

Amended pursuant to consent order entered on June 13, 2024.
Originally filed on January 11, 2024.



No. S-240224
Vancouver Registry

In the Supreme Court of British Columbia

Rodney Hodgins

Plaintiff

and

**~~Air Canada, Air Canada Rouge General Partner Inc.,
Chorus Aviation Inc., Jazz Aviation LP, Air Canada
Rouge LP~~**

Defendants

Brought pursuant to the *Class Proceedings Act*, RSBC, 1996 c 50

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (c) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

- (d) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

PART 1: STATEMENT OF FACTS

Overview

1. This proposed class proceeding seeks redress for ~~the-defendants'~~Air Canada's systemic failure to provide adequate services to passengers with mobility disabilities.
2. Air Canada ~~and its affiliates are~~is contractually obligated to provide assistance and services to passengers who rely on mobility aids, such as electric or manual wheelchairs. Pursuant to the explicit contractual terms of Air Canada's tariffs, ~~the defendants~~Air Canada must:

- (a) physically move passengers safely and with dignity, be it between their mobility aid and passenger seat (or vice versa) or within an airport; and
- (b) transport mobility aids so that they are not damaged, destroyed or lost during transport.

(Collectively, "**Contractual Obligations**")

- 3. The Contractual Obligations are critical to passengers with mobility impairments. Without the Contractual Obligations, these passengers could not travel by air.
- 4. ~~The defendants have~~Air Canada has cultivated a culture of apathy and indifference towards ~~their-its~~ Contractual Obligations and routinely and systemically breach them as a result. Air Canada has ~~The defendants have~~ failed to develop or implement policies, procedures, training, or oversight mechanisms that ensure they comply with the Contractual Obligations. People with mobility impairments are routinely denied the benefits of the Contractual Obligations and are harmed as a result.
- 5. The plaintiff brings this action on his own behalf and on behalf of all Canadian residents who rely on manual wheelchairs, walkers or power mobility aids (collectively, "**Mobility Aids**") and who travelled on a flight subject to Air Canada's tariffs from January 2021 onwards ("**Class**" or "**Class Members**") on the basis that ~~the defendants~~Air Canada and its affiliates systematically breach ~~their-the~~ Contractual Obligations, causing Class Members harm, including emotional and psychological harm.
- 6. In the alternative, the plaintiff alleges ~~the defendants~~Air Canada made false or misleading representations about the services ~~they-it (or its affiliates)~~ provide people who use Mobility Aids contrary to s. 52 of the *Competition Act*, RSC 1985, c C-34, and committed unconscionable or unfair acts or practices contrary to consumer protection legislation.

The Plaintiff

7. The plaintiff, Rodney Hodgins, lives in Prince George, British Columbia. He works full time in the construction industry and has a wife, three stepchildren and five step-grandchildren.
8. Mr. Hodgins has spastic cerebral palsy and is unable to walk. He uses a Mobility Aid, namely an electric wheelchair. His wheelchair is customized to his measurements, body shape and needs.
9. The Contractual Obligations are critical terms of carriage, without which Mr. Hodgins could not travel by air.
10. Mr. Hodgins requires physical assistance to move from his wheelchair to his passenger seat (and vice versa). When Mr. Hodgins flies with Air Canada, Air Canada staff lift Mr. Hodgins from his wheelchair and place him in an "aisle seat", which is a narrow wheelchair that can fit down the aisle of an aircraft, and then lift him from the aisle chair to his passenger seat. This process requires assistance from multiple airline staff members. One person lifts Mr. Hodgins from under his shoulders while another lifts his legs. Another person stabilizes the aisle chair while Mr. Hodgins is placed in it.
11. Because Mr. Hodgins has quad spastic cerebral palsy, it is common for him to experience involuntary and painful muscle contractions in his arms and legs during this process. This results in his arms and legs stiffening and flexing, which creates additional challenges both in terms of lifting Mr. Hodgins but also with respect to securing him safely in the aisle chair.
12. ~~The defendants have~~Air Canada has never offered to move Mr. Hodgins with the "Eagle Lift", which is a specialized device that allows airline staff to move a passenger to their seat without manually lifting them. The Eagle Lift has a sling in a metal frame on wheels that is narrow enough to fit down the aircraft aisle. The sling is placed underneath the passenger while they are in their wheelchair. Once the passenger's body is secured, the Eagle Lift lifts the passenger out of their

wheelchair and transports them down the aisle in the sling, and then lowers the passenger into their seat.

13. In the last two years, Mr. Hodgins has taken two trips on Air Canada flights where Air Canada breached the Contractual Obligations, resulting in damages and harm to Mr. Hodgins.
14. The first trip was in July 2022, when Mr. Hodgins and his wife took a return trip on Air Canada flights to Newark, New Jersey, to visit his stepdaughter and her family. The flights were subject to the terms of Air Canada's international tariff, which formed the terms of the parties' contract (described in more detail below).
15. Mr. Hodgins' return itinerary included a flight from Montreal to Vancouver. Mr. Hodgins arrived at the gate for this flight approximately three hours before the flight's scheduled departure. The airline staff required to assist Mr. Hodgins to his passenger seat were delayed by approximately 2 hours, thereby delaying the flight's departure. Rather than wait for the necessary staff to arrive so that Mr. Hodgins could board the aircraft before other passengers, Air Canada staff boarded all other passengers onto the flight. When airline staff arrived to assist Mr. Hodgins, they moved Mr. Hodgins to his seat while other passengers stared. Several passengers were required to move to make way for Mr. Hodgins. Further, because the flight was delayed and Mr. Hodgins was the last to board, it appeared to other passengers that he at fault for their delay. Mr. Hodgins was humiliated.
16. Additionally, because Mr. Hodgins was the last to board the aircraft, there was no space left in the overhead compartments. Air Canada staff required Mr. Hodgins to check a bag containing the charger to his wheelchair and important medication. Air Canada then lost this bag. When Mr. Hodgins' landed in Prince George, he was unable to charge his electric wheelchair, which impaired his mobility until the checked bag was returned to him.
17. The second trip began on August 30, 2023, when Mr. Hodgins and his wife took a flight from Prince George to Las Vegas, Nevada, for a vacation. The flight was

subject to the terms of Air Canada's international tariff, which formed the terms of the parties' contract.

18. When Mr. Hodgins arrived in Las Vegas, Air Canada sent a single staff member with the aisle chair to move Mr. Hodgins off the aircraft. The staff member was not capable of moving Mr. Hodgins alone, so Air Canada staff insisted he make his own way off the airplane. Mr. Hodgins was sitting in aisle 13.
19. Mr. Hodgins is unable to use his legs. Believing he had no other option, Mr. Hodgins used his upper body strength to bring himself to a standing position by putting his weight on the top of the aircraft seats. He was able to shuffle down the aisle, holding on to the tops of the seats, while his wife crawled behind him adjusting his legs so that they did not get caught in the base of the seats.
20. Once Mr. Hodgins got to the last row of seats (and there was nothing left for him to hold on to) he held onto his wife's back while she tried to carry him off the aircraft.
21. Due to the physical and emotional stress of this event, Mr. Hodgins suffered increased cramping and spasms in his limbs that caused him significant pain and interfered with his ability to enjoy the first few days of his vacation.
22. During his return trip from Las Vegas, Mr. Hodgins' itinerary included a flight from Vancouver to Prince George. When Air Canada staff were assisting Mr. Hodgins to his passenger seat, Mr. Hodgins experienced limb spasms that resulted in airline staff being unable to fit or properly secure him in the aisle chair. Air Canada staff tried pushing Mr. Hodgins down the aisle, using only the aisle chair's back wheels and relying on gravity to keep Mr. Hodgins from falling. Before reaching his passenger seat, Mr. Hodgins began to slip out of the chair. When he asked airline staff members to stop, he was told they did not want to delay the flight and they continued to move him to his passenger seat.
23. Following this trip, word spread about Air Canada denying Mr. Hodgins assistance getting off the aircraft in Las Vegas. The following public outcry revealed ~~the defendants'~~Air Canada's pervasive disregard for ~~their-its~~ Contractual Obligations

to provide appropriate services to passengers who use Mobility Aids, as further detailed below.

The Defendants Air Canada

24. The defendant Air Canada is a federally incorporated company with a head office located at 700-510 De Maisonneuve Boulevard West, Montreal. It has a designated attorney in British Columbia with a delivery and mailing address at 2700-700 West Georgia Street, Vancouver, BC. At all relevant times, Air Canada carried on business in Canada (including British Columbia) as a provider of air travel services and provided those services pursuant to the terms of its tariffs, described below.
25. Other airlines operate flights pursuant to Air Canada's tariffs. ~~The defendants-~~ Air Canada Rouge General Partner Inc. and Air Canada Rouge LP (collectively, "Rouge") is a wholly-owned subsidiary of Air Canada and ~~ais-incorporated pursuant to the laws of Canada with a registered office located at 7373 de la Cote Vertu Boulevard, Montreal, Quebec.~~ At all material times, Class Members' contracts of carriage on Rouge-operated flights incorporated the terms of Air Canada's tariffs.
26. ~~Additionally, The defendant Chorus Aviation Inc. ("Chorus") is a company incorporated pursuant to the Laws of Canada with a registered office at 100 King Street West, Suite 6100, 1 First Canada Place, Toronto, Ontario. At all material times, Chorus carried on business as a provider of air travel services through its subsidiary, the defendant Jazz Aviation LP (collectives with Chorus, "Jazz").~~
27. ~~26.~~ Jazz provides regional and charter airline services under contract to Air Canada under the brand name "Air Canada Express" or "Air Canada Jazz". ~~It has a registered office at 2200-1055 West Hastings Street, Vancouver.~~ At all material times, Class Members' contracts of carriage on Jazz-operated flights incorporated the terms of Air Canada's tariffs.

~~28-27. To the extent Jazz and Rouge provide air travel services to Class Members, they do so as agents of Air Canada-controlled the air travel services provided by Rouge, Chorus and Jazz through contractual arrangements. The business of Air Canada, Rouge, Chorus and Jazz is inextricably interwoven with that of the other and each is the agent of the other for the purposes of providing of air travel services to Class Members. As such, the defendants Air Canada, Rouge, Chorus and Jazz are collectively referred to as "Air Canada" or the "defendants" herein. Air Canada is directly or, in the alternative, vicariously liable for any failure by Jazz or Rouge to comply with the Contractual Obligations.~~

The Class

~~29-28.~~ The proposed Class consists of all Canadian residents who use a Mobility Aid and travelled on a flight subject to Air Canada's international or domestic tariffs from January 2021 onwards ("**Class Members**").

~~30-29.~~ Like the plaintiff, Class Members have mobility impairments and require physical assistance to get in and out of their passenger seats. This usually requires specialized equipment such as an aisle chair or Eagle Lift (described above).

~~31-30.~~ Some Class Members have additional medical devices (such as respirators) that airline staff are required to handle when assisting Class Members to and from their seats, or when moving Class Members within an airport.

~~32-31.~~ Class Members' Mobility Aids are necessary for their movement and therefore their independence. Class Members who use electric or manual wheelchairs (like the plaintiff), these Mobility Aids are customized, meaning everything from the frame to tires, cushions, footplate, and backrest are uniquely built to accommodate the Class Members' specific needs. This customization is necessary to prevent injuries such as pressure sores (which can be life threatening) and joint injuries.

~~33-32.~~ The defendants Air Canada requires Class Members to check their Mobility Aids into the baggage hold of aircrafts. When a Class Member's Mobility Aid is damaged, lost or delayed, Class Members suffer harms beyond the repair or

replacement cost. These harms include inconvenience, mental distress (stress and anxiety, humiliation, embarrassment, and damage to one's sense of self-worth) and the inability to obtain the benefit for which they bargained (i.e. the reason for travel, be it to enjoy a vacation or attend a work meeting).

34.33. Class Members are in a position of vulnerability and dependence with ~~the defendants~~Air Canada in two significant ways. First, Class Members are physically dependent on Air Canada. The Contractual Obligations require Air Canada to provide assistance with things that Class Members physically cannot do themselves. Being physically moved can be uncomfortable or painful or even dangerous for Class Members. Because of their mobility impairments, Class Members have no physical control over how these services are performed and they have no alternative but to accept the services that Air Canada provides.

35.34. Second, Class Members are vulnerable insofar as the Contractual Obligations require Air Canada to provide assistance with things that are personal in nature. For example, in the process of assisting Class Members to their passenger seats, Air Canada staff often need to touch Class Members' bodies. It is also common for Class Members' clothing to lift and shift, exposing their skin, during the process. This personal element to the services increases Class Members' vulnerability.

36.35. This dependence and vulnerability results in Class Members being unable to protect their interests when dealing with Air Canada out of fear of having the assistance they require denied or performed in bad faith.

37.36. Class Members are also more likely to have lower socio-economic status and/or additional mental or physical disabilities that exacerbate their inability to protect their interests when interacting with ~~the defendants~~Air Canada.

The Parties' Contracts

38.37. Class Members had contracts with ~~the defendants~~Air Canada: they paid the ticket price set by ~~the defendants~~Air Canada and the terms and conditions of those contracts are contained in Air Canada's tariffs.

~~39-38.~~ The contracts are standard form and are unilaterally prepared by ~~the defendants~~Air Canada. Class Members have no ability to negotiate with Air Canada the ~~defendants~~-over ~~their-its~~ tariffs or the terms and condition of carriage.

~~40-39.~~ At all material times, Air Canada's tariffs have required Air Canada (and, by extension, Jazz and Rouge) to comply with the Contractual Obligations. More specifically, at all material times, Air Canada's tariffs have expressly required Air Canada to:

- (a) assist Class Members with proceeding to the boarding area;
- (b) before boarding, transfer Class Members between their own mobility aid and Air Canada's mobility aid;
- (c) assist Class Members in boarding and disembarking aircrafts;
- (d) before departure and on arrival at the destination, transfer Class Members between a mobility aid and the person's passenger seat;
- (e) provide Class Members with on-board wheelchairs and assist them with transferring between their passenger seat and an on-board wheelchair;
- (f) assist Class Members, after disembarkation, in proceeding to the general public area or to catch a connecting flight;

(g) treat Class Members' Mobility Aids as priority baggage; ~~and~~

~~(g)~~ —

(h) disassemble and package their Mobility Aids for transport and then reassemble them upon arrival at their destinations; ~~and-~~

~~(h)~~(i) allow Class Members to board in advance of other passengers.

~~41.40.~~ Implicit in these contractual terms is that Air Canada will ensure these services are provided by persons with adequate knowledge and skill to carry out those services safely and without harming (physically or emotionally) Class Members.

~~42.41.~~ Additionally, at all material times, Air Canada's domestic and international tariffs have contained the following term, which expressly incorporates the *Accessible Transportation for Persons with Disabilities Regulations*, SOR/2019-244 ("ATPDR") into their tariffs:

The obligations of ~~[the defendants]~~Air Canada under the ATPDR form part of this tariff and supersede any incompatible or inconsistent term and condition of carriage set out in the tariff to the extent of such inconsistency or incompatibility, but do not relieve the carrier from applying terms and conditions of carriage of this tariff that are more favorable to the passenger than the obligations set out in the ATPDR. (Emphasis added)

~~43.42.~~ The ATPDR (and therefore Class Members' contracts with ~~the defendants~~Air Canada) expressly require ~~the defendants~~Air Canada to:

- (a) per ATPDR s. 2.1, treat Class Members with dignity;
- (b) ATPDR s. 16(1), ensure personnel who interact with Class Members or participate in making decisions or in developing policies or procedures that affect Class Members have adequate knowledge and skills to carry out those functions;
- (c) per ATPDR s. 16(2)(a), ensure personnel have adequate knowledge in respect of the following principles:
 - (i) the principle that all persons must be treated with dignity regardless of their disabilities,
 - (ii) the principle that all persons must have the same opportunity to make for themselves the lives that they are able and wish to have regardless of their disabilities or of how their disabilities interact with their personal and social characteristics,

- (iii) the principle that all persons must have barrier-free access to full and equal participation in society, regardless of their disabilities, and
 - (iv) the principle that all persons must have meaningful options and be free to make their own choices, with support if they desire, regardless of their disabilities;
- (d) per ATPDR s. 16(2)(b), ensure personnel have adequate knowledge in respect of the different types of barriers that may hinder Class Members' equal access to transportation services;
- (e) per ATPDR s. 16(2)(c), ensure personnel have adequate knowledge in respect of the various types of assistance Class Members may need and Air Canada's duties in relation to those needs;
- (f) per ATPDR s. 16(2)(d), ensure personnel have adequate knowledge with respect to how to communicate with Class Members in a manner that respects their autonomy and dignity;
- (g) per ATPDR s. 17, ensure personnel who may be required to provide Class Members with physical assistance have adequate knowledge and skills to carry out those functions, including training on how to:
 - (i) seek information from Class Members with respect to their preferred method of assistance and any other measures they may require to ensure their safety and their comfort;
 - (ii) manoeuvre Mobility Aids through doors and on irregular and multi-level surfaces, steps, curbs and elevators;
 - (iii) transfer Class Members between their own Mobility Aids and a Mobility Aid provided by Air Canada and between a Mobility Aid and the Class Member's passenger seat, including performing appropriate lifting techniques to perform various types of transfers of

the person with maximum consideration for their dignity, safety and comfort;

- (h) per ATPDR s. 18, ensure personnel who may be required to handle Mobility Aids have adequate knowledge and skills to carry out those functions, including training with respect to
 - (i) the different types of mobility aids; and
 - (ii) the requirements and appropriate methods for transporting and storing mobility aids, including the disassembling, packaging, unpackaging and reassembling of mobility aids; and
- (i) per ATPDR s. 19, ensure personnel who may be required to use, or to assist a Class Member in using, any special equipment in the course of carrying out their functions, have adequate knowledge and skills to carry out those functions.

44.43. The Contractual Obligations are "peace of mind" contractual terms. They are intended to give Class Members assurance that they will be provided appropriate assistance when they travel and it was foreseeable to Air Canada that a breach of these terms would result in significant mental distress to Class Members.

45.44. To the extent Air Canada retains third parties to perform the Contractual Obligations, those third parties, if any, perform the Contractual Obligations as agents of Air Canada.

46.45. The Contractual Obligations all outside of and are actionable separately from the *Carriage by Air Act*, RSC 1985, c C-26 ("**Montreal Convention**").

The Defendants Air Canada's Breaches of the Contractual Obligations

47.46. Class Members are vulnerable to and/or have experienced conduct that amounts to breaches of the Contractual Obligations including the following acts and omissions:

- (a) being denied assistance moving between their passenger seat and Mobility Aid;
- (b) being roughly or insensitively moved between their Mobility Aid and their passenger seat;
- (c) being moved between their Mobility Aid and their passenger seat with inappropriate equipment or by inappropriate means;
- (d) being moved between their Mobility Aid and their passenger seat by someone without sufficient training on how to safely use the equipment or safely move the Class Member's body;
- (e) being dropped or otherwise injured while being moved between their Mobility Aid and their passenger seat;
- (f) being denied pre-boarding, resulting in them being made a spectacle as other passengers watch airline staff assist them to their seats; and
- (g) having their Mobility Aid damaged, lost or delayed.

48.47. The acts and omissions above are the result of ~~the defendants~~ Air Canada's systemic breaches of the Contractual Obligations by:

- (a) failing to develop or implement appropriate policies and procedures and training for defendants' personnel to comply with the Contractual Obligations;
- (b) failing to develop or implement procedures so that when Class Members give advance notice of the services they require, ~~the defendants~~ Air Canada makes arrangements in advance for those services to be provided in a timely manner;
- (c) failing to take breaches of the Contractual Obligations seriously, including but not limited to:

- (i) failing to treat Class Members complaints seriously by promptly investigating the conduct that led to the complaint;
 - (ii) failing to take appropriate corrective measures so that when the Contractual Obligations are breached, steps are taken to prevent future breaches;
 - (iii) failing to develop or implement oversight mechanisms to review conduct to prevent breaches of the Contractual Obligations;
 - (iv) failing to take proactive measures to reduce the risk that the Contractual Obligations will be breached; and
 - (v) diminishing the harm ~~the defendants~~Air Canada cause Class Members when Air Canada breaches the Contractual Obligations; and
- (d) treating breaches of the Contractual Obligations as "the cost of doing business" as opposed something ~~the defendants~~Air Canada can and should address.

~~49-48. The defendants~~Air Canada knew or should have known for years that they routinely and systemically breach the Contractual Obligations but have failed to take steps to prevent future breaches because:

- (a) ~~the defendants~~Air Canada ~~are-is~~ apathetic towards their Contractual Obligations; and
- (b) ~~the defendants~~Air Canada believes it is more cost-effective to breach the Contractual Obligations than fulfil them.

~~50-49. The defendants~~Air Canada financially benefits from ~~their-its~~ systemic breaches of the Contractual Obligations. ~~The defendants~~Air Canada derives costs savings and increased profitability from ~~their-its~~ failure to, among other things:

- (a) design initiatives that are reasonably capable of fulfilling the Contractual Obligations;
- (b) train and retain staff and management necessary to fulfil the Contractual Obligations;
- (c) discipline, suspend or terminate employees who breach the Contractual Obligations; and
- (d) conduct appropriate investigations of breaches of the Contractual Obligations.

~~51.50.~~ The plaintiff and Class Members have suffered losses as a result of ~~the defendants~~Air Canada's breaches of the Contractual Obligations including but not limited to direct and indirect physical, emotional and psychological harm. Such damages are actionable separate and apart from claims under the Montreal Convention.

RELIEF SOUGHT

~~52.51.~~ The plaintiff claim on his own behalf and on behalf of the Class:

- (a) a declaration that the Contractual Obligations are terms of Class Members' contracts with ~~the defendants~~Air Canada;
- (b) a declaration that ~~the defendants~~Air Canada ~~have~~has failed to implement the initiatives necessary to comply with the Contractual Obligations thereby systemically breaching the Contractual Obligations;
- (c) a declaration that Air Canada ~~has the defendants have~~ benefitted from ~~their~~its systemic breaches of the Contractual Obligations;
- (d) a declaration that any contractual limitation of Air Canada's ~~the defendants'~~ liability is inapplicable to the Contractual Obligations or it is void or unenforceable;

- (e) restitution in the form of disgorgement of the monetary value of the benefits Air Canada has the defendants have accrued in failing to comply with the Contractual Obligations;
- (f) additionally or in the alternative, damages for breach of contract including but not limited to damages for mental distress, inconvenience, humiliation, and pain and suffering;
- (g) additionally or in the further alternative, punitive, exemplary and aggravated damages;
- (h) relief for contraventions of consumer protection legislation, as follows:
 - (i) a declaration that Air Canada's conduct the defendants' "per-seat" fair policies amounts to unconscionable acts or practices and/or unfair acts or practices pursuant to ss. 8, 9, 10, 171 and 172 of the British Columbia *Business Practices and Consumer Protection Act*, SBC 2004, c 2 ("**BC BPCPA**"); ss. 6 and 13 of the Alberta *Consumer Protection Act*, RSA 2000, c. C-26.3 ("**Alberta CPA**"); ss. 6, 7 and 93 of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 ("**Saskatchewan CPBPA**") ss. 2, 3, and 23 of the Manitoba *Business Practices Act*, CCSM, c B120 ("**Manitoba BPA**") ss. 15, 17 and 18 of the Ontario *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A ("**Ontario CPA**"); ss. 8 and 272 of the Quebec *Consumer Protection Act*, CQLR c P-40.1 ("**Quebec CPA**"); ss. 2 and 4 of the P.E.I. *Business Practices Act*, RSPEI 1988, c B-7 ("**PEI BPA**"); and ss. 8 and 10 of the Newfoundland and Labrador *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1 ("**NL CPBPA**");
 - (ii) damages under s. 171 of the BC BPCPA; s. 13(2) or s. 142.1 of the Alberta CPA; s. 93(1) of the Saskatchewan CPBPA; s. 23(2) of the

Manitoba BPA; s. 18 of the Ontario CPA; ss. 220-222 of the Quebec CPA; s. 4 of the PEI BPA; and s. 10 of the NL CPBPA;

- (iii) a permanent injunction restraining ~~the defendants~~Air Canada from engaging in or attempting to engage the unconscionable acts or practices and/or unfair acts or practices pursuant to ss. 171, 172 of the BC BPCPA; s. 13(2) or s. 142.1 of the Alberta CPA; s. 93(1) of the Saskatchewan CPBPA; s. 23(2) of the Manitoba BPA; s. 18 of the Ontario CPA; ss. 220-222 of the Quebec CPA; s. 4 of the PEI CPA; and s. 10 of the NL CPBPA;
- (iv) an order directing ~~the defendants~~Air Canada to advertise any adverse findings against them pursuant to s. 172(3)(c) of the BC BPCPA; s. 19 of the Alberta CPA; s. 93(1)(f) of the Saskatchewan CPBPA; s. 23(2)(f) of the Manitoba BPA; s. 18(11) of the Ontario CPA; ss. 220-222 of the Quebec CPA; s. 4(1) of the PEI BPA; and s. 10(2)(f) of the NL CPBPA;
- (i) pre-judgment interest;
- (j) costs; and
- (k) such further and other relief as this Court may deem just.

PART 2: LEGAL BASIS

Breach of Contract

53-52. As set out above, ~~the defendants~~Air Canada owed explicit and implied contractual duties to the plaintiff and the Class and, in breach of those duties, ~~the defendants~~Air Canada derived substantial financial benefit.

Disgorgement is Appropriate

54-53. Restitutionary disgorgement is appropriate because other measures of damages would effectively allow ~~the defendants~~Air Canada to continue breaching the

Contractual Obligations with impunity. The Class has a legitimate interest in preventing Air Canada has the defendant's from profiting from their systemic breaches of the Contractual Obligations.

55-54. Additionally, restitutionary disgorgement is appropriate in circumstances such as this, where the harm to Class Members cannot be easily measured in economic terms.

Punitive, Exemplary and Aggravated Damages are Appropriate

56-55. Air Canada ~~The defendants~~ knew or should have known about the systemic breaches of the Contractual Obligations but have not addressed them. Such conduct is sufficiently high-handed and reprehensible to justify awarding Class Members aggravated damages to compensate them for their pain, anguish, grief, humiliation, wounded pride, and damaged self confidence.

57-56. Additionally, Air Canada's the defendants' conduct warrants punitive damages to deter Air Canada the defendants and others from similar misconduct in the future, and to mark the community's collective condemnation of their conduct.

Exclusions of Liability Are Inapplicable or Unenforceable

58-57. Any exclusion or limitation of liability in Air Canada's tariffs do not apply to the plaintiff's and Class Members' claims.

59-58. Pursuant to Air Canada's tariffs, Air Canada's obligations under the ATPDR "supersede any incompatible or inconsistent term and condition of carriage set out in the tariff". On the plain wording of Air Canada's tariffs, any exclusion clause cannot apply to the Contractual Obligations because those obligations supersede all other terms. To find otherwise would be to interpret Air Canada's tariffs as providing Class Members with rights but no effective remedies for Air Canada's breaches.

60-59. In the alternative, Air Canada's tariffs are ambiguous and the plaintiff and Class rely on the doctrine of *contra proferentem*.

~~61-60.~~ In the further alternative, if any exclusion or limitation of liability in Air Canada's tariffs apply to prevent claims or reduce Class Members' forms of recovery, they are void or unenforceable on the basis that they are unconscionable or contrary to public policy.

~~62-61.~~ There is significant inequality of bargaining power between ~~the defendants~~Air Canada and Class Members. Class Members are in a position of vulnerability and have no ability to negotiate the terms of the tariffs. Any clause that would limit their recovery would be improvident insofar as it would insulate Air Canada from having to modify its behaviour. ~~The defendants~~Air Canada knew or should have known for years about the systemic breaches of their Contractual Obligations and have financially benefitted from those breaches. It would be unconscionable or contrary to public policy to enforce contractual terms that not only enable but incentivize further contractual breaches.

Contravention of the Competition Act

~~63-62.~~ Air Canada knowingly or recklessly made, and continues to knowingly or recklessly make, representations in its tariffs and to Class Members that it will comply with the Contractual Obligations.

~~64-63.~~ The representations were false or misleading in a material respect. As set out above, ~~the defendants~~Air Canada failed to take steps to ensure they comply with the Contractual Obligations and systemically fail to comply with the Contractual Obligations. This constituted, and continues to constitute, contraventions of s. 52 of the *Competition Act*.

~~65-64.~~ The plaintiff and Class Members relied upon the representations that ~~the defendants~~Air Canada would provide the Contractual Obligations. As a result, the plaintiff and Class Members have suffered loss, damage and expense as described herein, and plead and rely on s. 36 of the *Competition Act*.

Breach of Consumer Protection Legislation

66.65. The plaintiff and Class Members plead and rely on the BC BPCPA, the Alberta CPA, the Saskatchewan CPBPA, the Manitoba BPA, the Ontario CPA, the Quebec CPA, the PEI BPA and the NL CPBPA (collectively, the “**Consumer Protection Statutes**”).

67.66. By systemically failing to comply with the Contractual Obligations, ~~the defendants~~Air Canada committed unfair, unconscionable and/or otherwise prohibited practices under the Consumer Protection Statutes, given that, among other things, ~~the defendants~~Air Canada knew, or ought to have known, that:

- (a) the members of the Class purchased flights for purposes that were primarily personal, family or household;
- (b) as set out above, ~~the defendants~~Air Canada failed to take steps to ensure they comply with the Contractual Obligations and systemically fail to comply with the Contractual Obligations. It is misleading and/or harsh, oppressive or excessively one-sided to promise to provide the Contractual Obligations in such circumstances;
- (c) Class Members reasonably rely on the defenadnts’ representations that they will be provided with the Contractual Obligations;
- (d) without the Contractual Obligations, Class Members cannot travel by air and, when these services are withheld or performed poorly, Class Members are unable to receive any reasonable benefit from their flights;
- (e) the plainitff and Class Members were not able to negotiate the terms of their contracts with ~~the defendants~~Air Canada and were unable to protect their interests. They rely on ~~the defendants~~Air Canada to provide the Contractual Obligations.

British Columbia

~~68-67.~~ During the relevant time period, Class Members purchased flights from ~~the defendants~~Air Canada (directly or indirectly) for purposes that were primarily personal, family or household. As such, ~~the defendants~~Air Canada are suppliers engaging in consumer transactions within the meaning of s. 1 of the BC BPCPA.

~~69-68.~~ By systemically failing to comply with the Contractual Obligations, ~~the defendants~~Air Canada committed unconscionable acts contrary to the BC BPCPA:

8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

9(1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

~~70-69.~~ The Classes suffered losses due to ~~the defendants~~Air Canada's unfair practices and are entitled to damages pursuant to s. 171 of the BC BPCPA.

Alberta

~~71-70.~~ Air Canada's ~~The defendants'~~ supply of air travel services to the plaintiff and Class Members were consumer transactions within the meaning of s. 1(1) of the Alberta CPA.

~~72-71.~~ By systemically failing to comply with the Contractual Obligations, ~~the defendants~~Air Canada committed an unfair practice contrary to the Alberta CPA:

6(1.1) It is an offence for a supplier to engage in an unfair practice.

6(2) It is an unfair practice for a supplier, in a consumer transaction or a proposed consumer transaction,

(b) to take advantage of the consumer as a result of the consumer's inability to understand the character, nature, language or effect of the consumer transaction or any matter related to the transaction;

6(3) It is an unfair practice for a supplier

(a) to enter into a consumer transaction if the supplier knows or ought to know that the consumer is unable to receive any reasonable benefit from the goods or services;

...

(c) to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided;

(d) to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact;

6(4) Without limiting subsections (2) and (3), the following are unfair practices if they are directed at one or more consumers or potential consumers:

- (a) a supplier's doing or saying anything that might reasonably deceive or mislead a consumer;
- (b) a supplier's misleading statement of opinion if the consumer is likely to rely on that opinion to the consumer's disadvantage;
- (k) a supplier's representation that the supplier can supply goods or services if the supplier cannot;

~~73.72.~~ Class Members suffered losses due to Air Canada's ~~the defendants'~~ unfair practices and are entitled to damages pursuant to s. 13 or s. 142.1 of the Alberta CPA.

~~74.73.~~ The filing of this action, constitutes notice pursuant to s. 7.2 of the Alberta CPA. In the alternative, and to the extent necessary, Class Members are entitled to a waiver of the notice requirements pursuant to section 7.2(3) of the Alberta CPA.

Saskatchewan

~~75.74.~~ Air Canada's ~~The defendants'~~ supply of air travel services to the plaintiff and Class Members were consumer transactions within the meaning of s. 5 and s. 2 of the Saskatchewan CPBPA.

~~76.75.~~ By systemically failing to comply with the Contractual Obligations, ~~the defendants~~ Air Canada committed an unfair practice contrary to the Saskatchewan CPBPA:

6 It is an unfair practice for a supplier, in a transaction or proposed transaction involving goods or services, to:

- (a) do or say anything, or fail to do or say anything, if as a result a consumer might reasonably be deceived or misled;
- (b) make a false claim;
- (c) take advantage of a consumer if the person knows or should reasonably be expected to know that the consumer: (i) is not in a position to protect his or her own interests; or (ii) is not reasonably able to

understand the nature of the transaction or proposed transaction; or

7 The following are unfair practices:

(f) representing that goods or services are available if the supplier does not supply nor intend to supply or otherwise dispose of the goods or services as represented;

(k) representing that a transaction involving goods or services involves or does not involve rights, remedies or obligations if that representation is deceptive or misleading;

(q) taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one-sided;

(p) representing that goods or services have been made available in accordance with a previous representation if they have not;

~~77-76.~~ The Classes suffered losses due to Air Canada's ~~the defendants'~~ unfair practices and are entitled to damages pursuant to s. 93(1) of the Saskatchewan CPBPA.

Manitoba

~~78-77.~~ Air Canada's ~~The defendants'~~ supply of air travel services to the plaintiff and Class Members were consumer transactions within the meaning of s. 1 of the Manitoba BPA.

~~79-78.~~ By systemically failing to comply with the Contractual Obligations, ~~the defendants~~Air Canada committed unfair practices contrary to the Manitoba BPA:

2(3) Without limiting the generality of subsection (1), any of the following representations, acts or omissions, when made or engaged in by a supplier in relation to goods or to a consumer transaction, is deemed for the purposes of this Act to be an unfair business practice within the meaning of that subsection:

(j) a representation that the goods are available, when the supplier has no intention of supplying or otherwise disposing of the goods as represented;

(n) a false representation that the consumer transaction involves or does not involve rights, remedies or obligations;

3(1) It is an unfair business practice for a supplier

(a) to take advantage of a consumer if the supplier knows or ought to have known that the consumer is not in a position to protect his or her own interests;

3(2) Without limiting the generality of subsection (1), it is deemed to be an unfair business practice within the meaning of that subsection when:

(a) a supplier takes advantage of a consumer if the supplier knows or ought to have known that the consumer was unable to protect, or incapable of protecting, his or her own interests because of the consumer's physical or mental infirmity, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction; or

(b) the terms or conditions on which, or subject to which, the consumer entered into the consumer transaction are so adverse or so harsh to the consumer as to be inequitable.

~~80-79.~~ The Classes suffered losses due to Air Canada's ~~the defendants'~~ unfair practices and are entitled to damages pursuant to s. 23 of the Manitoba BPA.

Ontario

~~81-80.~~ Air Canada's ~~The defendants'~~ supply of air travel services to the plaintiff and Class Members were consumer transactions within the meaning of within the meaning of s. 1 of the Ontario CPA.

~~82-81.~~ By systemically failing to comply with the Contractual Obligations, ~~the defendants~~Air Canada committed unconscionable representations contrary to the Ontario CPA:

14(1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

14(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.

13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

15(1) It is an unfair practice to make an unconscionable representation;

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

(a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment.

17(1) No person shall engage in an unfair practice.

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

~~83-82.~~ The Classes suffered losses due to Air Canada's ~~the defendants'~~ unfair practices and are entitled to damages pursuant to s. 18 of the Ontario CPA.

~~84-83.~~ The filing of this action constitutes notice pursuant to s. 18 of the Ontario CPA. In the alternative, and to the extent necessary, the Class members are entitled to a waiver of the notice requirements pursuant to section 18(15) of the Ontario CPA.

Prince Edward Island

~~85-84.~~ Air Canada's ~~The defendants'~~ supply of air travel services to the plaintiff and Class Members are services within the meaning of s. 1 of the PEI BPA.

~~86-85.~~ By systemically failing to comply with the Contractual Obligations, Air Canada ~~the defendants'~~ made unconscionable consumer representations contrary to the PEI BPA:

2 For the purposes of this Act, the following shall be deemed to be unfair practices:

(a) a false, misleading or deceptive consumer representation including, but without limiting the generality of the foregoing,

(xii) a representation that the proposed transaction involves or does not involve rights, remedies or obligations if the representation is false or misleading,

(b) an unconscionable consumer representation made in respect of a particular transaction and in determining whether or not a consumer representation is unconscionable there may be taken into account that the person making the representation or his employer or principal knows or ought to know

(i) that the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,

(iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,

(v) that the proposed transaction is excessively one-sided in favour of someone other than the consumer,

(vi) that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable,

(vii) that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment.

3(1) No person shall engage in an unfair practice.

(2) A person who performs one act referred to in section 2 shall be deemed to be engaging in an unfair practice.

~~87-86. Air Canada's The defendants'~~ unconscionable consumer representations induced members of the Classes to purchase flights with Air Canada. Class Members who purchased flights with Air Canada for any purpose other than carrying on a business are entitled to damages pursuant to s. 4(1) of the PEI BPA.

Newfoundland and Labrador

~~88-87. Air Canada's The defendants'~~ supply of air travel services to the Classes for personal, family or household purposes were consumer transactions within the meaning of s. 2 of the NL CPBPA.

~~89-88.~~ By systemically failing to comply with the Contractual Obligations, ~~the defendants~~ Air Canada committed unfair practices and unconscionable acts contrary to the NL CPBPA:

7(1) In this Part, an unfair business practice is a representation, conduct or failure to disclose material facts that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer, and includes:

(h) a representation that the goods or services have been made available in accordance with a previous representation where they have not;

(k) a representation that the goods or services are available when the supplier knows or ought to know that they are not or has no intention of supplying them;

(p) a representation that a consumer transaction involves or does not involve rights, remedies or obligations where that representation is deceptive or misleading;

8(1) In determining whether an act or practice is unconscionable the court shall consider the circumstances that the supplier knew or ought to have known, including

(b) that the consumer was unable to receive a substantial benefit from the consumer transaction;

(d) that the terms and conditions of the consumer transaction were so one-sided, harsh or adverse to the consumer as to be inequitable;

(f) that the supplier took advantage of the extreme necessity or helplessness of the consumer or the inability of the consumer to protect his or her interests because of his or her physical or mental disability, his or her ignorance, illiteracy, age or emotional state, or his or her inability to understand the character, nature or language of the consumer transaction.

9. (1) A person shall not engage in an unfair business practice or unconscionable act or practice.

(2) Where it is alleged that a supplier is engaging in or has engaged in an unfair business practice or an unconscionable act or practice, the burden of proof that the supplier is not engaging in or has not engaged in an unfair business practice or an unconscionable act or practice rests with the supplier.

~~90-89.~~ Members of the Classes suffered losses due to Air Canada's ~~the defendants'~~ conduct and are entitled to damages pursuant to s. 10 of the NL CPBPA.

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Place of trial: Vancouver Law Courts

Address of the registry: 800 Smithe Street, Vancouver, BC V6Z 2E1

Date: June 14, 2024



Signature of lawyer
for plaintiff

Rebecca Coad

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE
OUTSIDE BRITISH COLUMBIA**

*The party(ies), name(s) of party(ies), claim(s) the right to serve this pleading/petition on
the party(ies), name(s) of party(ies), outside British Columbia on the ground that state
the circumstances, enumerated in section 10 of the Court Jurisdiction and Proceedings
Transfer Act, on which the plaintiff/petitioner relies*

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

CONCISE SUMMARY OF NATURE OF CLAIM:



THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property

- ☐ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☐ a matter not listed here

THIS CLAIM INVOLVES:

- ☐ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

[If an enactment is being relied on, specify. Do not list more than 3 enactments.]

1. ◆