Refund is owed:
    - i. As a result of a departure delay, cancellation, denied boarding or downgrade pursuant to Rule 80 and Rule 90;
    - ii. As a result of any reason within Air Canada's control in the event the passenger is prevented from using all or a portion of their ticket, including a substitution to a lower class of service by the carrier (downgrade) or a missed connection due to Schedule Irregularity.
  - b. The amount of the Involuntary Refund is either:
    - i. If the passenger is not at the point of origin and travel no longer serves a purpose, refund the full value of the ticket and provide the passenger with a confirmed reservation back to the point of origin that accommodates the passenger's needs.
    - ii. If a portion of the trip has been made and the passenger elects to continue to destination by travel not arranged by carrier, the amount of refund of the unused portion will be prorated on mileage.
    - iii. When a Schedule Irregularity results in the passenger travelling in lower class of service (downgrade) than that purchased, Air Canada will refund the far difference for the affected flight(s).

As seen in Rule 100(D) of the International Tariff, **Exhibit P-15**.

53. In addition to the express terms of the Ticket Contract, the Applicant and Air Canada are bound to perform the obligations arising from what is incidental to it, including obligations imposed on contracts of carriage by the Civil Code of Quebec and as set out in federal regulation of the Canadian airline industry.
54. Under the rules applicable to contracts of carriage, Air Canada may not exclude or limit their liability except to the extent and subject to the conditions established by the law (art. 2034 al. 1 CCQ).
55. In addition, the obligation to carry the Applicant without delay is an obligation of result. This means that in the event Air Canada fails to bring about the specific and determined outcome expected by this contract, which is to carry the Applicant to the destination as agreed upon, Air Canada is bound to make reparation for injury resulting from delay, unless they can prove superior force (art. 2034 al. 2 CCQ).
56. In concluding a contract with the Applicant, Air Canada bound themselves to perform the obligations owed to the Applicant described in their tariff respecting flights within Canada ("Domestic Tariff") and in their tariff in respect of flights with a departure or destination

outside of Canada ("International Tariff"), as it appears from Rule 5(C) of Air Canada's Domestic Tariff and International Tariff, respectively **Exhibit P-14** and **Exhibit P-15**.

57. In addition to the express terms and the terms set forth in their International Tariff, Air Canada is bound to perform their contract in conformity with the duties and conduct incumbent on them by the APPR for all flights subject to its application.
58. The purpose of the APPR is to hold air carriers such as Air Canada to their word and to provide possible recourses for passengers when an air carrier does not hold up their side of the bargain.
59. More specifically, the sponsor of the legislation, Honorable Marc Garneau (as he was then), stated that the importance of the obligations set out in the APPR is for the passenger to receive what is expected when they reserve their ticket, and when the airline fails to deliver what is expected, the passenger is compensated by the airline:

I believe that when passengers purchase an airline ticket, they expect and deserve the airline to fulfill its part of the transaction. When that agreement is not fulfilled, passengers deserve clear, transparent, and enforceable standards of treatment and compensation.<sup>1</sup>

60. In particular, the APPR mandates Air Canada to pay minimum levels of compensation for inconvenience if the Applicant's flight is delayed and/or cancelled with notice of 14 days or less (individually, "Flight Disruptions") due to an event or situation within Air Canada's control that causes the Applicant's arrival to be at least 3 hours later than the arrival time set out on the Ticket Contract.
61. The rights and obligations imposed on both the Applicant and Air Canada set out in the APPR form part of the Ticket Contract. Air Canada has integrated these obligations related to compensation for inconvenience directly in their Domestic and International Tariffs, see the compensation scheme set out at Rule 80 of their Domestic Tariff and Rule 80 of their International Tariff, respectively **Exhibit P-14** and **Exhibit P-15**.
62. In concluding the Ticket Contract, Air Canada bound themselves to provide the Applicant with compensation for inconvenience for a flight disruption within their control that was not required for safety purposes, as set out in ss. 10-12:
  - a. On one hand, compensation for inconvenience is never owed for flight disruption caused by situations outside of Air Canada's control (s. 10 APPR).
  - b. On the other hand, compensation for inconvenience is always owed for flight disruptions caused by situations within Air Canada's control, except where the disruption was required for safety purposes (ss. 11 and 12 APPR).

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<sup>1</sup> Honorable Marc Garneau, Sponsor of Bill X, Monday, June 5, 2017, Official Report (Hansard), online at: <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-187/hansard#9581962>

63. As per s. 19 of the APPR, the Ticket Contract grants the Applicant the right to file a Flight Disruption Claim from Air Canada to obtain this compensation for inconvenience within a year of the disruption.
64. Also set out by s. 19 of the APPR, the Ticket Contract grants Air Canada the right to refuse the claim in the specific circumstances that the Flight Disruption is attributable to an unforeseeable and irresistible event.
65. The contractual discretion disclosed at s. 19(4) sets out two possibilities for Air Canada: either i) provide the Applicant with the compensation for inconvenience, or ii) where there exists an unforeseeable and irresistible event and hence valid reason for not providing compensation, provide the Applicant a complete explanation as to why compensation was not payable, as seen on the Canadian Transport Agency ("Agency") guidance document on Flight delays and cancellations, **Exhibit P-16**.
66. Air Canada has an archival system of the written notifications setting out the communicated reasons for flight disruptions to passengers, as seen on the copy of the Report of the Inquiry Officer for the Canadian Transport Agency dated September 30, 2020, filed in support of this Application as **Exhibit P-17**.
67. Finally, in concluding the Ticket Contract, Air Canada bound themselves to act in accordance with good faith at the time the obligation arises and at the time it is performed or extinguished (art. 1375 CCQ).
68. In the performance of their contractual obligations, no right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, which would therefore be contrary to the requirements of good faith (art. 7 CCQ).
69. This obligation to exercise rights in a reasonable manner infers that Air Canada has an obligation to perform their contractual obligations with honesty, and extends to Air Canada's right to exercise discretion and categorize circumstances of a Flight Disruption in one of the three categories set out by the APPR:
  - a. Outside of Air Canada's control – s. 10 APPR
  - b. Within Air Canada's control, but required for safety purposes – s. 11 APPR
  - c. Within Air Canada's control – s. 12 APPR
70. Air Canada's exercise of their discretion to determine which category the Applicant's Flight Disruption falls into simultaneously determines whether they must provide the Applicant with compensation or not.
71. It is therefore essential for Air Canada to exercise this discretion according to the principles of good faith to legitimize the original expectations of the bargain concluded between the two when the ticket was reserved.

### **C. AIR CANADA TO COMPENSATE DELAY, UNLESS FORCE MAJEURE**

72. Air Canada's power is limited to assess the circumstances leading to the Flight Disruption does not mean they can categorize the event as they please.

73. Air Canada must act honestly and reasonably in exercising their contractual discretion, which is limited to applying the specific category, as set out and defined by law, to the circumstances of the Flight Disruption at hand.
74. Flight Disruptions outside of Air Canada's control are defined by characteristics and examples of events that amount to a *force majeure*.
75. Section 10 of the APPR lists examples of events that are outside of Air Canada's control, such as a natural disaster, war, labor strikes, etc. (s. 10(3) APPR).
76. All of these events have a characteristic in common: they are unforeseeable and irresistible events that render Air Canada's performance of their obligation impossible.
77. The fact that the APPR does not mandate Air Canada to provide compensation for inconvenience in situations where war makes it impossible to carry the Applicant to their destination according to the agreed upon terms aligns with the maxims *nemo tenetur ad impossibilia* (no one is bound to the impossible) and *impossibilium nulla obligatio* (an impossibility creates no obligation).
78. A *force majeure*, also known as superior force or an "act of God", is an unforeseeable, and irresistible event, including external causes with the same characteristics, that render the performance of the obligation impossible (art. 1470 al. 2 CCQ).
79. Thus, the terms of the Ticket Contract set out that where such an event renders Air Canada's performance impossible, they are not expected to provide compensation for inconvenience for delay.
80. Applying this to the context of crew constraints, if a war broke out the morning of the Applicant's flight resulting in a constraint on the members of the crew required to operate flight AC8939, then this Flight Disruption could be categorized under s. 10 APPR as crew constraints outside of Air Canada's control.
81. Also, Flight Disruptions within Air Canada's control, but required for safety purposes, are defined by characteristics and examples of events that amount to *force majeure*.
82. The APPR define "required for safety purposes" in section 1(1) as:
 

required by law in order to reduce risk to passenger safety and includes required by **safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a safety management system** as defined in subsection 101.01(1) of the *Canadian Aviation Regulations* but does not include scheduled maintenance in compliance with legal requirements.

[Bold emphasis added]
83. Thus, Air Canada only has a right to categorize a Flight Disruption as "required for safety" where there is either:

- a. a safety decision made within the authority of the pilot of the aircraft; or
  - b. a decision made in accordance with a safety management system (“SMS”) as defined by federal regulation.
84. A Flight Disruption “required for safety purposes” may arise from a decision made by the pilot of the aircraft regarding safety issues identified during pre- or post- flight checks which are performed to locate last-minute, unforeseeable issues, see the copy of the Canadian Transport Agency – Flight delays and cancellations: A guide, page 4, **Exhibit P-16**.
85. A Flight Disruption “required for safety purposes” may also arise from decisions made in accordance with the air carrier’s internal safety management policies to reduce and control aviation accidents. For example, during an event like engine failure or fire on board, the safety management system may direct staff to disrupt the flight as a part of the designated response to eliminate, mitigate or tolerate this safety risk.
86. In both above scenarios, the Flight Disruption is the result of a decision made by the pilot or in accordance with an SMS that is necessary to address unforeseen, irresistible events outside the normal scope of activities of Air Canada.
87. Applying this to the context of crew constraints, only where the constraint results from either i) a decision made by the pilot facing an unforeseeable and last-minute event, or ii) a decision made according to a safety management system, can they be categorized as “within Air Canada’s control – but required for safety”.
88. If the crew constraint does not result from a decision made by the pilot, or according to an SMS, then it does not fit the definition of Flight Disruptions within Air Canada’s control but required for safety purposes.
89. In other words, crew constraints may only be considered outside of Air Canada’s control where the constraint’s root cause is a *force majeure*, and crew constraints may only be considered within Air Canada’s control but required for safety purposes where the constraint results from a decision of the pilot or an SMS in response to an event amounting to a *force majeure*.

**A. CREW SHORTAGES ARE FORESEEABLE FLIGHT DISRUPTIONS NOT REQUIRED FOR SAFETY PURPOSES**

90. First, unless caused by a *force majeure* such as war or political instability, situations related to crew constraints and staffing issues are always within a carrier’s control.
91. Situations related to crew constraints do not satisfy the two essential elements of *force majeure* – foreseeability and irresistibility.
92. In the case at issue in this Application, at the time the Ticket Contract was concluded, Air Canada could have reasonably foreseen that staff member absences or crew constraints would impact their ability to perform their obligations as they bound themselves to.



93. In addition, the Applicant has no information that allows her to infer the crew constraint in question was irresistible, meaning that the specific constraint would have prevented *any* person placed in Air Canada's situation from fulfilling their obligation of carrying the Applicant to Newark as agreed upon.
94. Second, where crew constraints are within the carrier's control, the Flights Disruptions they cause do not meet the requirements to be categorized as "required for safety purposes" unless one of the required decisions set out in the definition of "required for safety purposes" was made in the circumstances.
95. On November 17, 2021, in Decision No. 122-C-A-2021 the Canadian Transport Agency (the "Agency") held that:
- a) Crew absences or shortages are part of day-to-day operations, and therefore should be anticipated and planned for, including in relation to the expiration of crew duty time limits.
  - b) Carriers are responsible for proper crew scheduling, including reasonable contingency planning and that a crew shortage caused by a scheduling error of the carrier would therefore be due to a situation within the carrier's control.
  - c) In categorizing a flight disruption caused by a crew shortage, the circumstances surrounding the crew shortage must be considered, including, but not limited to, the following factors:
    - i. Whether there were events affecting the flight that caused the crew shortage and whether those events were outside the carrier's control, within the carrier's control, or within the carrier's control but required for safety purposes; and
    - ii. Whether the carrier has prepared and implemented reasonable contingency plans, considering elements which may impact scheduling of new crew, such as whether the issue occurred in a remote or foreign location;
  - d) A flight disruption due to a crew shortage must be categorized according to the event causing that shortage; and
  - e) A lack of reasonable contingency planning renders the flight disruption within the carrier's control and not required for safety purposes.

As seen on the copy of Decision No. 122-C-A-2021, **Exhibit P-18**.

96. On July 8, 2022, the Agency concluded that a disruption caused by a crew shortage should not be considered "required for safety purposes" when the carrier's own actions caused the safety issue. In Decision No. 89-C-A-2022 (*Lareau v WestJet*), the Agency held:

- f) Flight Disruptions within the carrier's control but required for safety purposes are limited to events that cannot be foreseen nor prevented or, in other words, that cannot be prevented by a prudent and diligent carrier.
- g) Carriers generally have control over staffing issues such as how many employees they hire, how far in advance their employees are hired and trained, where employees are dispatched, the frequency of their employees' work assignments and at which hubs employees are located.
- h) The threshold for establishing that a crew shortage was not within the carrier's control within the meaning of the APPR is high.
- i) To show the disruption was outside the carrier's control, the carrier must demonstrate that it could not have reasonably prevented the disruption despite proper planning. This includes not only contingency planning, but also advance planning to ensure that the carrier has enough staff available to operate the services it offers for sale, considering that various events can affect a carrier's day-to-day operations.

As seen on the copy of Decision No. No. 89-C-A-2022, **Exhibit P-19**.

- 97. On August 25, 2022, in Decision No. 107-C-A-2022, the Agency uphold the above two decisions and ordered Air Canada to pay Ms. Lisa Crawford \$1000, as prescribed by the APPR, as seen on the copy of Decision No. 107-C-A-2022, **Exhibit P-20**.
- 98. Air Canada's leave for appeal of this Decision 107-C-A-2022 to the Federal Court of Appeal was denied.
- 99. In emphasizing the elements of foreseeability and irresistibility, these decisions stand for the proposition that crew shortages are within the carrier's control and not required for safety purposes, unless they amount to *force majeure*. These decisions constitute a simple presumption of exactitude.
- 100. The events leading to flight disruptions caused by situations outside of the air carrier's control per s. 10(3) of the APPR and the flight disruptions caused by a situation within the air carrier's control "required for safety purposes" per s. 11(3) of the APPR, are in both cases events that amount to a *force majeure*.
- 101. In both of the above situations, compensation for inconvenience is not owed by Air Canada as the nonperformance was caused by an unforeseen and irresistible event outside of Air Canada's control.
- 102. In sum, where unforeseeable amounting to a *force majeure* cause crew constraints and therefore a flight disruption, Air Canada is not expected to provide compensation for inconveniences beyond their control.
- 103. Conversely, where the flight disruption is caused by crew constraints that are not cumulatively unforeseeable, irresistible, and external, Air Canada is expected to provide the prescribed compensation for inconvenience considering their nonperformance.

104. Thus, in the case of the Applicant's cancelled Flight AC8939 YUL-EWR, by categorizing the Flight Disruption as either under s. 10 or s. 11 (without specifying which one), Air Canada indicated that the crew constraints constituted unforeseeable and irresistible circumstances.

**B. AIR CANADA PREEMPTIVELY DETERMINED THEIR OWN FORESEEABLE CREW SHORTAGES WERE "REQUIRED FOR SAFETY PURPOSES"**

105. On or around December 29, 2021, Air Canada issued an internal direction to its employees advising that all disruptions caused by crew shortages would be categorized as "within the carrier's control – but required for safety purposes," as seen below, and on the internal memorandum produced in support of this Application as **Exhibit P-21**.

106. The internal Air Canada memorandum dated December 29, 2021 reads:

29 December

**Flight Cancellations due to Crew Constraints are now "Within Carrier Control – For Safety" (Temporary)**

Effective immediately, flight cancellations due to CREW are considered as *Within Carrier Control – For Safety*. Upon close review by our Legal, Customer Relations and the Commercial teams, it has been deemed that these flight cancellations are tightly tied with COVID-19 causing cabin or flight crew shortages. This is implemented on a temporary basis only, any further updates will be communicated at a later date.

**What this means for our customers:**

Customers impacted by these flight cancellations will still be eligible for the standard of treatment such as hotel accommodations, meals etc. but will no longer be eligible for APPR claims/monetary compensation.

CASUAL CATEGORY	NETLINE 4-ALPHA CODE	3-ALPHA CODE	KEY WORD	INTERPRETATION	SCENARIOS	Refund (YES/NO)	Compensation	Standards of Treatment	Rebooking
Within Carrier Control – For Safety	CREW	FOC	CREW	Crew Constraints	Cancellation Due to crew constraints – COVID Restrictions	YES	NO	YES	YES

107. On July 25, 2022 representatives of Air Canada indicated that this direction to Air Canada staff to exercise the contractual discretion of s. 19 in this predetermined manner remains in place, see the CBC News Article dated August 7, 2022, provided in support of this Application as **Exhibit P-22**.

108. In essence, Air Canada directed its employees to preemptively categorize flight disruptions resulting from crew shortages as situations that fall into section 11 of the APPR, rather than section 12 of the APPR. Whether Air Canada made the same or similar

direction at an earlier point in time is unknown to the Applicant but well known to Air Canada.

109. Air Canada exercised its contractual discretion to categorize events causing crew shortages as "required for safety" weeks, and in the case of the Applicant months before the Ticket Contract was concluded and before such future constraints even occurred.
110. In plain language contained in this memorandum, Air Canada acknowledges and declares the foreseeability of cabin or flight crew shortages.
111. Despite foreseeing crew constraints since December 2021 and alerting their staff to this fact, Air Canada continues to categorize Flight Disruptions caused by crew constraints as "unforeseeable".
112. In the Applicant's case, Air Canada categorized the crew constraints as unforeseeable and irresistible citing that the Flight Disruption was "not within the control of the airline or is due to safety-related reasons."
113. By doing so, Air Canada exercises their discretionary power set out in s. 19 APPR in a dishonest manner. Air Canada's conduct to deem the crew constraints as unforeseeable when in reality they have foreseen such events since December 2021.
114. In addition, Air Canada exercises their contractual right to determine the APPR category of the Flight Disruption in an unreasonable manner. By internally deeming crew constraints as foreseeable, but externally deeming such crew constraints as unforeseeable, Air Canada acts contrary to the practical reality.
115. Furthermore, Air Canada's conduct is particularly dishonest and unreasonable considering that they have never provided the information necessary for the Applicant to understand what circumstances led to the Flight Disruption.
116. Justifying their denial to compensate the Applicant by describing the Flight Disruption as 'outside of Air Canada's control' or 'within Air Canada's control – but required for safety purposes' does not allow the Applicant to understand the Flight Disruption.
117. The APPR categories are conclusions of law. By simply providing the Applicant with the legal conclusion they arrived at after exercising their discretion against the facts of the circumstances, rather than setting out the facts underlying this conclusion, Air Canada acts unfairly and unreasonably by withholding the information necessary for the Applicant to be informed of the root cause of the Flight Disruption.

### **C. AIR CANADA'S LIABILITY**

118. Air Canada has a duty to honour their contractual undertakings and provide minimum mandatory compensation for inconvenience as detailed therein when a flight is delayed, cancelled or the passenger is denied boarding due to situations within Air Canada's control and not required for safety purposes.
119. Air Canada's conduct has engaged their contractual responsibility towards the Applicant under the *Civil Code of Quebec*.

120. As described above, Air Canada's conduct is contrary to the standards incumbent upon them, and in particular, failed to perform the following contractual obligations:
- a. By cancelling Flight AC8939 due to crew constraints, Air Canada failed to provide air carriage services of the Applicant from Montreal to Newark on July 30, 2022 as expected and as set out in the Ticket Contract, and not in conformity with the description made of the services in the Ticket Contract.
  - b. Air Canada failed to provide the Applicant with expected compensation for inconvenience they bound themselves to provide in situations where foreseeable and resistible events cause a Flight Disruption;
  - c. Air Canada failed to provide the Applicant with the expected factual information allowing the Applicant to understand the root cause of the Flight Disruption that justifies the APPR category provided;
  - d. By preemptively categorizing crew shortages as "required for safety purposes", Air Canada exercised their right to refuse Flight Disruption claims in an unreasonable and dishonest manner, and therefore contrary to the requirements of good faith.
  - e. By
121. Due to the above-described conduct, Canada failed to provide services to the Applicant in conformity to the description made of the services set out in the Ticket Contract, in violation of article 40 of the *Consumer Protection Act*, CQLR c P-40.1 (the "CPA").
122. Air Canada's conduct is reprehensible, abusive and particularly reckless of the consumer. Air Canada takes advantage of the power dynamic present in consumer contracts between airline passengers and large airline carriers.

#### **D. PREJUDICE**

123. Air Canada's has failed to honour their contractual undertakings to the Applicant and provided services that did not conform to the description agreed upon the Applicant and Air Canada and set out in the content of the Ticket Contract.
124. As a result of Air Canada's failure to perform its contractual obligations as agreed upon with the Applicant, the Applicant is justified to be placed in the position she would have been had the Ticket Contract been performed fully and properly and to receive compensation to repair the injury she has suffered as a result of the unjustified breach.
125. Air Canada was bound to perform the Ticket Contract in full, properly and without delay as well as repair the injury borne by the Applicant. Considering their failure to do so, Air Canada was in default of their obligations arising from the Ticket Contract.
126. The Applicant demanded that they do so and submitted a Flight Disruption Claim. Air Canada refused the Applicant's Flight Disruption claim and as set above; this refusal was without justification.



127. For these reasons, the Applicant demands now that her right to performance of the Ticket Contract be performed by equivalence and that she be placed in the position she would have been had the Ticket Contract been performed properly.
128. As such, the Applicant is entitled that Air Canada repair the injury she has suffered because of the unjustified breach and pay her the following sums:
  - a. Damages in the sum equivalent to the amount paid to Air Canada for cancelled Flight AC8939, for a total of \$112.74.
  - b. Damages in the sum equivalent to the losses borne by the Applicant as a result of the unjustified breach, for a total of \$447.76.
  - c. Damages in the sum equivalent to the prescribed compensation for inconvenience set out in the APPR and mirrored in Air Canada's Tariffs.
  - d. Punitive damages in the sum of \$1000.00 for Air Canada's reckless and intentional violation of the Applicant's rights as a consumer.

#### **FACTS GIVING RISE TO CLAIMS HELD BY CLASS MEMBERS**

129. The facts that give rise to the personal claim of the Applicant are the same as each personal claim belonging to members of the class against the Defendant.
130. Each of Air Canada's Domestic and International Tariffs form a part of the contracts held by each Class Member.
131. As a federal regulation, the obligations set out in the APPR form a part of the contractual content for both residents of Quebec as well as residents of common law provinces and territories.
132. The Superior Court of Quebec's general, inherent, and residual jurisdiction allows it to hear and adjudicate the claims held by the Class Members.
133. This action calls upon the adjudicative powers of the Superior Court of Quebec and seeks a private law contractual remedy of an order for damages to place the Applicant and Class Members in the positions they would be had Air Canada properly and fully performed the Ticket Contract and to seek remedies available as a result of Air Canada's violation of consumer protection legislation.
134. Neither the *Canadian Transportation Act*, or its related enactments have assigned an exclusive power to adjudicate the matters set out in this claim to another court or specialized tribunal (*WestJet c. Chabot*, 2016 QCCA 584).
135. The Superior Court of Quebec has jurisdiction over the national class, the extraterritorial nature of which is appropriate in the circumstances of this case:

- a) The claims regarding conduct contrary to good faith were exercised in the province of Quebec, the location of the headquarters from which the directive was sent.
- b) The APPR and the Tariffs of Air Canada are uniform and apply in the same way for all putative class members across Canada.
- c) The conduct alleged to constitute contractual faults or breaches of contract is the same for each class member.
- d) Air Canada violated federal laws, the APPR, that applies to all class members.
- e) Air Canada has a headquarters in Quebec.
- f) Air Rouge S.E.C. indicates their establishment to be at Air Canada's headquarters in Quebec.
- g) Jazz Aviation S.E.C. has a commercial establishment in the province of Quebec and operates their services in Quebec.

The proposed action is available and practical for all persons across Canada.

- 136. Each Class Member concluded a contract with Air Canada for a flight scheduled to fly to or from Canada, or with a connection to or from Canada, during the Class Period.
- 137. Each Class Member executed their respective obligations set out in the terms of the contract and paid the applicable fare to Air Canada for their airline ticket.
- 138. Each Class Member meets the definition of passenger on a cancelled or delayed flight within the meaning of ss. 10 to 12 of the APPR.
- 139. Each Class Member was notified of a Flight Disruption caused by crew constraints within 14 days of their scheduled departure.
- 140. As a result of this Flight Disruption, each Class Member arrived at their destination at least 3 hours after the scheduled arrival time indicated on their original ticket.
- 141. Each Class Member addressed Air Canada directly and gave Air Canada the opportunity to perform their obligations owed.
- 142. Each Class Member was denied compensation for inconvenience by Air Canada who cited that the disruption was due to circumstances within the carrier's control but required for safety purposes per s. 11 of the APPR.
- 143. Each Class Member bore losses resulting from Air Canada's failure to perform the contract as agreed upon, including refund of their original flight, costs related to food and other elements required as standards of treatment set out in the APPR, costs to cover out-of-pocket expenses, and a sum equivalent to the compensation for inconvenience as prescribed by the APPR.

144. Accordingly, the Class Members are justified to seek an order that they be placed in the position they would be had Air Canada properly and fully performed their contract as set out and according to the principles of good faith.
145. These amounts can be determined on a class-wide basis and are capable of individual recovery.
146. For the Applicant and Class Members residing in Quebec, they are entitled to be placed in the position they would be had Air Canada properly and fully performed the contract concluded between them and for damages to repair the losses they incurred because of Air Canada's violation of good faith pursuant to articles 6, 7, 1375, 1458 and 1590 C.C.Q.
147. For the Class Members residing in Canada outside of Quebec, they plead and rely on the common law right to be placed in the position they would be had Air Canada properly and fully performed the contract concluded between them as well as the common law rules related to good faith to demand compensatory damages for Air Canada's violation of the duty of honesty in contractual performance (*Bhasin v Hrynew*, 2014 SCC 71; *C.M. Callow Inc. v Zollinger*, 2020 SCC 45).
148. The Consumer Subclass plead and rely on the *Consumer Protection Act*, pursuant to articles 40 and 272 CPA for the Class Members residing in Quebec and under equivalent provisions in consumer protection legislations of each province and territory for Class Members residing in Canada outside of Quebec.

#### **IDENTICAL, SIMILAR OR RELATED QUESTIONS OF FACT OR LAW**

149. The conclusions sought by each class member are the same and raise identical, similar or related questions of fact and law, namely:
  - a) In disrupting the Class Members' flights because of crew constraints, did the Defendant's air passenger carriage services conform to the description made of these services in the contract?
  - b) Have the Defendants violated the *Consumer Protection Act*, LRQ c. P-40.1, and the corresponding consumer protection legislation in other provinces and territories?
  - c) In disrupting the Class Members' flights because of crew constraints, did the Defendants fail to perform the contract for carriage concluded with the Class Members properly and fully?
  - d) Did the Defendants fail to inform the Class Members properly and fully as to the reason for the crew constraint and thus why compensation for inconvenience was not payable?
  - e) In directing their staff to preemptively categorize crew constraints causing a flight disruption as flight disruptions within the Defendants' control but required for safety reasons, did the Defendants fail to act according to their duty of good faith and violate their duty to honest contractual performance?

- f) Does the Defendant's failure to perform the contract according to its agreed upon terms engage the Defendants contractual liability towards the Class Members?
- g) Are the Class Members entitled to damages for equivalent to the losses incurred because of the Defendants' breach and in what amount?
- h) Are the Class Members entitled to punitive damages because of the Defendant's reprehensible and reckless conduct and in what amount?
- i) If the Class Members are entitled to compensatory or punitive damages, can these damages be

### **COMPOSITION OF CLASS MAKES RULES OF MANDATE IMPRACTICAL**

- 150. The composition of the class makes it difficult and/or impractical to apply the rules of mandates to take part in judicial proceedings on behalf of others for consolidation of proceedings pursuant to articles 59 or 67 C.C.P.
- 151. The sheer size of the class makes it impossible for the representative to contact each to potentially obtain their consent in a joinder or a mandate. As Canada's largest airline, Air Canada provides a daily average of 500 domestic flights, 400 transborder flights between Canada and the USA, and 147 international flights, as seen on the copy of Air Canada's Corporate Information Webpage, filed in support of this Application as **Exhibit P-2**.
- 152. In addition, due to the relatively modest amount claimed for each class member this claim speaks to one of the main objectives of the class action which is to provide an access to justice for claims with otherwise may not be adjudicated before the courts.

### **CLASS ACTION IS APPROPRIATE**

- 153. A class action is an appropriate vehicle for the relief sought by the class group for the following reasons.
- 154. The total amounts of compensation for inconvenience owed to each Member are set out in prescribed categories in the APPR and may be applied according to a grid for each Class Member's circumstances.
- 155. The determination of facts underlying each Flight Disruption made by Air Canada is maintained in an archive and may be collectively applied to each of the Class Members circumstances.
- 156. Air Canada may purport that it is impossible to determine the APPR category on a collective basis such as this and therefore a class action is inappropriate. This Application advances why this is not the case.
- 157. In addition, determining the root cause of each Flight Disruption is a contractual obligation that Air Canada bound themselves to already have performed properly and fully, and thus Air Canada cannot benefit from their nonperformance.

158. The cost of bringing each individual action would disproportionately exceed the amount sought by each member against Air Canada and the majority of Class Members may not have the time or money that allows them to access justice through other means, such as the Small Claims Court.
159. Furthermore, due to extended processing times and blanket denials by air carriers, if Class Members have the time and information necessary to request a judicial review of Air Canada's denial of their Flight Disruption to the Agency, they must wait behind all of the other requests before them, which as of August 2022, the backlog was at least 18,200, as seen on the copy of the CBC News article dated August 11, 2022, **Exhibit P-23**.
160. Considering the inherent power of the Superior Court to adjudicate these claims, and the current backlog at the Agency, this proposed class action promotes judicial efficiency and economy by allowing individuals in similar circumstances from across the Country to combine forces and resolve their shared legal and factual issues in a single claim therefore avoiding a multiplicity of decisions.
161. It is expedient that the bringing of a class action for the benefit of the class members be authorized.

#### **PROPOSED CLASS REPRESENTATIVE**

162. The Applicant Michèle Dussault seeks to be appointed the status of representative Applicant for the following reasons.
163. The Applicant is a Class Member and has the legal interest necessary to pursue their own claim against Air Canada.
164. The Applicant has the time, energy, will and determination to assume and perform the duties incumbent upon him that are required to carry out the proposed class action.
165. The Applicant acts in good faith with the only goal in accessing justice and the relief sought for themselves and for the other class members.
166. The Applicant does not have any circumstances that would put them in conflict with the other members of the class.

#### **NATURE OF THE CLASS ACTION**

167. The nature of the action the Applicant intends to bring on behalf of the class members is an action in specific performance and in compensatory and punitive damages.
168. The nature of the Class Members' claims is for contractual liability under the *Civil Code of Québec* (CCQ) and breach of contract under common law principles for residents of other provinces or territories in Canada as well as for damages arising from violations of consumer protection laws in Quebec and across Canada.

#### **CONCLUSIONS**



169. The conclusions that the Applicant wishes to introduce by way of an originating application are:

- j) **GRANT** the Plaintiff's action against the Defendants;
- k) **ORDER** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C, to perform their obligation to inform each Class Member of the factual reasons underlying the Flight Disruption.
- l) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C., solidarily, to pay to the members of the Class an amount to be determined in compensatory damages, and **ORDER** collective recovery of these sums;
- m) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C., solidarily, to pay the members of the Class an amount equivalent to the compensation for inconvenience set out in the APPR, and **ORDER** collective recovery of these sums;
- n) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C., solidarily, to pay the members of the Class \$1000.00 each in punitive damages, and **ORDER** collective recovery of these sums;
- o) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C. to pay interest and additional indemnity provided for by law, accruing as of the of service of this *Application to Authorize the Bringing of a Class Action & to Appoint the Status of Representative Plaintiff*.

#### **DISTRICT**

170. The Applicant suggests that the proposed class action should be brought before the Superior Court of the district of Montreal for the following reasons:

171. Air Canada's headquarters are in Montreal.

172. Pierre-Elliott Trudeau airport, one of Air Canada's main Canadian hubs is located in Montreal.

#### **NOTICE TO CLASS MEMBERS**

173. A draft version of long-form and short-form notices to provide Notice to Class Members according to the Form VI of the Regulation on Civil Procedure, R.R.Q. 1981, c. C-25, r. 8 can be communicated at the request of the Court.

#### **FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present application;

**AUTHORIZE** the bringing of a class action in the form of an originating application in damages;

**APPOINT** the Applicant the status of Representative Applicant of the persons included in the Class herein described as:

All passengers of Air Canada-operated or code-share flights subject to the APPR, between December 15, 2019 and the date this action is authorized as a class action who reached their destination at least 3 hours after scheduled arrival because of a flight disruption resulting from staffing issues or crew constraints, of which they were informed of within 14 days of their scheduled departure time, and for which they were denied compensation for inconvenience by Air Canada on the basis that this flight disruption was required for safety purpose.

and

All Class Members who are natural persons and purchased their flight for family or personal purposes other than for their business.

or any other class to be determined by the Court.

**IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

- a) In disrupting the Class Members' flights because of crew constraints, did the Defendant's air passenger carriage services conform to the description made of these services in the contract?
- b) Have the Defendants violated the *Consumer Protection Act*, LRQ c. P-40.1, and the corresponding consumer protection legislation in other provinces and territories?
- c) In disrupting the Class Members' flights because of crew constraints, did the Defendants fail to perform the contract for carriage concluded with the Class Members properly and fully?
- d) Did the Defendants fail to inform the Class Members properly and fully as to the reason for the crew constraint and thus why compensation for inconvenience was not payable?
- e) In directing their staff to preemptively categorize crew constraints causing a flight disruption as flight disruptions within the Defendants' control but required for safety reasons, did the Defendants fail to act according to their duty of good faith and violate their duty to honest contractual performance?
- f) Does the Defendant's failure to perform the contract according to its agreed upon terms engage the Defendants contractual liability towards the Class Members?

- g) Are the Class Members entitled to damages for equivalent to the losses incurred because of the Defendants' breach and in what amount?
- h) Are the Class Members entitled to punitive damages because of the Defendant's reprehensible and reckless conduct and in what amount?

**IDENTIFY** as follows the conclusions sought by the class action in relation thereof:

- a) **GRANT** the Plaintiff's action against the Defendants;
- b) **ORDER** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C, to perform their obligation to inform each Class Member of the factual reasons underlying the Flight Disruption.
- c) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C., solidarily, to pay to the members of the Class an amount to be determined in compensatory damages, and **ORDER** collective recovery of these sums;
- d) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C., solidarily, to pay the members of the Class an amount equivalent to the compensation for inconvenience set out in the APPR, and **ORDER** collective recovery of these sums;
- e) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C., solidarily, to pay the members of the Class \$1000.00 each in punitive damages, and **ORDER** collective recovery of these sums;
- f) **CONDEMN** the Defendants Air Canada, Air Canada Rouge S.E.C. and Jazz Aviation S.E.C. to pay interest and additional indemnity provided for by law, accruing as of the of service of this *Application to Authorize the Bringing of a Class Action & to Appoint the Status of Representative Plaintiff*.

**DECLARE** that any member who has not requested his exclusion from the class be bound by any judgment to be rendered on the class action, in accordance with law;

**FIX** the delay for exclusion from the Class at 30 days from the date of notice to the Class and after the expiry of such delay the members of the class who have not requested exclusion be bound by any such judgment;

**ORDER** the publication of a notice to the members of the Class according to the terms to be determined by the Court in accordance with article 579 CCP within 60 days from the judgment to be rendered herein by e-mail to each Class Member and Consumer SubClass Member, to their last known email address.

**REFER** the record to the Chief Justice so that he may fix the district in which the class action is to be brought and the judge before whom it will be heard and In the event that the class action is to be brought in another district, that the clerk of this Court be ordered, upon receiving the

decision of the Chief Justice, to transmit the present record to the clerk of the district designated.

**THE WHOLE** with legal costs, including the cost of all notices.

Montréal, December 16, 2022.

*Slater Vecchio LLP*

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**Slater Vecchio LLP**  
Counsel for the Applicant

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## SUMMONS

(Articles 145 and following CCP)

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### **Filing of a judicial application**

Take notice that the Applicant has filed this Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff in the office of the Superior Court in the judicial district of Montreal.

### **Exhibits supporting the application**

In support of the *Application for authorization to Institute a Class Action*, the Applicant relies on the following exhibits:

- Exhibit P-1:** Copy of Air Canada Corporate Information Webpage
- Exhibit P-2:** Copy of a corporate search for Defendant Air Canada
- Exhibit P-3:** Copy of a corporate search for Defendant Air Canada Rouge
- Exhibit P-4:** Copy of a corporate search for Defendant Jazz Aviation
- Exhibit P-5:** Copy of Jazz Aviation's Corporate Fact Sheet Webpage
- Exhibit P-6:** Copy of Celebrity Cruises Booking Confirmation
- Exhibit P-7:** Copy of Air Canada Text Message re Cancellation
- Exhibit P-8:** Copy of Flight History of Flight AC8938
- Exhibit P-9:** Copy of Flight History of Flight AC411
- Exhibit P-10:** Copy of Applicant's Credit Card Statement dated August 16, 2022
- Exhibit P-11:** Copy of Applicant's Credit Card Statement dated October 16, 2022
- Exhibit P-12:** Copy of Air Canada's E-mail Confirming Reception of Claim dated August 8, 2022
- Exhibit P-13:** Copy of Air Canada's E-mail Denial of Claim dated September 13, 2022
- Exhibit P-14:** Copy of Air Canada's Domestic Tariff General Rules
- Exhibit P-15:** Copy of Air Canada's International Tariff General Rules
- Exhibit P-16:** Copy of Canadian Transport Agency Guidance Document on Flight Delays and Cancellations



- Exhibit P-17:** Copy of the Report of the Inquiry Officer for the Canadian Transport Agency dated September 30, 2020
- Exhibit P-18:** Copy of Canadian Transport Agency's Decision No. 122-C-A-2021
- Exhibit P-19:** Copy of Canadian Transport Agency's Decision No. 89-C-A-2022
- Exhibit P-20:** Copy of Canadian Transport Agency's Decision No. 107-C-A-2022
- Exhibit P-21:** Copy of the Air Canada Memo Declaring Crew Shortage as Safety Issue
- Exhibit P-22:** Copy of CBC News Article dated August 7, 2022
- Exhibit P-23:** Copy of the CBC News article dated August 11, 2022

The exhibits in support of the application are available upon request.

### **Defendants' answer**

You must answer the application in writing, personally or through a lawyer, at the courthouse of Montreal situated at 1 Rue Notre-Dame Est, Montreal, Québec, H2Y 186, within 15 days of service of the Application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the Applicant's lawyer or, if the Applicant is not represented, to the Applicant.

### **Failure to answer**

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgement may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

### **Content of answer**

In your answer, you must state your intention to:

- negotiate a settlement;
- propose mediation to resolve the dispute;
- defend the application and, in the case required by the Code, cooperate with the Applicant in preparing the case protocol that is to govern the conduct of the proceeding. The protocol must be filed with the court office in the district

specified above within 45 days after service of the summons or, in family matters or if you have no domicile, residence or establishment in Québec, within 3 months after service;

- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

### **Change of judicial district**

You may ask the court to refer the originating Application to the district of your domicile or residence, or of your elected domicile or the district designated by an agreement with the plaintiff.

If the application pertains to an employment contract, consumer contract or insurance contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred. The request must be filed with the special clerk of the district of territorial jurisdiction after it has been notified to the other parties and to the office of the court already seized of the originating application.

### **Transfer of application to Small Claims Division**

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

### **Calling to a case management conference**

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

### **Notice of presentation of an application**

If the application is an application in the course of a proceeding or an application under Book III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; however, the application must be accompanied by a notice stating the date and time it is to be presented.

Montréal, December 16, 2022

*Slater Vecchio LLP*

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**Slater Vecchio LLP**  
Counsel for the Applicant

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**NOTICE OF PRESENTATION**

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**TO:**

**AIR CANADA**, legal person having its head office at 7373 boulevard de la Côte Vertu Ouest, Saint-Laurent, district of Montreal, province of Québec, H4S 1Z3

**AIR CANADA ROUGE S.E.C.**, legal person having its head office at 7373 boulevard de la Côte Vertu Ouest, Saint-Laurent, district of Montreal, province of Québec, H4S 1Z3

**JAZZ AVIATION S.E.C.**, legal person having its head office at 6200 – 100 King Street West, 1 First Canadian Place, Toronto, Ontario, M5X 1B8

**TAKE NOTICE** that Applicant's *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff* will be presented before the Superior Court at 1 Rue Notre-Dame E, Montréal, Quebec, H2Y 1B6, on the date set by the coordinator of the Class Action chamber.

**GOVERN YOURSELF ACCORDINGLY.**

Montréal, December 16, 2022

*Slater Vecchio LLP*

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**Slater Vecchio LLP**  
Counsel for the Applicant

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**No.**

500-06-001213-228

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SUPERIOR COURT  
DISTRICT OF MONTRÉAL  
(Class Actions)

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**MICHÈLE DUSSAULT**

Applicant

v.

**AIR CANADA et al**

Respondents

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**APPLICATION FOR AUTHORIZATION TO INSTITUTE  
A CLASS ACTION AND APPOINT APPLICANT AS  
CLASS REPRESENTATIVE  
(Article 571 C.C.P and following)**

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Our file: CA0073-2