

File No.

DARREN JAKUBEC and BETH JAKUBEC

Applicants

- and -

AIR CANADA, ZIP AIRLINES INC., ACE AVIATION HOLDINGS INC.

Respondents

NOTICE OF APPLICATION

TO THE CANADIAN TRANSPORTATION AGENCY

TO: AIR CANADA
7373 COTE VERTU WEST P.O. Box: 14000, STATION AIRPORT
ST-LAURENT, Quebec
H4Y 1H4

AND TO: ACE Aviation Holdings, Inc.
7373 COTE VERTU WEST P.O. Box: 14000, STATION AIRPORT
ST-LAURENT, Quebec
H4Y 1H4

AND To: Zip Air Inc. c/o AIR CANADA
7373 COTE VERTU WEST P.O. Box: 14000, STATION AIRPORT
ST-LAURENT, Quebec
H4Y 1H4

**ACTS AND OMISSIONS OF THE RESPONDENT FOR WHICH THE
APPLICANTS SEEK RELIEF:**

1. The Respondents Air Canada, Zip Airlines Inc., and ACE Aviation Holdings Inc. (hereinafter the Respondent or the Respondent Air Canada) caused the death of the Applicants' dog Sila while Sila was being transported in the baggage compartment or cargo hold on connecting flights on January 4, 2004: Air Canada

flight 8063 from Smithers to Vancouver British Columbia; Zip Airlines flight 3J6288 from Vancouver BC to Winnipeg Manitoba.

2. The Respondent, through its acts and/or omissions, caused Sila's death by carbon monoxide poisoning or other means while Sila was on board one of the connecting flights of the Respondent as above.
3. In addition, the Respondent negligently misrepresented to the Applicants that Sila would be safe through these flights, and by failing to warn the Applicants about the possible risks to Sila's life and health, and by failing to point out to the Applicants Air Canada/Zip's exclusion from liability clause in its tariff in regard to the death of animals during transport or any other aspect of its tariff or related regulations, laws or contract terms.
4. These acts and omissions (failures to inform) constitute the application of terms and conditions not in the Tariff and contrary to s. 67(3) of the Canada Transport Act (the "Act"). Section 67(3) states that the holder of a domestic licence shall not apply any term or condition of carriage unless the term or condition is set out in a tariff *that has been published or displayed*. The tariff was not published or displayed by the Respondent in any manner visible, known or readily accessible to the Applicants.
5. The Respondent purported to deny any liability for Sila's death or the resulting injury to the Applicants, by relying on the Canadian Domestic Rules Tariff for Air Canada (the "Tariff", which applicable sections/rules are identical in the Zip Tariff), Section V-Baggage, Rule 230AC, subpart (B), subsection (1) (the "tariff exclusion"), which states:

"Carrier shall not be liable for loss, delay, injury, sickness, or death of any pet or animal accepted for transportation...."

RELIEF SOUGHT

6. The Applicants seek the following relief:

- (a) A declaration or order by the Agency, as a quasi-judicial tribunal, that, pursuant to s. 67.1 of the Canada Transportation Act (the “Act”), the Respondent, contrary to s. 67(3) of the Act, applied a term or condition of carriage applicable to its domestic service that was not set out in its tariffs.
- (b) An order by the Agency that, pursuant to s. 67.1(b) of the Act, the Respondent must compensate the Applicants for special damages incurred, including the costs of the autopsy of Sila, such special damages currently estimated at \$40,000.
- (c) An order by the Agency that, pursuant to s. 67.1(c) of the Act, the Respondent must compensate the Applicants for \$50,000 in special damages for lost income and in general damages for the extreme emotional, mental and psychological injury to the Applicants as a result of the untimely, unnecessary and avoidable death of Sila caused by the negligence of the Respondent.
- (d) A declaration or order by the Agency that, pursuant to s. 67.2 of the Act, provisions of the Respondent’s Tariff (being the Canadian Domestic Rules Tariff for Air Canada, and for Zip), listed below, are unreasonable, and to the extent that they force untenable choices, risks, liabilities and conditions on those traveling with animals, are unduly discriminatory (such choice being to either travel by other means, which might not be feasible or practicable, or to travel by air but accept risks to the health and well-being of their animals and the legal risk resulting from the tariff exclusion). The provisions of the Tariff at issue are:
 - ∞ Rule 1(A): “These rules ... are expressly agreed to by the passenger to the same extent as if such rules were included as conditions in the contract of carriage.”
 - ∞ Rule 95 (F): “Carrier shall not be liable for consequential, special, punitive or exemplary damages arising from or connected in any

way with any act or omission by the carrier, its employees or agents, whether or not such act or omission was negligent and whether or not the carrier had knowledge that such damages might be incurred.”

- ∞ Rule 200 (A) (4): “The passenger must ... assume all responsibility for complying with any applicable laws, customs, and/or other governmental regulations, requirements, or restrictions of the country, state or territory to which the animal is being transported” to the extent this limits the Respondent’s liability where it would otherwise, but for this Rule, be liable.
- ∞ Rule 200 (A) (7): “Air Canada and/or Zip will not be responsible in the event of loss, delay, injury, sickness or death of such animal.”
- ∞ Rule 200 (C): To the extent it limits or prevents passengers from carrying a dog in the passenger compartment if such dog will not fit within a container 20 inches long, 16 inches wide, and 9 inches in height.
- ∞ Rule 230 (A) (1): “Liability for the loss of, damage to, or the delay in delivery of, baggage or other personal property ... shall not be more than \$1500 per passenger unless a higher value is declared in advance and charges are paid pursuant to carriers regulations in paragraph (C). In the event, the liability of the carrier shall be limited to such higher declared value. In no case shall the carrier’s liability exceed the actual loss suffered by the passenger.... [for Zip, and its Tariff, such liability is limited to \$250].”
- ∞ Rule 230 (A) (3): “The carrier may disallow any claim for loss or damage ... where the passenger fails to have the carrier’s baggage claim declaration form notarized. Carrier may also disallow claims

when the passenger fails to provide proof of loss in the form of receipts of purchase.”

∞ Rule 230 (B) (1): “Carrier shall not be liable for loss, delay, injury, sickness or death of any pet or animal accepted for transportation. The owner of the pet assumes all responsibility for compliance with all governmental regulations and/or restrictions.”

∞ Rule 230 (C) (2): “Limits on declared higher values: The declared value for personal property, including baggage, shall not exceed the limits of \$2500 CAD.”

- (e) An order by the Agency disallowing the above provisions of the Tariff, pursuant to s. 67.2 of the Act.
 - (f) Costs of this application on a solicitor and client basis, and the Goods and Services Tax.
 - (g) Such further and other relief as this Honourable Agency may deem just.
7. The Applicants bring this application following the lifting of the stay order as applied to the Respondent, on September 30, 2004 by Justice Farley of the Ontario Superior Court of Justice.

THE PARTIES

1. The Applicants at the time material to this action were in the process of moving their residence from Smithers BC to Wawa, Ontario. The Applicants currently reside in Smithers BC, having relocated back to Smithers on or about July 20 to 24, 2004.
2. The Applicants Dr. Darren Jakubec is a medical doctor who is licenced to work, and does work in and travels to various remote locations in the north, especially in

Ontario, BC and Nunavut, doing full spectrum general practice. The locations and remoteness of his work sites, the distance between locations, and his work schedule (his contracts generally range from one to six months after which relocation is required, and travel is required during contracts) all require that Dr. Jakubec travel by air for his work. Since Dr. Jakubec is constantly traveling for his work, in order for his family (his wife Beth, and their dog Sila) to be together as a family unit, they too must travel by air.

3. The Applicant Beth Jakubec is a registered nurse who is often retained to work, sometimes after the fact, with the Applicant Dr. Darren Jakubec at the locations to which he is assigned.
4. The Applicants acquired Sila from a shelter in Cornwall, Ontario when she was a puppy. Sila lived and traveled with the Applicants during her entire life with the Applicants. Sila was approximately five years old at the time of her death. The Applicants have no children and at all times regarded Sila as a special and loved family member, regardless of the cultural affinity for defining such family members as “pets” or the legal affinity for defining them as “property”.
5. The Respondent Air Canada is a corporation incorporated under the federal laws of Canada with its head office in Dorval, Quebec. The Respondent Air Canada regularly carries on business in Ontario.
6. The Respondent ACE Aviation Holdings Inc. (“ACE”) is a corporation incorporated under the laws of Canada in or about June, 2004, and is the parent

corporation of Air Canada. The Respondent ACE regularly carries on business in Ontario.

7. At all times material to this action, Zip Airlines Inc. (“Zip”) was a wholly-owned subsidiary of Air Canada, and Zip’s head office was at the time the cause of action arose located in Calgary, Alberta. Air Canada launched Zip as a discount carrier in the west, some time in or about the summer or early fall of 2002. On or about September 6, 2004, Zip ceased operations when it became fully integrated into the operations of Air Canada, and its liabilities became wholly those of Air Canada.
8. Air Canada operated flight AC 8063 from Smithers to Vancouver BC on January 4, 2004. Zip Airlines, being a wholly owned subsidiary of Air Canada, operated flight 3J6288 from Vancouver to Winnipeg on January 4, 2004.

INCIDENTS LEADING UP TO AND FOLLOWING SILA’S DEATH

9. Sila was a healthy, fit and beloved family member when her life was ended. She was a black lab mix, approximately five years of age, and weighing about 70 to 80 pounds. She was in excellent health and fitness prior to the flights of January 4, 2004, and all her annual checkup shots were current. She accompanied the Applicants on many long walks and hikes (up to 30 kilometre hikes over several hours) in the months prior to her death, without any sign of fatigue or discomfiture.

10. The Applicants loved Sila as a family member without reservation or without diminution because she was a dog and not a human. Sila provided the Applicants with one of their only forms of continuity and sense of family in a life that involved working in, traveling and constantly relocating to various parts of northern Canada. In addition, Sila provided the Applicants with a sense of comfort and protection in many remote northern communities in which lighting and other neighbourhood security amenities were not available.
11. Sila traveled with the Applicants by air on numerous occasions prior to January 4, 2004, including on many Air Canada flights, always without incident. Sila was accustomed to air travel, and there were never any signs (prior to January 4, 2004) that flight was in any way injurious to or uncomfortable for Sila.
12. In or about October, 2003, the Applicants purchased directly from Air Canada, by telephone, two (2) tickets for airline transport originating in Smithers, BC and ending at Winnipeg, Manitoba, with a stop and change of aircraft in Vancouver, BC. Those tickets were purchased for travel on Air Canada flight AC 8063 from Smithers to Vancouver on January 4, 2004 and for travel on Zip flight 3J6288 from Vancouver to Winnipeg on January 4, 2004. The tickets were issued electronically on or about October 10, 2003. At the same time as the purchase of their own tickets, the Applicants reserved space to transport Sila on the same flights.
13. On January 4, 2004, the Applicants arrived at the Smithers airport, and discovered that their flight times had been changed by Air Canada. The Applicants checked

- themselves in for the two flights (to Vancouver, then to Winnipeg), and checked Sila in to be transported in the baggage compartments on the same flights. The Applicants paid \$40.00 plus taxes for Sila's transport at the time of check-in and were issued an excess baggage ticket. Sila was placed by the Applicants in a kennel, with padding, blankets and soft toys. This was the same kennel the Applicants had used to transport Sila by air on numerous previous occasions without incident; the kennel was in sound and safe condition. Sila was not sedated, and had never been sedated on any previous flight.
14. The Applicants and Sila were boarded onto and transported on Air Canada flight AC 8063 from Smithers to Vancouver on January 4, 2004. The flight left and arrived about 20 minutes late, lasted about 1 ½ hours, passage was smooth and to the knowledge of the Applicants was uneventful.
 15. The Applicants disembarked at the Vancouver airport, and as there was only about one half hour before the connecting flight from Vancouver to Winnipeg was to depart, they elected to not remove Sila from her kennel for a walk. The Applicants asked an attendant at the departure gate to make sure that Sila was put on the same flight as the Applicants to Winnipeg.
 16. The Applicants were later advised by Shirley McDivet that her dog had been safely transported in the cargo hold of this same Smithers to Vancouver flight on January 4, 2004.
 17. The Applicants boarded the Zip flight 3J6288 from Vancouver to Winnipeg, and from a window in the plane, saw Sila's kennel loaded onto the same plane with

other baggage. The Applicants were not close enough to see what position or condition Sila was in, but were not informed by anyone that there were any apparent problems with Sila at this point.

18. The flight from Vancouver to Winnipeg left and arrived about one half hour late, lasted about 2 ³/₄ hours, passage was smooth and to the knowledge of the Applicants was uneventful.
19. On arrival at the Winnipeg airport, the Applicants went to the baggage arrival area, and retrieved their luggage. However, Sila and her kennel did not arrive with the other baggage. The Applicants waited for several minutes, and then asked an airport security staff member to find out where Sila was; this security person radioed someone and moments later responded, "There's a problem", and informed the Applicants they had to attend at the "lost baggage" area. The Applicants hurried to lost baggage, did not see Sila or her kennel, were informed by a staff person there that they had to speak with a particular Air Canada employee, who they pointed out.
20. This staff person pointed out was Mr. Jim Heaton, customer service manager for Air Canada/Zip in Winnipeg. He advised the Applicants that there was a problem. He said "When they opened the door, Sila was not moving." The Applicants took this to mean and it does mean that when the baggage compartment door to the Air Canada/Zip flight was opened, Sila was already dead.
21. The Applicants hurried back to the regular baggage area, and saw the kennel with Sila prone inside and not moving. The Applicant Beth Jakubec shouted, "She's

- not moving.” The Applicant Dr. Darren Jakubec tore the roof off the kennel and found Sila to be stiff, her eyes glossed, not breathing, and slightly warm.
22. The Applicant Dr. Darren Jakubec checked Sila for signs of life, but found that she was dead.
 23. Mr. Jim Heaton informed the Applicants that the crew had checked the aircraft and had found no flaws; that pressure, heat, coolness and oxygen were monitored. But Mr. Heaton did not specify whether he meant this was routinely done on such flights or had been done because Sila had died; he did not specify when or where such monitoring took place, or how. He also said, “It’s bad PR to lose a dog”, and said that “they” lose one or two dogs a year to death.
 24. Mr. Heaton also indicated that the Applicants would receive a report reviewing some aspect of the airplane’s system between Vancouver and Winnipeg, which the airline was looking into, and that the Applicants would get such report the next day. The Applicants have to date received no report or review from Air Canada.
 25. Mr. Jim Heaton provided the Applicants with the name, address and phone number for a Winnipeg veterinary clinic, being the Winnipeg Animal Emergency Clinic. After repeated insistence from the Applicants, Mr. Heaton arranged for an Air Canada employee to drive the Applicants, with Sila’s body, to the veterinary clinic.

26. The veterinarian on site at the clinic confirmed that Sila was dead, and at the Applicants' request, arranged to have an autopsy performed on Sila.
27. The autopsy was performed by J. Grant Spearman on January 5, 2004. The autopsy report by Dr. Spearman, DVM, dated January 5, 2004, states "probable carbon monoxide poisoning" as the cause of Sila's death. The report states: "The reddish colouration of the fresh tissues and the presentation of formalin fixed tissues appearing unfixated is consistent with what we have seen previously with carbon monoxide poisoning."
28. The autopsy report goes on to state what the Respondent Air Canada had stated to Dr. Spearman, and Dr. Spearman's questions about this:

"Cargo area tested oxygen levels normal, temperature 65F.... The monitoring done in the plane is relatively normal – however, the information that wasn't given was (a) how long after the compartment was opened were the readings taken, and (b) were the readings taken at height or at floor level since carbon monoxide is heavier than air."

29. Dr. Spearman received a phone call from an Air Canada representative (he does not recall the person's name) on or about January 5, 2004, and this person provided the information to him that monitoring was done on the plane, that oxygen levels were normal, and that the temperature in the cargo area was 65F. Dr. Spearman further noted in the autopsy the two questions, listed as (a) and (b) above, and indicated that the information provided by the Air Canada representative did not confirm that carbon monoxide poisoning did not occur.

- Further, Dr. Spearman does not know whether the Air Canada representative meant that monitoring was done on a regular or routine basis, or had specifically been done in this case after Sila was found dead.
30. The Applicant Beth Jakubec called the Winnipeg Animal Emergency Clinic approximately one week after January 4, 2004 and a clinic staff person informed her that someone from Air Canada had been calling or been at the clinic in person almost every day since January 5 asking about the autopsy report for Sila (which was not then finished). Beth Jakubec called the clinic back on or about January 14, 2004 asking when she would receive the autopsy report, and Dr. D. Van Middlesworth, one of the owners and supervising veterinarians of the clinic, informed Beth Jakubec that on that day a man identifying himself as representing Air Canada came into the clinic asking about the autopsy report. Dr. Van Middlesworth then informed Beth Jakubec that a clinic staff person at the front desk gave a copy of the autopsy report to this person from Air Canada, because said clinic staff person was not aware of the Jakubecs' request that the report not be shared with anyone else until the Applicants gave their approval. The Applicants made such request because they wanted to be informed first of the cause of Sila's death.
31. The Applicant Dr. Darren Jakubec wrote to Mr. Stephen Smith, then President and CEO of Zip Airlines, by fax letter dated January 7, 2004, and informed Mr. Smith of Sila's death, the incidents which occurred on discovery of her death, and how important Sila had been to the Applicants.

32. The Applicants assert that this faxed letter to Mr. Smith constitutes due and proper notice of the claim herein, and that further notice or action was not possible prior to the lifting of stay order on September 30, 2004, applying to the Respondent as of April 1, 2003.

TARIFF

33. The Applicants were not informed by any representative of the Respondent of any exclusion from liability or of any conditions on the ticket, or of the existence of any Tariff limiting liability, until after Sila's death.
34. The Applicants had never been informed by any ACE, Air Canada or subsidiary airline employee or agent, or anyone, prior to or during any flight which they also paid for and had Sila boarded in baggage, or otherwise, about any Tariff nor any exclusion from liability applying to the transport of animals or baggage on Air Canada or Zip flights.
35. The Applicants had never been informed by any ACE, Air Canada or subsidiary airline employee or agent, or anyone, about the application of or any content of any Tariffs, prior to being told of the exclusion from liability Tariff rule after Sila's death. Neither the Tariffs for Air Canada or for Zip are, to the knowledge of the Applicants, readily available or accessible to the public through any means, either on the Internet or otherwise. The Applicants, through counsel, had to request copies of various portions of the Tariffs from Air Canada's legal department; staff in other departments contacted at Air Canada stated they did not even know what the Tariffs were or how to access them.

36. Neither the passenger tickets, baggage checks nor excess baggage form issued to the Applicants for the flights at issue made any mention of any content of any Tariffs, identified as such, made any mention of the Tariff exclusion or any limitation of liability for death of any animal during transport, nor made any mention of any risks to animals during transport in the baggage compartment or cargo hold.
37. In the alternative, if the tickets or other documents issued by the Respondent to the Applicants contained the word “tariff” or contained an exclusion of liability for the transport of baggage or animals, no Air Canada, ACE, or subsidiary airline employee or agent, or anyone, on January 4, 2004 or at any time prior or since, pointed out to the Applicants in any way such reference or what it means.
38. The Applicants were never informed by any ACE, Air Canada or subsidiary airline employee or agent, or anyone, of any possibility or risk of carbon monoxide accumulation or poisoning, or injury or death by other means, to an animal in the baggage compartment or cargo hold of any flight.
39. Neither the Tariff exclusion nor any limitation of the Respondent’s liability as might be found in the Air Canada or Zip Tariff applies to, binds or limits the Applicant, or excludes or limits the liability of the Respondent in any way in regard to the herein claim.
40. The Applicants have not received anything – neither investigation nor review reports or results, nor compensation – from the Respondent.

41. The Applicants have both suffered and continue to suffer extreme emotional and psychological injury, harm, pain and distress as a result of Sila's untimely, unexpected and unnecessary death, and as a result of the Respondent's failure to provide any relief whatsoever. The Applicants have lost a beloved family member due to the negligence of the Respondent, a loss from which they will likely never fully recover.

42. As a result of this loss and the resulting psychological injury, the Applicants experienced financial loss in Ontario, including loss of income, costs of an autopsy report, and costs of relocation of their residence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, DATED THIS 13TH DAY OF
DECEMBER, 2004

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