

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

**RAYMOND PAUL NAWROT and
KRISTINA MARIE NAWROT and
KAROLYN THERESA NAWROT**

Moving Parties

– and –

**SUNWING AIRLINES INC. and
CANADIAN TRANSPORTATION AGENCY**

Respondents

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PART I – STATEMENT OF FACTS

A. Overview

1. This case involves fundamental principles of law: (a) the duty to provide adequate reasons; (b) that there is only one civil standard of proof; and (c) that a decision that is a product of fettered discretion is unreasonable. It also involves application of the *Montreal Convention*, an international treaty governing civil liability of airlines to passengers, to which Canada is a party.

2. In August 2012, the Nawrots' flight from London Gatwick to Toronto was delayed by 14 hours. The Nawrots presented themselves for check-in 75 minutes before the revised departure time, but found the airline's counters closed, and they were involuntarily denied boarding. The airline offered to transport the Nawrots six days later; however, this was not feasible due to the Nawrots' pre-existing commitments. The Nawrots purchased seats on an Air Canada flight, and returned to Toronto two days later than originally scheduled.

3. The Nawrots filed a complaint with the Canadian Transportation Agency against the airline, and sought, among other things, compensation for the out-of-pocket expenses they incurred, as well as denied boarding compensation, and legal costs. The Agency dismissed the Nawrots' claim for compensation, and concluded that they failed to prove that they presented themselves for check-in at least 60 minutes before the flight's departure. The Agency did not consider the claim based on the *Montreal Convention*, and did not award the Nawrots even the amounts that the airline explicitly admitted to owing.

4. Although the Agency upheld the Nawrots' complaint that the airline's tariff was unreasonable, the Agency refused to award the Nawrots legal costs based on the practice of the Agency that "an award of costs is warranted only in special or exceptional circumstances."

5. The Nawrots are seeking leave to appeal to this Honourable Court from the Agency's decision. The Nawrots submit that the Agency erred in law and/or rendered an unreasonable decision and/or exceeded its jurisdiction by:

- (a) failing to order the airline to pay the undisputed portion of their claim;
- (b) failing to give adequate reasons and to analyze important relevant evidence;
- (c) failing to consider delay and apply the *Montreal Convention*;
- (d) misstating the civil standard of proof;
- (e) fettering its discretion with respect to costs.

6. The proposed appeal raises matters of some public importance beyond the specific decision of the Agency, because it involves fundamental principles of administrative and international law.

B. Factual background

(a) The parties

7. The Moving Parties, Raymond Paul Nawrot, Kristina Marie Nawrot and Karolyn Theresa Nawrot (the "Nawrots") purchased a Toronto-London Gatwick-Toronto round-trip itinerary on the flights of the Respondent, Sunwing Airlines ("Sunwing").

(b) Flight WG 201 was delayed by 14 hours

8. It is common ground that:

- (a) the Nawrots were scheduled to return from London to Toronto on Flight WG 201 of Sunwing on August 10, 2012 at 12:20 pm;
- (b) Flight WG 201 was delayed by more than 14 hours, and was rescheduled to depart at 2:25 am on August 11, 2012;
- (c) the Nawrots incurred hotel and meal expenses during this initial 14-hour delay, and Sunwing is liable for these expenses.

Answer of Sunwing, p. 10

[Tab 8, P228]

(c) Cut-off time for Flight WG 201: 1:25 am

9. It is also common ground that the check-in cut-off time for Flight WG 201 was 1:25 am on August 11, 2012 (60 minutes before departure), and Sunwing was required to staff its check-in counters and accept passengers until then.

Answer of Sunwing, p. 2

[Tab 8, P220]

(d) Arrival at Gatwick Airport station at 1:00 am

10. On August 10, 2013 at 11:55 pm, the Nawrots purchased three train tickets to Gatwick Airport at Victoria Station.

**Reply of the Nawrots, Annexes "A"- "C":
Southern Railway's records
Productions of the Nawrots, Annex "A"
Affidavit of Mr. Nawrot, para. 7**

[Tabs 13A-C, P349]

[Tab 7A, P212]

[Tab 4, P101]

11. The Nawrots' tickets were marked "SOUTHERN ONLY" and they were not valid for Gatwick Express, which has a different and higher fare schedule.

Reply of the Nawrots, Annexes "C" & "D"

[Tabs 13C-D, P353]

12. On August 11, 2012, in the hour following the Nawrots' train ticket purchase, there were only two regular (non-Gatwick Express) trains from Victoria Station to Gatwick Airport: at 0:05 am and 0:14 am, arriving at Gatwick Airport station at 0:41 am and 0:59 am, respectively.

Complaint of the Nawrots, Annex "A": [Tab 3A, P76]
Train schedule for 2012

13. On August 11, 2012, between 0:00 and 2:00 am, there were no delays of Southern Railway's trains between Victoria Station and Gatwick Airport.

Reply of the Nawrots, Annex "E": [Tab 13E, P358]
Southern Railway's records

14. On August 11, 2012, the Nawrots took the train from Victoria Station to Gatwick Airport, and arrived there at 1:00 am or shortly thereafter.

Affidavit of Mr. Nawrot, para. 8 [Tab 4, P101]

(e) The Nawrots presented themselves for check-in at 1:10 am

15. It is common ground that the train station of Gatwick airport is located at the South Terminal, while Sunwing's counters were at the North Terminal.

Answer of Sunwing, p. 4 [Tab 8, P222]

16. Gatwick Airport operates a free shuttle train service between the terminals 24 hours a day, whose journey takes two minutes.

Nawrot's Reply, Annex "G": [Tab 13G, P362]
Gatwick Airport website

17. The Nawrots arrived at the North Terminal of Gatwick Airport and presented themselves for check-in at 1:10 am.

Affidavit of Mr. Nawrot, para. 9 [Tab 4, P102]
Declaration of Ms. Karolyn Nawrot, para. 7 [Tab 6, P203]

(f) Involuntary denied boarding

18. On August 11, 2012, at 1:10 am, the Nawrots found the Sunwing check-in counters to be closed, unattended, and the lights dimmed. Their request to check in and be allowed to board Flight WG 201 was refused by a supervisor, who insisted that the Nawrots should have checked in 3 hours before the departure time of the flight.

Affidavit of Mr. Nawrot, paras. 9-12

[Tab 4, P102]

(g) Check-in at Sofitel London Gatwick Hotel: 2:05 am

19. The Nawrots left the North Terminal at 1:45 am, and proceeded to the Sofitel London Gatwick Hotel, where they checked in. Subsequently, Mr. Nawrot's credit card was preauthorized at 2:05 am.

Affidavit of Mr. Nawrot, Exhibit "H"

[Tab 4H, P138]

(h) Sunwing's offer to transport the Nawrots 6 days later

20. On August 11, 2012, Sunwing offered to transport the Nawrots to Toronto six days later than originally scheduled, on August 16, 2012.

Affidavit of Mr. Nawrot, Exhibit "J"

[Tab 4J, P142]

(i) Purchase of Air Canada tickets

21. Due to their pre-existing commitments in Canada, the Nawrots were unable to accept Sunwing's unreasonable offer to transport them six days later. The Nawrots purchased new tickets from Air Canada, and returned to Toronto on August 12, 2012.

Affidavit of Mr. Nawrot, paras. 18-19, Exhibit "K"

[Tab 4K, P145]

C. Proceedings before the Agency

(a) The Nawrots' complaint

22. On March 21, 2013, the Nawrots filed a complaint against Sunwing with the Canadian Transportation Agency (the "Agency"), and asked the Agency to:

- (a) direct Sunwing to reimburse the Nawrots for out-of-pocket expenses in the amount of \$4,963.32 that they incurred;
- (b) direct Sunwing to pay denied boarding compensation;
- (c) substitute certain tariff provisions in Sunwing's International Tariff;
- (d) disallow Sunwing's International Tariff rule governing denied boarding as being unclear and unreasonable, and substitute it;
- (e) award costs on a full indemnity basis.

Complaint of the Nawrots, p. 33

[Tab 3, P69]

23. The Nawrots explicitly relied on the *Montreal Convention* as the legal basis for their claim for compensation.

Complaint of the Nawrots, p. 13

[Tab 3, P49]

(b) Sunwing's answer with respect to compensation

24. Sunwing explicitly admitted liability for the Nawrots' out-of-pocket expenses they incurred during the initial 14-hour delay.

Answer of Sunwing, p. 10

[Tab 8, P228]

25. Sunwing argued that the Nawrots were denied boarding because they did not present themselves by 1:25 am, 60 minutes before the flight's departure.

Answer of Sunwing, p. 2

[Tab 8, P220]

26. Sunwing relied on two documents in support of its position: the affidavit of Mr. Vic Tydeman, the supervisor of its handling agent at the Gatwick Airport, and a shift report completed by Mr. Tydeman. Both documents refer to four passengers who presented themselves late for check-in, and were denied boarding as a result. Neither of the documents mentions the passengers' names.

Partially unredacted Exhibit "1" [Tab 11]
to the Affidavit of Ms. Due
Affidavit of Mr. Tydeman [Tab 12]

27. Sunwing also challenged the credibility of the Nawrots.

Answer of Sunwing, p. 8 [Tab 8, P226]

28. Sunwing argued that the *Montreal Convention* was not applicable to the involuntary denied boarding of the Nawrots.

Answer of Sunwing, p. 10 [Tab 8, P228]

(c) The Nawrots' reply

29. The Nawrots challenged the credibility of Mr. Tydeman, and provided a detailed analysis of his evidence, demonstrating that it could only be true if one accepts that 285 passengers can be boarded in five (5) minutes or that the Nawrots were at two different places at the same time.

Reply of the Nawrots, p. 11 [Tab 13, P335]

30. The Nawrots also made extensive submissions on the applicability of the *Montreal Convention* and the strong presumption in favour of "delay" and against alternative categorizations that fall outside the scope of the convention.

Reply of the Nawrots, p. 12 [Tab 13, P335]

(d) **Decision no. 432-C-A-2013 of the Agency**

(i) **Compensation (Issue 1)**

31. The Agency failed to acknowledge in its decision the admissions made by Sunwing with respect to amounts owing to the Nawrots, and erred in law in failing to order Sunwing to pay these undisputed amounts to the Nawrots.

32. The Agency erred in law in failing to consider the parties' submissions on the applicability of the *Montreal Convention* to the Nawrots' claim for compensation, and failing to apply the *Montreal Convention*.

33. The Agency placed the burden of proof on the Nawrots, contrary to the *Montreal Convention*, and incorrectly held that "[t]hey have a greater burden of proof than simply presenting facts."

Decision of the Agency, p. 8, para. 42

[Tab 2, P14]

34. The Agency correctly found that the parties' versions of the events were contradictory, but erred in law in failing to conduct any analysis of the evidence on the record and failing to address the issue of reliability and credibility raised by both parties.

Decision of the Agency, p. 9, para. 44

[Tab 2, P15]

35. The Agency erred in law by simply stating its conclusion that the Nawrots failed to provide evidence that would lead to the conclusion that they arrived at Sunwing's check-in counter 60 minutes before the scheduled departure of their flight, without providing reasons for its conclusion.

Decision of the Agency, p. 9, para. 47

[Tab 2, P15]

(ii) **Sunwing's International Tariff (Issues 2-4)**

36. The Agency correctly concluded that Sunwing's International Tariff Rule 20, governing denied boarding, was unclear and unreasonable, and also held that certain portions of Sunwing's proposed amendments to the rule were unreasonable.

Decision of the Agency, p. 25, paras. 138-140

[Tab 2, P31]

(iii) **Costs (Issue 5)**

37. In refusing to award costs against Sunwing, the Agency fettered its discretion by taking into account irrelevant considerations, ignoring relevant considerations, and adhering to the practice that "an award of costs is warranted only in special or exceptional circumstances."

Decision of the Agency, p. 25, para. 136

[Tab 2, P31]

38. The Agency misinterpreted *Bell Canada v. Consumers' Assoc. of Canada* as standing for the proposition that "costs" before an administrative tribunal have a substantially different meaning than legal costs, and failed to consider the principle of indemnity.

Decision of the Agency, p. 24, paras. 130-131

[Tab 2, P30]

PART II – STATEMENT OF THE POINTS IN ISSUE

39. The only question to be decided is whether this Honourable Court should grant the Nawrots leave to appeal Decision no. 432-C-A-2013 of the Canadian Transportation Agency.

PART III – STATEMENT OF SUBMISSIONS

Applicable legal principles

(a) The test for granting leave to appeal

40. Every decision, order, rule or regulation of the Agency is appealable to this Honourable Court on a question of law or a question of jurisdiction with the leave of the Court.

Canada Transportation Act, s. 41(1) [Appendix “A”, P399]

41. Parties seeking leave to appeal need to establish only that the proposed appeal raises a fairly arguable question of jurisdiction or law, that is, some ground upon which the appeal *may* succeed. This test is a first and lower hurdle than what must be met on the hearing of the appeal on the merits.

Canadian National Railway Co. v. York (Regional Municipality), 2003 FCA 474 [Vol. III, Tab 5]

42. It is submitted that the proposed appeal more than meets this threshold.

(b) Standard of Review

43. According to the Supreme Court’s decision in *Dunsmuir*, there are only two standards of review: reasonableness and correctness. Reasonableness is a deferential standard, which concerns mostly the justification, transparency and intelligibility within the decision-making process, but also examines whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9, para. 47 [Vol. III, Tab 7]

44. Questions of general law that are of central importance to the legal system as a whole and outside the tribunal's specialized area of expertise do not attract deference, and are subject to the standard of review of correctness: the reviewing court must impose its own view of the correct answer.

***Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [Vol. III, Tab 7]
2008 SCC 9, para. 60**

A. The Agency's decision is unreasonable

(a) The Agency was oblivious to the parties' submissions

(i) Undisputed portions of the claim

45. The Nawrots sought compensation, as per the *Montreal Convention*, for the out-of-pocket expenses they incurred during the initial delay of 14 hours.

Complaint of the Nawrots, p. 14 [Tab 3, P50]

46. Sunwing explicitly admitted liability and that certain amounts were owing to the Nawrots:

With respect to the approximate 14 hour delay in departure of Flight WG201, Sunwing Airlines acknowledges that the *Convention* applies and that Sunwing Airlines would be liable pursuant to Article 19 for the proven out of pocket expenses incurred by the Nawrots caused by that delay. In which case, the Nawrots are relegated to compensation for their hotel accommodation August 10, 2012 in the amount of \$157.99 as well as reasonable amount for food expenses. [...] lunch and dinner; or, \$120.00 total.

Answer of Sunwing, p. 10 [Tab 8, P228]

47. The Agency considered neither the Nawrots' claim in this respect nor the admission of Sunwing that \$277.99 was owing to the Nawrots, and failed to order Sunwing to pay this undisputed, but unpaid, portion of the claim.

(ii) **Applicability of the *Montreal Convention***

48. Sunwing's International Tariff fully incorporates the liability rules set out in the *Montreal Convention*, and provides that the convention shall supersede and prevail over any provision in the tariff.

International Tariff Rule 10 of Sunwing

[Tab 14, P363]

49. Both parties made extensive submissions on the *Montreal Convention* and its applicability with respect to the Nawrots' claim for compensation, not only for the expenses incurred during the initial 14-hour delay, but also for the subsequent expenses the Nawrots incurred.

Complaint of the Nawrots, pp. 13-14, 16

[Tab 3, P49]

Answer of Sunwing, p. 10

[Tab 8, P228]

Reply of the Nawrots, pp. 12-14, 22

[Tab 13, P336]

50. The Agency did not consider the applicability of the *Montreal Convention* to the issue of compensation, nor did it otherwise address or acknowledge the parties' submissions on this central question of the applicable law.

(iii) **Conclusion**

51. The Agency's decision demonstrates that the Agency was oblivious to the parties' submissions and admissions both with respect to the facts and the law. Furthermore, the Agency provided no reasons for its not considering and awarding the undisputed, but unpaid, portion of the Nawrots' claim. Thus, it is submitted that the Decision is unreasonable.

(b) The Agency failed to give adequate reasons and to consider and analyze important relevant evidence

(i) The duty to provide reasons

52. When an administrative tribunal's decision is reviewable on a standard of reasonableness, the justification, transparency and intelligibility within the decision-making process and its reasons are primary concern.

Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada, 2006 FCA 337, para. 16 [Vol. III, Tab 4]
Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9, para. 47 [Vol. III, Tab 7]

53. Section 36 of the *Canadian Transportation Agency General Rules* imposes on the Agency the duty to give reasons.

Canadian Transportation Agency General Rules, SOR/2005-35, s. 36 [Appendix "A", P400]
Via Rail Canada Inc. v. Lemonde, [2001] 2 FC 25, para. 16 [Vol. III, Tab 16]

(ii) Adequacy of reasons

54. The duty to give reasons is a salutary one that is only fulfilled if the reasons provided are adequate. Adequate reasons are those that serve the functions for which the duty to provide them was imposed. Reasons serve a number of purposes:

- (a) focus the decision maker on the relevant factors and evidence;
- (b) provide the parties with the assurance that their representations have been considered;
- (c) provide a basis for an assessment of possible grounds for appeal;

- (d) allow the appellate court to determine whether the decision maker erred and thereby render him or her accountable.

Via Rail Canada Inc. v. Lemonde, [2001] 2 FC 25, [Vol. III, Tab 16]
paras. 17-19, 21

Vancouver International Airport Authority v. Public Service Alliance of Canada, 2010 FCA 158, [Vol. III, Tab 15]
paras. 13-14

55. A tribunal cannot discharge its duty to provide reasons by merely asserting bottom-line conclusions with no supporting information, because that immunizes the decision-maker from review and accountability.

Vancouver International Airport Authority v. Public Service Alliance of Canada, 2010 FCA 158, [Vol. III, Tab 15]
paras. 21

56. This Honourable Court held in the *Via Rail Canada* case that:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

Via Rail Canada Inc. v. Lemonde, [2001] 2 FC 25, [Vol. III, Tab 16]
para. 22

57. A tribunal must analyze and weigh the evidence presented by the parties. Evidence that is not mentioned specifically and analyzed in the tribunal's reasons supports a finding that it made an erroneous finding of fact without regard to the evidence. The tribunal's burden of explanation increases with the relevance of the evidence in question to the disputed facts.

Cepeda-Gutierrez v. Canada, 157 F.T.R. 35, [Vol. III, Tab 6]
paras. 15, 17

(iii) **The Agency failed to discharge its duty**

58. The time when the Nawrots presented themselves for check-in was a central question of fact. Although the Agency found that the parties' versions of the events were contradictory, the Agency failed to conduct any analysis of the evidence before it with respect to the issue of compensation.

Decision of the Agency, p. 9, para. 44

[Tab 2, P15]

59. The Agency's decision merely recited (albeit with material omissions) the submissions of the parties, and then stated the conclusion that the Nawrots failed to prove that they arrived at Sunwing's check-in counter 60 minutes before the scheduled departure of the flight, with no reasons for this conclusion.

Decision of the Agency, p. 9, para. 47

[Tab 2, P15]

60. The Agency's decision contains no consideration of the reliability or credibility of Mr. Nawrot's evidence, or whether it was corroborated by the documentary evidence on record. The Decision is silent as to why the Nawrots' evidence was held to be insufficient.

61. The affidavit of Mr. Nawrot, who swore that the Nawrots presented themselves for check-in at 1:10 am on August 11, 2012 **[Tab 4]**, was corroborated by third-party evidence before the Agency, but which the Agency failed to analyze:

(a) records of Southern Railway, confirming the time the Nawrots purchased their tickets, the train schedule, and that the trains were running on time; **[Tabs 13A-F], [Tab 3]**

(b) airport shuttle train schedule; **[Tab 13G]**

(c) credit card slip from the hotel at the airport. **[Tab 4H]**

62. The Agency also failed to address the substantial inconsistencies in Sunwing's evidence that were challenged by the Nawrots:

- (a) Why did Sunwing offer the Nawrots free transportation (albeit 6 days later) if Sunwing believed that the Nawrots were at fault for not presenting themselves for check-in on time? **[Tab 3, P46]**
- (b) The times stated in the affidavit of Mr. Tydeman, the "Passenger Services Supervisor" referred to in the Agency's decision, and his "Shift Report" could possibly be true only if either 285 passengers boarded the aircraft in five (5) minutes, or if the Nawrots were at two different locations at the same time. **[Tab 13, P334]**

The Agency failed to make findings with respect to the reliability and credibility of Sunwing's key affiant, Mr. Tydeman, and only observed that the parties' versions of the events were contradictory.

63. In the absence of an explicit finding of lack of reliability or credibility of Mr. Nawrot's evidence (who swore that the Nawrots presented themselves for check-in at 1:10 am) and explicit reasons for this finding, it was not open for the Agency to find that the Nawrots' evidence was insufficient, and the Agency's conclusion is (patently) unreasonable.

***Noorhassan v. Canada*, 2008 FC 97, para. 4**

[Vol. III, Tab 12]

64. It is submitted that the Agency entirely abandoned its duty as a trier of facts to analyze conflicting evidence before it and to provide adequate reasons. The Agency merely stated its conclusion. Consequently, the Agency's decision is unreasonable with respect to the issue of compensation.

B. Standard of proof

(a) Standard of review: correctness

65. Standard of proof is a question of law that is of central importance to the legal system as a whole, and falls outside the Agency's specialized area of expertise. Thus, according to *Dunsmuir*, the Agency's choice of standard of proof attracts a correctness standard.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [Vol. III, Tab 7]
2008 SCC 9, para. 60

(b) There is only one civil standard of proof

66. There is only one civil standard of proof in Canada, and that is proof on a balance of probabilities. Considerations related to the seriousness of allegations or consequences do not change the standard of proof.

F.N. v. McDougall, [2008] 3 S.C.R. 41, 2008 SCC [Vol. III, Tab 8]
53, para. 40

(c) The Agency erred in law in applying an elevated standard of proof

67. The Agency cited *Smith v. Smith*, a 1952 case involving an allegation of a quasi-criminal offence of adultery—the only legal grounds for divorce at the time—that cites *George v. George and Logie*:

The judicial mind must be "satisfied" that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal – be it judge or jury – acting with care and caution, to the fair and reasonable conclusion that the act was committed.

Smith v. Smith, [1952] 2 S.C.R. 312 [Vol. III, Tab 13]

68. The Agency then went on to misdirect itself as to the “balance of probabilities” standard, and applied an elevated standard of proof:

[42] For this case, the onus is on the Nawrots, as they are making the allegations, to convince the Agency, on a balance of probabilities, that they presented themselves at the check-in counter on time. They have a greater burden of proof than simply presenting facts.

[Emphasis added.]

Decision of the Agency, p. 8, para. 42

[Tab 2, P14]

69. Due to the lack of analysis of the evidence and adequate reasons by the Agency, it is difficult to understand what the Agency expected in addition to the sworn affidavit of Mr. Nawrot, the declarations of his daughters, and third-party documents corroborating their evidence, short of an admission by Sunwing.

70. The Agency failed to recognize that sworn affidavits are one of the most common documents used to establish facts on a balance of probabilities in civil matters in Canada, and without which the whole legal system would come to a grinding halt. Affidavits are not a way of presenting allegations or unverified statements as the Agency appears to believe, but rather a document that the affiant swears the truth of its contents.

71. The Agency erred in law and misdirected itself as to the meaning of “balance of probabilities” by holding that the Nawrots had a higher burden of proof than demonstrating facts. There is only one civil standard of proof, and in the absence of a negative finding of reliability or credibility with respect to Mr. Nawrot’s evidence, the Nawrots could have discharged this burden by as little as the sworn affidavit of Mr. Nawrot alone.

C. The Agency failed to apply the *Montreal Convention*

72. As noted earlier, Sunwing's International Tariff fully incorporates the liability rules set out in the *Montreal Convention*, and provides that the convention shall supersede and prevail over any provision in the tariff.

International Tariff Rule 10 of Sunwing

[Tab 14, P363]

73. The Nawrots sought compensation based on the *Montreal Convention* not only for the expenses they incurred during the initial 14-hour delay, but also for their subsequent expenses until their return to Canada, including the three Air Canada tickets they purchased after Sunwing offered to transport the Nawrots 6 days later than scheduled.

Complaint of the Nawrots, pp. 13-14, 16

[Tab 3, P49]

74. The applicability of the *Montreal Convention* to the Nawrots' claim for compensation was addressed in detail both in Sunwing's answer, and in the Nawrots' reply. Oddly and for unclear reasons, however, the Agency neither cited nor considered any of these submissions in its decision.

Answer of Sunwing, p. 10

[Tab 8, P228]

Reply of the Nawrots, pp. 12-14, 22

[Tab 13, P336]

(a) Excess of jurisdiction

75. The *Montreal Convention* is an international convention governing the rights and liabilities of carriers and passengers to which Canada is a party. The *Montreal Convention* has the force of law in Canada.

***Carriage by Air Act*, R.S. 1985, c. C-26, s. 2(2.1)**

[Appendix "A", P401]

76. Subsection 78(1) of the *Canada Transportation Act* provides that:

Subject to any directions issued to the Agency under section 76, the powers conferred on the Agency by this Part shall be exercised in accordance with any international agreement, convention or arrangement relating to civil aviation to which Canada is a party.

Canada Transportation Act, s. 78(1)

[Appendix “A”, P400]

77. Thus, Parliament has specifically instructed the Agency to exercise its powers with respect to air transportation in accordance with international conventions relating to civil aviation to which Canada is a party, including the *Montreal Convention*.

78. Therefore, the Agency exceeded its jurisdiction by failing to consider whether the *Montreal Convention* was applicable to the Nawrots’ claim, and failing to apply the *Convention*.

(b) Delay under the *Montreal Convention*

(i) Reverse burden of proof

79. Article 19 of the *Montreal Convention*, governing the carrier’s liability in the case of delay of passengers, imposes strict liability upon carriers. The carrier’s liability is presumed, and the burden of proof is on the carrier to demonstrate that it meets the conditions for exonerating itself from liability:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures. [Emphasis added.]

Montreal Convention, Article 19

[Appendix “A”, P401]

80. Article 20 of the *Montreal Convention* permits the carrier to exonerate itself from liability in the case of negligence or other wrongful act or omission of the person claiming compensation, but the burden of proof is placed on the carrier:

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. [Emphasis added.]

Montreal Convention, Article 20

[Appendix “A”, P402]

81. The fact that a carrier’s airplanes are fully booked does not derogate from the obligation to transport stranded passengers to their destinations, and does not fulfill the defense under Article 19 of the *Convention*. In such situations, carriers are expected to transfer the unused portion of passengers’ tickets to another carrier and reroute passengers to their final destinations. If the carrier fails to reroute passengers in a timely manner, passengers who purchase tickets on another carrier are entitled to reimbursement of their out-of-pocket expenses pursuant to Article 19.

Mohammad c. Air Canada, 2010 QCCQ 6858,
paras. 27, 30

[Vol. III, Tab 11]

(ii) **Presumption for delay and against non-performance**

82. Article 29 of the *Montreal Convention* has a “preemptive effect” in that it preempts domestic law with respect to claims that fall within the scope of the *Convention*.

Montreal Convention, Article 29

[Appendix “A”, P403]

83. While claims for delay of passengers are within the scope of the *Montreal Convention*, complete non-performance falls outside its scope, and is subject to domestic law. Consequently, courts were often called upon to decide whether the particular facts of a case gave rise to delay or complete non-performance.

84. Due to the preemptive effect of the *Montreal Convention* and the intent of the contracting states to create unified rules, there is a strong presumption in favour of a finding of delay, where the *Convention* applies, and against non-performance, where the *Convention* does not apply.

85. Courts have found that the facts of the case gave rise to “delay” and not to complete non-performance if one of the following three conditions were met:

- (a) the defendant airlines ultimately provided transportation;
- (b) the plaintiffs secured alternate transportation without waiting to see whether the airline would transport them or they refused an offer of a later flight; or
- (c) plaintiffs never alleged non-performance.

Lukács v. Air Canada, Canadian Transportation Agency, LET-C-A-80-2011, paras. 36-37 [Vol. III, Tab 10]
In re Nigeria Charter Flights Contract Litigation, [Vol. III, Tab 9]
520 F. Supp. 2d 447 (E.D.N.Y. 2007)

86. In the present case, criterion (c) is met, because the Nawrots never alleged complete non-performance; as explained below, the case also meets criterion (b). Consequently the *Montreal Convention* is applicable to their claim for compensation.

(c) **Application of the law to the present case**

(i) **The Nawrots were delayed within the meaning of the *Convention***

87. An undisputed but important fact that entirely escaped the Agency's attention is that after the Nawrots were denied boarding on Flight WG 201, Sunwing offered to transport them six (6) days later than originally scheduled and without seeking an additional payment. In other words, Sunwing acknowledged its obligation to transport the Nawrots after they were denied boarding.

Affidavit of Mr. Nawrot, Exhibit "J"

[Tab 4J, P142]

88. Thus, based on the aforementioned criterion (b), the present case is not one of complete non-performance, but rather the Nawrots were delayed within the meaning of the *Montreal Convention*. In particular, the *Montreal Convention* is applicable to the Nawrots' claim for compensation.

Lukács v. Air Canada, Canadian Transportation Agency, LET-C-A-80-2011, paras. 36-37
In re Nigeria Charter Flights Contract Litigation,
520 F. Supp. 2d 447 (E.D.N.Y. 2007)

[Vol. III, Tab 10]

[Vol. III, Tab 9]

(ii) **The burden of proof is on Sunwing**

89. There is no doubt that a passenger showing up late for a flight may give rise to a defense of contributory negligence under Article 20 of the *Montreal Convention*; however, the *Convention* is clear that the burden of proof rests with the carrier, and not the passenger, to demonstrate contributory negligence.

Montreal Convention, Article 20

[Appendix "A", P402]

90. Consequently, in the present case, the burden of proof was on Sunwing, and not the Nawrots. Sunwing had to demonstrate that the Nawrots did not present themselves on time for their flight.

91. Since the Agency did not make a finding of fact that the Nawrots were late for their flight (but only that there was insufficient evidence to conclude that they were *not* late), Sunwing did not discharge its burden of proof under Articles 19 and 20 of the *Montreal Convention*, and therefore is liable for the out-of-pocket expenses incurred by the Nawrots as a result of the delay.

(iii) The Nawrots' out-of-pocket expenses occasioned by the delay

92. It is important to note that the Nawrots were seeking only out-of-pocket expenses: hotel, meals, and the three Air Canada tickets they purchased after Sunwing made the unreasonable offer of transporting the Nawrots six (6) days later than originally scheduled.

93. Although the Nawrots had no obligation to mitigate their damages by securing transportation on the flight of another airline that departed earlier than what Sunwing offered, they were certainly entitled to do so. The availability of seats on Air Canada demonstrates that Sunwing failed to take all reasonable measures to prevent or mitigate the Nawrots' delay. Consequently, Sunwing is liable for these out-of-pocket expenses.

***Mohammad c. Air Canada*, 2010 QCCQ 6858,
paras. 27, 30**

[Vol. III, Tab 11]

(d) Conclusion

94. It is submitted that the Agency erred in law by: (i) failing to consider the applicability of the *Montreal Convention*; (ii) failing to apply the *Convention* to the Nawrots' claim for compensation; (iii) placing the burden of proof on the Nawrots contrary to the *Convention*; and (iv) failing to award the Nawrots compensation pursuant to Article 19 of the *Convention*.

D. The Agency fettered its discretion

(a) The Agency's rationale for its practice

95. The Nawrots, who were represented by counsel, sought an award of legal costs against Sunwing Airlines, and challenged the longstanding practice of the Agency to award costs only in "special or exceptional circumstances," regardless of the outcome of the case.

Complaint of the Nawrots, pp. 26-32

[Tab 3, P62]

96. The Nawrots' request for costs was refused on the basis that:

[t]he Agency maintains, as it has in past decisions, that an award of costs is warranted only in special or exceptional circumstances. There are no special or exceptional circumstances in this case.

Decision of the Agency, p. 25, para. 136

[Tab 2, P31]

97. The Agency provided the following justifications for this practice:

- (a) "costs" before tribunals have a substantially different meaning than legal costs;
- (b) there are no filing fees in proceedings before the Agency;
- (c) unrepresented parties can successfully plead before the Agency;
- (d) the Agency's *General Rules* can be used by an unrepresented party as a guide to the procedures of the Agency.

Decision of the Agency, pp. 24-25, paras. 131-134

[Tab 2, P30]

98. It is submitted that the Agency fettered its discretion to award costs by taking into account irrelevant considerations, ignoring relevant considerations, and adhering to this practice.

(b) Standard of review

99. A decision that is the product of a fettered discretion is automatically unreasonable.

***Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, para. 24** [Vol. III, Tab 14]

(c) Meaning of “costs”

100. Contrary to what is suggested by Agency’s reasons, the Supreme Court of Canada held in *Bell Canada v. Consumers’ Association of Canada* that “costs” in s. 73 of the *National Transportation Act* carries the same general connotation as legal costs, that is, being for the purpose of indemnification or compensation. A tribunal not being bound by the principle of indemnity means that it can award costs even in cases where no out-of-pocket legal expenses were incurred. This does not derogate from the principal purpose of costs: to indemnify.

***Bell Canada v. Consumers’ Association of Canada*, [1986] 1 S.C.R. 190, para. 30** [Vol. III, Tab 1]

***Canada v. Georgian College of Applied Arts and Technology (C.A.)*, 2003 FCA 199, para. 25** [Vol. III, Tab 3]

101. Section 25.1(1) of the *Canada Transportation Act*, which replaced section 73(1) of the *National Transportation Act*, unambiguously demonstrates the intent of Parliament that costs are to be awarded by the Agency in the same manner as in the Federal Court:

25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.

***Canada Transportation Act*, s. 25.1(1)** [Appendix “A”, P399]

(d) Discretion to award costs

102. The discretion of tribunals to award (or not to award) costs does not relieve tribunals from the duty to exercise this discretion judicially.

British Columbia v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71, paras. 20, 22 [Vol. III, Tab 2]

Canada v. Georgian College of Applied Arts and Technology (C.A.), 2003 FCA 199, para. 30 [Vol. III, Tab 3]

103. The discretion to award costs cannot be fettered by a practice that is not based on explicit statutory authority.

Canada v. Georgian College of Applied Arts and Technology (C.A.), 2003 FCA 199, para. 38 [Vol. III, Tab 3]

(e) Conclusion

104. The Agency's reasons contain four justifications for its current practice with respect to costs: the first is based on a misinterpretation of *Bell Canada* by the Agency as to the meaning of "costs"; the second one is relevant only to disbursements; and the third and fourth justifications are not only irrelevant, but also troubling, because they reflect an intent to discourage parties from exercising their rights to be represented by counsel.

105. There is nothing in the *Canada Transportation Act* that would confer authority upon the Agency to discourage parties from seeking legal representation, or penalize represented parties by withholding costs.

106. Therefore, it is submitted that the Agency fettered its discretion to award costs by adhering to the impugned practice, and ignoring relevant considerations, such as the indemnification principle.

PART IV – ORDER SOUGHT

107. The Moving Parties, the Nawrots, are seeking an Order:
- (a) granting the Nawrots leave to appeal decision no. 432-C-A-2013 dated November 15, 2013 of the Canadian Transportation Agency;
 - (b) granting the Moving Parties their costs of this motion; and
 - (c) granting such further relief as this Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PART V – LIST OF AUTHORITIES

CASES	PARA. No.
<i>Bell Canada v. Consumers' Association of Canada</i> , [1986] 1 S.C.R. 190	100
<i>British Columbia (Minister of Forests) v. Okanagan Indian Band</i> , [2003] 3 S.C.R. 371, 2003 SCC 71	102
<i>Canada (Attorney General) v. Georgian College of Applied Arts and Technology (C.A.)</i> , 2003 FCA 199	100, 102, 103
<i>Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada</i> , 2006 FCA 337	52
<i>Canadian National Railway Co. v. York (Regional Municipality)</i> , 2003 FCA 474	41
<i>Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)</i> , 157 F.T.R. 35	57
<i>Dunsmuir v. New Brunswick</i> , [2008] 1 S.C.R. 190, 2008 SCC 9	43, 44, 52, 65
<i>F.N. v. McDougall</i> , [2008] 3 S.C.R. 41, 2008 SCC 53	66
<i>In re Nigeria Charter Flights Contract Litigation</i> , 520 F. Supp. 2d 447 (E.D.N.Y. 2007)	85, 88
<i>Lukács v. Air Canada</i> , Canadian Transportation Agency, LET-C-A-80-2011	85, 88
<i>Mohammad c. Air Canada</i> , 2010 QCCQ 6858	81, 93
<i>Noorhassan v. Canada (Minister of Citizenship and Immigration)</i> , 2008 FC 97	63
<i>Smith v. Smith</i> , [1952] 2 S.C.R. 312	67

CASES	PARA. No.
<i>Stemijon Investments Ltd. v. Canada (Attorney General)</i> , 2011 FCA 299	99
<i>Vancouver International Airport Authority v. Public Service Alliance of Canada</i> , 2010 FCA 158	54, 55
<i>Via Rail Canada Inc. v. Lemonde</i> , [2001] 2 FC 25	53, 54, 56
STATUTES AND REGULATIONS	PARA. No.
<i>Canada Transportation Act</i> , S.C. 1996, c. 10, ss. 25.1, 41	40, 101, 76
<i>Canadian Transportation Agency General Rules</i> , SOR/2005-35, s. 36	53
<i>Carriage by Air Act</i> , R.S. 1985, c. C-26, s. 2(2.1)	75
<i>Montreal Convention (Schedule VI, Carriage by Air Act, R.S. 1985, c. C-26)</i> , Articles 19, 20, 29	79, 80, 82, 89

APPENDIX “A” – STATUTES AND REGULATIONS

<p><i>Canada Transportation Act, S.C. 1996, c. 10</i></p>	<p><i>Loi sur les transports au Canada, L.C. 1996, ch. 10</i></p>
<p>25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.</p> <p>(2) Costs may be fixed in any case at a sum certain or may be taxed.</p> <p>(3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.</p> <p>(4) The Agency may make rules specifying a scale under which costs are to be taxed.</p>	<p>25.1 (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.</p> <p>(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.</p> <p>(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.</p> <p>(4) L'Office peut, par règle, fixer un tarif de taxation des frais.</p>
<p>41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.</p>	<p>41. (1) Tout acte - décision, arrêté, règle ou règlement - de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.</p>

<p>(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.</p>	<p>(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.</p>
<p>78. (1) Subject to any directions issued to the Agency under section 76, the powers conferred on the Agency by this Part shall be exercised in accordance with any international agreement, convention or arrangement relating to civil aviation to which Canada is a party.</p>	<p>78. (1) Sous réserve des directives visées à l'article 76, l'exercice des attributions conférées à l'Office par la présente partie est assujéti aux ententes, conventions ou accords internationaux, relatifs à l'aviation civile, dont le Canada est signataire.</p>
<p><i>Canadian Transportation Agency General Rules, SOR/2005-35</i></p>	<p><i>Règles générales de l'Office des transports du Canada, DORS/2005-35</i></p>
<p>36. The Agency shall give oral or written reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed.</p>	<p>36. L'Office a l'obligation de motiver oralement ou par écrit ceux de ses arrêtés ou celles de ses décisions qui n'accordent pas le redressement demandé ou qui donnent lieu à une opposition.</p>

<p><i>Carriage by Air Act, R.S. 1985, c. C-26</i></p>	<p><i>Loi sur le transport aérien, L.R. 1985, c. C-26</i></p>
<p>2. (2.1) Subject to this section, the provisions of the Convention set out in Schedule VI, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.</p>	<p>2. (2.1) Sous réserve des autres dispositions du présent article, les dispositions de la convention figurant à l'annexe VI, dans la mesure où elles se rapportent aux droits et responsabilités des personnes concernées par le transport aérien - notamment les transporteurs et leurs préposés, les voyageurs, les consignateurs et les consignataires -, ont force de loi au Canada relativement au transport aérien visé par ces dispositions, indépendamment de la nationalité de l'aéronef en cause.</p>
<p><i>Montreal Convention (Schedule VI, Carriage by Air Act, R.S. 1985, c. C-26)</i></p>	<p><i>Convention de Montréal (Annexe VI, Loi sur le transport aérien, L.R. 1985, c. C-26)</i></p>
<p>Article 19 - Delay</p> <p>The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.</p>	<p>Article 19 - Retard</p> <p>Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.</p>

Article 20 - Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 20 - Exonération

Dans le cas où il fait la preuve que la négligence ou un autre acte ou omission préjudiciable de la personne qui demande réparation ou de la personne dont elle tient ses droits a causé le dommage ou y a contribué, le transporteur est exonéré en tout ou en partie de sa responsabilité à l'égard de cette personne, dans la mesure où cette négligence ou cet autre acte ou omission préjudiciable a causé le dommage ou y a contribué. Lorsqu'une demande en réparation est introduite par une personne autre que le passager, en raison de la mort ou d'une lésion subie par ce dernier, le transporteur est également exonéré en tout ou en partie de sa responsabilité dans la mesure où il prouve que la négligence ou un autre acte ou omission préjudiciable de ce passager a causé le dommage ou y a contribué. Le présent article s'applique à toutes les dispositions de la convention en matière de responsabilité, y compris le paragraphe 1 de l'article 21.

Article 29 – Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 29 - Principe des recours

Dans le transport de passagers, de bagages et de marchandises, toute action en dommages-intérêts, à quelque titre que ce soit, en vertu de la présente convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente convention, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. Dans toute action de ce genre, on ne pourra pas obtenir de dommages-intérêts punitifs ou exemplaires ni de dommages à un titre autre que la réparation.