

C A N A D A

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

S U P E R I O R C O U R T

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N° 500-06-000779-161

PRIMO BEDDING COMPANY INC.

Petitioner

and

GEORGE ITZKOVITZ

and

DAVID ITZKOVITZ

Representative Plaintiffs

v.

AIR CANADA

and

AIR CANADA ROUGE

Defendants

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**AMENDED MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION**  
(Arts. 571 ff. C.C.P.)

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IN SUPPORT OF ITS AMENDED MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION,  
THE PETITIONER ALLEGES AS FOLLOWS:

1. During the proposed class period, an airline ticket for international travel (excluding the United States, Mexico and the Caribbean) (“the Airline Ticket”) sold by Air Canada or Air Canada Rouge (“the Defendants”) was made up of two components: air transportation charges (including the base fare and various surcharges) and “taxes, fees and charges”.
2. Those surcharges were made up, in turn, of such things as an international fuel surcharge (the “International Fuel Surcharge”), which varied by destination and over the course of the class period.
3. All of the terms, conditions, and other elements of the purchase of the airline ticket were imposed by Air Canada on its customers without any negotiation. The contract between Air Canada and its customers was one of adhesion.
4. During the class period, the International Fuel Surcharge was an important component of the total fare paid for a ticket, sometimes representing as much as 50% of the total fare price.

5. The International Fuel Surcharge is imposed by Air Canada through a tariff that they update at irregular intervals with the Canadian Transportation Agency ("CTA"). Air Canada is not, by law, required, to file with the CTA its definition of "fuel surcharge" (including how the surcharge is calculated) that it imposes on its customers at the pre-contractual and contractual stages, nor is such definition otherwise subject to examination or approval by the CTA after a filing.

#### Introduction of the International Fuel Surcharge

6. In 2002, Air Canada introduced a tariff for international flights, which included, for the first time, a surcharge of \$15 each way on all international flights.
7. On June 7, 2002, Air Canada's tariff was examined by the CTA, the whole as appears from Order No. 2002-A-216, communicated in support hereof as Exhibit R-1.
8. As set out in that decision, in its presentation attempting to justify the tariff, Air Canada stated that 50% of its traffic was international and that the purpose of the International Fuel Surcharge was "an attempt to recuperate the increased cost of fuel for this segment", and that the International Fuel Surcharge would represent 3% of the ticket price.
9. Furthermore, Air Canada stated that "The carrier advises that it will react to market prices of fuel and, if warranted, will revisit the amount of the surcharge on a regular basis."
10. The CTA found that the tariff was not just and reasonable under the ATS because it had no expiry date, and the proliferation of surcharges made it difficult for consumers to know the real price of a ticket.
11. In 2003, Air Canada filed a new tariff, which was examined by the CTA on February 3, 2003, the whole as appears from Order No. 2003-A-85, communicated in support hereof as Exhibit R-2.
12. The International Fuel Surcharge proposed on this occasion was for \$20 each way. Again, Air Canada indicated that the intention was not for the International Fuel Surcharge to be permanent. In their submissions, Air Canada wrote:

In a letter in support of the application dated January 24, 2003, Air Canada advises that 50 percent of its traffic is international, and that the surcharge is an attempt to recuperate the increased cost of fuel for this traffic. Air Canada notes that its fuel cost increased by 9 percent during the period from September 2002 to January 2003, and anticipates that this cost will continue to escalate in the next few months and that, therefore, it is required to apply the surcharge to all flights. The carrier notes that the surcharge of \$20 for one-way travel represents approximately 4 percent of Air Canada's average international one-way fare. [Emphasis added]

13. This tariff was also rejected by the CTA.

14. In 2004, Air Canada submitted a third tariff containing an International Fuel Surcharge, which the CTA approved on July 15, 2004, the whole as appears from Order No. 2004-A-315), communicated in support hereof as Exhibit R-3.
15. That tariff contained an International Fuel Surcharge of \$11 on all international flights segments, save for Hong Kong, where the charge was \$19. As appears from the decision, the CTA allowed the International Fuel Surcharge on a temporary basis due to the then-prevailing situation with respect to fuel prices. In that regard, the CTA stated: "The Agency expects Air Canada to also monitor fuel prices and to reduce or cancel the surcharges should fuel prices be reduced." The CTA authorized Air Canada to collect the International Fuel Surcharge for airline tickets issued on or before October 31, 2004.
16. In 2004, Air Canada paid an average of 45.9¢ (or 46.2¢) per litre, the whole as appears from Air Canada's 2004 and 2005 Annual Reports, and taking hedging and exchange rates into account. Air Canada's 2004 and 2005 Annual Reports are communicated in support hereof as Exhibit R-4, and Exhibit R-5.
17. The Petitioner has been unable to ascertain what disclosure, if any, Air Canada provided to its passengers in respect of the International Fuel Surcharge in 2004.
18. Later in 2004, Air Canada amended its tariff again, this time increasing the Fuel Surcharge from \$11 to \$19 for all international flights, and \$19 to \$25 for Hong Kong, the whole as approved in Order No. 2004-A-381, communicated in support hereof as Exhibit R-6. The CTA authorized Air Canada to collect the International Fuel Surcharge for airline tickets issued on or before February 28, 2005.
19. Air Canada continued to increase the International Fuel Charge from time to time, introducing updated tariffs and eventually adopting a system where the International Fuel Surcharge varied from destination to destination.
20. In 2007, when its then-current tariff was once again subject to approval by the CTA, Air Canada stated:

Air Canada advises that fuel costs have continued to represent unstable and unavoidable operating costs and that the carrier does not use the surcharge to cover the total cost of fuel, but rather as a means to offset volatility in fuel costs. Air Canada submits that fuel prices at current levels have an adverse impact on its costs as fuel represents a major portion of Air Canada's operating costs.

Furthermore, Air Canada submits that it does not intend to adopt a permanent fuel surcharge for international carriage and has always considered it to be a temporary measure. Air Canada adds that it is committed to monitoring fuel prices, has adjusted the surcharge on numerous occasions, and will react to market prices of fuel and, if warranted, will revisit the amount of the surcharge on a regular basis. Air Canada asserts that it remains committed to removing the fuel surcharge should the price of jet fuel return to below US\$40 per barrel for thirty (30) consecutive days. Air Canada notes that it instructs all of its

customer service agents to advise customers of extra taxes and surcharges, that the fuel surcharge is clearly displayed on its Web site, [www.aircanada.com](http://www.aircanada.com), and that travel agencies are notified of the proposed fuel surcharge, including the effective date and duration of such surcharge. [Emphasis added]

The whole as appears from Order No. 2007-A-89, communicated in support hereof as Exhibit R-7.

21. On September 18, 2008, Air Canada announced that "in response to decreased fuel prices the airline [...] is incorporating fuel surcharges into its advertised base fares on North American flights", the whole as appears from Air Canada's press release of that date communicated in support hereof as Exhibit R-8.
22. Air Canada stated further that:

Although the cost of fuel remains highly volatile and far above historic norms, the recent retreat in oil prices is enabling us to reinstate our previous baggage policy. We are eliminating the second checked bag charge on North American Tango and Tango Plus fares, reflecting our customers' expressed preferences. Further, Air Canada is making its pricing more transparent by removing add-on fuel surcharges for flights within North America and instead adjusting its base fares to cover the total cost of fuel," said Ben Smith, Executive Vice President and Chief Commercial Officer. "These initiatives are made possible by the recent relief from all-time high oil prices and even though fares will remain dynamic, Air Canada is committed to everyday low prices and will continue to match the lowest fares in the marketplace. [...]"

With the measures announced today Air Canada will:

Incorporate into its advertised prices the one-way, add-on fuel surcharge that currently ranges between \$20 and \$60 on domestic and U.S. transborder flights. Starting September 18, 2008, Air Canada will adjust its published fares to include the total cost of fuel in its advertised base fares. This will provide customers simple, transparent and low fares always available at [www.aircanada.com](http://www.aircanada.com). [Emphasis added]

23. Although Air Canada took this step for its domestic flights and those to the United States, it continued to charge the International Fuel Surcharge as a separate, and additional component, to airfare on its other international flights.

#### Disclosure of the International Fuel Surcharge

24. As mentioned above, the relationship between Air Canada and its customers was governed by a contract of adhesion prepared exclusively by Air Canada. Air Canada has, subject to applicable legislation, exclusive control over the terms and conditions of the contract between Air Canada and the customer, including all definitions, costs, and restrictions.

25. The ticket issued by Air Canada or through travel agencies, Aimia Canada inc. (“Aimia”) (with respect to Aeroplan members), or LoyaltyOne inc. (“LoyaltyOne”) (with respect to Air Miles members) for Air Canada flights during the proposed period contains the following information:
- a. The booking reference number, contact information for the passenger and for Air Canada’s customer Care;
  - b. Links to Air Canada’s online services, including managing the booking, requesting an upgrade, alerts of flight status changes, flight arrival and departure information, and online check-in;
  - c. The flight itinerary, including dates and airports of the departure and arrival of the flight, the number and duration of the flight, the aircraft, and the type of the fare;
  - d. Information about the passenger, including the name, ticket number, Aeroplan number, seat selection, special needs, and payment card;
  - e. Information concerning check-in, upgrades, and consular registration

The whole as appears from the e-ticket for Air Canada flight AC871 issued to the Petitioner in the name of the Representative Plaintiffs, communicated in support hereof as Exhibit R-9, and from the invoice and itinerary for Air Canada flight AC876 issued to the Petitioner in the name of the Representative Plaintiffs on December 18, 2013 through Vision 2000 Groupe Voyages/Travel Groupe, communicated in support hereof as Exhibit R-10.

26. No information concerning the definition, or calculation of the International Fuel Surcharge appears on the e-tickets. However, there is a hyperlink that leads to Air Canada’s website.
27. Information concerning the International Fuel Surcharge is available on Air Canada’s website and in Air Canada’s published tariffs.
28. As far as the Petitioner has been able to ascertain, at some point prior to April 15, 2012, the International Fuel Surcharge was described as follows on Air Canada’s website:

Fuel Surcharges: For travel within Canada and between Canada and the United-States, fuel surcharges are now included in the ticket price. For International travel, fuel surcharges vary according to destination.  
(emphasis added)

29. Accordingly, again as far as the Petitioner has been able to ascertain, at that time, Air Canada did not make any additional representations in its contract with its passengers as to the amount or purpose of the International Fuel Surcharge, only that it was charging it (though it had, of course, made the representations stated above regarding its purpose).
30. As far as the Petitioner has been able to ascertain, on April 15, 2012, Air Canada changed the way it defined the International Fuel Surcharge on its website to the following:

**Fuel Surcharges:** Fuel Surcharges are collected by airlines as a measure to offset partially the volatility of and fluctuations in operating costs associated with the price of fuel. For international travel, fuel surcharges vary according to destination.

**Supplément carburant :** Les transporteurs perçoivent un supplément carburant en vue d'atténuer la volatilité et les fluctuations des coûts d'exploitation associés au prix du carburant. Pour les vols internationaux, le supplément carburant varie selon la destination.

The whole as appears from an extract from Air Canada's website, communicated in support hereof as Exhibit R-11.

31. In accordance with this definition, Air Canada bound itself to collect an International Fuel Surcharge in an amount exclusively enabling it to "offset partially the volatility of and fluctuations in operating costs associated with the price of fuel", which, then, in a second step, varied "according to the destination" once the amount required to "offset partially the volatility of and fluctuations" in the cost of fuel had been calculated. The amount of the surcharge so calculated was thus also, in accordance with this definition, proportional to the distance of the flight.
32. As Air Canada itself had stated when seeking approval for the International Fuel Surcharge, the Surcharge was *not* meant to recoup the entire cost of the fuel on a given flight, but merely to be a small percentage of the cost of the ticket to partially offset or neutralize any past volatility of, and fluctuations in, the costs of fuel for a particular flight.
33. This position was reiterated by Air Canada's witness in the British Columbia Supreme Court's judgment in *Unlu v. Air Canada*, 2012 BCSC 60, a case concerning a constitutional challenge to the applicability of British Columbia's *Consumer Protection Act*:

[50] Mr. Magny sets out his views on the potential impact of provincial regulation on Air Canada. He says that Air Canada's operations would be "impaired" if the consumer legislation in each of the ten provinces and three territories were to be applied to ticket pricing and the tariffs Air Canada has filed or will file with the Agency. He explains that Air Canada has applied and continues to apply an international fuel surcharge "to attempt to recover unstable and unavoidable operating costs resulting from fluctuating fuel costs." According to Mr. Magny, the surcharge is not used to cover the total cost of fuel, but rather is a means to offset the volatility of, and fluctuations in, fuel costs. He explains why it is not feasible for Air Canada to include the international fuel surcharge amounts in its base fares, citing among other things the complex competitive environment. Mr. Magny says that the Agency has accepted such considerations as justifying a separate fuel surcharge, referring to a ruling by the Agency from March 2007 involving Air Canada ("Order No. 2007-A-89") as an example. [Emphasis added]

34. However, despite its repeated representations, and contractual language to the contrary, that the International Fuel Surcharge was not used to cover the total cost of

fuel, as will be demonstrated below, in the vast majority of cases, the International Fuel Surcharge did just that, in effect defraying between 75% and 125% (and sometimes more) of the total costs of fuel for a flight:

Actual cost of fuel paid by Air Canada v. Surcharge

Year	Fuel Price Per Litre (based on <u>Air Canada's</u> annual reports, taking hedging and exchange rates into account)	<u>Examples of International [...] Fuel Surcharges charged by Air Canada</u>
2004	<u>46.2 or 50.3¢ average for Q3-Q4<sup>1</sup> [...]</u>	\$11 (except for Hong Kong); increased to \$19 (except for HK)
2005	<u>59.7</u>	\$19
2006	<u>62.2</u>	
2007	<u>65.6</u>	
2008	<u>90.4</u>	
2009	<u>69.4</u>	
2010	<u>66.4</u>	
2011	<u>85.2</u>	
2012	<u>89.6</u>	
2013	<u>89.0</u>	
2014	<u>89.3</u>	<u>\$238 for economy class and \$438 for business class (for a Montréal-Paris flight)</u>

The whole as appears from the above table, the data and calculations contained within being derived from Air Canada's annual reports from 2004-2014, Air Canada's published tariffs, and information available on Air Canada's website.

35. Accordingly, from when the first international fuel surcharge was imposed in the third and fourth quarters of 2004, until November 29, 2014, the price of fuel paid by Air Canada, during those quarters, increased approximately 78% before inflation, or 49% [...] with inflation adjusted.
36. Based on those percentage increases in Air Canada's net cost of fuel between the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2004 and the end of 2014, the International Fuel Surcharge charged by Air Canada in 2014 should have been \$20 per ticket before inflation ( $\$11 \times 1.78$ ) or \$16 with inflation adjusted ( $\$11 \times 1.49$ ).
37. Yet, as the examples in the table indicate, the International Fuel Surcharge charged to customers was \$238 per economy class passenger and \$438 per business class passenger, per flight.
38. Indeed, as the table indicates, the amount of the International Fuel Surcharge increased, on average, by 2063% for economy class and by 3881% for business class from the imposition of the first surcharge in late 2004 until November 29, 2014.

<sup>1</sup> Air Canada's first international fuel surcharge of \$11 was based on, and applicable during the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2004, hence the average fuel cost for those two quarters.

39. If, as Air Canada represented and set out in its defined contractual terms, the International Fuel Surcharge is exclusively used to partially offset the volatility of, and fluctuations in, fuel costs, the International Fuel Surcharge charged to the Petitioner for the impugned airline tickets should have been \$20. Instead, it was \$238.
40. Thus, for the relevant period, the rate of increase of the International Fuel Supplement was 21 times higher than it should have been, based on Air Canada's own definition and calculations, and the International Fuel Supplement itself was 11 times higher than it should have been, again based on Air Canada's definition and calculation.
41. Comparative calculations of the Frankfurt and Paris flights purchased by the Petitioner on behalf of the Representative Plaintiffs also illustrate the gravity of these illegal and grossly excessive charges, this time when the actual variation in Air Canada's net cost of fuel (after hedging and currency exchange) between the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2004 and the end of 2013 (adjusted for inflation) is taken in to account.
- 41.1 Air Canada's net cost of fuel for the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2004 was 50.3¢ per litre (or 59¢ after inflation, as expressed in 2014 dollars), while its net cost for 2013 was 89¢ per litre, for a net variation of 30¢ in its cost of fuel for that period. In other words, in Air Canada's net cost of fuel of 89¢ per litre, only 30¢ per litre (or 33%) represented, in the very wording of Air Canada's own definition of its International Fuel Surcharge, "the volatility of, and fluctuating in, operating costs associated with the price of fuel" since 2004.
42. With respect to the Frankfurt flight, Air Canada charged customers in business and economy classes 91% of the total fuel cost, nearly three times the 33% after-inflation variation in the cost of fuel that Air Canada's definition allowed it to charge its customers.
43. Based on the variations in Air Canada's net fuel cost between 2004 and 2013 (adjusted for inflation) for the Frankfurt flight, Air Canada should have charged a total amount of \$26,795 as a fuel supplement to its customers. Instead, it charged them \$73,678.
44. Air Canada thus illegally overcharged its customers, including the Petitioner, for this flight by the amount of:
  - a. \$151 for each customer in economy class, who paid \$238 as an International Fuel Surcharge. According to Air Canada's contractual definition, they should have paid \$87 each.
  - b. \$278 for each customer in business class, who paid \$438 as an International Fuel Surcharge. According to Air Canada's contractual definition, they should have paid \$160 each.
45. With respect to the Paris flight, Air Canada charged customers in business and economy classes 105% of the total fuel cost, more than three times the 33% after-inflation



variation in the cost of fuel that that Air Canada's definition allowed it to charge to its customers, thus also allowing Air Canada to reap a clear profit.

46. Based on the variations in Air Canada's net fuel cost between 2004 and 2013 (adjusted for inflation) for the Paris flight, Air Canada should have charged a total amount of \$23,164 as a fuel supplement to its customers. Instead, it charged them \$73,678.
47. Air Canada thus illegally overcharged its customers, including the Petitioner, for this flight by the amount of:
  - a. \$163 for each customer in economy class, who paid \$238 as an International Fuel Surcharge. According to Air Canada's contractual definition, they should have paid \$75 each.
  - b. \$300 for each customer in business class, who paid \$438 as an International Fuel Surcharge. According to Air Canada's contractual definition, they should have paid \$138 each.
48. Simply put, the International Fuel Surcharge charged by Air Canada in the proposed class period violates the definition and calculation of the International Fuel Surcharge set out, agreed to, and represented by Air Canada in its contracts with customers.
49. Additionally, for most locations in 2012-2014, the International Fuel Surcharge per passenger accounted for more than 75% of the total cost of the fuel on the plane and, sometimes, more than the total cost of the fuel on the plane.
- 49.1 The webpage on which Air Canada published its definition of the International Fuel Surcharge was modified a total of 57 times during the class period. Thus, between April 15, 2012 and November 30, 2014, Air Canada had nearly 60 opportunities to modify, in the contract of adhesion it imposes on its customers, its definition of the International Fuel Surcharge to permit, validate, and legalize the amounts that it was charging to class members as an International Fuel Surcharge. Though Air Canada modified other aspects of the content of this webpage, it deliberately chose not to modify in any way the contractual definition of the International Fuel Surcharge.

#### Air Canada Changes its Definition

50. On or about November 29, 2014, only a couple of weeks after the *Choquette* motion to authorize a class action was filed (which motion covers, in its contestation of Air Canada's international fuel surcharge, only physical persons who purchased their tickets online directly from Air Canada or Air Canada Rouge), Air Canada changed its definition of the International Fuel Surcharge. The new definition reads:

Destinations internationales (incluant les É.-U.) Supplément du transporteur : Des suppléments sont perçus par les transporteurs afin de compenser certains frais et coûts d'exploitation volatils, imprévisibles ou variables, ainsi que certaines primes liées aux périodes de pointe. Ces

suppléments exigés par les transporteurs sont inclus dans les frais de transport aérien et peuvent servir notamment à compenser les frais suivants: carburant, supplément de navigation ou voyages lors de périodes de pointe.

International Destinations (including the United States) Carrier Surcharges: Carrier surcharges are included in the Air Transportation Charges and are collected by airlines to partially offset certain volatile, unpredictable or fluctuating operating costs and fees, and certain fare Premiums linked to peak travel periods. These carrier surcharges can be used to offset some (among others) of the following costs: fuel, navigational charges, or select peak travel dates to/from certain destinations.

The whole as appears from an extract of Air Canada's website on November 29, 2014, communicated in support hereof as Exhibit R-12.

51. This definition clearly enlarged Air Canada's contractual terms, changing from tying the International Fuel Surcharge to both partially offsetting the volatility of and fluctuations in the cost of fuel and destinations. In fact, given this newly-extended definition, the Air Canada likely now has the right to encompass the entire cost of the fuel on a particular flight in its International Fuel Surcharge.
- 51.1 Air Canada was not required to file this new contractual definition imposed on customers in its adhesion contract with the CTA, nor did it otherwise need to submit this definition to the CTA for its review or approval.

#### Air Canada Rouge

52. Upon the Petitioner's information and belief at this time, the facts as described vis-à-vis Air Canada in paragraphs 1-51.1 above, describe Air Canada Rouge's contractual relationship with and representations towards its customers in the same way.
53. Upon the Petitioner's information and belief at this time, Air Canada Rouge's practice of charging the International Fuel Surcharge is the same as Air Canada's practice described in paragraphs 1-51.1 above.

#### Aeroplan members

- 53.1 Aimia Canada inc. ("Aimia") owns and operates the Aeroplan loyalty program ("Aeroplan"), which had more than 5 million registered members in 2014, the whole as it appears from the Aeroplan General Terms and Conditions, communicated in support hereof as Exhibit R-13 and from Aimia's Aeroplan Fact Sheet, communicated in support hereof as Exhibit R-14.

53.2 Under the Aeroplan program, members can obtain and accumulate Aeroplan Miles by buying products and services or conducting other transactions through Aimia's partners. The members can then exchange their Aeroplan Miles to obtain products, services, and other goods offered by Aimia, termed "rewards". These rewards include airline tickets for flights with Air Canada and other member airlines of the Star Alliance group, known as "flight rewards".

53.3 According to Aimia, in 2015, "approximately 2.6 million rewards were issued to members including 1.9 million flights on Air Canada and Star Alliance carriers which offer travel to more than 1,300 destinations worldwide", the whole as it appears from Exhibit R-14.

53.4 When Aeroplan members exchange Aeroplan Miles for flight rewards, specifically international flights with Air Canada or Air Canada Rouge, they acquire their airline tickets from Aimia in exchange for:

- a) Remitting the required number of Aeroplan Miles for the flight in question; and
- b) Paying the applicable taxes, surcharges, and other fees, as set out in Article 9 of the Aeroplan Terms and Conditions applicable during the class period (the "Aeroplan Contract").

53.5 During the class period, Article 9 of the Aeroplan Contract read as follows:

9. Members shall be responsible for any taxes, departure fees, security charges, levies or other charges imposed by or with the authority of any government or governmental authority in respect of any rewards or reward travel or benefit; any surcharge imposed by an airline; and any service fee imposed by Aeroplan.

9. Le membre Aéroplan est tenu d'acquitter les taxes, les frais de départ et de sécurité, les droits ou frais applicables aux primes ou aux avantages, tels qu'imposés par tout autorité gouvernementale, les surtaxes exigées par tout transporteur aérien et tout frais de service imposés par Aéroplan.

The whole as it appears from the Aeroplan Contract, communicated in support hereof as Exhibit R-15.

53.6 With respect to Aeroplan members who paid an International Fuel Surcharge upon redeeming Aeroplan miles for an international flight with Air Canada or Air Canada Rouge, the International Fuel Surcharge was, throughout the class period, according to Aimia, collected by Aimia as an intermediary for and on behalf of Air Canada and fully remitted by Aimia to Air Canada.

53.7 Indeed, in that regard Aimia states:

All major loyalty programs in Canada are required to collect carrier-imposed surcharges. Aeroplan only applies carrier surcharges where applicable on behalf of its partner Air Canada. 100 per cent of the surcharges applied are passed directly to Air Canada for settlement with the applicable airlines and Aeroplan only applies the surcharge for carriers that already apply the surcharge to their own frequent flyer program tickets.

The whole as it appears from Aimia's FAQ page on the Aeroplan website, communicated in support hereof as Exhibit R-16.

53.8 During the class period, Aimia's FAQ page on the Aeroplan website stated in this regard:

Aeroplan's airline partners determine whether or not to apply fuel surcharges and Aeroplan is required to apply these charges on applicable rewards tickets on behalf of its airline partners.

Fuel surcharges are based upon the airline responding to high crude oil and jet fuel prices. Surcharges are assessed on a regular basis and adjusted to reflect current fuel prices.

100% of the fuel surcharges and the NAVCAN surcharges are passed directly to AC for settlement with the applicable airline partners to mitigate the financial impact of rising fuel prices and the costs incurred from NAV Canada.

The whole as it appears from Aimia's FAQ page on the Aeroplan website dating from the class period, communicated in support hereof as Exhibit R-17.

53.9 That Aimia acts only as an intermediary in acting as Air Canada's mandatary in respect of the International Fuel Surcharge charged to and paid by Aeroplan Members for international flights with Air Canada, as Aimia claims, is further illustrated by Aimia's description of the surcharge in its FAQ:

**Why does Aeroplan apply this carrier surcharge to reward tickets?**

...It's important to note that carrier-imposed surcharges are a direct pass through to the ticketing carrier (Aeroplan neither collects nor remits carrier-imposed surcharges).

**How did Aeroplan arrive at the amounts for the carrier-imposed surcharges?**

Aeroplan does not determine the carrier surcharge, the amount is determined by each airline carrier individually and varies based on their own costs, destination, cabin, etc.

The whole as appears from Exhibit R-17.

53.10 Since, as it contends, Aimia is acting as a mandatary for and on behalf of Air Canada with respect to the International Fuel Surcharge, Aeroplan members may exercise all of their rights and recourses directly against Air Canada and Air Canada Rouge.

53.11 As a result, the Aeroplan members who, through the Aeroplan program, acquired flight rewards for international flights of Air Canada or Air Canada Rouge paid to Air Canada an amount in excess of what they were contractually obliged to pay and that was not calculated or applied in the stipulated manner.

53.12 Accordingly, the Aeroplan members who, in accordance with the Aeroplan program, acquired flight rewards for international flights of Air Canada or Air Canada Rouge are entitled to take legal recourse against Air Canada and Air Canada Rouge for the illegal overcharging committed by Air Canada and Air Canada Rouge, and to demand restitution, of the amounts paid to Air Canada and Air Canada Rouge in excess of the amount provided for in the definition of the International Fuel Supplement.

#### Air Miles Collectors

53.13 LoyaltyOne inc. ("LoyaltyOne") owns and operates the Air Miles Canada reward program ("Air Miles program"), which has more than nine million active collector accounts in Canada, the whole as appears from Industry Canada's profile of LoyaltyOne, communicated in support hereof as Exhibit R-18.

53.14 Under the Air Miles Program, the members, known as Collectors, can obtain and accumulate Air Miles by buying products and services or conducting other transactions through LoyaltyOne inc.'s partners. The Collectors can then exchange their Air Miles to obtain products, services, and other goods offered by Aimia, termed rewards. These rewards include airline tickets for flights with Air Canada and member airlines of the Star Alliance group, known as "flight rewards", the whole as it appears from the Terms and Conditions of the Air Miles Rewards Program ("the Air Miles Contract"), communicated in support hereof as Exhibit R-19.

53.15 When Air Miles Collectors redeem Air Miles for flight rewards, specifically international flights with Air Canada or Air Canada Rouge, they acquire their airline tickets from LoyaltyOne in exchange for:

- a) Remitting the required number of Air Miles for the flight in question; and
- b) Paying the applicable taxes, surcharges, and other fees, as set out in the Air Miles Contract.

53.16 In that regard, the Air Miles Contract states:

You are responsible for and must pay all administration charges, taxes and fees (such as sales, departure and transportation taxes and fees, airport improvement fees and other fees), airline fuel and other surcharges and excess baggage charges, immigration fees, governmental fees and levies, customs charges and passenger facilities charges (including port charges), health or other inspection fees, and other non-ticket costs or charges which may be imposed or collected with respect to Rewards requested by you or through your Collector Accounts. All travel services are arranged by LoyaltyOne Travel Services Inc., a licensed travel agent in Ontario, British Columbia and Quebec, which may impose its own service fees for arranging travel services.

The whole as appears from Exhibit R-19.

53.17 With respect to Air Miles Collectors who paid an International Fuel Surcharge upon redeeming Air Miles for an international flight with Air Canada or Air Canada Rouge, the International Fuel Surcharge was, throughout the class period, according to LoyaltyOne, collected by LoyaltyOne as a mandatary for and on behalf of Air Canada and then fully remitted by LoyaltyOne to Air Canada.

53.18 Indeed, LoyaltyOne states in that regard that:

Collectors who redeem reward miles for AIR MILES® seats on some of our partner airlines continue to see the fuel surcharge as the airline has not removed this charge from the tickets it sells to us. The charge is part of the taxes, fees and service charges the airline requires us to collect on their behalf for all redemption tickets and is remitted to the airline.

The whole as it appears from LoyaltyOne's FAQ page on the Air Miles website, communicated in support hereof as Exhibit R-20.

53.19 Since, as it contends, LoyaltyOne is acting as a mandatary for and on behalf of Air Canada with respect to the International Fuel Surcharge, Air Miles Collectors may exercise all of their rights and recourses directly against Air Canada and Air Canada Rouge.

53.20 As a result, the Air Miles Collectors who, through the Air Miles program, acquired flight rewards for international flights of Air Canada or Air Canada Rouge paid to Air Canada an amount in excess of what they were contractually obliged to pay and that was not calculated or applied in the stipulated manner.

53.21 Accordingly, the Air Miles Collectors who, in accordance with the Air Miles program, acquired flight rewards for international flights of Air Canada or Air Canada Rouge are entitled to take legal recourse against Air Canada and Air Canada Rouge for the illegal overcharging committed by Air Canada and Air Canada Rouge, and to demand restitution, in whole or in part, of the amounts paid to Air Canada and Air Canada Rouge

in excess of the amount provided for in the definition of the International Fuel Supplement, with interest from the date of overpayment.

### Prescription

54 Given the steps required to determine that the International Fuel Surcharge was not permitted by the contractual language between the parties, the class members were not in a position to know that the charge exceeded what was permitted under the contract until Air Canada changed its definition of the International Fuel Surcharge on November 29, 2014.

55 In effect, the excessive nature of the International Fuel Surcharge was hidden from Air Canada's customers, they were not in a position to know that they had a cause of action against Air Canada until they were alerted to that fact, at the earliest, on November 29, 2014.

### The Cause of Action

56 Petitioner does not challenge Air Canada's right to charge an International Fuel Surcharge. Air Canada has the absolute right to charge a fuel surcharge to its customers and to unilaterally determine the terms and amount of that surcharge in the contract of adhesion that it imposes on its customers.

57 By the same logic, if Air Canada does unilaterally determine the definition and amount of an International Fuel Supplement in its contract of adhesion, it may only charge its customers the amount consistent with that contract.

58 Accordingly, the question here is entirely one of private law.

59 According to its own contractual definition, Air Canada obliged itself to its customers, during the entire proposed class period, to only charge its customers the amount required to partially offset the volatility of, and fluctuations in the cost of fuel.

60 Here, not only did Air Canada charge an amount higher than what was required to simply partially offset the variations of, and fluctuations in the cost of fuel, but also, in multiple cases, Air Canada charged an amount equal to the entire cost of fuel for the flight, and sometimes more, thus allowing them to reap a clean profit from the fuel surcharge.

61 Air Canada may only charge its customers the amount that Air Canada obliged them to pay and that charge must be limited to what is contemplated in the contract of adhesion imposed by Air Canada on its customers, being the amount that Air Canada specifically obliged its customers to pay under the contract, i.e. an amount that would *partially* offset the volatility of, and fluctuations in, fuel costs over the period.

62 Given that Air Canada did not have a right to charge more than its contract permitted, any amounts received above what that definition allows is an undue payment which the class members are entitled to have returned to them in accordance with arts. 1491 and 1492 CCQ.

- 63 Also, since the contract in question is a contract of adhesion for all members of the class, Air Canada could have provided for a different contractual clause as regards its International Fuel Surcharge, including its definition and mode of calculation.
- 64 Air Canada could similarly have decided not to provide for the definition and method of calculation of the International Fuel Surcharge, as many other air carriers have chosen to do.
- 65 Air Canada chose otherwise. It must accept the consequences of its informed and unilateral contractual choices.

65.1 Indeed, the Defendants' modification to the contractual definition of the International Fuel Surcharge on or around November 29, 2014, only a few weeks after the filing of the Choquette motion, constitutes an implicit admission by the Defendants that the International Fuel Surcharge was not calculated and charged in accordance with the definition in effect throughout the class period. It thus amounts to an implicit admission of fault on the part of the Defendants.

65.2 As the fuel factsheet appearing on Air Canada's website as of September 6, 2015 indicates, it was fully within Air Canada's power and ability to accurately and truthfully represent the scope, definition, and calculation of its International Fuel Surcharge:

Air Canada monitors the price of fuel very closely; it is our single largest expense and we continue to consider adjustments to pricing and capacity.

There are a number of other factors that also affect pricing such as currency changes, market conditions, competition, supply and demand, all of which are continually reviewed and we adjust fares both up and down to reflect these factors. Such price adjustments are normal in the industry. Fuel is purchased in US dollars so the recent relative decline in the Canadian dollar has had an unfavourable impact on the real cost of fuel to Canadian carriers.

Air Canada aims to be price competitive in all markets but beyond that we cannot speculate about future changes to fares or fees.

The whole as appears from the Industry Facts fuel factsheet appearing on Air Canada's website as of September 6, 2015, communicated in support hereof as Exhibit R-21.

- 66 As the Supreme Court of Canada affirmed in *Amex Bank of Canada v. Adams*, 2014 SCC 56, in the context of a claim for restitution within the meaning of sections 1491 C.C.Q. ff. following the reception of payment not due, neither the existence of prejudice to the debtor nor the existence of a fault by the creditor are relevant to the claim; neither element need be proven.



67 Accordingly, the prejudice suffered by the Representative Plaintiffs and the members of the proposed class does not need to be alleged or proven. Nor must the Petitioner prove that Air Canada committed a fault.

68 The actions of the Defendants also constitute a breach of section 219 (false and misleading representations) of the *Consumer Protection Act*.

**Estimate of the Value of the Claim**

69 Petitioners estimate the value of the restitution claim for all class members other than those who are Aeroplan Members and Air Miles Collectors at approximately \$190 million, based on the following facts and assumptions:

Number of Air Canada Passengers: <ul style="list-style-type: none"> <li>• 2012: <u>34.9</u></li> <li>• 2013: 35.7 million</li> <li>• 2014: 38.5 million</li> </ul>	Total passengers: <ul style="list-style-type: none"> <li>• April 15 2012-December 2012: <u>approximately 25 million</u></li> <li>• 2013: 35.7 million</li> <li>• January 2014-November 29, 2014: 35.3 million</li> <li>• <b>Total: 96 million</b></li> </ul>
[...] <u>Approximately 25% of total traffic is international traffic (excluding the USA, Mexico and the Caribbean) to which the International Fuel Surcharge would apply</u>	24 million
Number of Canadian <u>customers</u> - 50%	12 million
Number of Quebec <u>customers</u> - 24%	2.88 million
Number of tickets not bought online - 66%	1.9 million
[...] <u>Percentage of customers who are physical persons - 90%</u>	
Average amount of overpayment of the surcharge [...]	\$100

70 In addition, the Petitioner seeks an award of punitive damages in the amount of [...] \$25 per passenger per flight in accordance with section 272 of the *Consumer Protection Act*.

71 Thus, the estimated value of the claim for all class members other than those who are Aeroplan Members and Air Miles Collectors is \$233 million, being the total of:

- a. Illegal cumulative overcharge of \$190,000,000;
- b. Punitive damages (cumulative) of \$43,000,000.

71.1 Petitioners estimate the value of the restitution claim for all class members who are Aeroplan Members at approximately \$24 million, based on the following facts and assumptions:

<u>Number of flights taken by Aeroplan members during the class period</u>	<u>Average of 1.7 million flights<sup>2</sup></u>
<u>Estimated percentage of flight rewards redeemed by Aeroplan Members for applicable international flights that were either operated by Air Canada or code-shared with Air Canada</u>	<u>25%</u>
<u>Estimated percentage of applicable international flights taken by Aeroplan Members residing in Canada</u>	<u>90%</u>
<u>Estimated percentage of Canadian Aeroplan Members taking applicable international flights who reside in Quebec</u>	<u>24%</u>
<u>Class Period</u>	<u>2.625 years (April 15, 2012 - November 30, 2014)</u>
<u>Average overcharge of the International Fuel Surcharge for an applicable one-way international flight with Air Canada</u>	<u>\$100</u>
<u>Number of applicable one-way flights taken by Aeroplan Members during the class period</u>	<u>241,000 flights</u>

71.2 In light of the punitive damages award sought, the estimated value of the claim for all class members who are Aeroplan Members is \$30 million, being the total of:

- a. Illegal cumulative overcharge of \$24,000,000;
- b. Punitive damages (cumulative) of \$6,000,000.

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<sup>2</sup> According to Aimia's annual reports, its members took 1.6 million flights in 2012 and more than 1.8 million flights in 2014. Aimia's Annual Report does not indicate whether a "flight" also includes a return flight and not only a one-way flight. If the term "flight" comprises a return flight, then the amount of the claim would be substantially higher because the fuel surcharge charged by Aeroplan would be then be double the amount. For the purposes of the above estimation, the term "flight" is considered as one-way.

71.3 The Petitioner is currently unable to determine with certainty the value of the claim of class members who are Air Miles Collectors as, LoyaltyOne does not publish detailed information in its possession concerning the number of flight rewards redeemed by Air Miles Collectors.

71.4 However, upon the Petitioner's information and belief at this time, it is estimated that the value of the claim of class members who are Air Miles Collectors is equal to approximately 33% that of class members who are Aeroplan Members, based on the following facts and estimations:

- a. A total of more than 4 billion reward miles (including travel rewards) were redeemed under the Air Miles program in 2012 alone;
- b. 10% of all travel rewards redeemed through the Air Miles program are used for applicable international flights (excluding the USA, Mexico and the Caribbean), as contrasted to the estimated 25% of Air Canada's flights that fly to the applicable international destinations;
- c. For the entire duration of the class period, Air Canada was, as a Rewards Partner, the only airline offering applicable international flights to Air Miles Collectors, either as the flight operator or as the code-sharer.

71.5 Accordingly, the estimated value of the claim for all class members who are Air Miles Collectors is approximately \$10 million, being the total of:

- a. Illegal cumulative overcharge of approximately \$8,000,000;
- b. Punitive damages (cumulative) of approximately \$2,000,000.

71.6 Thus, the estimated value of the claim for all class members is \$273 million, being the total of:

- a. The estimated value of the claim for all class members who are neither Aeroplan Members nor Air Miles Collectors of \$233,000,000;
- b. The estimated value of the claim for all class members who are Aeroplan Members of \$30,000,000;
- c. The estimated value of the claim for all class members who are Air Miles Collectors of approximately \$10,000,000.

The criteria for the authorization of a class proceeding are met

- 72 Petitioner respectfully submits that all of the criteria of section 575 C.C.P. are met here.
- 73 First, the questions of law for all of the members of the class - i.e., whether the Defendants were entitled to the amount charged as a fuel surcharge - are all identical.
- 74 Moreover, there are no significant individual questions to be dealt with in the present case.
- 75 Second, it is respectfully submitted that the facts alleged justify the conclusions sought for the reasons given above.
- 76 Third, the composition of the class makes it impossible or impractical to use any procedural vehicle other than the class proceeding.
- 77 Indeed, Petitioner estimates that the class includes hundreds of thousands of passengers who, cumulatively, took a total of approximately 2 million flights.
- 78 Finally, the Petitioner and the Representative Plaintiffs are in a proper position to adequately represent the class members, as they have, with the assistance of counsel, conducted an investigation into the behaviour of the Defendants, hired competent counsel, and diligently pursued the present claim.

Questions to be decided collectively

- 79 In light of the above, the Petitioner respectfully submits that this Honourable Court should authorize the proposed class actions and identify the following questions to be dealt with collectively:
- a. Whether the contract between passengers and the Defendants is a contract of adhesion;
  - b. Whether the wording of the international fuel surcharge clause imposed by the Defendants allowed them to charge the amounts highlighted herein;
  - c. Whether the wording of the international fuel surcharge clause imposed by the Defendants constitutes a false or misleading representation within the meaning of the *Consumer Protection Act*;
  - d. Whether the class members are entitled, pursuant to articles 1401 and ff CCQ to recover the amounts paid in excess as a fuel surcharge;
  - e. Whether the class members are entitled to punitive damages by reason of the violation by the Defendants of the *Consumer Protection Act*;
- e.1 Whether the class members are entitled, pursuant to article 1704 CCQ, to be

paid interest and the additional indemnity on the amounts paid in excess as an international fuel surcharge as of the date the payment of the undue sums was made;

- f. Whether collective recovery of compensatory and punitive damages is appropriate.

### Collective recovery

- 80 Petitioner respectfully submits that the total amount of the claims can be determined with sufficient precision such that collective recovery should be ordered.

### Individual claim of the Petitioner and the Representative Plaintiffs

- 81 As appears from the allegations above, the Petitioner and Representative Plaintiffs were grossly overcharged with regard to the fuel surcharge.
- 82 Indeed, upon their reading of the relevant clause, they were entitled to expect paying only what was necessary to *partially* offset the volatility of, and fluctuations in, fuel costs.
- 83 Instead, they were charged and paid - unbeknownst to them - a surcharge that is exponentially higher.
- 84 For the Toronto-Frankfurt flight (AC876):
- 85 For each ticket, a fuel surcharge of \$238 was paid (the tickets were purchased for economy class). For business class seats on the same flight, the amount of the surcharge was \$438.
- 86 Air Canada collected - with its surcharge to passengers only - 91% of the full cost of the fuel for the entire flight.
- 87 Based on the variation of the net cost of fuel for Air Canada between 2004 and 2013 (adjusted for inflation), Air Canada should have charged a total amount of \$26,795 as a fuel surcharge. It charged \$73,678.
- 88 That means that Air Canada overcharged each passenger in economy an amount of \$151 (the amount of the surcharge should have been \$87 and not \$238) and overcharged each passenger in business class \$278 (the surcharge should have been of \$160 and not \$438).
- 89 For the Paris-Montréal flight (AC871):
- 90 For each ticket, a fuel surcharge of \$438 was paid (the tickets were purchased for business class). For economy class seats on the same flight, the amount of the surcharge was \$238.
- 91 Not only did Air Canada collect - with its surcharge to passengers only - the full cost of the fuel for the entire flight, but it also made a profit of 5%. In other words, the ratio of fuel surcharge collected to total fuel cost for the flight is 105%.

- 92 Based on the variation of the net cost of fuel for Air Canada between 2004 and 2013 (adjusted for inflation), Air Canada should have charged a total amount of \$23,164 as a fuel surcharge. It charged \$73,678.
- 93 That means that Air Canada overcharged each passenger in economy an amount of \$163 (the amount of the surcharge should have been \$75 and not \$238) and overcharged each passenger in business class \$300 (the surcharge should have been of \$138 and not \$438).
- 94 The Petitioner is therefore entitled to recover the overcharges for those tickets which amount to \$902 (\$151x2 and \$300x2), as well as punitive damages by reason of the false or misleading representations made.

**Appropriate district in which to proceed**

- 95 The Petitioner respectfully submits that the district of Montreal is the most appropriate district for the present case to be heard as both Defendants have their head office therein and a substantial number of proposed class members also reside therein.
- 96 The present motion is well-founded in fact and law.

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

- 97 **AUTHORIZE** the petitioner to pursue the present proceeding on behalf of the proposed class in the judicial district of Montreal;
- 98 **CERTIFY** the class as proposed below:

All of the physical and legal persons (excluding travel agencies) who, in Quebec, between April 15, 2012 and November 28, 2014, bought an airline ticket for an international flight (with the exception of the United States (including Hawaii), Mexico and the Caribbean) either:

- i. Directly from Air Canada or Air Canada Rouge in person or over the telephone;
- ii. Indirectly from Air Canada or Air Canada Rouge through a travel agency, online, in person, or over the telephone;
- iii. In the case of legal persons only, directly from Air Canada or Air Canada Rouge through the airlines' transactional websites
- iv. In the case of physical persons only, indirectly from Air Canada or Air Canada Rouge through the Aeroplan loyalty plan owned and operated by Aimia Canada inc. online, in person, or over the telephone;
- v. In the case of physical persons only, indirectly from Air Canada or Air Canada Rouge through the Air Miles loyalty program owned and operated by LoyaltyOne, inc., online, in person, or over the telephone.

and for whom an international fuel surcharge was charged by Air Canada or Air Canada Rouge and paid to them, regardless of whether the flight was [...] operated by Air Canada or Air Canada Rouge or code-shared with any one of the member airlines of the Star Alliance group or any other airline.

99 IDENTIFY as follows the collective questions:

- a. Whether the contract between passengers and the Defendants is a contract of adhesion;
- b. Whether the wording of the fuel surcharge clause imposed by the Defendants allowed them to charge the amounts highlighted herein;
- c. Whether the wording of the fuel surcharge clause imposed by the Defendants constitutes false or misleading representation within the meaning of the *Consumer Protection Act*;
- d. Whether the class members are entitled, pursuant to articles 1401 and ff CCQ, to recover the amounts paid in excess as a fuel surcharge;
- e. Whether the class members are entitled to punitive damages by reason of the violation by the Defendants of the *Consumer Protection Act*;
- e.1 Whether the class members are entitled, pursuant to article 1704 CCQ, to be paid interest and the additional indemnity on the amounts paid in excess as an international fuel surcharge as of the date the payment of the undue sums was made;
- f. Whether collective recovery of compensatory and punitive damages is appropriate.

100 IDENTIFY as follows the conclusions sought:

- a. **GRANT** the class action of the Petitioner;
- b. **CONDEMN** the Defendants solidarily to pay the amount of \$222,000,000 in compensatory damages to the class as defined above, *sauf à parfaire*, the whole bearing interest at the legal rate and the additional indemnity from the date of overpayment;
- c. **CONDEMN** the Defendants solidarily to pay the amount of \$51,000,000 in punitive damages to the class as defined above, *sauf à parfaire*, the whole bearing interest at the legal rate and the additional indemnity from the date of filing of the present proceedings;
- d. **ORDER** the collective recovery of these amounts;
- e. **THE WHOLE** with costs, including expert and notice costs.

101 **DECLARE** that barring exclusion, the members of the class will be bound by any judgment to intervene in the class action in the manner provided by law;

- 102 SET AT 30 days the time period for a class member to ask to be excluded, at the expiry of which all of the members of the class who will not have sought exclusion will be bound by any judgment to intervene herein;
- 103 ORDER the publication of a notice to members of the class in a wording and by means appropriate for the present proceedings;
- 104 REFER the file to the Associate Chief Justice for determination of the district in which the present class proceeding will be heard and for the designation of the judge who will hear same;
- 105 THE WHOLE with costs.

MONTREAL, the 1<sup>st</sup> day of March, 2016

*(S) Renno Vathilakis Inc.*

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**RENNO VATHILAKIS INC.**

Lawyers for the Petitioner, PRIMO BEDDING Co.,  
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