

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT OF QUÉBEC
(CLASS ACTION)

No.: 500-06-000756-151

██████████, a person residing at ██████████
██████████ City of ██████████
██████████, Province of British Columbia,
Canada, ██████████

Petitioner

vs.

AIR CANADA an airline incorporated pursuant to the laws of Canada with a registered office at 7373 De La Côte Vertu Blvd West in the City of Montréal in the Province of Québec

Respondent

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO
ASCRIBE THE STATUS OF REPRESENTATIVE
(ARTICLE 1002 C.C.P. AND FOLLOWING)**

**TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT OF
QUÉBEC, SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, THE PETITIONER
STATES THE FOLLOWING:**

12-80-3102
0015-00
9207-4100-9209100

Palais Justice Montréal
Gouvernement du Québec
CROIX DE FERRE



I. **GENERAL PRESENTATION**

1. The Petitioner addresses the Court for the purpose of obtaining authorization to institute a class action for and on behalf of the members of the Group (as hereinafter defined) against the Respondent based on the provisions of the *Consumer Protection Act*, chapter P-40.1 (hereinafter the “CPA”) or, in the alternative, the laws of any Canadian province or territory of similar application, and the Respondent’s failure to perform obligations under a contract with each member of the Group in relation to the Flight Pass (as hereinafter defined).

II. **THE PARTIES**

2. The Petitioner, [REDACTED] is a consumer within the meaning of the CPA.
3. The Petitioner wishes to institute a class action on behalf of the following Group of which the Petitioner is a member, namely:

All “consumers”, within the meaning of the CPA, in Canada, who between August 25, 2015 and August 28, 2015:

- a) *purchased, received, and/or acquired a flight pass from Air Canada’s internet website, which consisted of credits for ten business class one-way flights in the Western USA and/or Canada (the “Flight Pass”); and*
- b) *had their Flight Pass delivered to their Air Canada internet website account and subsequently removed from their internet website account by Air Canada;*

or any other group to be determined by the Court;

(hereinafter referred to as “**Petitioner(s)**”; the “**Class Member(s)**”, the “**Class**”, the “**Group Member(s)**”, the “**Group**”, or the “**Customer(s)**”);

4. Air Canada is a body corporate continued under the *Canada Business Corporations Act*. Its registered office is located at 7373 Boulevard de la Côte-Vertu, Saint-Laurent, Québec, Canada, H4S 1Z3, disclosed as **Exhibit P-1** is the Industry Canada corporate registry extract.

5. The Respondent carries on business in the Province of Québec and has its headquarters in the Province of Québec, disclosed as **Exhibit P-2** is the corporate registry extract from the Registraire des entreprises Québec.
6. The Respondent derives revenue as a result of its presence in the Province of Québec and providing airline services throughout Canada.

III. FACTS GIVING RISE TO THE PETITIONER'S CLAIM

7. On August 26, 2015, the Respondent agreed to sell and the Petitioner agreed to purchase a Flight Pass with the name “Western USA Plus Executive 10 credits – 10 credits” bearing Product ID 225EC0000110 from a website owned, operated, and maintained by the Respondent from the domain name aircanada.com (the “Website”). Disclosed as **Exhibit P-3** is the confirmation email and receipt received by the Petitioner.
8. Identical terms as those documented in Exhibit P-3 were shown to the Petitioner prior to his agreeing to purchase the Flight Pass.
9. The use of the Website is bound by the terms of use, disclosed as **Exhibit P-4**, which states that:

“This User Agreement shall be deemed to have been made in the Province of Quebec, Canada, and shall be governed in all respects by the laws of the Province of Quebec, Canada, and the federal laws applicable therein, without regard to its conflicts of law principles. You submit to the exclusive jurisdiction of the courts situated in the judicial District of Montreal, Province of Quebec for the all disputes or disagreements arising pursuant to, or transactions and relationships contemplated by, this User Agreement, and waive any objections as to personal jurisdiction or as to the laying of venue in such courts due to inconvenient forum or any other basis and undertake to file no action or bring no complaint in any other court.”

.....

This User Agreement shall constitute the entire agreement between you and Air Canada with respect to our website, and it supersedes all prior or contemporaneous communications and proposals, whether electronic, oral or written, between you and Air Canada with respect to our website. A printed version of this Agreement and of any notice given in electronic form will be admissible in judicial or administrative proceedings based upon or relating to this Agreement to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form.”

10. The Flight Pass consists of 10 credits, each of which can be redeemed for a one-way flight on routes within Western Canada and the Western United States of America.
11. The Flight Pass also entitles the Petitioner to:
 - a. book flights in the Executive/Business Class fare option (J booking class);
 - b. complimentary advance seat selection;
 - c. complimentary changes at any time;
 - d. access to Maple Leaf Lounges; and
 - e. earn up to 150% Aeroplan Miles for distance flown.
12. The Flight Pass issued to the Petitioner is non-transferrable and can only be used by the Petitioner.
13. The Flight Pass is valid for one year and expires on August 26, 2016 but can be extended for three months for a fee of \$300 CAD plus taxes.
14. At all material times, the Respondent required the purchaser to be a “Canadian resident with a valid address, Aeroplan membership and password at time of purchase AND during the validity period of the pass.”

15. The Respondent advertised and offered the Flight Pass for sale on the Website for \$798.00 plus taxes for a total price of \$837.90. The Petitioner accepted the Respondent's offer by registering for the Aeroplan program and providing his credit card information and authorisation to charge his credit card for the total purchase price (the "Agreement").

16. The Respondent performed the Agreement by charging \$837.90 to the Respondent's credit card, adding the Flight Pass to his online account on the Website, and sending him an email that shows, amongst other terms:

"Your flight pass purchase is confirmed.

Please print this receipt for your reference.

Thank you for choosing Air Canada and we look forward to welcoming you on board.

...

Flight Pass Reference: 0140851366731

...

No refund, in whole or in part, will be issued for any Flight Pass."

17. The Respondent removed the Flight Pass from the Petitioner's account on the Website thereby preventing the Petitioner from using the Flight Pass (the "Taking").

18. On August 28, 2015, the Respondent sent the Petitioner an email, disclosed as **Exhibit P-5**, stating:

"Dear [REDACTED]:

We're in touch with you regarding the Western USA Plus Pass that you recently purchased from Air Canada that was, unfortunately, incorrectly priced and is now corrected. Let me first say that we're sorry for the inconvenience and misperception this error caused and outlined below are details of what happened and the steps we're taking to correct this error and a gesture of thank you for your understanding.

On the evening of August 25th, a computer loading error resulted in a temporary mispricing of our Western USA Plus Pass product for Business Class travel. This product, good for 10 one-way flights, was mistakenly displayed at \$800 instead of the correct price of \$8,000. When we became aware of this error 24 hours later, the passes were withdrawn from sale and the booking of flights was inhibited.

We understand your disappointment and trust you understand we cannot honour the Flight Passes mistakenly sold at 10% of their value. Therefore, any Flight Passes purchased at the incorrect \$800 price will be cancelled and refunded. If you have already made any credit bookings with your incorrectly-priced Flight Pass, however, these flights WILL be honoured and the remaining credits cancelled and refunded on a prorated basis. We appreciate your understanding and to express our thanks, if you choose to re-purchase this Flight Pass at the correct price, we will add an 11th flight credit to the package for free. (Once you complete your purchase, simply eMail us at crflightpass@aircanada.ca with your Flight Pass number and we will process the extra credit.)

Thank you for your support for Air Canada and, as always, we look forward to welcoming you onboard.”

19. At all material times, the Frequently Asked Questions (“FAQ”) section accessed from the “What is a Flight Pass?” page of the Website stated, amongst other questions:

“What happens if the Flight Pass price changes after I purchase it?”

The price of the Flight Pass is guaranteed. You will pay nothing more if the price of the Flight Pass changes after you purchase it.”

20. Disclosed as **Exhibit P-6** is a computer screenshot of the question and answer cited in paragraph 19.

21. At or about the time of the Taking, the Respondent removed the question and answer cited in paragraph 19 from the FAQ section of the Website. Disclosed as **Exhibit P-7** is an excerpt from Respondent's Website on August 31, 2015 after the question and answer was removed.
22. At or about the time of the Taking, Respondent published numerous messages to the public via Twitter, a social media website. Disclosed as **Exhibit P-8** is one example of the Respondent's message indicating that "*There is a 24 hour window, to correct err made on our fares posted online. We apologize for the inconvenience.*"

IV. **FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP**

23. The Respondent advertised a price of approximately \$790, depending on the Group Member's province of residence, for the Flight Pass.
24. Every member of the Group purchased, received, or acquired the Flight Pass from the Respondent's Website during the material times.
25. Every member of the Group is bound by the same Website terms of use, as disclosed in Exhibit P-4.
26. The question and answer referred to in paragraph 19 of the Motion applied to the Flight Passes purchased, received, or acquired by every member of the Group.
27. Every member of the Group was presented with terms and conditions identical to the ones in Exhibit P-3 and thereafter received a confirmation and/or receipt in the form of that in Exhibit P-3.
28. Every member of the Group had their Flight Passes unilaterally removed from their Website accounts by the Respondent on or about August 26, 2015 without agreement or consent.

29. Every member of the Group received an email from the Respondent in the form of that in Exhibit P-5.
30. All of the damages to the Group Members are a direct and proximate result of the Respondent's abusive and unilateral conduct.
31. The questions of fact and law raised and the recourse sought by this Motion are identical with respect to each member of the Group.
32. In taking the foregoing into account, all members of the Group are justified in claiming damages.

V. **CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

33. The composition of the Group makes the application of Article 59 or 67 C.C.P. impractical or impossible for the reasons detailed below.
34. The number of persons included in the Group is estimated to be in the thousands, if not tens of thousands.
35. The names and addresses of all persons included in the Group are not known to the Petitioner but are, however, in the possession of the Respondent.
36. In addition, given the costs and risks inherent in an action before the Courts, many Group Members will hesitate to institute an individual action against the Respondent.
37. Even if the Group Members could afford such individual litigation, the Court system could not as it would be overloaded.

38. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondent would increase delay and expense to all parties and to the Court system.
39. Moreover, a multitude of actions institutes risks leading to contradictory judgments on questions of fact and law that are similar or related to all Group Members.
40. These facts demonstrate that it would be impractical, if not impossible, to contact each and every Group Member to obtain mandates and to join them in one action.
41. In these circumstances, a class action is the only appropriate procedure for all of the Members of the Class to effectively pursue their respective rights and have access to justice.
42. The claims of the Members raise identical, similar, or related questions of fact or law, namely:
- a. Did the Respondent contravene Article 224(c) of the *CPA*?
 - b. Did the Respondent contravene Article 225(c) of the *CPA*?
 - c. Did the Respondent contravene Article 228 of the *CPA*?
 - d. Did the Respondent contravene Article 230(b) of the *CPA*?
 - e. Did the Respondent fail to perform its obligations under the contract for Flight Pass(es) with each member of the Group?
 - f. Are the Group Members entitled to compensatory damages and, if so, in what amount?
 - g. Are the Group Members entitled to punitive or exemplary damages and, if so, in what amount?
43. The majority of the issues to be dealt with are issues common to every Group Member.
44. The damages sustained by the Group Members flow, in each instance, from a common nucleus of operative facts, namely the Respondent's advertisement, refusal to perform its contractual obligations, and unilateral and illegal removal of Flight Passes from the Group Members' possession.

45. The interests of justice favour that this motion be granted in accordance with its conclusions.

VI. **NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

46. The action that the Petitioner wishes to institute on behalf of the members of the Group is an action for damages.

47. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the Group Members;

ORDER the treatment of individual claims of each member of the Group in accordance with Articles 1037 to 1040 C.C.P.;

DECLARE the Respondent liable for the damages suffered by the Petitioner and each of the members of the Group;

CONDEMN the Respondent to pay an amount in compensatory damages to each member of the Group, in an amount to be determined by the Court, plus interest as well as additional indemnity, under Article 1619 of the CCQ, since the date of purchase;

CONDEMN the Respondent to pay an amount in punitive and/or exemplary damages to each member of the Group, in an amount to be determined by the Court, with interest as well as the additional indemnity, under Article 1619 of the CCQ;

CONDEMN the Respondent to bear the costs of the present action including expert, expertise, and notice fees;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;

DECLARE that all members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the Group Members;

ORDER the publication of a notice to the members of the Group in accordance with Article 1006 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Québec and with full costs and expenses including expert fees and publication fees to advise members.

48. The Petitioner suggests that this class action be exercised before the Superior Court in the District of Montréal for the following reasons:

- a. The contract between the Respondent and Group Members for the sale and purchase of Flight Passes was concluded in the Province of Québec;
- b. The contract between the Respondent and each member of the Group has a “real and substantial connection” to the Province of Québec;
- c. The obligations between the Respondent and Group Members are governed in all respects by the laws of the Province of Québec;
- d. The Respondent conducts business in the District of Montréal and the Province of Québec;
- e. The Respondent is a “merchant” within the definition of the *CPA*;
- f. The Respondent’s headquarters is in the Province of Québec; and
- g. The Group Members have, by operation of a contract between the Respondent and each member of the Group, submitted to the exclusive jurisdiction of the courts situated in the judicial District of Montréal, Province of Québec for the resolution of all disputes or disagreements.

49. The Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the members of the Group, since the Petitioner:

- a. was aware of Respondent’s advertisement of the Flight Pass;
- b. purchased a Flight Pass from the Respondent during the material time;
- c. received written confirmation and delivery of the Flight Pass;
- d. had his Flight Pass subsequently removed from his account without consent or agreement;
- e. understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interests of the Members of the Group;
- f. is available to dedicate the time necessary for the present proceedings and to collaborate with Class attorneys in this regard;
- g. is ready and available to manage and direct the present action in the interest of the Class Members and is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class Members;
- h. has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intends to keep informed of all developments;
- i. has given the mandate to the undersigned attorneys to post the present matter on their firm website in order to keep the Class Members informed of the progress of these proceedings and in order to more easily be contacted or consulted by said Class Members; and

j. does not have interests that are antagonistic to those of other members of the Group.

50. The present motion is well-founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

ASCRIBE the Petitioner the status of representative of the persons included in the Group herein described as:

All “consumers”, within the meaning of the CPA, in Canada, who between August 25, 2015 and August 28, 2015:

- a) purchased, received, and/or acquired a flight pass from Air Canada’s internet website, which consisted of credits for ten business class one-way flights in the Western USA and/or Canada (the “Flight Pass”); and*
- b) had their Flight Pass delivered to their Air Canada internet website account and subsequently removed from their internet website account by Air Canada;*

or any other group to be determined by the Court;

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

- a. Did the Respondent contravene Article 224(c) of the CPA?
- b. Did the Respondent contravene Article 225(c) of the CPA?
- c. Did the Respondent contravene Article 228 of the CPA?
- d. Did the Respondent contravene Article 230(b) of the CPA?
- e. Did the Respondent fail to perform its obligations under the contract for Flight Pass(es) with each member of the Group?
- f. Are the Group Members entitled to compensatory damages and, if so, in what amount?
- g. Are the Group Members entitled to punitive or exemplary damages and, if so, in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the Group Members;

ORDER the treatment of individual claims of each member of the Group in accordance with Articles 1037 to 1040 C.C.P.;

DECLARE the Respondent liable for the damages suffered by the Petitioner and each of the members of the Group;

CONDEMN the Respondent to pay an amount in compensatory damages to each member of the Group, in an amount to be determined by the Court, plus interest as well as additional indemnity, under Article 1619 of the CCQ, since the date of purchase;

CONDEMN the Respondent to pay an amount in punitive and/or exemplary damages to each member of the Group, in an amount to be determined by the Court, with interest as well as the additional indemnity, under Article 1619 of the CCQ;

CONDEMN the Respondent to bear the costs of the present action including expert, expertise, and notice fees;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;

DECLARE that all members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the Group Members;

ORDER the publication of a notice to the members of the Group in accordance with Article 1006 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert fees and publication fees to advise members.

Montréal, August 31, 2015



per: Garrett R. Munroe and Simon Lin
Munroe & Company, Barristers & Solicitors
Attorneys for Petitioner