



# Determination No. A-2017-194

November 30, 2017

**DETERMINATION by the Canadian Transportation Agency (Agency) as to whether Air Transat failed to properly apply the terms and conditions of carriage set out in its International Scheduled Services Tariff, CTA (A) No. 4 (Tariff) and whether Air Transat's applicable Tariff provisions are reasonable, pursuant to subsections 110(4) and 111(1) of the *Air Transportation Regulations*, SOR/88-50, as amended (ATR (Air Transportation Regulations)).**

**Case number:** 17-03788

## Summary

[1] In the late afternoon of July 31, 2017, Air Transat Flight Nos. 157 and 507, along with 18 other commercial aircraft, were diverted to the Ottawa MacDonald-Cartier International Airport (Ottawa Airport). The extraordinary presence of 20 diverted aircraft during peak hours in addition to the regularly scheduled arrivals and departures placed considerable pressure on the operational capacity of the Ottawa Airport. All diverted flights were delayed on the tarmac for periods ranging from one hour to six hours. The flights subject to this inquiry experienced delays lasting 5 hours and 51 minutes (Flight No. 157) and 4 hours and 47 minutes (Flight No. 507).

[2] Passengers on Flight Nos. 157 and 507 reported challenging onboard conditions on social media and the news media reported on the events. In addition, the Agency received 48 complaints from passengers of Flight No. 157 and 24 complaints from passengers of Flight No. 507. The media reports and passengers' complaints referred to limited water and food services, high temperatures, limited ventilation, passengers becoming physically ill, and the fact that passengers of Flight No. 157 called emergency responders (911) to seek assistance.

[3] In light of these events, the Agency provided Air Transat with the opportunity to explain why the Agency should not conclude that it had failed to properly apply the terms and conditions set out in its Tariff. This Determination provides a resolution to all complaints made by passengers in respect of Flight Nos. 157 and 507 that have been filed with the Agency pursuant to subsection 110(4) and section 111 of the ATR (Air Transportation Regulations).

[4] Based on Air Transat's response, the Agency convened an oral hearing to address the following issues:

- Did Air Transat properly apply its Tariff during these incidents, pursuant to subsection 110(4) of the ATR (Air Transportation Regulations)?
- Are Air Transat's applicable Tariff provisions reasonable, pursuant to subsection 111(1) of the ATR (Air Transportation Regulations)?

[5] For the reasons set out below, the Agency finds that with respect to both Flight No. 157 and Flight No. 507:

- Air Transat did not properly apply Rules 5.2d) and 21.3c) of its Tariff relating to drinks and snacks;
- Air Transat did not properly apply Rules 5.2d) and 21.3c) of its Tariff relating to disembarking.

[6] Furthermore, the Agency finds that:

- The Tariff provisions relating to drinks and snacks are reasonable;
- The Tariff provisions relating to disembarking are unreasonable;
- Rule 5.3.1 of the Tariff is unreasonable;
- Air Transat is not exempted from liability in respect of its non-application of Rules 5.2d) and 21.3c) of its Tariff on the basis that the diversion resulted from a Force Majeure event or on the basis that its contracted service provider allegedly failed to perform its obligations.

[7] Therefore, the Agency orders Air Transat to:

- Compensate all passengers of Flight Nos. 157 and 507 for expenses incurred as a result of its failure to properly apply its Tariff; and,
- Take the following corrective measure to ensure future compliance with Tariff obligations:
  - Ensure that proper training is provided to all Air Transat employees, including aircraft commanders, flight crew, and operations staff, and to any servant or agent engaged in delivering services during onboard delays so that they have knowledge of applicable Tariff provisions, policies and procedures. Such training should emphasize that these provisions and policies are set out in the Tariff and are therefore legal obligations that Air Transat is bound to respect. Air Transat is to provide information on the required training, once it has been developed and delivered, and no later than May 24, 2018.

[8] Based on the Agency's finding that elements of Rules 5.2d) and 21.3c) of the Tariff are unreasonable, the Agency orders Air Transat to revise these Rules and all corresponding rules of its other international tariffs so that the existing text in respect of food and water distribution and disembarking with the commander's permission after 90 minutes is supplemented with the terms and conditions that incorporate the provisions of Air Transat's Contingency Plan for Lengthy Tarmac Delays at US Airports (Revised April 2016). Those terms and conditions create a positive obligation to disembark passengers if a tarmac delay reaches four hours – unless there are safety, security, or air traffic control issues that prevent it – and require that during the delay, the carrier provide passengers with updates every 30 minutes, working lavatories, and medical assistance if needed. These amendments are to be filed with the Agency as soon as possible, and no later than February 27, 2018.

[9] Based on the Agency's finding that Rule 5.3.1 of the Tariff is unreasonable, the Agency orders Air

Transat to revise Rule 5.3.1 and all corresponding rules of its other international tariffs to reflect the definition of Force Majeure found in the Agency's sample tariff for domestic and international scheduled flights. This revision is to be filed with the Agency as soon as possible, and no later than February 27, 2018.

## **Background**

[10] This section provides an overview of the events of July 31, 2017 and procedural information about the inquiry.

## **Factual Background**

[11] In the late afternoon of July 31, 2017, 20 commercial aircraft were diverted to the Ottawa Airport due to adverse weather conditions that halted operations at the Montréal Pierre Elliott Trudeau International Airport (Montréal Airport) and the Toronto Pearson International Airport (Toronto Airport). The diverted flights included Air Transat Flight Nos. 157 and 507, which were inbound from Brussels and Rome, respectively. There were 340 passengers on Flight No. 157 and 250 passengers on Flight No. 507.

[12] The extraordinary presence of 20 diverted aircraft during peak hours in addition to the regularly scheduled arrivals and departures placed considerable pressure on the operational capacity and physical space of the Ottawa Airport. All diverted flights were delayed on the tarmac for periods ranging from approximately one hour to six hours. Flight No. 157 was delayed for 5 hours and 51 minutes and Flight No. 507 was delayed for 4 hours and 47 minutes.

[13] Flight No. 157 landed at the Ottawa Airport at approximately 4:45 p.m. and Flight No. 507 landed at approximately 5:15 p.m. These aircraft were initially positioned in an area south of the terminal building, with Flight No. 157 parked on Runway 7 and Flight No. 507 parked on Taxiway C. Upon their arrival, the aircraft commanders of both flights requested fuel from First Air Operations, Air Transat's contracted ground services handler, and both commanders had the intention of refuelling and departing as soon as possible. These types of refuelling operations are colloquially referred to as "gas and go".

[14] At around 6:45 p.m., the aircraft commanders of Flight Nos. 157 and 507 received instructions from NAV CANADA to move to an area northwest of the Terminal (north of the de-icing area and adjacent to Hangar 14).

[15] The aircraft commanders of both flights repeatedly contacted First Air Operations in an effort to obtain fuel. Air Transat submits that, once the aircraft were located near Hangar 14, its commanders were told on multiple occasions that they would be refuelled within 30 minutes.

[16] At approximately 9:00 p.m., the auxiliary power unit of the aircraft servicing Flight No. 157 stopped working because of a shortage of fuel. This caused the forced air ventilation to shut down and the cabin to darken as only emergency lights were functioning. This situation lasted for approximately 10 minutes. Passengers on this flight called emergency services (911). The aircraft

doors were opened when the police and emergency response teams arrived.

[17] Following refuelling, Flight No. 157 departed at 10:59 p.m. and Flight No. 507 departed at 10:07 p.m.

[18] Passengers on Flight Nos. 157 and 507 reported the challenging circumstances on social media and media reports followed. In addition, the Agency received 48 complaints from passengers of Flight No. 157 and 24 complaints from passengers of Flight No. 507. Passengers described their experience with words including “inhumane”, “horrendous”, “unsustainable”, “stifling”, “tensions mounting”, “general discontent and disgust are palpable”, “we are being treated like animals”, and “unacceptable”.

[19] Passengers testified that they vigorously complained to the flight crew about the inadequacy and lack of drinks and snacks being offered in relation to the time in which they were confined to the aircraft and asked to disembark. In addition, passengers testified about the deteriorating conditions in the aircraft, including high temperatures, limited ventilation, limited air conditioning, poor lighting, and passengers becoming physically ill. Finally, numerous passengers stated that Air Transat did not provide timely or accurate information regarding the delay.

## **Procedural Background**

### **Show Cause**

[20] On August 2, 2017, the Agency issued Decision No. LET-A-47-2017 providing Air Transat with the opportunity to show cause why the Agency should not find that Air Transat did not properly apply the terms and conditions set out in its Tariff, as required by subsection 110(4) of the ATR (Air Transportation Regulations). Decision No. LET-A-47-2017 states that complaints filed with the Agency by individual passengers regarding the incidents would be addressed through this proceeding.

### **Air Transat’s Response to Show Cause**

[21] On August 4, 2017, Air Transat responded to Decision No. LET-A-47-2017. Air Transat provided a chronology of the events of July 31, 2017 and stated that “there were a number of parties involved in this matter whose actions had a direct impact on the management of the unfolding events.”

[22] Air Transat argued that its ability to manage the events was affected by a “confluence of factors beyond its control” which “led directly to the inability to minimize the weather-related diversion delays of the affected flights, deplane passengers safely from stranded aircraft and provide minimal levels of comfort to [its] passengers onboard.”

[23] Air Transat added that the requirements of the Tariff had been satisfied, arguing that its “crews exercised their duties and satisfied the requirements...to the fullest extent that was physically and reasonably possible and in the interests of passenger safety and comfort.”

### **Oral Hearing and Appointment of Inquiry Officer**

[24] After reviewing Air Transat's response to Decision No. LET-A-47-2017, and given that the Agency had received complaints, the Agency issued Decision No. LET-A-49-2017 on August 9, 2017, pursuant to section 37 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), indicating that it would convene an oral hearing in order to better understand Air Transat's actions and the "confluence of factors" that the carrier asserted had caused the events in question.

[25] The scope of the oral hearing was limited to investigating the tarmac delays experienced by passengers of Air Transat Flight Nos. 157 and 507 on July 31, 2017. The Agency considered two issues in this proceeding:

- Did Air Transat properly apply its Tariff during these incidents, pursuant to subsection 110(4) of the ATR (Air Transportation Regulations)?
- Are Air Transat's applicable Tariff provisions reasonable, pursuant to subsection 111(1) of the ATR (Air Transportation Regulations)?

[26] To provide for an efficient hearing, the Agency appointed an Inquiry Officer, Jean-Michel Gagnon, an employee of the Agency and an enforcement officer designated as such pursuant to subsection 178(1)(a) of the CTA, to collect evidence and report his findings to the Agency, pursuant to subsection 38(1) of the CTA. The Inquiry Officer was authorized to exercise all powers described in section 39 of the CTA, including conducting onsite visits, interviewing witnesses and requiring the production of evidence.

### **Acceptance and Adoption of Inquiry Officer's Report**

[27] On August 25, 2017, the Agency examined the Inquiry Officer's Report and, pursuant to subsection 38(2) of the CTA, adopted the Report. The Agency used the Report to inform the subsequent oral hearing and it forms part of this Determination. Additional detailed background information is appended to that Report.

### **Oral Hearing**

[28] The oral hearing was held on August 30 and 31, 2017 in Ottawa. The Agency heard testimony from passengers of both Flight No. 157 and Flight No. 507, and from witnesses for Air Transat, the Ottawa International Airport Authority (OIAA), the Aircraft Service International Group (ASIG), First Air Operations, and the Airline Pilots Association (ALPA). After the oral hearing was completed, written submissions were received from Air Transat and passengers. The Agency also permitted OIAA, ASIG, First Air Operations, the Canadian Union of Public Employees and ALPA to provide written position statements; however, only OIAA and ALPA submitted such statements. All final written submissions were received by October 11, 2017.

### **The Law**

[29] The statutory and Tariff extracts relevant to this matter are set out in Appendix A and Appendix B.

## **Preliminary Matter**

[30] Air Transat's submissions and testimony raise a preliminary issue: whether Air Transat is absolved of its liability as a result of the Force Majeure provisions in its Tariff, which are found in Rules 5.3.1 and 21.5.

## **Positions of the Parties**

### **Position of Air Transat**

[31] Air Transat submits that the events of July 31, 2017 were the result of a confluence of factors beyond its control and comparable to a Force Majeure event. Consequently, pursuant to Rules 5.3.1 and 21.5 of its Tariff, Air Transat states that it cannot be held liable for any alleged failure to perform the obligations outlined in its Tariff, including the obligations outlined in Rules 5.2d) and 21.3c).

[32] Air Transat states that Flight Nos. 157 and 507 were diverted to the Ottawa Airport as a result of poor weather conditions that caused the temporary closure of two major airports. It further states that these events could not have been reasonably predicted.

[33] Air Transat adds that the duration of the delays is attributable to the presence of an exceptionally high number of wide-body aircraft that had been diverted to the Ottawa Airport during peak hours, the positioning of aircraft, the non-availability of fuel, a shortage of labour and equipment failure.

[34] Air Transat submits that these factors are specifically addressed in Rule 5.3.1 of its Tariff.

[35] In addition, Air Transat points out that pursuant to Rule 21.5 of its Tariff, it cannot be held responsible for the impacts of inclement weather or actions of third parties, including the OIAA, NAV CANADA, First Air Operations and ASIG.

[36] Air Transat submits that the third parties over which it had no control were also dealing with a chaotic, exceptional and unusual situation comparable to a Force Majeure event. In this respect, Air Transat stresses that in addition to the 20 commercial flights that were diverted during peak hours, regular operations at the Ottawa Airport had to accommodate 44 arrivals and departures of aircraft carrying over 4,000 passengers. In addition, the OIAA had to deal with the unexpected presence of an Emirates Airline Airbus A-380. Air Transat states that the Ottawa Airport did not have adequate infrastructure to accommodate such an aircraft and had to deploy considerable efforts to ensure its quick departure. According to Air Transat, the presence of the Airbus A-380 caused additional delays as it slowed down and complicated positioning operations and delayed service delivery to other aircraft.

[37] Air Transat points out that in all airports around the world, the fueling order for aircraft during a diversion is usually on a first-come, first-served basis, depending on the positioning of the aircraft. Air Transat submits that the usual first-come, first-served basis was not used, as the OIAA intervened directly in order to prioritize the refueling of some aircraft, including the Emirates Airline Airbus A-380, an Air Canada aircraft and a KLM aircraft. According to Air Transat, the OIAA proceeded in this manner to avoid the expiration of the maximum hours on duty of personnel, which would have

resulted in a massive disembarking of passengers. Air Transat submits that the OIAA's decisions regarding the positioning of aircraft had a significant impact on the waiting period on the ground.

[38] Air Transat submits that the testimonies of the OIAA representatives indicate that disembarking the passengers of the diverted aircraft would have put untenable pressure on the space and operational capacity of the Ottawa Airport. Consequently, it was imperative for the OIAA to avoid the expiration of the maximum hours on duty of various crews, which would have led to the disembarking of over 6,000 passengers, 5,000 of which originated from international destinations.

[39] According to Air Transat, the movement to the area next to Hangar 14 took place in a disorganized manner and lasted 22 minutes. Air Transat submits that the commanders initially received instructions to move and then were ordered to stop to allow the Emirates Airbus A-380 to take off. According to Air Transat, that caused unnecessary consumption of fuel and had a noticeable impact on the aircraft operating Flight No. 157.

[40] Air Transat submits that once the aircraft was parked near Hangar 14, the commanders were told every 30 minutes that they would be refueled shortly. Air Transat states that as a result, [translation] "considering, on the one hand, that they could be refueled at any time in the next 30 minutes, and, on the other hand, the considerable amount of time needed to disembark wide body aircraft with 250 passengers on board Flight No. TS507 and 340 passengers on board Flight No. TS157, the Air Transat commanders were never really able to plan to proceed with disembarking the passengers while waiting for the aircraft's departure."

[41] Air Transat adds that the commanders of Flight Nos. 157 and 507 were never informed, either by the OIAA or by First Air Operations, that the waiting period could be abnormally long. It submits that their decisions would have been different had they been informed.

[42] Air Transat submits that the Tariff provisions on which it is relying to conclude that it was a Force Majeure event list events that are generally qualified as Force Majeure events under civil law, common law and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).

[43] As a result, Air Transat maintains that it is consistent with the principles of exemption of liability under civil law, common law and the Montreal Convention that it cannot be held liable for any alleged failure to perform its obligations in a Force Majeure situation.

[44] In any case, Air Transat submits that it correctly performed the obligations set out in its Tariff with respect to the incidents of July 31, 2017.

## **Position of the OIAA**

[45] In its position statement, the OIAA describes "the complexity of a diversion event at an airport" in order to explain the roles and responsibilities of air carriers, airport authorities, service providers and other parties during irregular operations such as those that occurred on July 31, 2017.

[46] The OIAA states that air carriers have direct service contracts with service providers (i.e. ground handlers, aircraft catering and fuel providers, etc.) which specify the service standards required for

handling the aircraft, priority for fuelling, procedures and protocols during regular and irregular operations, and so on. The OIAA states that it is not responsible for passenger care, including the provision of drinks and snacks to passengers.

[47] The OIAA states that airports maintain “operating licenses” with air carriers to permit such companies to operate on airport property. The terms of these licences address safety, security, insurance, and liability in the event of damage to property or injury to persons. The OIAA indicates that these contracts do not cover service standards or any other specific matters required by airlines in handling aircraft, such as catering needs, fuelling protocols, or equipment requirements. Rather, air carriers enter into contracts with their chosen ground handlers to provide these services.

[48] The OIAA emphasizes that it is not involved in any way in the contract between air carriers and fuel service providers. It further explains that most commercial carriers, including Air Transat, use the same fuel consortium, which is owned and managed by airlines, to provide refuelling services.

[49] Finally, the OIAA states that it must always respect NAV CANADA’s decision to divert aircraft to the Ottawa Airport and work with NAV CANADA to facilitate aircraft landing. The OIAA further states that given the number of aircraft and space availability, it positions aircraft in the best way possible to meet carriers’ needs. Once an aircraft is safely on the ground at the airport, the responsibility lies with the carrier and its handlers to ensure proper passenger care while the aircraft is serviced.

[50] With respect to the events at the heart of this inquiry, the OIAA maintains that under the terms of Air Transat’s Tariff, the aircraft commander has sole control of the aircraft and therefore it is they who have sole discretion to make all decisions and make any requests necessary in order to properly manage the needs of their flight and passengers. Moreover, the OIAA argues that it is the aircraft commander who is aware of “the protocols for diversions, the contractual relationships with the airline’s service providers and the normal time frame in which an aircraft could be refuelled given the number of other diverted aircraft on the ground at the time of the event.” The OIAA further states that the aircraft commander would have knowledge that significant time may be required for refuelling given the aircraft’s position and that a request for priority refuelling should be made if required.

[51] The OIAA argues that the fundamental cause of the events of July 31, 2017 was a communication breakdown. Accordingly, it recommends that “air crews be obligated to provide precise and up to date information to passengers as events unfold.” In addition, the OIAA suggests that carriers often provide imprecise information, which leads passengers to believe that airport authorities are responsible for services such as marshalling, ground handling, catering, and fueling. The OIAA submits that passengers should be made aware of who is responsible for their care while on an aircraft and whether those who are servicing the aircraft are employed or contracted by the carrier. In this regard, the OIAA recommends that carriers and aircraft commanders be more transparent and precise in their communication with passengers.

[52] The OIAA further recommends that industry stakeholders such as airport authorities, NAV CANADA, and carriers coordinate to ensure that no one airport is unduly burdened in a diversion event. OIAA contends that, if possible, it would be preferable to divert aircraft across several airports in a coordinated manner rather than diverting aircraft to a single airport.



## Analysis and Findings

[53] It is clear that the diversion of Flight Nos. 157 and 507 to the Ottawa Airport was caused by adverse weather conditions, the closure of the Montréal Airport and the Toronto Airport and the re-direction of the flights by NAV CANADA, and was not within the control of Air Transat.

[54] The Agency also recognizes that the extraordinary presence of 20 diverted aircraft in addition to the scheduled arrivals and departures placed considerable pressure on the operational capacity of the Ottawa Airport and ground handlers. Difficulties were experienced in refuelling the flights due to the positioning of the aircraft by the OIAA, the fact that the normal order of refuelling was not followed, and the unplanned presence of an Airbus A-380. It is not surprising that multiple flights, including Flight Nos. 157 and 507, experienced delays in these circumstances.

[55] There is no basis, however, for any argument that the carrier is not responsible for non-performance of its obligations when that failure is related to the acts of its agents, with which it has contracts to perform all or part of those very obligations. Air Transat is responsible for the actions of parties with which it has contracted for services, including First Air Operations, and if it faces liability for actions related to their failure to deliver contracted services, that is a civil matter between them. First Air Operations is in a contractual relationship with Air Transat for the purposes of performing ground handling services such as passenger handling and ramp services. The service contract between Air Transat and First Air Operations contains a number of service standards, including standards relating to the number of employees required to complete various tasks.

[56] That said, it is evident that the duration of the post-diversion tarmac delays experienced by the passengers of Flight Nos. 157 and 507 resulted from a variety of causes, some of which were not within Air Transat's control. Accordingly, the Agency finds that Air Transat cannot be found solely responsible for those delays.

[57] Given that Air Transat was not responsible for the diversions and not solely responsible for the length of the tarmac delays, the question is whether, as the carrier submits, this relieves it of the requirement to comply with Rules 5.2d) and 21.3c) of its Tariff; namely, the obligation, during the course of the delay, to "offer drinks and snacks if it is safe, practical, and timely to do so" and to "offer passengers the option of disembarking until it is time to depart if the delay exceeds 90 minutes and if the aircraft commander permits".

[58] In order for a Force Majeure situation to exempt a carrier from liability for non-performance of an obligation, it must have some connection to the non-performance of that obligation. This interpretation stems in part from the language of the Tariff itself: Rule 5.3.1 states that "... the Carrier shall not be held liable for failure in the performance of any of its obligations due to [...]" and then lists the types of events that are considered Force Majeure under the Tariff. The words "due to" suggest that there must be some connection between the "failure in the performance" of a Tariff obligation and the Force Majeure event in question.

[59] Air Transat's Force Majeure provision may relieve it from liability where events beyond its control occur and prevent it from performing its obligations. However, providing drinks and snacks and considering whether or not to disembark were within its control. In addition, the tariff provisions

related to snacks and drinks and disembarking by their very nature apply and respond to passengers' needs during service disruptions, including Force Majeure events. Therefore, the Force Majeure provisions cannot be read to relieve the carrier of those very obligations.

[60] The Agency finds that the circumstances that caused the July 31, 2017 diversions and, to some degree, the length of the subsequent tarmac delays did not prevent Air Transat from being able to perform its obligations under Rules 5.2d) and 21.3c) of its Tariff.

[61] Further, the Agency finds that Rule 5.3.1 of the Tariff is overly broad and unreasonable because it includes events that have not been determined to constitute "Force Majeure". This conclusion is consistent with a series of decisions rendered by the Agency regarding Porter Airline's Force Majeure provisions (Decision No. 16-C-A-2013, Decision No. 344-C-A-2013, and Decision No. 31-C-A-2014). In these decisions, the Agency found that the Force Majeure provisions were unreasonable and inconsistent with the principles of the Montreal Convention. The provisions at issue in these decisions were very similar to Rule 5.3.1. Of particular note is the fact that the provision at issue in Decision No. 344-C-A-2013 relieved the carrier of liability for the non-performance of its obligations due to "others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight."

[62] In addition, Rule 5.3.1 constitutes a blanket exclusion of liability. The Agency finds that it is unreasonable as it relieves a carrier of liability for non-performance regardless of whether it took all reasonable measures to perform the obligations set out in its Tariff.

[63] For these reasons, the Agency finds that Rule 5.3.1 is unreasonable and does not balance the right of passengers to be subject to reasonable terms and conditions of carriage and Air Transat's statutory, commercial and operational obligations.

## Issues

[64] The Agency will now address the following issues:

1. Did Air Transat properly apply the terms and conditions set out in its Tariff, as required by subsection 110(4) of the ATR (Air Transportation Regulations):
  1. in respect of drinks and snacks?
  2. in respect of disembarking?
2. Are Air Transat's applicable Tariff provisions reasonable, pursuant to subsection 111(1) of the ATR (Air Transportation Regulations)?

## **Did Air Transat properly apply the terms and conditions set out in its Tariff in respect of drinks and snacks?**

### **Positions of the Parties**

#### **Positions of the Passengers – Flight No. 157**

[65] Passengers state that they repeatedly requested food and water from flight crew, with little or no success.

[66] Passengers claim that the amount of water that they received during the water services that did take place was inadequate, with some stating that they did not receive any water at all. Passengers state that they assumed that no water remained on the aircraft. Brice de Schietere and Pascal de Decker indicate that approximately four hours into the delay an announcement was made by flight crew that there would be a distribution of the last of the soft drinks, coffee and fruit juice (which were not served) and that some snacks remained and would be distributed on a priority basis to the children on board. Most of the complainants state that the adults received no food. Some cite repeated requests to flight crew that food and water be served, requests that produced no results. Several passengers maintain that the flight crew said that “all food is sealed” (for customs purposes) and therefore could not be served. Maryanne Zehil maintains that panic was mounting on the flight due to the lack of supplies.

[67] Passengers state that they felt dehydrated, extremely hungry, and physically ill. One passenger, Lauren Straw, states that “our patience was running thin as we were dehydrated, starving and extremely confused.” Nathalie Vanderstappen complains that the following day “I felt sick and this was due to dehydration.”

[68] Passengers indicate that approximately four hours into the delay emergency services were called, and first responders distributed water bottles to all passengers.

### **Positions of the Passengers – Flight No. 507**

[69] Passengers on Flight No. 507 testified that they only received half a glass of water during the tarmac delay, and that this only occurred several hours after the aircraft landed at the Ottawa Airport. They stated that they did not receive any food or snacks.

[70] Chris Couture indicates that after approximately three hours, passengers began asking for drinks and snacks and were told that Air Transat could not offer anything. He submits that some passengers began panicking and some vomited. He contends that it was at this point that passengers were offered a single glass of water each, and only because passengers demanded it. Mr. Couture also alleges that three Air Transat employees or friends of employees who were sitting directly in front of him were given various refreshments including beer, bottled wine, and salad.

[71] Mr. and Mrs. Abraham state that they received no food and maintain that flight attendants were hiding from their responsibilities at the back of the aircraft and were not interacting with passengers. Mrs. Abraham states that “as far as I am concerned, Air Transat should have contacted the airport and said, ‘We have all of these people onboard, can you bring them some sandwiches’ or something along those lines, or have food onboard that they can serve to people and make sure they have plenty of water.”

[72] Three pregnant passengers submit that Air Transat did not show concern or regard for their health or the particular needs that they may have as a result of pregnancy. Each states that she felt dehydrated as a result of not receiving adequate drinks.

[73] Ms. Tremblay, who was seated in Club Class, communicated to cabin crew that her 13-month old daughter needed food and potentially some milk. Ms. Tremblay states that the cabin crew informed her that they would only be able to provide powdered milk from outside the aircraft if her daughter was in danger. Ms. Tremblay submits that as a result of her persistence, her daughter was provided some yogurt and cheese during the delay. Ms. Tremblay also indicates that Club Class passengers received the remaining food on board.

[74] In response to Air Transat's submission, passengers state that no announcement was made that the remaining food and drinks were available on request, with Chris Couture stating that "It's a complete fabrication on the part of Air Transat". The passengers also express frustration that there were drinks and snacks remaining on board when the aircraft landed in Montréal.

### **Air Transat's Position in Respect of Both Flights**

[75] Air Transat submits that it correctly performed the Tariff obligations related to the offer of drinks and snacks during a delay. Air Transat submits that it is clear from the evidence that it correctly performed its obligations by:

- Distributing drinks and snacks as soon as it was safe, practical and timely to do so;
- Offering all food available while prioritizing children;
- Completing water services and serving water as requested;
- Not exhausting the food or water supplies on either flight.

[76] Air Transat emphasizes that, although the food and water supplies on board were limited, they were not depleted. There were remaining drinks and snacks on board both flights upon returning to Montréal. Air Transat adds that given the repeated assurances that refueling would occur within 30 minutes, the flight directors did not believe that it was necessary to order additional food and water.

[77] In addition, Air Transat submits that the flight directors announced that water and snacks would be made available.

### **Air Transat's Position – Flight No. 157**

[78] According to Air Transat, approximately 30 minutes after it landed at the Ottawa Airport, while the aircraft was still on secondary Runway 7, the flight director determined that it was safe, practical and timely to proceed with an initial water service. For safety reasons, a flight attendant had to stay close to every door because they were armed. The water service was carried out by hand.

[79] Air Transat submits that a second water service was carried out in the same manner sometime after the aircraft's arrival near Hangar 14.

[80] According to Air Transat, approximately one hour and 30 minutes after the aircraft's arrival near Hangar 14, the flight director retrieved the sealed food and juice that were still available. The available food and juice were offered in priority to children and families.

### **Air Transat's Position – Flight No. 507**

[81] Air Transat states that the director of Flight No. 507 did not believe that it was safe, practical or timely to proceed with an initial water service when the aircraft was on taxiway "C." The flight director based her decision on the following factors:

- The reserve water was at a level of 20% at the time;
- The passengers had received drinks and snacks approximately one hour and 30 minutes prior to landing at the Ottawa Airport; and,
- No passenger had requested water.

[82] According to Air Transat, once the aircraft was positioned near Hangar 14, the flight director played a film, lowered the lights in the cabin and completed a water service. The water service was carried out by hand for the safety reasons mentioned above.

[83] During the wait near Hangar 14, and following requests from passengers, the flight director asked that the remaining food be distributed with priority given to children. Air Transat stresses that it was impossible to offer food to everyone. The remaining food was therefore offered discretely to passengers who requested it.

## **Analysis and Findings**

[84] Subsection 110(4) of the ATR (Air Transportation Regulations) requires that a carrier operating an international service apply the terms and conditions of carriage set out in its tariff.

[85] For issue 1(a), the applicable Tariff provisions are as follows:

- Rule 5.2d) provides that "If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so."
- Rule 21.3c) provides that "If the passenger is already on the aircraft when the delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so."

[86] The evidence shows that the flight directors and flight attendants of both flights were unaware of the Tariff's provisions, Captain Lussier was unfamiliar with the Tariff, and Captain Saint-Laurent was familiar with the Tariff but never received training on its application. Air Transat's failure to ensure that its employees were aware of the content of the Tariff and were trained on its application contributed to the Tariff not being properly applied.

[87] The Agency accepts the testimony of passengers of both flights that they received minimal drinks and snacks, and far less than was appropriate, particularly given the length of the delay and the conditions in the aircraft.

[88] With respect to Flight No. 157, the evidence shows that the water provided in two services was insufficient, especially given the high temperature in the cabin, and that snacks were not provided or offered to all passengers, though a few who asked for a snack received one.

[89] On Flight No. 507, while water was provided while the aircraft was positioned at Hangar 14, the evidence shows that the quantities were inadequate. Although some snacks were offered to passengers in the Club Class section, this was not extended to all passengers.

[90] Air Transat's contention that no one asked for snacks or drinks despite announcements offering them is, on the evidence, questionable. In any event, the obligation set out in the Tariff is independent of passenger requests: it suggests proactive steps, stating that "the carrier will offer drinks and snacks".

[91] With respect to whether it was "safe, practical and timely to do so" – the wording of Rule 21.3c) – there is nothing in the evidence to show that the circumstances prevented Air Transat from offering more drinks and snacks than were in fact distributed. Air Transat submits that because of the location of the aircraft on the ground, flight crew had to position themselves at the exits to adhere to safety protocols. While safety is always paramount, reasonable approaches such as allocating different tasks among crew members could have allowed for passengers to be offered drinks and snacks without imperiling safety. In this regard, the Agency notes that flight crew of Flight No. 157 were able to serve water once when the aircraft was on Runway 7 and once when it was located near Hangar 14. This supports the conclusion that more water and food could have been offered without compromising safety.

[92] Air Transat confirms that both flights had food and drinks remaining at their final destination. Additionally, in her testimony, Carol Clark of First Air Operations stated that First Air Operations could have requested food such as donuts for Air Transat's flights, and that permission from CBSA (Canada Border Services Agency) to provide water would definitely have been granted. First Air Operations states that the only record of a water or food request from either of the flights was a request from Flight No. 157 at 9:25 p.m. for potable water. Therefore, there were drinks and snacks on both aircraft that could have been offered to passengers and there was an option of requesting additional supplies from Air Transat's ground handlers.

[93] Based on the foregoing, the Agency concludes that passengers on Flight Nos. 157 and 507 were either not offered snacks and drinks at all or not offered snacks and drinks to a reasonable degree, and that there were no safety or other mitigating factors (such as a scarcity of supplies) that would justify this failing. The Agency therefore finds that Air Transat failed to properly apply the terms and conditions set out in Rule 5.2d) and Rule 21.3c) of its Tariff on both flights in respect of offering drinks and snacks, and has contravened subsection 110(4) of the ATR (Air Transportation Regulations).

## **Did Air Transat properly apply the terms and conditions set out in its Tariff in respect of disembarking?**

### **Positions of the Parties**

#### **Positions of the Passengers – Flight No. 157**

[94] Passengers of Flight No. 157 vigorously complain that they were confined to the aircraft for almost six hours without the opportunity to disembark. They also provide information about the deteriorating conditions on the aircraft during the time they remained on board, including conditions related to heat, ventilation, lighting and poor communications. The situation on Flight No. 157 worsened to the point where passengers felt compelled to call emergency services (911) in order to

obtain relief and to draw attention to the passengers' plight.

[95] Passengers report that the very hot cabin temperatures prompted demands to disembark the aircraft, with some passengers shouting "Open the doors".

[96] Many passengers indicate that they made specific and repeated requests to flight crew to disembark the aircraft. Most passengers simply wanted a means to escape the conditions on the aircraft.

[97] Mr. de Schietera filed a submission with the Agency on behalf of the passengers of Flight No. 157. He claims that nothing in the evidence demonstrates that the pilot of Flight No. 157 could not access a gate at the Ottawa Airport or that buses could not have transported the passengers from Hangar 14 to the terminal. He adds that, in any event, the pilot did not make the request.

[98] Mr. de Shietere submits that the majority of passengers on a commercial flight would find it perfectly acceptable, given the circumstances, not to disembark immediately upon the expiry of 90 minutes. However, given the promise set out in the Tariff, their expectation is that once 90 minutes have passed, the aircraft commander would do all that was possible to allow disembarking in adequate and safe conditions. This is particularly the case when the aircraft has no functioning air conditioning.

### **Positions of the Passengers – Flight No. 507**

[99] Passengers of Flight No. 507 complain that they were confined to the aircraft for almost five hours without the opportunity to disembark. Passengers of Flight No. 507 echo many of the same claims as the passengers of Flight No. 157.

[100] Some passengers indicate that they made specific requests to flight crew to disembark the aircraft. Mr. and Mrs. Abraham state that they asked a flight attendant about the possibility of disembarking well over 90 minutes into the delay and overheard another passenger make a similar request. The Abrahams maintain that the flight attendant advised that "customs will NOT allow it". They testified that to the best of their knowledge, these requests were not communicated to the aircraft commander.

[101] The Abrahams add that the air conditioning on Flight No. 507 was working properly but was set at approximately 24 degrees. They report that the temperature in the cabin was so hot that passengers were becoming ill and some started to vomit due to the air quality and heat. The Abrahams state that "the stench in the plane was unbearable. One young boy running to the bathroom didn't make it and vomited all over a number of passengers two rows behind us".

[102] Ms. Tremblay also testified that she asked on several occasions about the option of disembarking. Ms. Tremblay was concerned about her young daughter because she did not have enough food supplies and as a result, she wanted to be able to disembark and to rent a car or take a train back to Montréal. She indicates that the delay was too long for her daughter, who absolutely needed to eat. Ms. Tremblay maintains that the crew advised that it would not be possible to leave the aircraft because they did not have the equipment required for disembarking via stairs and there was not a gate available at the Ottawa Airport for their flight.

[103] During her testimony, Ms. Tremblay also stated that she heard other passengers ask to disembark and that they were told by the cabin crew that it was impossible. When asked whether, to her knowledge, those demands were communicated to the aircraft commander, Ms. Tremblay stated that, in her honest opinion, [translation] “the answer is definitely yes, because cabin crew members were in constant communication with the commander.”

[104] Mazen El Bawab states that “it seems to me that this is a game of pointing fingers.” Mr. El Bawab concedes that he understands that the commanders may be outstanding pilots, but it is clear to him that some mistakes were made. He states that “the moment the commanders were told, for the second or third time, that the delays for re-fueling will exceed 30 to 45 minutes, it would be common sense for such leaders to start looking into a Plan B course of action (for example allowing supplies to come into the aircraft)”. This was clearly not the case. Mr. El Bawab points out that a four-hour period contains eight sequences of 30 minutes, therefore the commanders were informed at least six or seven times of potential delays. He suggests that “by the third 30 minutes period, a Plan B should have been in motion already.”

### **Air Transat’s Position**

[105] Air Transat submits that it correctly performed the obligations respecting disembarking set out in its Tariff by transporting its passengers to their final destination and by not offering passengers the option of disembarking, based on the reasonable judgment of its commanders.

[106] Air Transat states that the commanders’ decision to not offer the passengers the option of disembarking after 90 minutes is provided for in the Tariff and meets the criterion of a reasonable commander under the same circumstances. In this regard, Air Transat emphasizes that disembarking would have made departure to the final destination impossible given the restrictions imposed on the maximum hours on duty for in-flight personnel and the fact that disembarking would have resulted in a complete customs clearance. Air Transat submits that [translation] “the commanders’ decision was intended to allow the passengers to depart for their final destination” and that “ensuring that the passengers arrived at their final destination remained the commanders’ main concern.”

[107] In addition, Air Transat submits that the reasonableness of the commanders’ decision must be considered in terms of the information available at the time the decision was made. According to Air Transat, it is clear from the evidence that the information available indicated that fueling would take place within 30 minute intervals. Air Transat stresses that the commanders clearly testified that they would have proceeded with disembarking if they had been informed ahead of time of the delay that they would eventually experience. In addition, two other commanders confirmed that they would have made the same decision under the same circumstances.

[108] Finally, Air Transat emphasizes that none of the 20 aircraft diverted to the Ottawa Airport had their passengers disembark. It adds that, given the brief deadline, it would have been difficult, or even impossible, to reserve hotel rooms for over 500 passengers and/or rent buses to transport all of these passengers to Montréal.

[109] In short, Air Transat submits that the commanders [translation] “were never really in a position to seriously consider proceeding with disembarking while waiting for the aircraft to depart” considering



the information that was communicated to them and the consequences of disembarking.

## **Position of ALPA**

[110] ALPA's submission focuses on the obligation of the Air Transat aircraft commanders to comply with the Tariff. Accordingly, ALPA addresses the reasonableness of the exercise of discretion by the two commanders, Commander Yves Saint-Laurent (Flight No. 507) and Commander Denis Lussier (Flight No. 157) in not providing passengers with the option of disembarking when the delays exceeded 90 minutes. It also touches on the deference that should be afforded those commanders in the exercise of that discretion.

[111] ALPA maintains that the two aircraft commanders made the correct decision in not offering their passengers the option to disembark given the information that they were provided by First Air Operations, ASIG, and the OIAA. It argues that the conveyance of improper or inaccurate information by the former parties essentially exacerbated the situation faced by the Air Transat passengers of the flights in question.

[112] ALPA indicates that had the aircraft commanders of the two flights known from the outset that the tarmac delays at the Ottawa Airport would be as long as they were on July 31, 2017, they would have taken measures to allow their respective passengers the option to disembark. ALPA argues that Air Transat's ground handler, First Air Operations, the refuelling contractor ASIG, and the OIAA should have informed the Air Transat aircraft commanders in advance that the tarmac delays at the Ottawa Airport could possibly exceed 90 minutes. With this information, the aircraft commanders would have been in a position to make informed decisions as to whether it was advisable to permit such a delay without affording passengers the option of disembarking.

[113] ALPA reiterates the August 31 testimony of the two aircraft commanders who stated that they repeatedly inquired (at 30 minute intervals) as to how long it would be before their respective aircraft would be refuelled, and that they were repeatedly told that fuel would arrive within 30 to 45 minutes. Further, ALPA states the two aircraft commanders considered whether it would even be feasible for their passengers to disembark given that their aircraft were surrounded by other aircraft and unable to move, and determined that even if the aircraft could move, "there would have been a lengthy delay of approximately five to six hours because of the need for passengers to go through customs and the need to charter buses for the passengers, as the pilots would have exceeded their maximum hours on duty that is permitted by law."

[114] ALPA submits that the Air Transat aircraft commanders made the correct decision to not afford their passengers the option to disembark their aircraft. ALPA places fault on First Air Operations for not giving them a clear idea of the total length of delay when they landed; ASIG, the refuelling contractor upon whom First Air Operations relied; and the OIAA in not advising the commanders of the extent of the situation.

## **Analysis and Findings**

[115] With respect to issue 1(b), the applicable Tariff provisions are Rule 5.2(d) and Rule 21(3)(c),

which state as follows:

If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.

[116] The Agency finds that the most reasonable interpretation of this provision is that the aircraft commander will consider whether to permit disembarking when a delay exceeds 90 minutes. Air Transat and ALPA correctly noted that these provisions grant Air Transat's aircraft commanders broad discretion to determine whether or not to permit disembarking. However, broad discretion cannot equate ignorance or inaction. Discretion to decide requires that the individual be aware that they have the discretion and that the individual actually exercise it. While proper application of the Tariff does not require that permission to disembark be granted, it does require that the option be weighed, taking into account relevant considerations such as the expected timing of refuelling and conditions on the aircraft. If the aircraft commanders do not realize that they have a choice to make or they never actually make it, the very logic of the provision – offering disembarking with the commander's permission - is negated. There is no evidence on record that either aircraft commander actively considered disembarking in accordance with the Tariff.

[117] Commander Lussier stated that he was unfamiliar with Air Transat's Tariff and Commander Saint-Laurent submitted that he was somewhat familiar with the Tariff, but it was clear that his understanding of the onboard delay provision was not accurate. Neither commander received training from Air Transat on the Tariff's application.

[118] The aircraft commanders indicated that had they known that the delays would have lasted as long as they did, they would have considered disembarking. The Agency finds the aircraft commanders' reliance on repeated 30-minute time estimates for refuelling to be unreasonable. The fact that these estimates were provided multiple times, combined with the fact that the commanders could see that multiple aircraft were simultaneously waiting for refuelling, should have led them to conclude at some point that refuelling would take longer than originally anticipated and to actively consider disembarking.

[119] The evidence shows that while disembarking would have been impossible, or feasible only with extraordinary authorizations, on Runway 7 and Taxiway C, it could have occurred subsequently, including while the aircraft were parked at Hangar 14. The OIAA stated that gates were available and customs were able to process one or more flights. However, nothing in the record indicates that there was any attempt on the part of the aircraft commanders to explore disembarking options with the OIAA, CBSA (Canada Border Services Agency), ground handlers, or Air Transat's own Operations Centre in Montréal.

[120] Air Transat correctly submitted that, in the event of an involuntary re-routing of a flight, the Tariff does require the air carrier to ensure that the passengers are brought to their ultimate destination. However, as per Rule 5.2(e), it does not require that this obligation be satisfied in one specific way. The air carrier can ensure that the passengers reach their destination on the same flight, another flight by another commercial carrier or by other modes of transportation, or by terminating the flight

and providing a refund to the passengers.

[121] Although disembarking would have significantly delayed the passengers' arrival at their destination, the conditions on the flights also needed to be taken into account when considering whether or not to disembark. Passengers' accounts, as described above and in the Inquiry Officer's Report, show that those conditions were poor. For Flight No. 157, these accounts are corroborated by the flight report prepared by the flight director, Igor Mazalica, which states that the situation on board reached the point where it was "close to a riot breaking out". Mr. Mazalica downplayed the difficulties experienced by the passengers in subsequent testimony before the Agency, but that testimony lacks credibility, given that it was marked by internal inconsistencies and the fact that the flight report was prepared immediately following the events in question.

[122] In light of the foregoing, the Agency finds that Air Transat failed to properly apply the terms and conditions set out in Rules 5.2(d) and Rule 21(3)(c) of its Tariff on both flights in respect of disembarking, and has contravened subsection 110(4) of the ATR (Air Transportation Regulations).

## **Are Air Transat's applicable tariff provisions reasonable?**

### **Positions of the Parties**

#### **Positions of the Passengers**

[123] Passengers made limited submissions directly addressing the reasonableness of Rules 5.2d) and 21.3c) of the Tariff.

[124] Some passengers argue that it was not reasonable for the aircraft commander to have absolute discretion and that factors beyond financial cost should be taken into account when considering whether to disembark. Some passengers state that they were surprised that no other entities had the authority to compel the aircraft commander to allow passengers to disembark. For example, Isabelle Archambault, a passenger on Flight No. 157 stated the following:

[translation]

To my amazement, no one seemed to have the authority to order the aircraft commander to allow us to leave. As stated above, the response from the police officer, firefighters and airport personnel was to systematically deny any responsibility, exclusively deferring responsibility to the aircraft commander. The same response was found in certain public statements made following the incident... We were true hostages with minimal humanitarian visitation and under the sole authority of the airline and its subordinate, the aircraft commander.

[125] Passengers' negative comments regarding conditions in the aircraft during the tarmac delays suggest that they may be of the view that Rules 5.2d) and 21.3c) are unreasonable to the extent that they do not address passengers' needs beyond drinks and snacks.

[126] Passengers state that lavatories were not consistently functional and that not all lavatories had sufficient supplies to ensure adequate comfort and hygiene. In addition, passengers of both flights submitted that they endured very high temperatures and poor ventilation in the aircraft.

[127] Numerous passengers also expressed concerns about the lack of information provided by Air Transat to its passengers and the limited accuracy of that information. These passengers stated that there was very limited communication with passengers by the flight crews and the aircraft commanders about the events. When asked during the hearing what recommendations she would make for improvements to communication, Mrs Tremblay replied as follows:

[translation]

[...] it is not right to give us information that makes no sense at all. It is impossible that the commander is able to assess that it takes 45 minutes to refuel, while everyone in the aircraft who works for Air Transat says that it's not true that it will be 45 minutes, rather it will be two hours. I would rather get the truth from the beginning and be correctly informed of the situation.

[128] Finally, the Agency notes that some passengers submitted that the Tariff is unreasonable precisely because crew members are unaware of its content and/or of its existence.

### **Air Transat's Position**

[129] Air Transat states that its Tariff is reasonable and that it establishes a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and its statutory, commercial and operational obligations. Air Transat does not, however, make specific submissions with respect to the reasonableness of the Tariff obligations respecting the offering of drinks and snack during a delay.

[130] Air Transat submits that the Tariff provisions that give the aircraft commander the discretion to determine whether they will allow passengers to disembark after 90 minutes are reasonable on the basis that the aircraft commander is in the best position to:

- Assess the risks that passengers could face during disembarking depending on the positioning of the aircraft; and,
- Determine whether the flight can be completed and arrive at its final destination in a timely manner given the information provided to them by the various interveners on the ground, the restrictions imposed on the maximum number of hours on duty and other relevant factors.

[131] According to Air Transat, the Tariff allows its commanders to exercise their reasonable judgment to assess the option of disembarking according to relevant factors such as: the safety of passengers, the availability of fuel, the timeframe in which they expect to be refueled, the location of the aircraft, the customs clearance delays and the possibility of eventually reaching the final destination.

[132] Air Transat submits that reasonable terms and conditions of carriage for passengers are in part achieved through the exercise of reasonable judgment by the aircraft commander. It adds that a contextualized reading of the Tariff requires the recognition of the important status of aircraft commanders under Canadian law: the aircraft commander has full charge and authority on the aircraft and has all the power of a peace officer on board, including the authority to arrest people. Air Transat submits that [translation] “it is completely reasonable to defer decision making in an aircraft to a person who has been given such authority by the law.”

[133] Air Transat adds that the aircraft commander’s discretion is “absolutely necessary” in order to give full meaning to Rules 5.2d) and 21.3c) of the Tariff. According to Air Transat, these Tariff provisions do not cover the possibility of the aircraft not having access to a gate when the 90-minute deadline expires. As a result, an application not based on the discretion of the aircraft commander would only be possible in cases where the aircraft is situated at, or has immediate access to, a boarding gate. In this respect, Air Transat stresses that one of its competitors’ tariffs specifies that the option of disembarking after 90 minutes will be offered if the aircraft is located at a gate.

[134] Finally, Air Transat argues that certain tariff provisions, including Rules 5 and 21, were adopted as a result of a “compromise” with Parliament promoted by certain Canadian carriers. Air Transat stresses that Bill C-310, tabled in the House of Commons by Jim Maloway in 2009, would have imposed significant obligations in the event of delays that lasted over one hour. As a compromise, several airlines incorporated into their respective tariffs certain provisions related to service in the event of the delay found in the Code of Conduct of Canada’s Airlines. Following this integration and the recommendation of the Standing Committee on Transport, Infrastructure and Communities, the House of Commons then ended its review of Bill C-310. Air Transat thus argues that the inclusion of Rules 5.2d) and 21.3c) in the Tariff resulted from a compromise that was found to be “reasonable” by Parliament.

## **Analysis and Findings**

[135] In assessing whether a term or condition of carriage is reasonable as required by section 111 of the ATR (Air Transportation Regulations), the Agency has traditionally applied a balancing test. This test requires that the right of a passenger to be subject to reasonable terms and conditions of carriage be balanced with the particular carrier’s statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*).

[136] Under the current law, the terms and conditions of carriage are determined by the air carrier without any requirement to receive input from passengers, the Agency, or any other party. There is no presumption, one way or the other, regarding the reasonableness of a tariff. The Agency may rule on the reasonableness of tariff provisions upon complaint or, for tariffs covering international flights, on its own motion.

### **Reasonableness of the Tariff Provisions Addressing Drinks and Snacks**

[137] Rules 5.2d) and 21.3c) of the Tariff provide that if passengers are on board the aircraft when a delay occurs, the carrier will offer drinks and snacks “if it is safe, practical and timely to do so.” The

Agency finds that these Tariff provisions strike an appropriate balance between the right of passengers to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations, and are accordingly reasonable.

### **Reasonableness of the Tariff Provisions Addressing Disembarking**

[138] Rules 5.2d) and 21.3c) state that the carrier will offer the passengers the option of disembarking until it is time to depart if the delay exceeds 90 minutes and the aircraft commander permits.

[139] The Agency finds that it is reasonable for the aircraft commander to have the broad discretion provided for by this provision at and for some time after the 90-minute mark, provided that this discretion is properly exercised, as described under issue 1(b) above.

[140] However, the Agency finds that it is unreasonable for the commander's discretion to remain so broad for an indefinite period of time. Generally, the length of a tarmac delay and the difficulties experienced by passengers will correlate and so, to respect the passengers' right to reasonable terms and conditions of carriage, the onus must eventually shift towards a stronger, less discretionary obligation to disembark passengers. At that point, the only restrictions on a positive obligation to disembark should be related to safety, security, and air traffic control.

[141] In this regard, the Agency notes that the United States of America has recognized that aircraft commanders should not have absolute discretion in the context of extended tarmac delays and has adopted a prescriptive regulatory framework that directs the actions of carriers. This means that carriers operating to, from, and within the United States of America – including Air Transat – must establish tarmac delay contingency plans. Air Transat's contingency plan addresses issues including, but not limited to, disembarking, communication with passengers, food and drinks, and measures that address passengers' other needs such as restroom facilities and medical care. It can be found in Appendix C.

[142] The Agency further finds that Rules 5.2d) and 21.3c) are unreasonable in that they do not take into account passengers' needs, beyond snacks and drinks, in the context of extended delays.

### **Corrective Measures and Orders**

[143] Air travel is a complex system that relies on multiple parties and regulatory frameworks. The events of July 31, 2017 at the Ottawa Airport further underscore the need for all the parties involved in commercial air travel to establish strong partnerships, lines of communication, and accountabilities to address the common interests and needs of passengers. While the Agency does not have the authority to order that air carriers, airport authorities, ground handlers, NAV CANADA, CBSA (Canada Border Services Agency), and others in the air travel supply chain to work together to create contingency plans for irregular operations such as those that occurred on July 31, 2017 in Ottawa, it strongly encourages them to do so.

[144] Notwithstanding the fact that the diversion of Flight Nos. 157 and 507 was beyond Air Transat's control and the length of the subsequent tarmac delays was partly out of its control, the Agency has found, on the evidence, that the carrier failed to properly apply those provisions of its Tariff that set

out its obligations in the event of such a delay.

[145] Paragraphs 113.1 (a) and (b) of the ATR (Air Transportation Regulations) provide that if an air carrier fails to properly apply its tariff, the Agency may direct it to take the corrective measures that the Agency considers appropriate and pay compensation for any expense incurred by any person adversely affected by that failure. The Agency does not have the statutory authority to award compensation for the inconvenience that passengers experienced (though such compensation may be payable under European Union rules applicable to Flight Nos. 157 and 507), nor for pain and suffering.

[146] Based on the Agency's finding that Air Transat did not properly apply Rules 5.2d) and 21.3c) of its Tariff, the Agency orders Air Transat to compensate all passengers of Flight Nos. 157 and 507 for out-of-pocket expenses incurred as a consequence of failure to properly apply its Tariff. Air Transat is to pay any out of pocket expenses incurred by the passengers as soon as possible, and no later than May 24, 2018.

[147] Based on the evidence that the employees and agents of Air Transat are not properly informed of the carrier's obligations as set out in its Tariff, and the likelihood that this contributed to the failure to properly apply the Tariff, the Agency orders Air Transat to ensure that proper training is provided to all Air Transat employees, including aircraft commanders, flight crew, operations staff, and any servant or agent engaged in delivering services during onboard delays so that they have knowledge of applicable Tariff provisions, policies, and procedures. Such training should emphasize that these provisions and policies are legal obligations that Air Transat is bound to respect. Air Transat is to provide information on the required training, once it has been developed and delivered, and no later than May 24, 2018.

[148] Based on the Agency's finding that elements of Rules 5.2d) and 21.3c) of the Tariff are unreasonable, the Agency orders Air Transat to revise these Rules and all corresponding rules of its other international tariffs (Canadian General Rules Tariff No. CGR-1, NTA (National Transportation Agency)(A) 241 applicable to the transportation of passengers and baggage between points in the United States/Virgin Islands/Puerto Rico and Canada and International Charter Tariff CTA(A) 5) so that the existing text in respect of food and water distribution and disembarking with the commander's permission after 90 minutes is supplemented with the terms and conditions that incorporate the provisions of Air Transat's Contingency Plan for Lengthy Tarmac Delays at US Airports (Revised April 2016). Those terms and conditions create a positive obligation to disembark passengers if a tarmac delay reaches four hours – unless there are safety, security, or air traffic control issues that prevent it – and require that during the delay, the carrier provide passengers with updates every 30 minutes, working lavatories, and medical assistance if needed. These amendments are to be filed with the Agency as soon as possible, and no later than February 27, 2018.

[149] Finally, based on the Agency's finding that Rule 5.3.1 of the Tariff is unreasonable, the Agency orders Air Transat to revise Rule 5.3.1 and all corresponding rules of its other international tariffs (Canadian General Rules Tariff No. CGR-1, NTA (National Transportation Agency)(A) 241 applicable to the transportation of passengers and baggage between points in the United States/Virgin Islands/Puerto Rico and Canada and International Charter Tariff CTA(A) 5) to reflect the definition of

Force Majeure found in the Agency's sample tariff for domestic and international scheduled flights. These amendments are to be filed with the Agency as soon as possible, and no later than February 27, 2018.

[150] This Determination provides a resolution to all complaints made by passengers in respect of Flight Nos. 157 and 507 that have been filed with the Agency pursuant to subsection 110(4) and section 111 of the ATR (Air Transportation Regulations).

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## **Appendix A: Air Transportation Regulations, SOR/88-58, as amended**

**110 (4)** Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

**111 (1)** All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

**113.1** If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

- a. take the corrective measures that the Agency considers appropriate; and
- b. pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

## **Appendix B: Air Transat's International Passenger Rules and Fares Tariff CTA(A) No. 4**

5.2 Responsibility for schedules and operations (Subject to Rule 21):

- a. The Carrier will endeavor to transport passengers and baggage with reasonable dispatch. Times shown in schedules, scheduled contracts, tickets, air waybills or elsewhere are not guaranteed. Flight schedules are subject to change without notice. Notwithstanding, the Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reason for the delay or change.
- b. Where a routing modification subsequent to the purchase of travel results in a change from a direct service to a connecting service, the Carrier will, upon request by the passenger, provide a full refund of the unused portion of the fare paid.



- c. Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier. Notwithstanding, if the baggage does not arrive on the same flight, the Carrier will take steps to deliver the baggage to the passenger's residence/hotel as soon as possible. The Carrier will take steps to inform the passenger on the status of delivery and will provide the passenger with an overnight kit, as required.
- d. If a flight is delayed for/advanced by more than four (4) hours in comparison to the originally scheduled departure time, the Carrier will provide the passenger with a meal voucher. If the flight is delayed for/advanced by more than eight (8) hours and requires an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not originate their travel at that airport. If the delay occurs while onboard, the Carrier will offer drinks and snacks, where it is safe to do so. If the delay exceeds 90 minutes and if the aircraft commander permits, the Carrier will offer passengers the option of disembarking until it is time to depart.

### 5.3 Force Majeure

5.3.1 Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:

- a. Act of God.
- b. War, revolution, insurrection, riot, blockade or any other unlawful act against public order or authority including an act of terrorism involving the use or release or threat thereof, of any nuclear weapon or device or chemical or biological agent.
- c. Strike, lock-out, labour dispute, or other industrial disturbance whether involving the Carrier's employees or others upon whom the Carrier relies.
- d. Fire, flood, explosion, earthquake, adverse weather conditions, storm/lightening, infectious disease outbreak, epidemic, pandemic, public health emergency and quarantine.
- e. Accidents to or failure of the aircraft or equipment used in connection therewith.
- f. Non-availability of fuel at the airport of origin, destination or enroute stop.
- g. Others upon whom the Carrier relies for the performance of the whole or any part of any scheduled contract or flight.
- h. Government order, regulation, action or inaction.
- i. Unless caused by its negligence, any difference in weight or quantity of cargo from shrinkage, leakage or evaporation.
- j. The nature of the cargo or any defect in the cargo or any characteristic or inherent vice therein.
- k. Violation by a consignor, consignee or any other party claiming an interest in the cargo of any of the terms and conditions contained in this tariff or in any other applicable tariff including, but without being limited to, failure to observe any of the terms and conditions relating to cargo not acceptable for transportation or cargo acceptable only under certain conditions.
- l. Improper or insufficient packing, securing, marking or addressing.
- m. Acts or omissions of warehouseman, customs or quarantine officials or other persons other than the Carrier or its agents, in gaining lawful possession of the cargo.
- n. Compliance with delivery instructions from the consignor or consignee.

- o. Any other causes beyond the reasonable control of the Carrier.
- p. Failure to obtain the approval of government agency, commission, board or other tribunal having jurisdiction in the circumstances as may be required to the conduct of operations hereunder or any government or legal restraint upon such operation.
- q. Loss of or hijacking of aircraft, or any shortage of or inability to provide labour, fuel or facilities.
- r. Any other event not reasonably to be foreseen, anticipated or predicted, whether actual, threatened or reported, which may interfere with the operations of the Carrier.

5.3.2 Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the Carrier shall refund the unused portion of the flight and shall use its best efforts to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper

**Rule 21 – ADDITIONAL PASSENGER SERVICE COMMITMENTS**

1. Given that passengers have a right to information on flight times and schedule changes, the Carrier will make reasonable efforts to inform passengers of delays and schedule changes and to the extent possible, the reason for the delay or change.
2. (C)(i) Given that passengers have a right to take the flight they paid for, if the passenger's journey is interrupted by a flight cancellation, overbooking or in the event that the originally scheduled departure time is advanced, the Carrier will take into account all the circumstances of the case as known to it and will provide the passenger with the option of accepting one or more of the following remedial choices:
  - a. transportation to the passenger's intended destination within a reasonable time at no additional cost;
  - b. return transportation to the passenger's point of origin within a reasonable time at no additional cost;
  - c. where no reasonable transportation option is available and upon surrendering of the unused portion of the ticket, a cash amount or travel credit (at the passenger's discretion) in an amount equal to the fare and charges paid will be refunded or provided as a credit where no portion of the ticket has been used. Where a portion of the ticket has been used, an amount equal to the lowest comparable one-way fare for the class of service paid for shall be refunded or provided as a credit in the event of a one-way booking/itinerary, and for round-trip, circle trip or open jaw bookings/itineraries, an amount equal to fifty percent of the round-trip fare and charges for the class of service paid for, for the unused flight segment(s), shall be refunded or provided as a credit.
- (ii) When determining the transportation service to be offered, the Carrier will consider:
  - a. available transportation services, including services offered by interline, code sharing and other affiliated partners and, if necessary, other non-affiliated carriers;
  - b. the circumstances of the passenger, as known to it, including any factors which impact upon the importance of timely arrival at destination.
- (C)(iii) Having taken all the known circumstances into consideration, the Carrier will take all measures that can reasonably be required to avoid or mitigate the damages caused by the

overbooking, cancellation or flight departure time advancement. Where a passenger who accepts option (a) or option (b) or option (c) nevertheless incurs expense as a result of the overbooking, cancellation or flight departure time advancement, the Carrier will in addition offer a cash payment or travel credit, the choice of which will be at the passenger's discretion.

(C)(iv) When determining the amount of the offered cash payment or travel credit, the Carrier will consider all circumstances of the case, including any expenses which the passenger, acting reasonably, may have incurred as a result of the overbooking, cancellation or flight departure time advancement, as for example, costs incurred for accommodation, meals or additional transportation. The Carrier will set the amount of compensation offered with a view to reimbursing the passenger for all such reasonable expenses.

[...]

3. (C) Given that passengers have a right to punctuality, the Carrier will do the following:
  - a. If a flight is delayed/advanced and the difference between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the Carrier will provide the passenger with a meal voucher;
  - b. If a flight is delayed/advanced by more than 8 hours and the delay/advancement involves an overnight stay, the Carrier will pay for an overnight hotel stay and airport transfers for passengers who did not start their travel at that airport;
  - c. If the passenger is already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and the aircraft commander permits, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart.

[...]

5. Given that nothing in this tariff would make the Carrier responsible for acts of force majeure per Rule 5.3 or for the acts of third parties that are not deemed servants and/or agents of the Carrier per applicable law or international conventions, the Carrier will not be held responsible for inclement weather or for the actions of such third parties including governments, air traffic control service providers, airport authorities, security and law enforcement agencies, or border control management authorities.
6. In the event of a conflict between the provisions of this Rule and those of any other rule in this tariff, the provisions of this Rule shall prevail except with respect to Rule 5.3.

## **Appendix C: Air Transat Contingency Plan for Lengthy Tarmac Delays at US Airports (Revised April 2016)**

April 2016/GS

In compliance with the U.S Department of Transportation (D.O.T.), this Plan for Lengthy Tarmac Delays at U.S. Airports is intended to provide information regarding Air Transat's policies for handling travel on our airline in the event of a lengthy onboard delay of our aircraft. Above all else, the safety and well-being of our passengers and crew remain our priority, as well as meeting our customer's essential needs.

A tarmac delay is defined as holding an aircraft on the ground after leaving the gate or upon landing without access to the terminal. Our Operations Control Centre will work with the affected airport and In-flight teams to implement the Plan, which may also include the participation of local airport authorities. In conjunction with requirements set forth by the D.O.T., our Plan applies to all U.S. airports served by Air Transat for both scheduled and diverted flights

1. For international flights departing from or arriving at a U.S. airport, Air Transat will not permit its aircraft to remain on the tarmac for more than four (4) hours after the aircraft leaves the gate in the case of departures or touches down in the case of arrivals before allowing passengers to deplane, unless:
  - A. The pilot-in-command determines there is a safety-related or security-related reason (e.g. weather, a directive from a government agency/authority) why the aircraft cannot leave its position on the tarmac to deplane passengers; or
  - B. Air traffic control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations.
2. In the event of an opportunity to disembark, Air Transat endeavours to ensure passengers are made aware and kept informed as to the deplaning process and ground services that will be provided and to ensure that passengers are updated every thirty (30) minutes that there is an opportunity to deplane the aircraft if the opportunity to deplane exists.
3. For all flights, Air Transat will:
  - A. Ensure passengers are updated every 30 minutes on the status of the delay; and
  - B. Provide adequate food (e.g. snack foods such as pretzels or granola bars) and non-alcoholic beverages if more than two (2) hours elapse after the aircraft leaves the gate (in the case of departure) or touches down (in the case of arrival) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security concerns preclude this offering; local Customs laws, facility limitations, weather, etc. notwithstanding.
4. For all flights, Air Transat will provide operable restroom facilities, as well as adequate medical attention if needed, while the aircraft remains on the tarmac.
5. Air Transat will provide sufficient resources to implement this Plan.
6. Air Transat will coordinate this Plan with airport authorities, U.S. Customs and Border Protection (CBP), and the Transportation Security Administration (TSA) of every airport that we serve in the U.S., including diversion airports.

## **Member(s)**

Scott Streiner  
Sam Barone  
P. Paul Fitzgerald

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