

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL  
No.: 500-06-000756-151

**SUPERIOR COURT**  
(Class Action)

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**DAVID HURST**

*Plaintiff*

v.

**AIR CANADA**

*Defendant*

v.

**FONDS D'AIDE AUX ACTIONS COLLECTIVES**

*Mise en cause*

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**A PPLICATION TO APPROVE A CLASS ACTION SETTLEMENT AND FOR APPROVAL  
OF CLASS COUNSEL'S FEES**

(Articles 590, 591 and 593 C.C.P., article 58 of the *Regulation of the Superior Court of Québec in civil matters*, CQLR c C-25.01, r 0.2.1, and article 32 of the *Act Respecting the Fonds d'aide aux actions collectives*, ch. F- 3.2.0.1.1)

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**TO THE HONORABLE PIERRE-C. GAGNON OF THE SUPERIOR COURT OF QUEBEC,  
SITTING AS CASE MANAGEMENT JUDGE, THE PLAINTIFF RESPECTFULLY STATES AS  
FOLLOWS:**

**I. OVERVIEW**

1. The present class action arises out of the Defendant's alleged failure to honour its advertised price on a flight pass sold via its website on or around August 25-26th, 2015;
2. The present class action was authorized in accordance with art. 575 C.C.P. on January 27, 2017;
3. On or about February 19, 2018, the Defendant notified their *Notice of Intent Pursuant to Article 76 C.C.P.* (reproduced herewith as **Exhibit T-1**) to debate various constitutional questions including:
  - a) Interjurisdictional immunity with respect to consumer protection for air passengers;
  - b) Paramountcy of federal law over the *Québec Consumer Protection Act*;
  - c) Extra-territoriality and/or applicability of the *Québec Consumer Protection Act* in respect of its application to consumers outside of Québec; and
  - d) Jurisdiction of the federal Canadian Transportation Agency;
4. The Attorney General of Québec then indicated that it intended to appear at the trial of this

class action;

5. The hearing on the merits of the class action occurred on February 18 to 20, 25 and 26, 2019 before the Honourable Pepita G. Capriolo, S.C.J. at the Montreal Courthouse, but judgment on the merits of the class action has not been rendered;
6. After the Plaintiff has almost finalized preparation for the aforementioned merits trial (after pre-trial examinations and debates of objections at a hearing), and shortly prior to the commencement of the merits trial, the Defendant withdrew its *Notice of Intent Pursuant to Article 76 C.C.P.* and indicated of its intent to instead focus on the applicability of the Québec *Consumer Protection Act*, relying on Book X (Private International Law);
7. On the first day of the aforementioned merits trial, and only for purposes of the present class action, the Defendant abandoned their argument relating to the alleged inapplicability of the Québec *Consumer Protection Act* to consumers outside of Québec;
8. Prior to the Court's rendering of judgment, the parties have entered into a proposed settlement agreement providing for, *inter alia*, the settlement of the class action between and among Plaintiff, on behalf of himself and the Class;
9. On September 10, 2019, this Court rendered judgment on the Plaintiff's request for approval of notices for approval of the settlement agreement;
10. In this application, the Plaintiff seeks the approval of the settlement agreement and approval of Class Counsel fees;

## II. APPROVAL OF THE PROPOSED SETTLEMENT

### ***The Settlement Amount***

11. The proposed Settlement Agreement provides for a total recovery of \$1,018,400 (equivalent to \$800 per Class Member);
12. After deduction of legal fees, disbursements and administration costs, the remaining amount will be distributed proportionally to each Class Member in the form of electronic credits;
13. Each Class Member will receive an estimated amount of \$500 electronic credit, to be issued and delivered by Air Canada, without the need for submitting a claim form;
14. The electronic credits are non-transferable and valid for a period of twelve months;
15. The criteria which the case law has established for approval of a class action settlement are the following:
  - a) The probability of success;
  - b) The amount and nature of discovery;
  - c) The terms and conditions of the Settlement Agreement;
  - d) The attorneys' recommendation and their experience;
  - e) Approval of the Plaintiff;
  - f) The future expenses and probable length of the litigation;
  - g) The number and nature of any opt-outs and/or objectors; and
  - h) Good faith of the parties and the absence of collusion;

16. Under Article 590 *CCP*, a court should approve a transaction for settlement of a class action if the court is satisfied that the terms of the settlement are fair, reasonable and in the best interest of the Class Members;
17. The Plaintiff submits that an analysis of all of these criteria demonstrates that the settlement is fair and reasonable and in the best interest of Class Members;

### **The Probability of Success**

18. While the Plaintiff maintains that his action is well-founded, the Defendant has vigorously denied his claims and allegations, in particular:
  - a) The applicability of art. 224(c) in instances involving mispricing over the internet, which involved some conflicting decisions in the Court of Québec (Small Claims Division);
  - b) The interpretation of an “excusable” versus “inexcusable” error under art. 1400 C.C.Q.;
  - c) The availability of compensatory damages as a remedy for the Class Members; and
  - d) The availability of punitive damages in the circumstances of this case;
19. The Parties have entered into a serious and contradictory debate as to the above noted issues;
20. The above noted issues are largely novel, with limited guidance in the case law, with a serious risk of multiple rounds of appeals given the highly contentious legal issues, which increases the possibility of non-recovery for the Class Members and considerable delays;
21. Some of the legal issues above (such as (a) and (b)) deals more with questions of policy, which further increases the likelihood of an appeal to the Supreme Court of Canada;
22. The policy implications relating to “mispricing” incidents on the internet is amply demonstrated in a report from *Option Consommateur* released earlier this year, around March 2019 (reproduced herewith as **Exhibit T-2**);

### **The Amount and Nature of Discovery**

23. There are 1273 Class Members in total in this class action, and discovery has been completed;
24. The Plaintiff, on behalf of the Class Members, takes the position that the Defendant shall pay monetary compensation in the amount of \$7,182 per Class Member (the price difference between the alleged original price of \$7,980 and the alleged mispricing of \$798), so as to allow the Class Members to acquire replacement flight tickets and/or other travel products if they so wish;
25. The Defendant has taken the position that the Class Members have suffered no “damage” because the purchases were unilaterally annulled by Air Canada and the Class Members were all refunded the \$798 (plus taxes), albeit involuntarily;
26. The total amount claimed by the Class Members is approximately \$9,142,686 (plus applicable taxes on such amount);

### **The Terms and Conditions of the Settlement Agreement**

27. The Settlement Agreement is a favourable outcome for the Class Members as it provides a resolution of the litigation and the following benefits:
- a) A travel credit in the amount of approximately \$500 CAD (after deduction of Class Counsel Fees) will be automatically delivered to each Class Member via e-mail, without the need to submit any claim forms or receipts;
  - b) Class Members will not be required to prove their claims, and, in particular, will not need to prove their status as “consumers” and their intended use of the Flight Pass;
  - c) It was disclosed in discovery and at trial that the Defendant has implemented further checks and balances to avoid similar incidents from occurring in the future, causing harm and disappointment for the prospective customers, thereby achieving the goal of behavioural modification;
  - d) The Class Members' credits, although it will expire in one-year, is freely transferable and can be used to acquire any flight products from Air Canada (including flight tickets); and
  - e) A credit of \$500 is, for example, sufficient to acquire two round-trip tickets from Vancouver, B.C. to Los Angeles, California, where ticket prices of \$180-220 are available on a frequent basis, and therefore Class Members need not pay any moneys out of their own pockets in order to acquire the benefit of the travel credit;

### **Class Counsel's Recommendations and Experience**

28. Class Counsel consists of two law firms: Champlain Avocats based in Montréal, Québec, and Evolink Law Group based in Burnaby, British Columbia;
29. Champlain Avocats' lawyers have over ten years of litigation experience and more than four years of experience prosecuting class actions and have appeared in courts across Canada on class action matters including this Court and the Federal Court of Canada;
30. Evolink Law Group's principal lawyer has over five years of litigation experience and focussed predominantly on class actions for over five years and has appeared in courts across Canada on class action matters including this Court, the Supreme Court of British Columbia, the Court of Appeal of British Columbia, and the Federal Court of Canada;
31. Class Counsel recommended the terms and conditions of the settlement agreement;

### **The Representative Plaintiff's Approval of the Settlement**

32. The Plaintiff provided his instructions to enter into the settlement agreement on his own behalf and on behalf of the Class Members and signed the settlement agreement;
33. The Plaintiff also approves of the settlement agreement;

### **The Future Expenses and Probable Length of the Litigation**

34. There is a real possibility of significant expenses in litigating of any appeals that could arise

from the trial judgment, including an appeal to the Supreme Court of Canada;

35. Given the Defendant's position and the amount being claimed, there is a strong likelihood that any negative decision will be further appealed and give rise to further delays for the Class Members, which could amount to many more years of litigation;
36. Justice delayed is justice denied, and an early resolution with a favourable result is in the best interest of Class Members and achieves the goal of access to justice;

#### **The Number and Nature of any Opt-Outs or Objections**

37. At the authorization stage, there were no opt-outs received by Class Counsel, nor did the plumentif indicate any Class Members opting out;
38. To date, no Class Members have filed an objection to the settlement;

#### **Good Faith of the Parties and the Absence of Collusion**

39. The settlement agreement was negotiated by experienced counsel, both on the Plaintiff's side and Defendant's side, at an arm's length and in good faith;

### **III. APPROVAL OF CLASS COUNSEL FEES**

40. The Settlement Agreement provides for a total recovery of \$1,018,400 (equivalent to \$800 per Class Member);
41. Out of the total recovery of \$1,018,400, the Defendant has agreed to pay an all-inclusive amount of \$377,900 (inclusive of fees for Class Counsel, disbursements, and applicable taxes);
42. For this action, Class Counsel has incurred disbursements of approximately \$8,433;
43. After deduction of applicable taxes (assuming sales taxes of 14.975%) and disbursements, Class Counsel fees amount to approximately \$321,345.51;
44. The jurisprudence and applicable ethical rules establish the following factors to consider in determining whether Class Counsel's fees are fair and reasonable in the circumstances:
  - a) The time and effort expended by Class Counsel on the litigation;
  - b) The importance of the class action;
  - c) The degree of difficulty of the class action;
  - d) Class counsel's experience and expertise in a specific field;
  - e) The risks and responsibilities assumed by Class Counsel;
  - f) The result(s) obtained; and
  - g) Whether the Requested Fees are contested;

#### **Time and Effort Expended by Class Counsel**

45. The plaintiff has advanced his case through a hotly contested authorization motion in December 2016, where the parties had significant debates over the merits of the claim, including some of the private international law issues;

46. While the facts of this case are relatively simple (i.e. a mispricing incident), it raised important issues of private international law that were a matter of first impression for the courts of this province;
47. The core question being whether the Québec *Consumer Protection Act* could apply to consumer transactions between a Québec merchant and an out-of-province consumer, which was conducted via the internet;
48. The resolution (and litigation) of this question potentially had significant ramifications for merchants in Québec who conduct e-commerce, and especially the Defendant who is headquartered and domiciled in Québec;
49. At the authorization, this Court found an arguable case for the application of the Québec *Consumer Protection Act* and the debate proceeded to a trial;
50. After filing of the originating application, in addition to the private international law issue, the Defendant sought to raise a myriad of constitutional issues and the Attorney General of Québec then intervened in this class action;
51. Shortly before the commencement of trial, and after all pre-trial examinations were completed (including a hearing debating the objections), the Defendant withdrew the bulk of its constitutional objections;
52. Consequently, the Attorney General of Québec did not appear at the trial;
53. On the first day of trial, the Defendant further withdrew its objection to the application of the Québec *Consumer Protection Act* to this case (and only this case);
54. The preparation of the private international law and constitutional law issues consumed significant efforts and time for this case, in addition to the other interesting legal issues that were presented in this case:
  - A. The applicability of art. 224(c) in instances involving mispricing over the internet, which involved some conflicting decisions in the Court of Québec (Small Claims Division);
  - B. The interpretation of an “excusable” versus “inexcusable” error under art. 1400 C.C.Q.;
  - C. The availability of compensatory damages as a remedy for the Class Members; and
  - D. The availability of punitive damages in the circumstances of this case;
55. In total, Class Counsel devoted 1013 hours to this class action, including authorization and the trial consisting of:
  - A. Evolink – 645 hours
  - B. Champlain – 367 hours
56. The contingency fee agreement provides for the greater of: a percentage of the judgment/settlement or an hourly rate of \$275 times a multiplier of 3.5, times the hours expended;

57. The requested fee is equivalent to an hourly rate of \$317.22 (amounting to a multiplier of 1.15 only) which is within a very reasonable range for a class action that has been through a contested authorization hearing and also a trial;

***The Importance of this Class Action***

58. This Class Action raises issues of public order that is of substantial importance to consumers and merchants;
59. While the direct beneficiary from a positive ruling on the private international law issue would be out-of-province consumers, it indirectly benefits all Québec consumers because it would ensure that Québec merchants must at all times comply with their obligations under the *Consumer Protection Act*;
60. If the *Consumer Protection Act* were to permit different treatment of out-of-province consumers, it would result in a two-tier system, undermine competition, and ultimately harm the Québec consumers;
61. Other than the scope of the Québec *Consumer Protection Act*, this class action also raised important questions of how mispricing incidents should be treated in the e-commerce era;
62. To date, there has been no Superior Court merits decision on how art. 224 (c) of the *Consumer Protection Act* is to apply to internet mispricings;
63. A merits decision from a senior level court would be important for both merchants and consumers;

***The Degree of Difficulty of this Class Action***

64. As noted above, the underlying factual matrix is relatively straightforward (an internet mispricing incident);
65. The difficulty of this Class Action lies in the: (1) constitutional issues; (2) the private international law issue; and (3) the interpretation of the *Consumer Protection Act* and "error" (under art. 1400 C.C.Q.) as it relates to e-commerce transactions;
66. While there has been a number of small claims court decisions on the last issue, there are no binding authorities;

***Class Counsel's Experience and Expertise***

67. As discussed in the earlier section of this application, Class Counsel has substantial experience in the field of class actions, both before this Court and across Canada;
68. The facts also speak for itself in that Class Counsel successfully brought this case through authorization and even proceeded to a contested trial on the merits;

***Risks Assumed by Class Counsel***

69. In this instance, the risks assumed by Class Counsel was significant as compared to typical class action cases;
70. The Plaintiff, and Class Counsel, did not receive financial support from the *Fonds D'aide Aux Actions Collectives* although an application was submitted;

71. The *Fonds* application was refused on the basis that the Plaintiff was not resident in this province, which appeared to be a requirement in the legislation in order to receive financial support;
72. Given the nature of this case (where almost all Class Members are in Western Canada, with only six out of 1273 Class Members being resident in Québec), it would have been a remote endeavor to obtain financial support;
73. In this case, Class Counsel assumed all the risks of the class action not succeeding, and funded all disbursements, all without any guarantee of a payment in the remote future;
74. Class Counsel was retained on this case entirely on a contingency basis;
75. Based on the nature of the issues, especially any ramifications to Air Canada, the risks were significant and the Defendant would likely have appealed any negative decision to the Court of Appeal or Supreme Court of Canada, which is self-evident because Air Canada is raising similar defenses in other class actions;
76. Class Counsel also agreed to fully indemnify the Plaintiff in the event that legal costs are awarded against him;

#### ***The Results Obtained***

77. While the settlement does not provide for cash payment directly to each Class Member, but rather flight credits (in the amount of \$500 per person after deductions of legal costs and disbursements), the result for the Class Member could not have been achieved without this litigation;
78. At the outset, the Class Members were offered close to nothing (only an offer to give an extra one-way flight if the Class Members paid the full price to Air Canada for the flight pass);
79. Frequently, mispricing incidents result in the merchant providing a small discount coupon (e.g. 5-10%) for future purchases and rarely, if ever, a merchant granting a credit of this amount;
80. The credits in this case are fully transferable and have few restrictions;
81. Air travel is a regular occurrence in this day and age and the Class Members will likely have the opportunity to travel to their dream destination within the one-year period of the credit;
82. Even if the Class Member(s) are not able to utilize their credits, it can be freely transferred to their friends or relatives that can benefit from this credit;

#### ***Whether the Requested Fees are Contested***

83. Notice has been given to the Class and there is no Class Member indicating any intention to contest the requested fees;

#### **IV. EXPENSES OF THE REPRESENTATIVE PLAINTIFF**

84. The Plaintiff's travel and other litigation expenses were also paid by Class Counsel;



85. However, the Plaintiff has experienced lost of wages from the times he had to devote to this Class Action to attend two pre-trial examinations and the trial of this action;
86. For the trial, the Plaintiff was required to travel from Vancouver to Montreal, which is a circumstance not typically seen in class actions before this Court;
87. The Plaintiff respectfully requests that the Court approve of the lost wages of \$430 as out-of-pocket expenses and that Class Counsel is authorized to reimburse the Plaintiff for such amounts from the Class Counsel fees;
88. Class Counsel has agreed to reimburse the above noted lost wages, should this Court approve;
89. The Plaintiff's efforts have caused this class action to be litigated forcefully, for the benefit of all Class Members;
90. The Plaintiff further requests that the Court approve a service award to the Plaintiff, in accordance with paragraph VIII (A) of the Settlement Agreement, consisting of an additional \$500 in travel credits;
91. The Defendant agrees that the additional \$500 in travel credits is fair and reasonable as a service award for the Plaintiff's efforts and the *Fonds* also does not oppose the issuance of this credit.

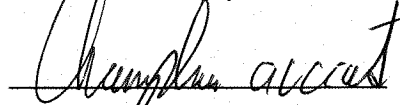
## V. CONCLUSION

92. The Plaintiff respectfully submits that the settlement agreement is fair and reasonable for the Class Members and in their best interest;
93. The Plaintiff further submits that the Class Counsel fees are fair and reasonable in this case and should be approved.

PAR CES MOTIFS, PLAISE AU TRIBUNAL :	FOR THESE REASONS, MAY IT PLEASE THE COURT TO:
[1] <b>ACCUEILLIR</b> la demande du Représentant en approbation de l'Entente de Règlement concernant le Défenderes Air Canada;	[1] <b>GRANT</b> Representative Plaintiff's Application to Approve the Settlement Agreement with Air Canada;
[2] <b>DÉCLARER</b> que les définitions contenues dans l'Entente de Règlement s'appliquent et sont incorporées au présent jugement, et en conséquence en font partie intégrante, étant entendu que les définitions lient les parties à l'Entente de Règlement;	[2] <b>DECLARE</b> that the definitions set forth in the Settlement Agreement apply to and are incorporated into this judgment, and as a consequence shall form an integral part thereof, being understood that the definitions are binding on the parties to the Settlement Agreement;
[3] <b>APPROUVER</b> l'Entente de Règlement («Settlement Agreement») conformément à l'article 590 du Code de procédure civile du Québec, et <b>ORDONNER</b> aux parties de s'y conformer;	[3] <b>APPROVE</b> the Settlement Agreement as a transaction pursuant to article 590 of the Code of Civil Procedure, and <b>ORDER</b> the parties to abide by it;
[4] <b>DÉCLARER</b> que l'Entente de Règlement (incluant son préambule et ses annexes) est juste, raisonnable et qu'elle est dans le meilleur	[4] <b>DECLARE</b> that the Settlement Agreement, (including its Preamble and its Schedules) is fair, reasonable and in the best interest of the Class

intérêt des Membres du Groupe et qu'elle constitue une transaction en vertu de l'article 2631 du Code civil du Québec, qui lie toutes les parties et tous les Membres du Groupe tel qu'énoncé aux présentes;	Members and constitutes a transaction pursuant to article 2631 of the <i>Civil Code of Quebec</i> , which is binding upon all parties and all Class Members as set forth herein;
<b>[5] ORDONNER ET DÉCLARER</b> que le présent jugement, incluant l'Entente de Règlement, lie chaque Membre du Groupe Visé par le Règlement;	<b>[5] ORDER AND DECLARE</b> that this judgment, including the Settlement Agreement, shall be binding on every Class Member;
<b>[6] APPROUVER</b> le paiement aux Avocats du Groupe de leurs honoraires extrajudiciaires et débours tel que prévu aux paragraphes VIII (B) – (H) de l'Entente de Règlement modifiée;	<b>[6] APPROVE</b> the payment to Class Counsel of its extrajudicial fees and disbursements as provided for at clauses VIII (B) – (H) of the Settlement Agreement;
<b>[6] APPROUVER</b> que les procureurs du demandeur lui rembourse ses pertes en salaires et revenus ainsi que ses débours et en considération des circonstances exceptionnelles de ce dossier, <b>APPROUVER</b> la délivrance d'un crédit de vol supplémentaire pour le demandeur à titre de montant adjugé;	<b>[6] APPROVE</b> Class Counsel to reimburse the Plaintiff's lost wages, as out-of-pocket expenses, in the exceptional circumstances of this case and <b>APPROVE</b> the issuance of one additional share of the flight credits to the Plaintiff as a service award;
<b>[7] ORDONNER</b> aux parties de faire rapport de l'exécution du jugement à l'expiration du délai prévu au paragraphe II(A)(13) de l'Entente de Règlement modifiée;	<b>[7] ORDER</b> the Parties, upon the expiry of the time specified at paragraph II(A)(13) of the Settlement Agreement, to render account of the execution of the judgment;
<b>[8] LE TOUT</b> , sans frais de justice.	<b>[8] THE WHOLE</b> , without legal costs.

MONTREAL, September 27, 2019



Champlain Avocats  
Attorneys for the Plaintiff



Evolink Law Group  
Attorneys for the Plaintiff

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL  
No.: 500-06-000756-151

**SUPERIOR COURT**  
(Class Action)

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**DAVID HURST**

*Plaintiff*

v.

**AIR CANADA**

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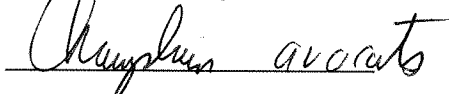
*Mise en cause*

**NOTICE OF PRESENTATION**

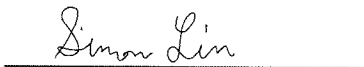
TO: Mtres. Robert Torralbo and Simon Seida  
Blake, Cassels & Graydon S.E.N.C.R.L./s.r.l.  
1 Place Ville Marie  
Bureau 3000  
Montréal (Québec) H3B 4N8

**PLEASE TAKE NOTICE** that Plaintiff's *Application to Authorize A Class Action For Settlement Purposes, Fixing the Opt-Out Period, and Approving Notice to Class Members Of A Proposed Settlement Agreement* will be presented at the Montreal Courthouse, 1 Notre-Dame St. E, Montreal, Québec, Room 2.08 on October 28, 2019 at 9:30AM before the Honourable Pierre-C Gagnon.

MONTREAL, September 27, 2019

  
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Champlain Avocats  
Attorneys for the Plaintiff

  
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Evolink Law Group  
Attorneys for the Plaintiff

No : 500-06-000756-151

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**SUPERIOR COURT**  
(Class action)  
**DISTRICT OF MONTRÉAL**

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**DAVID HURST**

Plaintiff / Class Representative

vs.

**AIR CANADA**

Defendant

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**APPLICATION TO APPROVE A  
CLASS ACTION SETTLEMENT AND  
FOR APPROVAL OF CLASS  
COUNSEL'S FEES**

**ORIGINAL**

---

**ME JÉRÉMIE JOHN MARTIN**  
**ME SÉBASTIEN A. PAQUETTE**  
**CHAMPLAIN AVOCATS**

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**MR. SIMON LIN, ATTORNEY** (appearing  
pursuant to a special permit)

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