File number: 35100

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MICHEL THIBODEAU and LYNDA THIBODEAU

Appellant
(Respondent)

– and –

AIR CANADA

Respondent
(Appellant)

– and –

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener
(Intervener)

AND BETWEEN:

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Appellant
(Intervener)

– and –

AIR CANADA

Respondent
(Appellant)

MOTION FOR LEAVE TO INTERVENE OF THE ONTARIO CIVIL LIBERTIES ASSOCIATION (OCLA) AND DR. GÁBOR LUKÁCS

Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

Ontario Civil Liberties Association (OCLA)
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Proposed Intervener

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Proposed Intervener

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Appellant
(Intervener)

– and –

AIR CANADA

Respondent
(Appellant)

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF THE ONTARIO CIVIL LIBERTIES ASSOCIATION (OCLA) AND DR. GÁBOR LUKÁCS

Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that the Ontario Civil Liberties Association ("OCLA") and Dr. Gábor Lukács hereby apply to a judge of the Court pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada* for an Order:

1. granting OCLA and Dr. Lukács leave to intervene in this appeal;
2. permitting OCLA and Dr. Lukács to file a joint factum of no longer than 20 pages;
3. permitting OCLA and Dr. Lukács to present oral arguments in a total length of 20 minutes at the hearing of this appeal;

4. any further or other order that the judge may deem appropriate.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion to intervene:

1. the affidavit of Mr. Joseph Hickey, Executive Director of OCLA;

2. the affidavit of Dr. Gábor Lukács; and

3. such further and other material as the Proposed Interveners may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE THAT this motion shall be made on the following grounds:

1. ***The Proposed Interveners.*** Formed in September 2012, OCLA is a nascent provincial organization that promotes the observance of fundamental human rights and civil liberties. In addition to these core values, OCLA promotes a broad interpretation of the freedom of thought, belief, opinion, expression, and the press. Since its public launch event in January 2013, OCLA has publicly addressed a number of civil liberties matters.

2. Dr. Lukács is a Canadian air passenger rights advocate, who has been promoting better protection of air travellers and implementation of airline policies that conform to the legal principles of the *Montreal Convention* since 2008. He has a lengthy record of successful regulatory complaints against airlines with the Canadian Transportation Agency, which have resulted in substantial improvements to the rights of air passengers. Most recently, the Agency upheld the complaint of Dr. Lukács concerning Air Canada's denied boarding compensation amounts, and ordered Air Canada to adopt a new policy governing compensation amounts that Dr. Lukács proposed.

3. ***OCLA and Dr. Lukács seek to intervene in this appeal.*** The appeal raises a fundamental question with respect to the scope of the *Montreal Convention* and the interpretation of Article 29: does it exclude an action for damages arising from events and risks not specific to carriage by air and not covered by the *Montreal Convention*?

4. Determination of this question by the Court may have far reaching, unexpected, and devastating consequences with respect to the rights of passengers on board international flights. As such, the outcome of the appeal impacts important public interest and public policy considerations that affect not only the parties to this appeal, but the travelling public at large.

5. In this case, the Federal Court of Appeal held that the *Montreal Convention* "precludes the award of damages for causes of action not specifically provided for therein." The result of the Federal Court of Appeal's decision is that it leaves without any remedy or recourse passengers whose human rights or civil liberties are violated by, or as a result of, an airline's actions, or who are seriously mistreated or abused by airline employees. Examples of such incidents from the case law include:

(a) discrimination by airline employees based on the passenger's race, national or ethnic origin, colour, religion, sex, or similar immutable traits;
(b) false arrest of passengers based on malicious information provided by airline employees to public authorities;
(c) failure of airline employees to prevent the sexual assault of a passenger by another;
(d) fraud or intentional misrepresentation by an airline in regard to travel or baggage;
(e) public embarrassment and/or defamation of a passenger by airline employees;
(f) discriminatory treatment of passengers with disabilities.

6. ***OCLA and Dr. Lukács have an interest.*** OCLA and Dr. Lukács wish to intervene, because the outcome of this appeal will directly affect the rights of passengers travelling on international itineraries to and from Canada in general, and their human rights and civil liberties in particular. Since rights cannot exist without remedies, the interpretation of the *Montreal Convention* and its Article 29 accepted by the Federal Court of Appeal strips passengers of virtually every right, leading to absurd results that shock the legal conscience. OCLA and Dr. Lukács therefore wish to ensure that the Court is fully apprised of the broader implications of its ruling and the consequences for the travelling public.

7. ***OCLA and Dr. Lukács have a distinct perspective.*** OCLA and Dr. Lukács would bring a useful and distinct perspective to this appeal, because they would represent the interests of the travelling public at large, rather than the private commercial interests of Air Canada or the interests of francophone travellers.

8. The proposed intervention is a collaborative work that combines the expertise of OCLA in human rights and civil liberties with Dr. Lukács's experience with air passenger rights in general, and the *Montreal Convention* in particular.

9. ***Position and proposed submissions.*** OCLA and Dr. Lukács seek leave to intervene to address the scope of the *Montreal Convention* and the proper interpretation of Article 29. They propose to make the following submissions (on which they will expand if leave to intervene is granted):

(a) The *Montreal Convention* is not a "complete code" with respect to all liabilities of airlines toward passengers, but only with respect to claims related to the events enumerated in Articles 17-19, which arise from risks associated with and specific to carriage by air.

(b) The plain and ordinary meaning of the first sentence of Article 29 is that the liability limits (Articles 21-22) and notice requirements (Article 31) apply to claims related to events enumerated in Articles 17-19, regardless of the legal theory used to pursue such claims.

(c) The *Montreal Convention* does not and was never meant to exclude claims arising from events that are not enumerated in Articles 17-19, such as fraud, defamation, or as in the present case, human rights violations by an airline. In particular, Article 29 of the *Montreal Convention* does not exclude an action for damages under the *Official Languages Act*.

(d) Due to the substantial differences between the objectives and the preambles of the *Warsaw Convention* and the *Montreal Convention*, authorities about the preemptive effect of the former do not automatically apply to the latter. Thus, interpretation of Article 29 of the *Montreal Convention* requires fresh and original analysis based on the *Vienna Convention*, as the European Court of Justice did in its recent ruling in *Axel Walz c. Clickair SA*, [2010] All E.R. 53.

(e) In ratifying the *Montreal Convention*, Parliament did not intend to strip travellers of their fundamental rights. The interpretation of Article 29 adopted by the Federal Court of Appeal is absurd, because it leaves passengers who are defrauded or defamed or whose human rights are violated by an airline without any remedy. This strips passengers of virtually every right in a manner that is inconsistent with the unwritten constitutional principle of rule of law and the principle of restitution stated in the preamble of the *Montreal Convention*.

(f) The Federal Court of Appeal erred in failing to consider the jurisprudence developed outside North America and the United Kingdom with respect to the *Montreal Convention*, and in referring to it as "a small number of isolated cases".

10. The proposed intervention will not cause a delay in the hearing of this appeal nor prejudice the parties to this appeal.

11. OCLA and Dr. Lukács will not seek costs and ask that costs not be awarded against them in this motion and in the appeal if leave to intervene is granted.

12. Rules 47 and 55 of the *Rules of the Supreme Court of Canada*.

13. Such further and other grounds as the Proposed Interveners may advise and this Honourable Court may permit.

DATED at Ottawa, Ontario and Halifax, Nova Scotia, this 22nd day of September, 2013.

SIGNED BY

JOSEPH HICKEY

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Proposed Intervener

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Ottawa Agent for the Respondent,
Air Canada

Notice to the respondent to the motion: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.
If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

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(Intervener)

– and –

AIR CANADA

Respondent
(Appellant)

AFFIDAVIT OF JOSEPH HICKEY

I, **JOSEPH HICKEY**, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

INTRODUCTION

1. I am the Executive Director of the Ontario Civil Liberties Association (OCLA), and have held this position since the founding of OCLA in September 2012. As such, I have personal knowledge of the matters to which I depose in this Affidavit.

2. This Affidavit is sworn in support of the joint motion of OCLA and Dr. Gábor Lukács for leave to intervene in this appeal.

THE ONTARIO CIVIL LIBERTIES ASSOCIATION (OCLA)

3. Formed in September 2012, OCLA is a nascent provincial organization that promotes the observance of fundamental human rights and civil liberties. In addition to these core values, OCLA promotes a broad interpretation of the freedom of thought, belief, opinion, expression, and the press. A copy of OCLA's founding principles is attached and marked as Exhibit "A".

4. OCLA draws on the experience and expertise of its Advisory Board in planning and carrying out its activities. A list of OCLA's Advisory Board members is attached and marked as Exhibit "B".

5. OCLA has been endorsed by prominent several civil liberties leaders, such as John Carpay, President of the Justice Centre for Constitutional Freedoms, and Noam Chomsky, Institute Professor (Emeritus) at MIT, the renowned linguist and political scientist.

6. Since its public launch event in January 2013, OCLA has publicly addressed a number of civil liberties matters, including:

   (a) use of tasers by Ontario police forces;
   (b) deportation proceedings against an individual born and raised in Ontario;
   (c) use of body-worn cameras by police forces;
   (d) Bill C-475, *An Act to amend the Personal Information Protection and Electronic Documents Act (order-making power)*;
   (e) seizure of cell phones for traffic violations by police forces;
   (f) interference by university administration with freedom of thought, expression, and association of students at an Ontario university;
   (g) use of public funds for silencing a public critic of a Canadian university;
   (h) access of self-represented litigants to the Supreme Court of Canada.

IMPACT OF THE OUTCOME OF THE APPEAL ON PARTIES NOT BEFORE THE COURT

7. The *Montreal Convention* is an international treaty with the force of law in Canada. The *Montreal Convention* sets out rules of liability for airlines with respect to certain common risks associated with carriage by air (Articles 17-19):

   (a) bodily injury or death of passengers;
   (b) damage to checked or unchecked baggage or cargo;
   (c) delay of passengers, baggage, or cargo.

8. The appeal raises a fundamental question with respect to the interpretation of Article 29 of the *Montreal Convention*: does it exclude an action for damages in relation to events and risks not covered by the *Montreal Convention*?

9. Determination of this question by the Court may have far reaching, drastic, and unexpected consequences in the area of human rights and civil liberties on board international flights. As such, the outcome of the appeal impacts important public interest and public policy considerations that affect the travelling public at large, not just the parties to this appeal.

OCLA'S INTEREST IN THE APPEAL

10. The appeal involves the interaction between the *Montreal Convention* and a specific human rights legislation: the *Official Languages Act*, which is intimately tied to freedom of expression. Furthermore, the case law demonstrates that the realm of possible encroachments of the *Montreal Convention* on civil liberties extends far beyond the specific facts of this case.

11. The interpretation of Article 29 of the *Montreal Convention* directly affects the ability of all passengers on international flights to seek redress from airlines for violations of their fundamental human rights and civil liberties such as:

   (a) discrimination by airline employees based on the passenger's race, national or ethnic origin, colour, religion, sex, or similar immutable traits; and
   (b) false arrest of passengers based on malicious information provided by airline employees to public authorities.

12. These matters fall squarely within the scope of OCLA's mandate and past activities.

POSITION AND PROPOSED SUBMISSIONS

13. If permitted to intervene, OCLA will focus its submissions on the scope of the *Montreal Convention* and the proper interpretation of Article 29. In general, OCLA will argue that:

(a) the "full preemption" interpretation of Article 29 strips travellers of their fundamental human rights and civil liberties in a manner that is inconsistent with the unwritten constitutional principle of the rule of law and the principle of restitution stated in the preamble of the *Montreal Convention*;

(b) the *Montreal Convention* governs only claims related to events arising from common risks associated with carriage by air (Articles 17-19), and its "preemptive effect" is confined to claims arising from such events;

(c) the *Montreal Convention* does not and was never intended to govern claims arising from events that are not covered by Articles 17-19, such as human rights violations by an airline;

(d) in ratifying the *Montreal Convention*, Parliament did not intend to strip travellers of their fundamental human rights and civil liberties nor to create a lawless onboard "Human Rights Free" zone on international flights;

(e) Article 29 of the *Montreal Convention* does not exclude an action for damages under the *Official Languages Act*.

14. OCLA will expand on these submissions if leave to intervene is granted.

15. I believe that the joint submissions of OCLA and Dr. Lukács will be of assistance to the Court in deciding the important issues in this appeal. These submissions will be unique in that they will represent the interests of the travelling public at large, rather than private commercial interests of Air Canada or the interests of francophone travellers.

16. OCLA's proposed intervention will not cause a delay in the hearing of this appeal nor prejudice the parties to this appeal.

17. OCLA will not seek costs and asks that it not have costs awarded against it in the event that leave to intervene is granted.

AFFIRMED before me at the City of Ottawa
in the Province on Ontario
this 20th day of September, 2013.

_____

_____

JOSEPH HICKEY

Ontario Civil Liberties Association

* * *

Founding Principles

There is a crying need in Ontario for a civil liberties association that stands for civil liberties.

We distinguish an individual's societal influence by expression from an individual's actuated power that derives from his/her institutional hierarchical position.

We hold that the individual's societal influence by expression, not structurally derived from the institutional and organizational hierarchy, is an absolute right, irrespective of race, gender, orientation, etc.

We believe that societal health depends on the individual's absolute right to free expression.

We defend all individual expression as an absolute right no matter how unacceptable it may appear to others.

We support individual free expression regardless of its form or content.

We oppose all state and corporate censorship, including employer gag orders on employees.

We oppose all forms of societal mobbing that have the effect of censorship.

* * *

Regarding controversial issues of the day, we support the right to:

- all individual expression critical of any state, including Israel and Iran;
- all individual expression critical of any religion or culture, including Judaism, Islam, and Christianity;
- all individual expression critical of any sexual orientation, including straight and queer;
- all individual expression critical of both sides of the abortion conflict, including pro-life and pro-choice;
- all individual expression critical of any public policy or law, including liberal or conservative;
- all individual expression of emotions, including hate and love;
- all individual expression about criminal behaviour, including expression about child pornography, genocide, war, slavery, and serial murder;
- all individual expression critical of any person, including public figures, neighbours, and colleagues.

Sept. 18, 2012
Ottawa, Ontario

This is Exhibit "A" referred to in the affidavit of Joseph Hickey affirmed before me on the 20th day of September, 2013

_____
Signature

Advisory Board of the Ontario Civil Liberties Association

Dr. Benoit Awazi Mbambi Kungua
Président
Centre de recherches pluridisciplinaires sur les Communautés d'Afrique noire et des diasporas (CERCLECAD)
Ottawa, Ontario

David Burton
Civil Liberties Activist
Former Director (Charter of Rights, Police, and Security Issues) of the National Capital Region Civil Liberties Association
Ottawa, Ontario

Colia Clark
Veteran of the American Civil Rights Movement
2010 & 2012 U.S. Senate Candidate, Green Party
New York, New York

This is Exhibit "B" referred to in the affidavit of Joseph Hickey affirmed before me on the 20th day of September, 2013

_____
Signature

Dr. Arthur Jutan
Professor (Emeritus), Dept. of Engineering
University of Western Ontario
London, Ontario

Dr. Mark Mercer
Professor, Dept. of Philosophy
Saint Mary's University
Halifax, Nova Scotia

Dr. Michel Seymour
Professeur, Département de philosophie
Université de Montréal
Montréal, Québec

Cindy Sheehan
Anti-War Activist
2012 U.S.A. Vice-Presidential Nominee, Peace and Freedom Party
Vacaville, California

Truther Girl Sonia
Vlogger – The Truther Girls – YouTube
Civil liberties web activist

Tyler Willis
Editor at *The Puritan* literary magazine
Toronto, Ontario

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(Intervener)

AND BETWEEN:

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Appellant
(Intervener)

– and –

AIR CANADA

Respondent
(Appellant)

AFFIDAVIT OF DR. GÁBOR LUKÁCS

I, **DR. GÁBOR LUKÁCS**, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY AS FOLLOWS:

INTRODUCTION

1. I am a Canadian air passenger rights advocate.

2. This Affidavit is sworn in support of my joint motion with the Ontario Civil Liberties Association (OCLA) for leave to intervene in this appeal.

3. The purpose of the proposed intervention is to:

   (a) represent the travelling public at large, whose interests are currently unrepresented in the appeal;

   (b) inform the Court about the far reaching, unexpected, and harmful policy consequences for the entire travelling public of upholding the Federal Court of Appeal's interpretation of the *Montreal Convention* in this case;

   (c) offer assistance to the Court, with authorities from continental Europe or elsewhere and with arguments, in determining the scope and proper interpretation of certain provisions of the *Montreal Convention*.

4. The proposed intervention is a collaborative work that combines the expertise of OCLA in human rights and civil liberties with my experience with air passenger rights in general, and the *Montreal Convention* in particular.

5. I have been advocating for air passenger rights and better protection of travellers in Canada since 2008. My activities in this area include:

   (a) more than a dozen successful regulatory complaints to the Canadian Transportation Agency (the "Agency"), resulting in airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;

   (b) promoting air passenger rights through the press and social media;

   (c) referring passengers mistreated by airlines to legal information and resources.

REGULATORY COMPLAINTS TO THE CANADIAN TRANSPORTATION AGENCY

6. In my experience, a substantial portion of disputes between airlines and passengers arises from contractual provisions that are inconsistent with the *Montreal Convention*, and the refusal of airlines to compensate passengers based on these provisions. Such contractual provisions are null and void based on Article 26 of the *Montreal Convention*, but most passengers do not know this. Thus, most of my efforts have focused on having contractual provisions that are inconsistent with the legal principles of the *Montreal Convention* purged from the conditions of carriage of airlines.

7. Airlines that operate within Canada or to and from Canada are required to publish a "tariff" that sets out their terms and conditions with respect to a prescribed list of matters (ss. 107 and 122 of the *Air Transportation Regulations*).

8. Airlines' tariffs must be "reasonable," and the Agency is empowered to disallow and substitute unreasonable provisions or portions of a tariff (s. 67.2(1) of the *Canada Transportation Act*, and ss. 111(1) and 113 of the *Air Transportation Regulations*). As the Agency pointed out in *Lukács v. Air Canada*, 250-C-A-2012:

> [9] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

9. The Agency has upheld my regulatory complaints in thirty (30) decisions, two of which were also upheld by the Federal Court of Appeal (leave to appeal denied). The Agency dismissed my complaints only in two (2) cases.

MOST SIGNIFICANT ACHIEVEMENTS

10. In June 2012, the Agency issued five decisions (Nos. 248-C-A-2012, 249-C-A-2012, 250-C-A-2012, 251-C-A-2012, and 252-C-A-2012) upholding five of my regulatory complaints concerning the tariff provisions of Air Canada, Air Transat, and WestJet governing the rights of passengers delayed as a result of overbooking and flight cancellation. The rulings significantly increased the rights and remedies of passengers affected by such delays, and harmonized them with the legal principles of the *Montreal Convention*.

11. In July 2013, the Agency issued a "Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights," asking all airlines to voluntarily amend their tariffs to reflect the principles set out in the aforementioned five rulings. A copy of the notice is attached and marked as Exhibit "A".

12. In summer 2013, the Agency issued two decisions upholding my complaint about Air Canada's denied boarding compensation policy. The first one (No. 204-C-A-2013) held that the current policy, calling for compensation in the amount of $100 in cash or $200 in travel vouchers, was unreasonable. The second ruling (No. 342-C-A-2013) imposed on Air Canada a new compensation regime that I proposed, requiring Air Canada to pay "bumped" passengers up to $800 in cash, depending on the length of the delay caused to the passenger. These rulings are significant steps toward Canada catching up with the United States and the European Union in the area of air passenger rights.

13. On September 4, 2013, the Consumers' Association of Canada recognized my achievements by awarding me its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."

FURTHER RELEVANT EXPERIENCE WITH THE MONTREAL CONVENTION

14. My past experience with the *Montreal Convention* and the Agency also includes complaints concerning:

    (a) the inconsistency of Air Canada's baggage liability policy with Articles 17(2) and 19 of the *Montreal Convention* (upheld, Decision No. 208-C-A-2009);

    (b) the inconsistency of WestJet's disclaimer of liability for valuables with Articles 17(2) and 19 of the *Montreal Convention* (upheld, Decision No. 477-C-A-2010, leave to appeal denied by the Federal Court of Appeal);

    (c) WestJet's domestic baggage liability cap being substantially lower than international standards, including the *Montreal Convention* (upheld, Decision No. 483-C-A-2010, leave to appeal denied by the Federal Court of Appeal);

    (d) the inconsistency of United Airlines' baggage policy with Articles 17(2) and 19 of the *Montreal Convention* (upheld, Decision No. 467-C-A-2012).

IMPACT OF THE OUTCOME OF THE APPEAL ON THE TRAVELLING PUBLIC AT LARGE

15. The *Montreal Convention* is an international treaty with the force of law in Canada. The *Montreal Convention* sets out rules of liability for airlines with respect to certain common risks associated with carriage by air (Articles 17-19):

    (a) bodily injury or death of passengers;

    (b) damage to checked or unchecked baggage or cargo;

    (c) delay of passengers, baggage, or cargo.

16. The appeal raises a fundamental question with respect to the scope of the *Montreal Convention* and the interpretation of Article 29: does it exclude an action for damages arising from events and risks not covered by the *Montreal Convention*?

17. Determination of this question by the Court may have far reaching, unexpected, and harmful consequences with respect to the rights of passengers on board international flights. As such, the outcome of the appeal impacts important public interest and public policy considerations that affect not only the parties to this appeal, but the travelling public at large.

INTEREST IN THE APPEAL

18. The legal question underpinning a substantial portion of the appeal is the extent to which the *Montreal Convention* allows airlines to evade the legal consequences of failing to abide by the law in their dealings with passengers on international flights. This question falls squarely within my interest as an air passenger rights advocate, and my expertise and experience with the *Montreal Convention*.

19. The scope of the *Montreal Convention* and the interpretation of Article 29 directly affect the ability of all passengers on international flights to seek redress from airlines for mistreatment or abuse such as:

    (a) failure of airline employees to prevent the sexual assault of a passenger by another;

    (b) fraud or intentional misrepresentation by an airline in regard to travel or baggage;

    (c) public embarrassment and/or defamation of a passenger by airline employees;

    (d) discriminatory treatment of passengers with disabilities.

POSITION AND PROPOSED SUBMISSIONS

20. If permitted to intervene, I will focus my submissions on the scope of the *Montreal Convention* and the proper interpretation of Article 29. In general, I will argue that:

(a) Article 29 does not affect claims with respect to which the *Montreal Convention* contains no "conditions" or "limits of liability," such as compensation for fraud, defamation, or human rights violations;

(b) the *Montreal Convention* sets out uniform rules only with respect to certain aspects of airline liability, namely, those arising from common risks associated with and specific to carriage by air (Articles 17-19);

(c) Article 29 only ensures that claims arising from events specific to carriage by air, which are addressed in Articles 17-19, 21-22, and 31, can only be brought in accordance with the *Montreal Convention*;

(d) the *Montreal Convention* is not and was never meant to govern disputes between passengers and airlines related to matters that are not specific to carriage by air, such as fraud, defamation, or human rights;

(e) the "full preemption" interpretation of Article 29 adopted by the Federal Court of Appeal leaves passengers who are defrauded or defamed or whose human rights are violated by an airline without any remedy;

(f) since rights cannot exist without remedies, the "full preemption" interpretation of Article 29 strips passengers of virtually every right, leading to absurd results that shock the legal conscience;

(g) due to the substantial differences between the objectives and the preambles of the *Warsaw Convention* and the *Montreal Convention*, authorities about the preemptive effect of the former do not automatically apply to the latter;

(h) the Federal Court of Appeal erred in failing to consider the jurisprudence developed outside North America and the United Kingdom with respect to the *Montreal Convention*, and in referring to it as "a small number of isolated cases";

(i) interpretation of Article 29 of the *Montreal Convention* requires fresh and original analysis based on the *Vienna Convention*, as the European Court of Justice did in its recent ruling in *Axel Walz c. Clickair SA*, [2010] All E.R. 53;

(j) Article 29 of the *Montreal Convention* does not exclude an action for damages under the *Official Languages Act*.

21. I will expand on these submissions if leave to intervene is granted.

22. I believe that my joint submissions with OCLA will be of assistance to the Court in deciding the important issues in this appeal. These submissions will be unique in that they will represent the interests of the travelling public at large, rather than the private commercial interests of Air Canada or the interests of francophone travellers.

23. My proposed intervention will not cause a delay in the hearing of this appeal nor prejudice the parties to this appeal.

24. I will not seek costs and ask that I not have costs awarded against me in the event that leave to intervene is granted.

AFFIRMED before me at the City of Halifax
in the Province on Nova Scotia
this 20th day of September, 2013.

_____
Commissioner for Taking Oaths

_____
DR. GÁBOR LUKÁCS

This is Exhibit "A" referred to in the affidavit of Dr. Gábor Lukács affirmed before me on the 20th day of September, 2013

Signature

Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights

Air carriers are required by law to have and apply a tariff[1], and their terms and conditions of carriage in the tariff must be clear, just and reasonable. The Agency has the authority to suspend, disallow or substitute a term or condition of carriage it deems unclear, unjust or unreasonable.

Based on this authority, the Agency, in June, 2012, issued five final decisions on the reasonableness of international and domestic tariff provisions of some carriers about overbooking and cancellation of flights[2]. The rulings significantly increased the rights and remedies of the passengers travelling with the air carriers named in the decisions. However, as these rulings do not apply to all air carriers, not all passengers can benefit from the same rights and remedies.

The Agency is of the opinion that if all air carriers were to apply the rulings on overbooking and cancellation, it would further enhance consumer protection while ensuring a level playing field among air carriers.

Accordingly, the Agency will take measures to encourage carriers to voluntarily amend their tariffs to reflect the following two principles.

If a passenger is delayed due to the overbooking or cancellation of a flight **within the carrier's control**[3], at the passenger's discretion, the carrier will:

1. **rebook the passenger on alternate transportation**to the passenger's intended destination, at no additional cost to the passenger and within a reasonable time, using:
    a. its own service;
    b. the services of carriers with which it has an interline agreement; or
    c. where possible and necessary, the services of carriers where no interline agreement exists, or:

2. if the purpose of the passenger's travel is no longer valid because of the delay incurred,

provide the passenger with a full refund[4], and, when travel has already commenced, **return the passenger to their point of origin**, within a reasonable time at no additional cost.

In addition, the Agency considers it good practice for carriers to always assessthe needs of the passengers on a case-by-case basis, and take into account all known circumstances to avoid or mitigate the disruptions caused by the overbooking or the cancellation of flights.

Agency staff is available to work with carriers and provide guidance to help them incorporate these principles into their tariffs. Rules 90, 95 and 125 of the Agency's Sample Tariff reflect these principles and provide carriers with text that they can choose to add to their terms and conditions of carriage.

The Canadian Transportation Agency is an independent, quasi-judicial tribunal and economic regulator of the Government of Canada. It makes decisions and determinations on a wide range of matters involving air, rail and marine modes of transportation under the authority of Parliament, as set out in the *Canada Transportation Act* and other legislation.

For further information:

Telephone: 1-888-222-2592
TTY: 1-800-669-5575
E-mail: info@otc-cta.gc.ca
Website: www.otc-cta.gc.ca

Notes

1 A tariff is a schedule of fares, rates, charges and terms and conditions of carriage applicable to an air service.

2 The Agency ruled that overbooking and cancellation that are within the control of the carrier constitute a delay.

3 The Montreal Convention (Article 19) states that an air carrier is always liable for damage occasioned by delay in the carriage of passengers and their baggage. However, for delays outside the control of the carrier, the Montreal Convention provides that the carrier cannot be held liable if it proves that it took all measures that could reasonably be required to avoid the damage or if the carrier proves that it was impossible to take such measures.

4 The passenger is entitled to a full refund even if travel has commenced, if the passenger has suffered a loss of purpose for the travel.

Date Modified :
2013-07-03

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Important Notices

MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENERS, THE ONTARIO CIVIL LIBERTIES ASSOCIATION (OCLA) AND DR. GÁBOR LUKÁCS

Part I – Statement of Facts

A. Overview

1. The appeal raises a fundamental question with respect to the scope of the *Montreal Convention*[1] and the interpretation of Article 29: does it exclude an action for damages arising from events and risks not specific to carriage by air and not enumerated in Articles 17-19?

2. Determination of this question by the Court may have far reaching, unexpected, and devastating consequences with respect to the rights of passengers on board international flights. As such, the outcome of the appeal impacts important public interest and public policy considerations that affect not only the parties to this appeal, but the travelling public at large.

3. In this case, the Federal Court of Appeal held that the *Montreal Convention* "precludes the award of damages for causes of action not specifically provided for therein, even when the cause of action does not arise out of a risk inherent in air carriage."[2] The result of the Federal Court of Appeal's decision is that it leaves without any remedy or recourse passengers whose human rights or civil liberties are violated by, or as a result of, an airline's actions, or who are seriously mistreated or abused by airline employees.[3,4]

4. OCLA and Dr. Lukács wish to intervene, because the outcome of this appeal will directly affect the rights of passengers travelling on international itineraries to and from Canada in general, and their human rights and civil liberties in particular. Since rights cannot exist without remedies, the interpretation of the *Montreal Convention* and its Article 29 adopted by the Federal Court of Appeal strips passengers of virtually every right, leading to absurd results that shock the legal conscience. OCLA and Dr. Lukács therefore wish to ensure that the Court is fully apprised of the broader implications of its ruling and the consequences for the travelling public.

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1 *Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999)*, Schedule VI to the *Carriage by Air Act*, R.S.C., 1985, c. C-26.

2 *Air Canada v. Thibodeau*, 2012 FCA 246, ¶33.

3 The Federal Court of Appeal (*id.*, ¶33) cites *King v. American Airlines*, 284 F. 3d 352 (2nd Cir. 2002) with approval, where the *Warsaw Convention* was held to exclude passengers' claims for damages for racial discrimination.

4 For further examples of manifestly absurd results of the "full preemption" doctrine, see Part III below.

B. The Proposed Interveners: OCLA and Dr. Lukács

5. Formed in September 2012, OCLA is a nascent provincial organization that promotes the observance of fundamental human rights and civil liberties. In addition to these core values, OCLA promotes a broad interpretation of the freedom of thought, belief, opinion, expression, and the press. Since its public launch event in January 2013, OCLA has publicly addressed a number of civil liberties matters.[5]

6. Dr. Lukács is a Canadian air passenger rights advocate, who has been promoting better protection of air travellers and implementation of airline policies that conform to the legal principles of the *Montreal Convention* since 2008. He has a lengthy record of successful regulatory complaints against airlines with the Canadian Transportation Agency, which have resulted in substantial improvements to the rights of air passengers. Most recently, the Agency upheld the complaint of Dr. Lukács concerning Air Canada's denied boarding compensation amounts, and ordered Air Canada to adopt a new policy governing compensation amounts that Dr. Lukács proposed.[6]

7. The proposed intervention is a collaborative effort that combines the expertise of OCLA in human rights and civil liberties with Dr. Lukács's experience with air passenger rights in general, and the *Montreal Convention* in particular.

Part II – Question in Issue

8. Should OCLA and Dr. Lukács be granted leave to intervene in this appeal?

Part III – Argument

A. The Test for Leave to Intervene

9. A prospective intervener must demonstrate: (i) a real interest; and (ii) useful submissions that will be argued from a different perspective than the other parties.[7] Under this test, this Court has welcomed interveners in constitutional cases, which "affect people far beyond the immediate dispute," allowing interveners to play "an important role in presenting the court with the perspectives it needs in order to make fully-informed decisions."[8]

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5 Hickey Affidavit, ¶¶3-6.
6 Lukács Affidavit, ¶¶9-14.
7 *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, ¶8, Sopinka J.
8 John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (2nd ed., 2000), p. 255.

B. OCLA and Dr. Lukács are Interested in this Appeal

10. The standard for an "interest" is flexible. Any interest in an appeal is sufficient, subject always to the Court's discretion.[9]

11. OCLA and Dr. Lukács are interested in the appeal, because it has significant implications for air travellers beyond the scope of the *Official Languages Act*.[10] There are two competing interpretations of the *Montreal Convention* and Article 29: the "limited preemption" and the "full preemption." The Federal Court of Appeal's decision adopted the latter doctrine, which deprives passengers of any remedy or recourse against an airline for violations of their human rights or civil liberties, or other serious mistreatment or abuse by airline employees that fall outside the events enumerated in Articles 17-19. Application of this doctrine has led to the manifestly absurd result of dismissal of claims in a wealth of cases:

(a) ***Racial discrimination and harassment.*** Passengers bumped from an overbooked flight because of their race.[11] Flight attendants calling passengers of colour "monkeys" and threatening them with physical harm.[12]

(b) ***False imprisonment or detention.*** Passenger incarcerated for nine (9) months as a result of airline employees placing a false label with the passenger's name on luggage containing drugs.[13] Passengers harassed by airline employees, then removed by security and military personnel, and detained at the airline's request.[14] Arrest and detention of a passenger who was cold and asked for a blanket onboard a Toronto-bound flight.[15]

(c) ***Sexual assault onboard an aircraft.*** Airline's failure to prevent sexual assault of a passenger by another passenger.[16] Airline's failure to protect a minor onboard, and prevent sexual assault of the minor by another passenger.[17]

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[9] *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, ¶¶10-11, Sopinka J.; *R. v. Finta*, [1993] 1 S.C.R. 1138, ¶5, McLachlin J. (as she was then).
[10] R.S.C., 1985, c. 31 (4th Supp.).
[11] *King v. American Airlines*, 284 F. 3d 352 (2nd Cir. 2002), decided based on the *Warsaw Convention*.
[12] *Nobre v. American Airlines*, 2009 WL 5125976 (S.D. Fla. Dec. 21, 2009).
[13] *Singh v. North American Airlines*, 426 F.Supp.2d 38 (E.D.N.Y. 2006).
[14] *Elnajjar v. Northwest Airlines, Inc.*, 2005 WL 1949545 (S.D.Tex. 2005), decided based on the *Warsaw Convention*.
[15] *Gontcharov v. Canjet*, 2012 ONSC 2279, ¶¶8-11.
[16] *Wallace v. Korean Air*, 214 F.3d 293 (2d Cir. 1999), decided based on the *Warsaw Convention*, see footnote 2.
[17] *Doe v. United Airlines*, 160 Cal.App.4th 1500, decided based on the *Warsaw Convention*.

(d) ***Fraud and intentional misrepresentation.*** Fraud and deceitful denial by airline of receipt of passenger's claim for lost checked baggage.[18] Airline fraudulently demanding passenger pay over $4,000 for excess baggage fees.[19] "An airline could, if it chose, even line up passengers on an international flight and rob them at gunpoint without fear of any civil liability to the victims whatsoever."[20]

(e) ***Public embarrassment and defamation.*** Defamatory statements about a passenger using the aircraft's public address system, and subsequently to the police.[21] Altercation between airline employees and a parent wanting to attend his ill child onboard.[22]

(f) ***Failure to assist passengers with disabilities.***[23]

C. OCLA and Dr. Lukács bring a Useful and Different Perspective to this Appeal

(i) A Fresh Perspective

12. Intervener status is granted when an applicant can "present argument from a different perspective with respect to some of the issues" raised in an appeal.[24] An intervention "is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue."[25]

13. OCLA and Dr. Lukács would bring a useful and distinct perspective to this appeal. The *Official Languages Act* is an instance of a human rights legislation, which protects civil liberties related to one's cultural identity. The Federal Court of Appeal adopted an interpretation of the *Montreal Convention* that bars any remedy or redress for violations not only of language rights, but of all human rights and civil liberties by airlines. Thus, at its core, the appeal concerns the rights in general, and the fundamental human rights and civil liberties in particular, of air passengers travelling on international itineraries. OCLA and Dr. Lukács would bring the much needed broader perspective, representing the interests of the travelling public at large, rather than the private commercial interests of Air Canada or the interests of francophone travellers.

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[18] *Cruz v. American Airlines*, 193 F.3d 526, decided based on the *Warsaw Convention*.
[19] *Mbaba v. Société Air France*, 457 F.3d 496 (5th Cir. 2006), decided based on the *Warsaw Convention*.
[20] *Id.*, at *499, hypothetical of counsel, left unaddressed by the judge.
[21] *Turturro v. Continental Airlines*, 128 F.Supp.2d 170 (S.D.N.Y. 2001), decided based on the *Warsaw Convention*.
[22] *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001), decided based on the *Warsaw Convention*.
[23] *Stott v. Thomas Cook Tour Operators Ltd. and others*, [2012] EWCA Civ 66.
[24] *Norberg v. Wynrib*, [1992] 2 S.C.R. 224, ¶3, Sopinka J.
[25] *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, ¶12, Sopinka J.

(ii) History of Involvement

14. The criterion of useful submissions is "easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter."[26]

15. Dr. Lukács has a lengthy record of successful complaints against airlines with the Canadian Transportation Agency with respect to issues affecting the rights of passengers, such as liability for baggage, flight cancellations, and denied boarding due to overbooking.[27] OCLA was founded in September 2012, and since its public launch event in January 2013, it has publicly addressed a number of civil liberties matters.[28]

D. An Outline of the Proposed Submissions of OCLA and Dr. Lukács

16. OCLA and Dr. Lukács propose to address the scope of the *Montreal Convention* and the interpretation of Article 29.

17. The purpose of the *Montreal Convention* is to provide a uniform and complete code only with respect to liabilities of airlines arising from common events and risks that are specific to carriage by air, and enumerated in Articles 17-19: (i) death or bodily injury of passengers caused by accident (Art. 17(1)); (ii) damage, loss, or destruction of baggage and cargo (Art. 17(2) and 18); and (iii) delay of passengers and their baggage (Art. 19). These are the events and risks that define the substantive scope of the *Montreal Convention*.

18. The *Montreal Convention* imposes a regime of absolute liability with respect to (i), and strict liability with respect to (ii) and (iii); it sets a monetary cap on airlines' liabilities (Art. 21-22), and a deadline for certain complaints (Art. 31). It also prescribes jurisdiction, limitation, and apportioning of liability in the case of code-sharing and successive carriage (Art. 33, 35-36, 39-48).

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[26] *Id.*

[27] *Lukács v. Air Canada*, 204-C-A-2013 and 342-C-A-2013 (denied boarding compensation amounts); *Lukács v. United Airlines*, 467-C-A-2012 (conditions inconsistent with Articles 17(2) and 19 of the *Montreal Convention*); *Lukács v. Air Canada*, 250-C-A-2012 and 251-C-A-2012, *Lukács v. Air Transat*, 248-C-A-2012, *Lukács v. WestJet*, 249-C-A-2012 and 252-C-A-2012 (*Montreal Convention* and delays caused by overbooking and flight cancellation); *Lukács v. WestJet*, 483-C-A-2010, leave to appeal to FCA denied, 10-A-42, (domestic baggage liability cap); *Lukács v. WestJet*, 477-C-A-2010, leave to appeal to FCA denied, 10-A-41, (disclaimer of liability inconsistent with Articles 17(2) and 19 of the *Montreal Convention*); *Lukács v. Air Canada*, 208-C-A-2009 (baggage liability policy inconsistent with Articles 17(2) and 19 of the *Montreal Convention*).

[28] Hickey Affidavit, ¶6.

19. Article 26 protects passengers from contractual provisions that purport to interfere with their rights under the *Montreal Convention*. Similarly, the first sentence of Article 29 ensures that "it was not possible to circumvent its provisions by bringing an action for damages [...] in contract or tort or otherwise."[29] The purpose of Article 29 is to bar actions aimed at circumventing the conditions and monetary limits (Art. 21-22) laid down in the *Montreal Convention*. Article 29 was never intended to and does not bar actions arising from events not enumerated in Articles 17-19, such as non-performance,[30] refusal to honour tickets,[31] refusal to transport,[32] or refunds, [33] because they fall outside the substantive scope of the *Montreal Convention*.

20. ***The European Court of Justice (ECJ) on the Montreal Convention.*** The decisions of the ECJ are binding upon the national courts of all 28 member states, which are also parties to the *Montreal Convention*; in particular, these rulings are binding upon the House of Lords, which is no longer a court of final resort. Over the past decade, the ECJ has devoted great attention to the *Montreal Convention*, and has issued a number of landmark rulings:

(a) *R (IATA) v Department of Transport*:[34] standardized compensation for the inconvenience caused by flight delay falls outside the substantive scope of the *Montreal Convention*, and is not precluded by Article 29. This ruling effectively reverses *Sidhu*'s preemption doctrine.[35]

(b) *Walz v. Clickair*:[36] the word "damage" in Chapter III of the *Montreal Convention* refers to both material and non-material damage. The ECJ analyzed the convention according to the interpretation rules of the *Vienna Convention*,[37] and reached a novel conclusion.

(c) *More v. KLM*:[38] the limitation period prescribed by the *Montreal Convention* (Art. 35) does not apply to claims for standardized compensation for flight delay, because such claims fall outside the scope of the convention.

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[29] ICAO, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air)*, Montreal, May 10-28, 1999, Vol. 1, Minutes, p. 235, ¶9-10.
[30] *Nankin v. Continental Airlines*, 2010 WL 342632 (C.D.Cal., 2010), at *6 and *7; *Mullaney v. Delta Air Lines*, 2009 WL 1584899 (S.D.N.Y., 2009); *In re Nigeria Charter Flights Contract Litigation*, 520 F.Supp.2d 447.
[31] *Northwest Airlines Inc. v. Canadian Transportation Agency*, 2004 FCA 238.
[32] *Jones v. Skyservice Airlines*, Canadian Transportation Agency, 378-C-A-2009.
[33] *Abdulle v. Air Canada*, Canadian Transportation Agency, 510-C-A-2006.
[34] C-344/04, [2006] E.C.R. I-403, ¶¶44-45.
[35] *Sidhu v. British Airways*, [1997] A.C. 430.
[36] C-63/09, [2010] All E.R. 53, ¶29.
[37] *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969), Can. T. 1980 No. 37.
[38] C-139/11, ¶¶28-29

21. ***Need for de novo analysis of the Montreal Convention.*** The Federal Court of Appeal's decision[39] considers *Sidhu* a "leading case in this field" and heavily relies on *Tseng*.[40] These cases, however, analyzed the *Warsaw Convention*, and not the *Montreal Convention*. As noted earlier, the "full preemption" doctrine of *Sidhu* was effectively reversed by the ECJ in the *IATA* decision, and "whether the *Montreal Convention* completely preempts state law remains an open question today."[41] These circumstances call for a fresh and original analysis of Article 29 of the *Montreal Convention* based on the principles of the *Vienna Convention*, as the ECJ performed in *Walz*.

22. ***The principle of restitution.*** The *Warsaw Convention* and the *Montreal Convention* are not only separated by 70 years, a period in which air travel evolved from an exotic pursuit to an everyday matter, but they are also distinct in their objectives. This difference is manifested in the principle of restitution enshrined in the third preamble of the *Montreal Convention*, which must be considered in interpreting the convention. The "full preemption" doctrine, which excludes passengers' claims in relation to events not enumerated in Articles 17-19, is inconsistent with the principle of restitution, and as such ought to be rejected.

23. A consistent interpretation of the *Montreal Convention* and Article 29 calls for limiting the convention's preemptive effect to claims whose essential character and substance fall within the common events and risks specific to carriage by air that are enumerated in Articles 17-19. Since the convention contains no extra "conditions" or "limits of liability" with respect to claims falling outside these enumerated risks and events, the first sentence of Article 29 does not impose any restriction on application of national law in the context of such claims; however, the second sentence precludes claims for punitive, exemplary or any other non-compensatory damages.

24. In ratifying the *Montreal Convention*, Parliament did not intend to strip travellers of their fundamental rights, and leave them without remedy in cases such as fraud, defamation, or as in the present case, human rights violations by an airline, as doing so would be inconsistent with the unwritten constitutional principle of the rule of law. In particular, Parliament did not intend to exempt airlines from human rights legislation that would otherwise apply, such as the *Official Languages Act*.

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[39] *Air Canada v. Thibodeau*, 2012 FCA 246, ¶¶26-27.
[40] *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 US 155 (1999) 119 S. Ct. 662.
[41] *Nankin v. Continental Airlines*, 2010 WL 342632 (C.D.Cal., 2010), at *4.

25. With respect to events taking place onboard an aircraft, or during embarking or disembarking, the first question to be asked is whether the event is an accident, and if so, whether it involves death or bodily injury. If the answer is negative, then the convention does not impose any extra "conditions" or "limits of liability" other than the exclusion of punitive, exemplary or any other non-compensatory damages, which are not consistent with the principle of restitution. Thus, the national law applies to such claims, with the only exception that punitive, exemplary or any other non-compensatory damages are not permitted.

26. Failing to provide service in accordance with the *Official Languages Act* onboard an international flight clearly does not constitute an accident, and does not involve death or bodily injury. As such, the only restriction imposed by the *Montreal Convention* on claims for damages under s. 77(4) is that punitive, exemplary or any other non-compensatory damages are not permitted.

27. Therefore, the *Montreal Convention* does not exclude awarding damages under s. 77(4) of the *Official Languages Act*, provided that such damages are limited to compensating for prejudice suffered by the passengers. Exemplary damages, awarded for the purpose of deterrence, would be inconsistent with the principle of restitution, and they are excluded by Article 29 of the *Montreal Convention*.

Part IV – Costs

28. OCLA and Dr. Lukács will not seek costs in this matter and ask that costs not be awarded against them in this motion or in the appeal if leave to intervene is granted.

Part V – Order Sought

29. OCLA and Dr. Lukács respectfully seek an order granting them leave to: (i) intervene in this appeal and file a joint factum not exceeding 20 pages; and (ii) make oral submissions in a total length of 20 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22nd day of September, 2013.

JOSEPH HICKEY	**DR. GÁBOR LUKÁCS**
Executive Director of the Proposed Intervener, the Ontario Civil Liberties Association	Proposed Intervener

Part VI – Table of Authorities

Doctrine	**Para. No.**
John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (2nd ed., 2000)	9
ICAO, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air)*, Montreal, May 10-28, 1999, Volume 1, Minutes	19

Legislation and International Instruments	**Para. No.**
Official Languages Act, R.S.C., 1985, c. 31 (4th Supp.)	11, 13, 24, 26, 27
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), Can. T. 1980 No. 37	20(b), 21

Part VII – Legislation

Montreal Convention (Schedule VI to the *Carriage by Air Act*, R.S.C., 1985, c. C-26)

Preamble
Articles 17-19
Articles 21-22
Article 26
Article 29
Article 31
Article 33
Article 35

SCHEDULE VI
(Subsections 2(2.1), (3) and (5) and 3(2) and section 4)

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1 — Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

ANNEXE VI
(paragraphes 2(2.1), (3) et (5) et 3(2) et article 4)

CONVENTION POUR L'UNIFICATION DE CERTAINES RÈGLES RELATIVES AU TRANSPORT AÉRIEN INTERNATIONAL

RECONNAISSANT l'importante contribution de la Convention pour l'unification de certaines règles relatives au transport aérien international, signée à Varsovie le 12 octobre 1929, ci-après appelée la « Convention de Varsovie » et celle d'autres instruments connexes à l'harmonisation du droit aérien international privé,

RECONNAISSANT la nécessité de moderniser et de refondre la Convention de Varsovie et les instruments connexes,

RECONNAISSANT l'importance d'assurer la protection des intérêts des consommateurs dans le transport aérien international et la nécessité d'une indemnisation équitable fondée sur le principe de réparation,

RÉAFFIRMANT l'intérêt d'assurer le développement d'une exploitation ordonnée du transport aérien international et un acheminement sans heurt des passagers, des bagages et des marchandises, conformément aux principes et aux objectifs de la Convention relative à l'aviation civile internationale faite à Chicago le 7 décembre 1944,

CONVAINCUS que l'adoption de mesures collectives par les États en vue d'harmoniser davantage et de codifier certaines règles régissant le transport aérien international est le meilleur moyen de réaliser un équilibre équitable des intérêts,

LES ÉTATS PARTIES À LA PRÉSENTE CONVENTION SONT CONVENUS DE CE QUI SUIT :

Chapitre I

Généralités

Article 1 — Champ d'application

1. La présente convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transport aérien.

2. Au sens de la présente convention, l'expression *transport international* s'entend de tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux États parties, soit sur le territoire d'un seul État partie si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas un État partie. Le transport sans une telle escale entre deux points du territoire d'un seul État partie n'est pas considéré comme international au sens de la présente convention.

3. Le transport à exécuter par plusieurs transporteurs successifs est censé constituer pour l'application de la présente convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats, et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans le territoire d'un même État.

4. La présente convention s'applique aussi aux transports visés au Chapitre V, sous réserve des dispositions dudit chapitre.

ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14 — Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15 — Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16 — Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 17 — Death and Injury of Passengers — Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entiloir vis-à-vis du transporteur les droits résultant du contrat de transport.

Article 14 — Possibilité de faire valoir les droits de l'expéditeur et du destinataire

L'expéditeur et le destinataire peuvent faire valoir tous les droits qui leur sont respectivement conférés par les articles 12 et 13, chacun en son nom propre, qu'il agisse dans son propre intérêt ou dans l'intérêt d'autrui, à condition d'exécuter les obligations que le contrat de transport impose.

Article 15 — Rapports entre l'expéditeur et le destinataire ou rapports entre les tierces parties

1. Les articles 12, 13 et 14 ne portent préjudice ni aux rapports entre l'expéditeur et le destinataire, ni aux rapports mutuels des tierces parties dont les droits proviennent de l'expéditeur ou du destinataire.

2. Toute clause dérogeant aux dispositions des articles 12, 13 et 14 doit être inscrite dans la lettre de transport aérien ou dans le récépissé de marchandises.

Article 16 — Formalités de douane, de police ou d'autres autorités publiques

1. L'expéditeur est tenu de fournir les renseignements et les documents qui, avant la remise de la marchandise au destinataire, sont nécessaires à l'accomplissement des formalités de douane, de police ou d'autres autorités publiques. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces renseignements et pièces, sauf le cas de faute de la part du transporteur ou de ses préposés ou mandataires.

2. Le transporteur n'est pas tenu d'examiner si ces renseignements et documents sont exacts ou suffisants.

Chapitre III

Responsabilité du transporteur et étendue de l'indemnisation du préjudice

Article 17 — Mort ou lésion subie par le passager — Dommage causé aux bagages

1. Le transporteur est responsable du préjudice survenu en cas de mort ou de lésion corporelle subie par un passager, par cela seul que l'accident qui a causé la mort ou la lésion s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement ou de débarquement.

2. Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés, par cela seul que le fait qui a causé la destruction, la perte ou l'avarie s'est produit à bord de l'aéronef ou au cours de toute période durant laquelle le transporteur avait la garde des bagages enregistrés. Toutefois, le transporteur n'est pas responsable si et dans la mesure où le dommage résulte de la nature ou du vice propre des bagages. Dans le cas des bagages non enregistrés, notamment des effets personnels, le transporteur est responsable si le dommage résulte de sa faute ou de celle de ses préposés ou mandataires.

3. Si le transporteur admet la perte des bagages enregistrés ou si les bagages enregistrés ne sont pas arrivés à destination dans les vingt et un jours qui suivent la date à laquelle ils auraient dû arriver, le pas-

tled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 18 — Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(*a*) inherent defect, quality or vice of that cargo;

(*b*) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(*c*) an act of war or an armed conflict;

(*d*) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19 — Delay

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

Article 20 — Exoneration

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

sager est autorisé à faire valoir contre le transporteur les droits qui découlent du contrat de transport.

4. Sous réserve de dispositions contraires, dans la présente convention le terme « bagages » désigne les bagages enregistrés aussi bien que les bagages non enregistrés.

Article 18 — Dommage causé à la marchandise

1. Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de la marchandise par cela seul que le fait qui a causé le dommage s'est produit pendant le transport aérien.

2. Toutefois, le transporteur n'est pas responsable s'il établit, et dans la mesure où il établit, que la destruction, la perte ou l'avarie de la marchandise résulte de l'un ou de plusieurs des faits suivants :

a) la nature ou le vice propre de la marchandise;

b) l'emballage défectueux de la marchandise par une personne autre que le transporteur ou ses préposés ou mandataires;

c) un fait de guerre ou un conflit armé;

d) un acte de l'autorité publique accompli en relation avec l'entrée, la sortie ou le transit de la marchandise.

3. Le transport aérien, au sens du paragraphe 1 du présent article, comprend la période pendant laquelle la marchandise se trouve sous la garde du transporteur.

4. La période du transport aérien ne couvre aucun transport terrestre, maritime ou par voie d'eau intérieure effectué en dehors d'un aéroport. Toutefois, lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve du contraire, résulter d'un fait survenu pendant le transport aérien. Si, sans le consentement de l'expéditeur, le transporteur remplace en totalité ou en partie le transport convenu dans l'entente conclue entre les parties comme étant le transport par voie aérienne, par un autre mode de transport, ce transport par un autre mode sera considéré comme faisant partie de la période du transport aérien.

Article 19 — Retard

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.

Article 20 — Exonération

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

Article 21 — Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(*a*) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(*b*) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22 — Limits of Liability in Relation to Delay, Baggage and Cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in

Article 21 — Indemnisation en cas de mort ou de lésion subie par le passager

1. Pour les dommages visés au paragraphe 1 de l'article 17 et ne dépassant pas 100 000 droits de tirage spéciaux par passager, le transporteur ne peut exclure ou limiter sa responsabilité.

2. Le transporteur n'est pas responsable des dommages visés au paragraphe 1 de l'article 17 dans la mesure où ils dépassent 100 000 droits de tirage spéciaux par passager, s'il prouve :

a) que le dommage n'est pas dû à la négligence ou à un autre acte ou omission préjudiciable du transporteur, de ses préposés ou de ses mandataires, ou

b) que ces dommages résultent uniquement de la négligence ou d'un autre acte ou omission préjudiciable d'un tiers.

Article 22 — Limites de responsabilité relatives aux retards, aux bagages et aux marchandises

1. En cas de dommage subi par des passagers résultant d'un retard, aux termes de l'article 19, la responsabilité du transporteur est limitée à la somme de 4 150 droits de tirage spéciaux par passager.

2. Dans le transport de bagages, la responsabilité du transporteur en cas de destruction, perte, avarie ou retard est limitée à la somme de 1 000 droits de tirage spéciaux par passager, sauf déclaration spéciale d'intérêt à la livraison faite par le passager au moment de la remise des bagages enregistrés au transporteur et moyennant le paiement éventuel d'une somme supplémentaire. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il prouve qu'elle est supérieure à l'intérêt réel du passager à la livraison.

3. Dans le transport de marchandises, la responsabilité du transporteur, en cas de destruction, de perte, d'avarie ou de retard, est limitée à la somme de 17 droits de tirage spéciaux par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une somme supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

4. En cas de destruction, de perte, d'avarie ou de retard d'une partie des marchandises, ou de tout objet qui y est contenu, seul le poids total du ou des colis dont il s'agit est pris en considération pour déterminer la limite de responsabilité du transporteur. Toutefois, lorsque la destruction, la perte, l'avarie ou le retard d'une partie des marchandises, ou d'un objet qui y est contenu, affecte la valeur d'autres colis couverts par la même lettre de transport aérien ou par le même récépissé ou, en l'absence de ces documents, par les mêmes indications consignées par les autres moyens visés à l'article 4, paragraphe 2, le poids total de ces colis doit être pris en considération pour déterminer la limite de responsabilité.

5. Les dispositions des paragraphes 1 et 2 du présent article ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du transporteur, de ses préposés ou de ses mandataires, fait soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés ou de mandataires, la preuve soit également apportée que ceux-ci ont agi dans l'exercice de leurs fonctions.

6. Les limites fixées par l'article 21 et par le présent article n'ont pas pour effet d'enlever au tribunal la faculté d'allouer en outre,

addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23 — Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1 500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of Article 22; 15 000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 24 — Review of Limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years

conformément à sa loi, une somme correspondant à tout ou partie des dépens et autres frais de procès exposés par le demandeur, intérêts compris. La disposition précédente ne s'applique pas lorsque le montant de l'indemnité allouée, non compris les dépens et autres frais de procès, ne dépasse pas la somme que le transporteur a offerte par écrit au demandeur dans un délai de six mois à dater du fait qui a causé le dommage ou avant l'introduction de l'instance si celle-ci est postérieure à ce délai.

Article 23 — Conversion des unités monétaires

1. Les sommes indiquées en droits de tirage spéciaux dans la présente convention sont considérées comme se rapportant au droit de tirage spécial tel que défini par le Fonds monétaire international. La conversion de ces sommes en monnaies nationales s'effectuera, en cas d'instance judiciaire, suivant la valeur de ces monnaies en droit de tirage spécial à la date du jugement. La valeur, en droit de tirage spécial, d'une monnaie nationale d'un État partie qui est membre du Fonds monétaire international, est calculée selon la méthode d'évaluation appliquée par le Fonds monétaire international à la date du jugement pour ses propres opérations et transactions. La valeur, en droit de tirage spécial, d'une monnaie nationale d'un État partie qui n'est pas membre du Fonds monétaire international, est calculée de la façon déterminée par cet État.

2. Toutefois, les États qui ne sont pas membres du Fonds monétaire international et dont la législation ne permet pas d'appliquer les dispositions du paragraphe 1 du présent article, peuvent, au moment de la ratification ou de l'adhésion, ou à tout moment par la suite, déclarer que la limite de responsabilité du transporteur prescrite à l'article 21 est fixée, dans les procédures judiciaires sur leur territoire, à la somme de 1 500 000 unités monétaires par passager; 62 500 unités monétaires par passager pour ce qui concerne le paragraphe 1 de l'article 22; 15 000 unités monétaires par passager pour ce qui concerne le paragraphe 2 de l'article 22; et 250 unités monétaires par kilogramme pour ce qui concerne le paragraphe 3 de l'article 22. Cette unité monétaire correspond à soixante-cinq milligrammes et demi d'or au titre de neuf cents millièmes de fin. Les sommes peuvent être converties dans la monnaie nationale concernée en chiffres ronds. La conversion de ces sommes en monnaie nationale s'effectuera conformément à la législation de l'État en cause.

3. Le calcul mentionné dans la dernière phrase du paragraphe 1 du présent article et la conversion mentionnée au paragraphe 2 du présent article sont effectués de façon à exprimer en monnaie nationale de l'État partie la même valeur réelle, dans la mesure du possible, pour les montants prévus aux articles 21 et 22, que celle qui découlerait de l'application des trois premières phrases du paragraphe 1 du présent article. Les États parties communiquent au dépositaire leur méthode de calcul conformément au paragraphe 1 du présent article ou les résultats de la conversion conformément au paragraphe 2 du présent article, selon le cas, lors du dépôt de leur instrument de ratification, d'acceptation ou d'approbation de la présente convention ou d'adhésion à celle-ci et chaque fois qu'un changement se produit dans cette méthode de calcul ou dans ces résultats.

Article 24 — Révision des limites

1. Sans préjudice des dispositions de l'article 25 de la présente convention et sous réserve du paragraphe 2 ci-dessous, les limites de responsabilité prescrites aux articles 21, 22 et 23 sont révisées par le dépositaire tous les cinq ans, la première révision intervenant à la fin de la cinquième année suivant la date d'entrée en vigueur de la présente convention, ou si la convention n'entre pas en vigueur dans les

of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25 — Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26 — Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 27 — Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 28 — Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

cinq ans qui suivent la date à laquelle elle est pour la première fois ouverte à la signature, dans l'année de son entrée en vigueur, moyennant l'application d'un coefficient pour inflation correspondant au taux cumulatif de l'inflation depuis la révision précédente ou, dans le cas d'une première révision, depuis la date d'entrée en vigueur de la convention. La mesure du taux d'inflation à utiliser pour déterminer le coefficient pour inflation est la moyenne pondérée des taux annuels de la hausse ou de la baisse des indices de prix à la consommation des États dont les monnaies composent le droit de tirage spécial cité au paragraphe 1 de l'article 23.

2. Si la révision mentionnée au paragraphe précédent conclut que le coefficient pour inflation a dépassé 10 %, le dépositaire notifie aux États parties une révision des limites de responsabilité. Toute révision ainsi adoptée prend effet six mois après sa notification aux États parties. Si, dans les trois mois qui suivent cette notification aux États parties, une majorité des États parties notifie sa désapprobation, la révision ne prend pas effet et le dépositaire renvoie la question à une réunion des États parties. Le dépositaire notifie immédiatement à tous les États parties l'entrée en vigueur de toute révision.

3. Nonobstant le paragraphe 1 du présent article, la procédure évoquée au paragraphe 2 du présent article est applicable à tout moment, à condition qu'un tiers des États parties exprime un souhait dans ce sens et à condition que le coefficient pour inflation visé au paragraphe 1 soit supérieur à 30 % de ce qu'il était à la date de la révision précédente ou à la date d'entrée en vigueur de la présente convention s'il n'y a pas eu de révision antérieure. Les révisions ultérieures selon la procédure décrite au paragraphe 1 du présent article interviennent tous les cinq ans à partir de la fin de la cinquième année suivant la date de la révision intervenue en vertu du présent paragraphe.

Article 25 — Stipulation de limites

Un transporteur peut stipuler que le contrat de transport peut fixer des limites de responsabilité plus élevées que celles qui sont prévues dans la présente convention, ou ne comporter aucune limite de responsabilité.

Article 26 — Nullité des dispositions contractuelles

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente convention.

Article 27 — Liberté de contracter

Rien dans la présente convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport, de renoncer aux moyens de défense qui lui sont donnés en vertu de la présente convention ou d'établir des conditions qui ne sont pas en contradiction avec les dispositions de la présente convention.

Article 28 — Paiements anticipés

En cas d'accident d'aviation entraînant la mort ou la lésion de passagers, le transporteur, s'il y est tenu par la législation de son pays, versera sans retard des avances aux personnes physiques qui ont droit à un dédommagement pour leur permettre de subvenir à leurs besoins économiques immédiats. Ces avances ne constituent pas une reconnaissance de responsabilité et elles peuvent être déduites des montants versés ultérieurement par le transporteur à titre de dédommagement.

Article 29 — Basis of Claims

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

Article 30 — Servants, Agents — Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 31 — Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 32 — Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 33 — Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the

Article 29 — Principe des recours

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

Article 30 — Préposés, mandataires — Montant total de la réparation

1. Si une action est intentée contre un préposé ou un mandataire du transporteur à la suite d'un dommage visé par la présente convention, ce préposé ou mandataire, s'il prouve qu'il a agi dans l'exercice de ses fonctions, pourra se prévaloir des conditions et des limites de responsabilité que peut invoquer le transporteur en vertu de la présente convention.

2. Le montant total de la réparation qui, dans ce cas, peut être obtenu du transporteur, de ses préposés et de ses mandataires, ne doit pas dépasser lesdites limites.

3. Sauf pour le transport de marchandises, les dispositions des paragraphes 1 et 2 du présent article ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du préposé ou du mandataire, fait soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement.

Article 31 — Délais de protestation

1. La réception des bagages enregistrés et des marchandises sans protestation par le destinataire constituera présomption, sauf preuve du contraire, que les bagages et marchandises ont été livrés en bon état et conformément au titre de transport ou aux indications consignées par les autres moyens visés à l'article 3, paragraphe 2, et à l'article 4, paragraphe 2.

2. En cas d'avarie, le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de sept jours pour les bagages enregistrés et de quatorze jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra être faite au plus tard dans les vingt et un jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition.

3. Toute protestation doit être faite par réserve écrite et remise ou expédiée dans le délai prévu pour cette protestation.

4. À défaut de protestation dans les délais prévus, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci.

Article 32 — Décès de la personne responsable

En cas de décès de la personne responsable, une action en responsabilité est recevable, conformément aux dispositions de la présente convention, à l'encontre de ceux qui représentent juridiquement sa succession.

Article 33 — Juridiction compétente

1. L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'un des États Parties, soit devant le tribunal

court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,

(*a*) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(*b*) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case.

Article 34 — Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35 — Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36 — Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

2. En ce qui concerne le dommage résultant de la mort ou d'une lésion corporelle subie par un passager, l'action en responsabilité peut être intentée devant l'un des tribunaux mentionnés au paragraphe 1 du présent article ou, eu égard aux spécificités du transport aérien, sur le territoire d'un État partie où le passager a sa résidence principale et permanente au moment de l'accident et vers lequel ou à partir duquel le transporteur exploite des services de transport aérien, soit avec ses propres aéronefs, soit avec les aéronefs d'un autre transporteur en vertu d'un accord commercial, et dans lequel ce transporteur mène ses activités de transport aérien à partir de locaux que lui-même ou un autre transporteur avec lequel il a conclu un accord commercial loue ou possède.

3. Aux fins du paragraphe 2 :

a) « accord commercial » signifie un accord autre qu'un accord d'agence conclu entre des transporteurs et portant sur la prestation de services communs de transport aérien de passagers;

b) « résidence principale et permanente » désigne le lieu unique de séjour fixe et permanent du passager au moment de l'accident. La nationalité du passager ne sera pas le facteur déterminant à cet égard.

4. La procédure sera régie selon le droit du tribunal saisi de l'affaire.

Article 34 — Arbitrage

1. Sous réserve des dispositions du présent article, les parties au contrat de transport de fret peuvent stipuler que tout différend relatif à la responsabilité du transporteur en vertu de la présente convention sera réglé par arbitrage. Cette entente sera consignée par écrit.

2. La procédure d'arbitrage se déroulera, au choix du demandeur, dans l'un des lieux de compétence des tribunaux prévus à l'article 33.

3. L'arbitre ou le tribunal arbitral appliquera les dispositions de la présente convention.

4. Les dispositions des paragraphes 2 et 3 du présent article seront réputées faire partie de toute clause ou de tout accord arbitral, et toute disposition contraire à telle clause ou à tel accord arbitral sera nulle et de nul effet.

Article 35 — Délai de recours

1. L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter de l'arrivée à destination, ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.

2. Le mode du calcul du délai est déterminé par la loi du tribunal saisi.

Article 36 — Transporteurs successifs

1. Dans les cas de transport régis par la définition du paragraphe 3 de l'article 1, à exécuter par divers transporteurs successifs, chaque transporteur acceptant des voyageurs, des bagages ou des marchandises est soumis aux règles établies par la présente convention, et est censé être une des parties du contrat de transport, pour autant que ce contrat ait trait à la partie du transport effectuée sous son contrôle.

File number: 35100

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MICHEL THIBODEAU and LYNDA THIBODEAU

Appellant
(Respondent)

– and –

AIR CANADA

Respondent
(Appellant)

– and –

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener
(Intervener)

AND BETWEEN:

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Appellant
(Intervener)

– and –

AIR CANADA

Respondent
(Appellant)

ORDER

UPON MOTION by the Ontario Civil Liberties Association (the "OCLA") and Dr. Gábor Lukács for leave to intervene;

AND HAVING READ the material filed;

IT IS HEREBY ORDERED that:

1. OCLA and Dr. Lukács are granted leave to intervene in this appeal on the condition that they do not seek costs;

2. OCLA and Dr. Lukács are granted leave to file a joint factum not exceeding 20 pages, and to present oral arguments in a total length of 20 minutes at the hearing of this appeal.