

Citation: *Southwick v. Air Canada Corporate Office
Headquarters, 2024 YKSM 5*

Date: 20241209
Docket: 24-S0018
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Judge K. McLeod

NETTASSIA SOUTHWICK and
JAMES DOLSEN

Plaintiffs

v.

AIR CANADA CORPORATE OFFICE
HEADQUARTERS

Defendant

Appearances:

Nettassia Southwick and
James Dolsen
Lilliane Pham-Bui

Appearing on their own behalf

Appearing on behalf of the Defendant

REASONS FOR JUDGMENT

[1] The Plaintiffs bring a Small Claims Court action against Air Canada for damages for numerous breaches of the *Air Passenger Protection Regulations*, SOR/2019-150, (“*APPR*”).

[2] The *APPR* imposes obligations – including liability – on air carriers with respect to tarmac delays, flight cancellations, flight delays, denial of boarding and damage or loss of baggage in the context of **domestic and international air travel** (emphasis added).

[3] Section 2(1) of the *APPR* states:

The carrier operating a flight is liable to passengers with respect to the obligations set out in sections 7 to 22 and 24, or if they are more favourable to those passengers, the obligations, on the same matter that are set out in the applicable tariff.

[4] The grounds for the Plaintiffs' claim are based on what is conceded by the Defendant as a "denial of boarding" on a flight from Toronto to Cuba.

[5] Air Canada, through its representative, Lilliane Pham-Bui, agrees that the *APPR* governs the rights and obligations of Air Canada's large carrier business and that the Plaintiffs were denied boarding.

[6] Article 1(3) of the *APPR* defines **denial of boarding** in the following manner:

For the purpose of these Regulations there is a denial of boarding when a passenger is not permitted to occupy a seat on board a flight because the number of seats that may be occupied on the flight is less than the number of passengers who have checked in by the required time, hold a confirmed reservation and valid travel documentation and are present at the boarding gate at the required boarding time

[7] This claim arises as a result of what could best be described as a series of events which left the Plaintiffs without the holiday of their choice and travelling through three airports in their quest to get to their vacation location, without success.

[8] The claim is for \$10,000 to cover what is described as "out-of-pocket expenses" plus "additional costs that the Court sees fit given that being bumped off an oversold flight (within the Carrier's control), resulting in the loss of vacation, financial burden and an incredible amount of stress and pain" (see Plaintiffs' Claim).

[9] Since filing this action, Air Canada did reimburse the Plaintiffs for their hotel and food out-of-pocket expenses of \$1,800, literally days before this trial commenced in September 2024. However, having reviewed the expenses incurred by the Plaintiffs, there are additional out-of-pocket expenses.

The Preliminary Issue

[10] Air Canada defends this claim on numerous bases, but I will deal first with the submission that I, in my role as a Deputy Judge of the Small Claims Court of Yukon, do not have the jurisdiction to award non-compensatory damages to the Plaintiffs for the following reasons:

1. The Defendant argues that the Plaintiffs' claim is governed by the Convention for the Unification of Certain Rules for International Carriage by Air ("the *Montreal Convention*" 1999 (MC99)).
2. The Defendant argues that Article 19 of the *Montreal Convention* provides the **exclusive** recourse against airlines for various types of claims in the course of international carriage by air.
3. The Defendant also relies on Article 29 of the *Montreal Convention* which states:

...In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

[11] The Defendant maintains this position despite the Federal Court of Appeal decision in *International Air Transport Assn. v. Canadian Transport Agency, 2022 FCA 211*, which categorically stated at para. 147:

I am of the view, therefore, that the minimum compensation required by the Regulations for cancellation and **denied boarding falls outside the scope of Article 19 of the *Montreal Convention***. [emphasis added]

[12] The Federal Court of Appeal thus found that exclusion of non-compensatory damages contained in Article 29 of the *Montreal Convention* does not cover a case for damages for cancellation and for those denied boarding, such as occurred in the Plaintiffs' case.

[13] The Defendant, through Ms. Pham-Bui, submits that this decision is not binding on me. This submission appears to be based in confidence that the appeal to the Supreme Court will overturn the Federal Court of Appeal decision. Thus, Ms. Pham-Bui predicted that the pending decision would find, *inter alia*, that the aforementioned exclusion clause does apply to the Plaintiffs' claim, thereby affirming the previous Supreme Court of Canada decision in *Thibodeau v. Air Canada, 2014 SCC 67*. It should be noted that *Thibodeau* was rendered before the adoption into law of the *APPR*.

[14] However, in October of this year, the decision of the Supreme Court of Canada in *International Air Transport Assn. v. Canada (Transportation Agency), 2024 SCC 30*, was released. The decision unanimously upheld the Federal Court of Appeal.

[15] The Court also stated at para. 27 of the judgment that the issue the *APPR* does not conflict with the *Montreal Convention* and thus "it does not need to deal with issue of "whether denial of boarding and cancellation qualify as 'delays' for the purposes of Article 19". The Supreme Court therefore agreed that the *Montreal Convention* is not a comprehensive convention that exclusively deals with all aspects of international travel.

[16] Therefore, since the Federal Court concluded that Article 19 does not apply in the Plaintiffs' case which is recognized to have as its grounding "a denial of boarding", thus both the exclusion clause and the strict liability regime within the *Montreal Convention* do not apply to a case where there has been a denial of boarding.

[17] Accordingly, I must conclude that there is no prohibition of an action seeking non-compensatory damages such as the claim brought by the Plaintiffs. This claim is properly within the jurisdiction of the Small Claims Court and must be proven by the Plaintiffs on a balance of probabilities.

The Defence

[18] The substantive argument of the Defendant is that the Plaintiffs received compensation for denial of boarding due to them under the *APPR*, namely \$2,400 per person, and that is the only financial obligation owed.

[19] Further, the Defendant argues that any further delays after the denial of boarding were due to weather conditions and safety concerns, which are entirely out of the control of the Defendant and therefore not claimable.

The Narrative

[20] The Plaintiffs are the parents of three children who live in the Yukon. They booked a nine-day trip which included spending time at a resort in Veradero, Cuba - arriving in Cuba on February 3, 2023, and departing February 10, 2023. This was to be, for the first time, a purely couple's vacation, for which the Plaintiffs had saved for three years.

[21] The Plaintiffs detailed that they arranged for childcare for their two high school aged children, care for their animals, and for their home. Furthermore, they arranged for time off from their work. Ms. Southwick is self-employed and testified that clearing her calendar was difficult for her as she has a really intense schedule. Mr. Dolsen works at the hospital and had to arrange for others to cover him while he was away.

[22] Their trip involved a number of flights leaving the Yukon on February 2, 2023. They flew from Whitehorse to Edmonton on Air North, and thereafter on Air Canada leaving Edmonton at 6:15 p.m. the same day to Calgary on February 2, 2023. In Calgary, they got a flight to Toronto departing at 12:25 a.m. on February 3, 2023, arriving in time in Toronto to board their Air Canada direct flight to Cuba, due to depart at 8:35 a.m. that same day.

[23] The couple travelled purposely light, with just carry-on luggage and on February 3 travelled in clothes suitable for the beach, and not for February in Ontario or Quebec.

[24] At the gate in Toronto, an Air Canada gate agent announced that the flight to Cuba was oversold. As a result "volunteers" were recruited to give up their seats on the plane on two promises. These were proffered by an Air Canada representative, who was identified as "Daryl": the first - a payment of \$2,400 per person for the denied boarding and second, that they were booked on an American Airlines flight 1807 to fly to Miami on that day, and to stay overnight there and then onto Cuba the following morning.

[25] Obviously, as a result of volunteering their seats, the Plaintiffs would arrive in Cuba a day late, but they were promised a hotel room, transportation and food in Miami. As a result of these inducements, the Plaintiffs stepped up and surrendered their seats. The Plaintiffs confirmed with their hotel in Cuba that their reservation was secure and changed the date and time of their taxi pick up from the airport in Cuba.

[26] Ms. Southwick testified that she had received updates on her phone confirming the American Airlines flight to Miami, but she did not receive boarding passes. She was given a hotel, food, and taxi vouchers by Air Canada to use while in Miami.

[27] Other than the text message updates, there is no other evidence of a booking on the promised American Airlines flight 1807 on February 3, 2023. According to the Plaintiffs, they waited for hours in line to receive their food vouchers, and they were then informed that the original American Airlines flight was not available to them. They were never told why this was the case.

[28] I will, during this narrative, refer also to computer printout documentation of tickets booked as a result of the denial of boarding. Exhibit D-1, in the Defendant's book of documents, provides a printout of a number of "reissued tickets". Missing from those printouts is the promised American Airlines flight to Miami on February 3, 2023. However, there is, inexplicably, a ticket titled "Reissued Ticket No 2" which appears to be a booking on an Air Canada ticket to Miami on flight 1200 due to leave at 10:30 a.m. on February 3, 2023. There does not appear to be an accompanying onward ticket from Miami to Varadero. Additionally, this ticket seems to have an "E" alongside it, which according to Ms. Pham-Bui, signifies an "exchange" of a ticket. No information has been proffered at any time up to and during the trial as to why this apparent "exchange" occurred.

[29] The Plaintiffs were then told that they were booked on an Air Transat flight to Varadero, flying out of Montreal, and again from the Air Canada documents provided, they were booked on Air Canada flight 406 leaving at 10:00 a.m. to Montreal and to pick up an Air Transat Flight at 3:00 p.m. in Montreal direct to Varadero (see Exhibit D-6 of the Defendant's documents).

[30] Ms. Southwick explained that it was suggested to her by the person previously identified as "Daryl" that she take a screen shot of his computer screen showing the onward travel – (that screen shot is included in the Plaintiffs' documents). However, only boarding passes for their trip to Montreal were issued (see Plaintiffs' documents). They did not receive any information or boarding passes to allow them to get onto the Air Transat flight in Montreal.

[31] That Montreal flight was delayed due to the late arrival of the plane into Toronto. The reason for the delay was that the plane coming from Ottawa was delayed due to apparently forecasted bad weather and the need for a change of aircraft due to (see Defendant's brief) "frozen engines".

[32] The Plaintiffs' flight to Montreal did not leave the terminal in Toronto until 12:31 p.m. and was not airborne until 1:12 p.m. It landed in Montreal at 2:02 p.m., arriving at the Terminal at 2:24 p.m., 36 minutes before the Air Transat flight to Cuba was scheduled to leave.

[33] Screenshots of Ms. Southwick's desperate efforts to message Air Transat are also contained in the Plaintiffs' brief. Through Air Transat's Facebook Messaging page, the Plaintiffs contacted Air Transat and tried to "speak to a human" as what appears to be a computer-generated messaging facility clearly could not comprehend what the Plaintiffs were trying to communicate. Furthermore, since the Plaintiffs did not have the relevant or indeed any Air Transat reference number, they were unable to get any information from Air Transat, despite numerous attempts. They could not even find information as to where in the terminal they should check in or whether their ongoing flight was departing on time.

[34] Upon arriving in Montreal, the Plaintiffs went to the Air Canada desk and since they did not have boarding passes for their international flight, they were told to exit the departure area and go to the Air Transat Customer Service counter. Air Transat could not help them with anything other than giving the Plaintiffs a 1-800 number to call. They

spent two hours on hold and were then told by Air Transat that it was Air Canada's problem.

[35] The Defendant concedes that due to the late arrival of the Montreal bound plane in Toronto, the Plaintiffs would not have been able to make the Air Transat flight. There was no evidence of any effort made to stop the Plaintiffs from boarding the flight to Montreal in what was clearly a completely hopeless endeavour. However, the Defendant argues that Air Canada is not responsible for the delay of its Montreal flight due to the weather conditions.

[36] Despite the fact that the Plaintiffs were given a new itinerary with their Air Canada/Air Transat connections, nobody at Air Canada ever contacted them either before leaving Toronto or after arriving in Montreal with an explanation of what was to happen to enable them to access the Air Transat flight.

[37] Back at the Air Canada counter in Montreal, the Plaintiffs were then told they would be on an American Airlines flight which was not scheduled to leave until 4:30 a.m. the next day. However, they were informed that as they had arrived from Toronto, and the delay of the flight to Montreal was due to weather, Air Canada refused to provide hotel accommodation.

[38] The Plaintiffs spent the night in Montreal at the airport hotel as they were unable to leave the airport in a quest for a cheaper hotel, due to their lack of appropriate clothing. The invoice, attached to their claim for that hotel expense was \$679.38.

[39] Evidence of the next attempt by Air Canada to get the Plaintiffs to Cuba is found in exhibit D-1 under the title "Reissued Ticket No. 3". A ticket dated February 3, 2023, shows a booking for a flight from Montreal on American Airlines flight 1516 to Miami on February 4, at 6:00 a.m., and then onto to Varadero on American Airlines flight 1807 at 1:11 p.m., again, on February 4, 2023. Again, the Plaintiffs were not provided with any boarding passes for the American Airlines flights.

[40] The Plaintiffs got up at 3:00 a.m. on February 4, 2023, and went to check in for their Miami flight at American Airlines. American Airlines were unable to accommodate the Plaintiffs as they did not have a ticket and told them to go back to the Air Canada desk. Ms. Pham-Bui has no explanation as to why American Airlines did not know of the booking, she merely posited that Air Canada loses visibility of flights that are not booked on Air Canada.

[41] The Plaintiffs waited for four hours at the Air Canada desk before being told there were no other options available to them and thus, they had to return to Toronto on Air Canada flight 424, leaving Montreal at 7:00 p.m., and arriving in Toronto at 8:35 p.m. in time for a 9:15 p.m. flight to Edmonton, as Air Canada was cancelling the Plaintiffs' vacation.

[42] Ms. Southwick testified that at this point, frankly not surprisingly, she became extremely emotional.

[43] The flight to Toronto was delayed, not leaving the Montreal terminal until 8:13 p.m. and not arriving at Toronto terminal, until 9:32 p.m. Thus, when this aircraft left

Montreal, it would have been obvious to anyone at Air Canada that the Plaintiffs would, once again, not make their connecting flight back to Edmonton. In the documentation provided by Air Canada as Exhibit D-8, there are the following remarks that reveals the following for the delay:

fln delayed upline due to late boarding of Flight 0509 pmm/tms. Arr.Del
late inbd due upline late Boarding completion – FK, Further Dlyd UE YYZ
WXX impacting ground ops –FK and further dly due insufficient time to
complete turn – FK.

[44] The notes also reveal that the ramp equipment failed due to cold temperatures.

[45] Turning back to the Defendant's brief, Reissued Ticket No. 4 shows a flight on February 5, 2023, at 9:25 p.m. on Air Canada flights from Montreal to Quebec City, and then a flight the following morning to Varadero leaving at 7:45 p.m., and a further entry showing the same flights for February 4, 2023. Again, there was no explanation as to why the Plaintiffs were not offered this ticket.

[46] Reissued Ticket No. 5 shows the return flights to Toronto and then to Edmonton.

[47] Reissued Ticket No. 6 shows the rebooked flight to Edmonton from Toronto which shows a new flight booked for 2:55 p.m. on February 5, 2023.

[48] Air Canada refused to supply hotel accommodation in Toronto for the Plaintiffs for another overnight stay. Once again, the Plaintiffs were left with no alternative but to take a hotel room in the Toronto Airport; the bill for which was \$695.02.

[49] Upon arriving back in Edmonton, the Plaintiffs could not get any assistance from Air Canada, so in an effort to try and get some sort of holiday, they booked, on a last

minute basis, a resort which was far from the beach vacation they had chosen, to what was available; Cancun. Yet another night in a hotel was incurred in Edmonton awaiting transportation to Mexico. That bill was \$520.78.

[50] As a result of this the Plaintiffs had to extend the calendar time for their holiday, and since Ms. Southwick runs her own business, that required the cancellation of appointments and for Mr. Dolsen, to get additional time off work.

[51] At all times, the Plaintiffs spent hours waiting in line for customer service, and while in line, used both of their phones to try and get through to a live person at Air Canada but to no avail. Ms. Southwick described the stress of waiting in lines at Air Canada counters only to be faced with a total lack of assistance.

[52] Ms. Southwick testified that the Air Canada representatives in Montreal could not understand why the Plaintiffs had been sent from Toronto to Montreal, the latter of which had adverse weather warnings in effect and is a much smaller airport than Toronto, thus offering less options for their onward travel.

[53] I will now turn to the process by which the Plaintiffs sought relief from their "experience" and the response from the Defendant Corporation.

[54] Upon return from their trip, the Plaintiffs tried to submit a claim for their losses to Air Canada. Ms. Southwick was "on hold" for six hours. They then used email to put in their claims all of which were all denied because Air Canada relied on a "weather related" exception.

[55] The Plaintiffs had purchased a new vacation at a less desirable location and not on a beach and in a completely different country. Only after hours and hours of waiting on hold on the phone for Air Canada did they get a refund for the initial holiday, but the replacement holiday put them out-of-pocket in the amount of \$760.00.

[56] Ms. Pham-Bui, in her role as an employee of Air Canada, testified that she reviews all claims after the computer has made a decision.

[57] She concedes the Plaintiffs were "denied boarding" and explained that is why they each received compensation of \$2,400. She further agrees that Air Canada had an obligation to rebook within 48 hours of any airline with whom they have an agreement (any airline within Star Alliance) but once the 48-hour period had expired, Air Canada had an obligation to book with any available airline.

[58] The overbooking that led to the denial of boarding clearly gives rise to the *APPR* obligations under s. 12. It was never communicated by the proffering desk agent that the overbooking was for any other reason than merely overbooking, and the rationale of safety concerns was never uttered. Thus, the whole genesis of this "experience" is the denial of boarding.

[59] I will now turn to the relevant *APPR Regulations* which govern the Plaintiffs' predicament and for which the Plaintiffs allege Air Canada failed to honour its obligations.

[60] Section 12 states:

Obligations when within a carrier's control

12 (1) Subject to subsection 10(2), this section applies to a carrier when there is delay, cancellation **or denial of boarding** that is within the carrier's control but is not referred to in subsections 11(1) or (2). [emphasis added]

...

Denial of boarding

(4) In the case of a **denial of boarding**, the carrier must

- (a) provide passengers affected by the denial of boarding with the information set out in section 13;
- (b) deny boarding in accordance with section 15 and provide the standard of treatment set out in section 16 to passengers affected by the denial of boarding;
- (c) provide alternate travel arrangements or a refund, in the manner set out in section 17; and
- (d) provide the minimum compensation for inconvenience for denial of boarding in the manner set out in section 20.

[emphasis added]

[61] Section 13 states:

Information — cancellation, delay, denial of boarding

13 (1) A carrier must provide the following information to the passengers who are affected by a cancellation, delay or a **denial of boarding**:

- (a) the reason for the delay, cancellation or denial of boarding;
- (b) the compensation to which the passenger may be entitled for the inconvenience;
- (c) the **standard of treatment for passengers, if any; and**
- (d) the recourse available against the carrier, including their recourse to the Agency.

Communication every 30 minutes

(2) In the case of a delay, the carrier must communicate status updates to passengers every 30 minutes until a new departure time for the flight is set or alternate travel arrangements have been made for the affected passenger.

New information

(3) The carrier must communicate to passengers any new information as soon as feasible.

Audible and visible announcement

(4) The information referred to in subsection (1) must be provided by means of audible announcements and, upon request, by means of visible announcements.

Method of communication

(5) The information referred to in subsection (1) must also be provided to the passenger using the available communication method that they have indicated that they prefer, including a method that is compatible with adaptive technologies intended to assist persons with disabilities.

[emphasis added]

[62] It is not disputed by the Defendant that Air Canada never communicated departure times, status updates - which would include access to boarding passes, and connection information once the Plaintiffs landed in Montreal.

[63] At no time did Air Canada provide information to the Plaintiffs about how to negotiate the Montreal Airport to get onto the Air Transat flight. When the Plaintiffs went to the Air Canada counter upon arriving in Montreal, they were then sent to Air Transat who had no knowledge of these tickets.

[64] The same lack of communication was repeated with respect to access to American Airlines tickets. Furthermore, it appears that Air Canada did not even have evidence of a communication with Air Transat or American Airlines.

[65] Ironically, the only text communication the Plaintiffs received was details about the American Airlines flight 1807, which they had been told they were to get from Toronto to Miami, which they were eventually told was not available to them, with no reason given.

[66] Sections 15 and 16 of the *APPR* dictate the rules for the actual denial of boarding and the standard of treatment as a result of the denial of boarding.

[67] Those sections state:

Denial of boarding – request for volunteers

15 (1) If paragraph 11(5)(b) or 12(4)(b) applies to a carrier, it must not deny boarding to a passenger unless it has asked all passengers if they are willing to give up their seat.

Passenger on aircraft

(2) The carrier must not deny boarding to a passenger who is already on board the aircraft, unless the denial of boarding is required for reasons of safety.

Confirmation of benefit

(3) If a carrier offers a benefit in exchange for a passenger willingly giving up their seat in accordance with subsection (1) and a passenger accepts the offer, **it must provide the passenger with a written confirmation of that benefit before the flight departs.**

[68] It is clear from both the Plaintiffs' claim, and the evidence and submissions of Ms. Southwick, that they stepped up voluntarily on the basis of the promises they had received from Daryl.

[69] The Plaintiffs did not receive a written confirmation of their boarding passes on American Airlines or of their rights under the *APPR*. However, the only written confirmation of which there is evidence, is the aforementioned updates of the American Airlines flight from Toronto and a screenshot of the alleged reservation on Air Transat and to the Air Canada flight to Montreal.

[70] I will now set out Air Canada's obligations under s. 16 of the *APPR*.

Treatment when boarding is denied

16 (1) If paragraph 11(5)(b) or **12(4)(b)** applies to a carrier, it must, before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the following treatment free of charge:

(a) food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and

(b) access to a means of communication.

Accommodations

(2) If the carrier expects that the passenger will be required to wait overnight for a flight reserved as part of alternate travel arrangements, the carrier must offer, free of charge, hotel or other comparable accommodation that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport.

Refusing or limiting treatment

(3) The carrier may limit or refuse to provide a standard of treatment referred to in subsection (1) or (2) if providing that treatment would further delay the passenger.

[emphasis added]

[71] The Plaintiffs' evidence is replete with stories of their inability to communicate meaningfully with Air Canada. Indeed, what communication they had was limited to their willingness to stand in long lines for hours to speak to a representative. It is obvious also that Air Canada had a means of communication with the Plaintiffs through text messages as they had received the text message referred to earlier.

[72] Additionally, the Plaintiffs, upon returning to their home, again spent hours on the phone trying to find out how to obtain redress for their experience. The statutory language "means of communication" can only mean an effective method to contact Air Canada. A six-hour wait cannot be considered "effective".

[73] Furthermore, the Plaintiffs were denied access to accommodation, despite the fact that the alternative flight arrangements were made as a result of "**the denial of boarding**", included two overnight stays in airports, Montreal and Toronto. As indicated earlier, the Plaintiffs did not receive any repayment for those hotels until just before the trial was due to take place, thus they had to bear the costs for all of the intervening months.

[74] I will now turn to the obligation included in s. 12 (4)(c) (see para. 60 supra), that binds Air Canada with respect to finding alternate transport once a denial of boarding has occurred.

[75] Section 17 of the *APPR* states:

Alternate arrangements — within carrier's control

17 (1) If paragraph 11(3)(c), (4)(c) or (5)(c) or 12(2)(c), (3)(c) or (4)(c) applies to a carrier, it must provide to the passenger, free of charge, the following alternate travel arrangements to ensure that the passenger completes their itinerary as soon as feasible:

(a) in the case of a **large carrier**,

- (i) **a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within nine hours of the departure time that is indicated on that original ticket,**
- (ii) **a confirmed reservation for a flight** that is operated by any carrier and is travelling on any reasonable air route from the airport at which the passenger is located **to the destination that is indicated on the passenger's original ticket** and departs within 48 hours of the departure time that is indicated on that original ticket if the carrier cannot provide a confirmed reservation that complies with subparagraph (i), or
- (iii) transportation to another airport that is within a reasonable distance of the airport at which the passenger is located and **a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from that other airport to the destination that is indicated on the passenger's original ticket,** if the carrier cannot provide a confirmed reservation that complies with subparagraphs (i) or (ii);

(2) If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger's travel needs, the carrier must

(a) if the passenger is no longer at the point of origin that is indicated on the original ticket and the travel no longer serves a purpose because of the delay, cancellation or denial of boarding, refund the ticket and provide to the passenger, free of charge, a confirmed reservation for a flight to that point of origin that accommodates the passenger's travel needs; and

(b) in any other case, refund the unused portion of the ticket.

[emphasis added]

[76] Air Canada failed to honour any of its obligations under this section of the *APPR*. They did not provide a "confirmed reservation" to the Plaintiffs' original destination. Indeed, the only reservation they had was on a flight to Montreal into the area of a snowstorm. Frankly, it is questionable as to whether to fly to Montreal, with the known weather issues, in the vain hope of getting a flight on Air Transat without a reservation, even meets the definition of the "reasonable route" prerequisite in this section of the *APPR*.

[77] Air Canada had options provided to it, it appears from the evidence, that it did not even realistically attempt to comply with any of those options, and repeatedly failed in its obligations to the Plaintiffs.

[78] I will now turn to the issue of compensation referred to in s. 12(d): the obligation to provide minimum compensation in accordance with s. 20:

Compensation for denial of boarding

20 (1) If paragraph 12(4)(d) applies to a carrier, it must provide the following minimum compensation:

- (a) \$900, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by less than six hours;
- (b) \$1,800, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours; and
- (c) \$2,400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more.

[79] The undisputed evidence at the trial and within the Plaintiff's claim is that the Plaintiffs were offered the \$2,400 compensation for each of them as they were readying to board their booked flight to Cuba. They were made two promises, and based on that, they relinquished their seats for the amount offered and the same day trip on American Airlines to Miami. Clearly, the full extent of the promise was not fulfilled.

[80] In terms of why the out-of-pocket expenses of hotel and food in Montreal and Toronto were denied, Air Canada submits that the hotels were only required because the planes were delayed for weather related and safety issues and therefore the Defendant was not liable for the accommodation expenses. Frankly this explanation simply ignores the fact that the Plaintiffs were on this journey to Montreal and back to Toronto because of the Defendant's obligation to provide alternate travel due to the denial of boarding. Without the reason for the denial, the overbooking of the flight, the Plaintiffs would have been happily enjoying their chosen vacation rather than being

carelessly booked and allowed to board flights which could not fulfill Air Canada's obligations.

[81] Ms. Pham-Bui also explained that the original claim made by the Plaintiffs was denied by the computer as its program will automatically deny claims when it sees "a weather-related delay". Ms. Southwick testified that it was not until the filing of the Small Claims Court action that anyone from Air Canada contacted her.

[82] Furthermore, the Plaintiffs allege that Air Canada was aware of the weather system in Montreal and Ottawa before sending them there. The Defendant suggests that this booking is all done by a computer system thus any rebooking as occurred in this case is solely dependent on what a computer is programmed to take into account and not the reality of any changing situation in a day.

[83] Air Canada suggests they can only put passengers on airlines with whom they have agreements. They do not have any information as to whether there are seats on other airlines. It is the system that chooses the flights. The system only allows for a booking with a partner airline. However, it is clear that even with the partner airlines, Air Canada did not contact Air Transat or American Airlines in advance, or at all, to explain the predicament of the Plaintiffs.

[84] The Plaintiffs allege that Air Canada as a large carrier had an obligation to book them on any airline, a competitor or not. Ms. Southwick testified that her subsequent computer research showed at least five flights on different airlines which were leaving

Toronto airport to destinations that could have got them to Cuba within the 48-hour window.

[85] There is no evidence that Air Canada ever attempted to book the Plaintiffs on a flight on any other airline with whom they were not partnered.

[86] Furthermore, the Plaintiffs were never offered a cancellation of their trip and the opportunity to make their own booking, rather than rely on the Air Canada system.

[87] Ms. Pham-Bui could not provide an explanation why Air Canada did not provide the requisite boarding passes on their partner airlines.

[88] Thus, the Plaintiffs allege numerous breaches of the *APPR*, and for which Air Canada has no defence. In summary therefore, Air Canada failed in numerous duties:

- To provide written confirmation of the alternative arrangements made for them.
- To communicate as required on the plans made for the Plaintiffs.
- To provide booking passes for the trips that Air Canada booked on partner airlines.
- Air Canada permitted the Plaintiffs to board a flight to Montreal, which they knew was leaving Toronto late and therefore the Plaintiffs would not make their connection in Montreal.

- That Air Canada did not ever communicate with the partner airline that, apparently, was to carry the Plaintiffs to their chosen destination.
- The Air Canada system booked the Plaintiffs to fly to a smaller airport which was subject to specific weather warnings in February and therefore restricted flight options.
- To provide accommodation as a result of the delays incurred stemming from the denial of boarding.
- That Air Canada did not provide a means of communication to the Plaintiffs that did not entail waiting hours in line, or on the phone.

[89] Ms. Pham-Bui suggests that because of Article 17 of the *APPR*, Air Canada followed through with its obligations to reimburse the passengers for their cancelled vacation and that ends Air Canada's liability. I respectfully disagree. Firstly Article 17 was not complied with and secondly, s. 12 only speaks of minimum compensation and thirdly, the Plaintiffs were compensated only for the relinquishment of their seats because of their acceptance of the terms of promises given to them.

[90] I find that the Plaintiffs have proven to the standard required, and frankly beyond, of all of the breaches of the *APPR* as set out above.

[91] Finally, s. 32 of the *APPR* sets out the Administrative Penalties payable for breaching the obligations in accordance with s. 177(1) of the *Canada Transportation Act*, SC 1996, c 10, which states:

177 (1) The Agency may, by regulation,

(a) designate

- (i) any provision of this Act or of any regulation, order or direction made pursuant to this Act,
- (ii) the requirements of any provision referred to in subparagraph (i), or
- (iii) any condition of a licence issued under this Act,

as a provision, requirement or condition the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180;
and

(b) prescribe the maximum amount payable for each violation, but the amount shall not exceed

- (i) \$5,000, in the case of an individual...

[92] The Schedule attached to s. 33 of the *APPR* sets out the "Maximum Amount Payable – per individual" for whom there has been a failure of the required obligations.

[93] The relevant breaches and amounts are as follows:

- Section 13(2) the failure to communicate as required - \$5,000;
- Section 15(3) the obligation to provide written confirmation of the alternative arrangements – the amount is \$5,000;
- Section 16(2) the obligation to provide accommodation – the amount is \$5,000;
- Section 17(1)(a)(i) the obligation to provide a confirmed reservation to the passengers' destination within 9 hours – the amount is \$5,000;

- Section 17(1)(a)(ii) the obligation to provide a confirmed reservation **on any flight** when (i) above cannot be honoured – the amount of \$5,000 and
- Section 17(1)(a)(iii) the obligation to provide transport to another airport and a confirmed reservation to the passengers' destination – the amount is \$5,000.

[94] Given my findings of the breaches of all of these obligations, clearly the Plaintiffs are entitled to much more than the \$2,400 each suggested by the Defendant.

[95] I will now turn to the issue of an assessment for damages.

[96] The Plaintiffs' claim is for \$10,000. Had they claimed all of their entitlement under the *APPR*, they would have received a greater sum, but I am limited, I believe to their claim.

[97] While some of the out-of-pocket expenses have been reimbursed, there remains the following:

- The difference in price between the original holiday booked for a week in Cuba and the reluctantly accepted last minute alternative of a week in Cancun. The amount is \$760.
- The lost income due to having to extend their time away from home in order to have a vacation, which the Plaintiffs submit is five days:

[98] Ms. Southwick earns \$95 per hour and is fairly only claiming an eight-hour day. She therefore lost \$3,800. Mr. Dolan works on an hourly basis of \$50. The amount he lost therefore is \$2,000.

[99] Thus the Plaintiffs will be reimbursed for the lost wages of \$5,800 and for the increased cost of their forced rebooked vacation of \$760 as out of pocket expenses.

[100] I will now turn to the issue of non-compensatory damages. There is no doubt that to agree to the denial of boarding and with hindsight, the Plaintiffs made a mistake. However, that decision was based on the undertaking given by the Air Canada representative. The effect of this denial lead to enormous stress, waiting in lines for hours to no avail, a complete failure by Air Canada to communicate in a meaningful way and the ruining of a long dreamt of holiday. As a result of the horrendous experience to which the Plaintiffs were subjected and the numerous breaches of the APPR , there will be an additional award of damages of \$3,480.

[101] I will therefore award the Plaintiffs the additional amount of \$3,480 damages for the numerous breaches of the *APPR* by Air Canada.

[102] Air Canada is in the business of transporting real people. While I appreciate the wonders of air travel has been advanced by computers, this case is an example of why computers cannot be the only decision maker. Had a human being looked at the available alternative travel for the Defendants, provided the proper documentation, examined the feasibility of onward travel plans chosen by the Corporation computers, much of this would have been avoided. Ms. Southwick and Mr. Dolan became pawns

who went through a horrendous experience as a result of the overbooking by Air Canada of a flight to Cuba.

[103] Air Canada has a duty to communicate. It failed completely. It is extraordinary that without this Small Claims Court action, no person-to-person communication would have taken place. Moreover, there has been no acknowledgment of the difficulties suffered or even an apology for the complete lack of care, ever communicated. Ms. Southwick and Mr. Dolan, who had saved for three years for their one-week vacation were treated shamefully, being moved around without any thought of the effect of this experience or not considered as valued customers who deserved to be treated as such.

[104] Judgment to the Plaintiffs will be in the amount of \$10,000.

[105] The costs of this claim will be borne by the Defendants.

[106] Pre- and post-judgment interest will be paid pursuant to the *Judicature Act*, RSY 2002, c. 128.

MCLEOD T.C.J.