



OLTHUIS  
KLEER  
TOWNSHEND

BARRISTERS AND SOLICITORS

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March 31, 2006

**By Facsimile 1-819-953-5686 and 1-514-422-5829**

Mike Redmond  
Canadian Transportation Agency  
Tariffs Division  
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Hull, Quebec  
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Louise-Hélène Sénécal  
Assistant General Counsel  
Air Canada  
Air Canada Centre, Zip 1276  
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Dorval, QC H4Y 1J2

Dear Mr. Redmond and Ms. Sénécal:

**Re: Complaint filed by Darren and Beth Jakubec Re: domestic carriage of animals  
Your File No. M4370/04-07454**

Please find enclosed our client's response to direction to show cause.

Yours truly,

Olthuis, Kleer, Townshend

Kate Kempton

KK/pgr

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**DARREN JAKUBEC and BETH JAKUBEC**

Applicants

- and -

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

Respondents

**RESPONSE TO DIRECTION TO SHOW CAUSE**

**TO:**

**AIR CANADA**

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

Attention: Louise-Hélène Sénécal, Assistant General Counsel

1-514-422-5829

**TO:**

Canadian Transportation Agency  
Ottawa, ON  
K1A 0N9

Attention: Mike Redmond

1-819-953-5686

1. By document dated March 9, 2006, the Canadian Transportation Agency (the “Agency”) released its preliminary decision in the within matter, and directed the Complainants, Darren and Beth Jakubec, to show cause with regard to the following two issues:
  - (a) The Agency’s preliminary decision that “exclusions from liability for the carriage of animals are not unreasonable given the inherent fragility of living creatures and the occasional hardships associated with carriage in the bellyhold of aircraft that may negatively impact the welfare of these animals”.
  - (b) The Agency’s preliminary decision that the limitations of liability for the carriage of animals are not “discriminatory” within the meaning of subsection 67.1(1) of the *Canada Transportation Act* (S.C. 1996 c.10)(“CTA”).

### UNREASONABLENESS OF TARIFF RULES EXCLUDING LIABILITY

#### General

2. The major impugned Tariff rules are:
  - Rule 200(A)(7) excludes or negates any responsibility of Air Canada for the loss, delay, injury, sickness or death of an animal.
  - Rule 95(F) excludes Air Canada from liability for any consequential, special punitive or exemplary damages, even in instances where Air Canada is negligent.
  - Rule 230(B)(1) states that Air Canada shall not be liable for loss, delay, injury, sickness or death of any pet or animal that it carries.
3. The Agency stated, at page 12, that in its opinion, subsection 67.2(1) of the CTA (which in effect allows the Agency to overturn unreasonable airline tariff rules) is a regulation intended to carry out or reflect the objective of the national transportation policy found in section 5(g) of the CTA, that carriers, *as far as practicable*, carry traffic under conditions that do not constitute an unfair disadvantage, beyond the disadvantage *inherent* in the location or volume of the traffic, the scale of operation connected with the traffic, or the type of traffic or service involved”.
4. In this case, there is nothing *inherent* in the carriage of animals that requires or renders reasonable a blanket exclusion from liability for harm that befalls animals while under the care and control of the carrier. It is *not impracticable* (meaning effectively impossible) for carriers to accept some liability for harm to animals in their care and control, especially when there is evidence that the harm results from acts or omissions of the carrier (or conversely, there is no evidence that harm resulted from anything else).

#### Negligence

5. The Agency requested, at paragraph 46, further submissions from the Complainants relating to exclusions from liability “even in situations where Air Canada may be deemed

to have been negligent”. The point is that the exclusion from liability rules are blanket provisions which Air Canada purports to rely on in all cases – including when it may be deemed to have been negligent. This is precisely the effect in the instant case, in which there is some evidence that the Complainants’ dog died as a result of carbon monoxide poisoning, possibly or even likely as a result of exhaust from a belt loader emitted near where the Complainant’s dog was placed in its travel kennel. Yet, Air Canada, in the civil suit brought by the Complainants, specifically relied on the exclusion from liability tariff rules as part of its defence.

6. Exclusion from liability clauses are blanket provisions. Otherwise, if they were intended only to exclude liability in cases where the party relying on them was not at fault, they would not be necessary as the common law of contract and tort provides sufficient protection. Instead, exclusion from liability clauses are designed to preclude any reference to or reliance on such common law (and perhaps statute law) by the harmed party. It is precisely the blanket nature of the exclusion from liability provisions – meant to apply in all cases, even where Air Canada may be deemed or found to be negligent or otherwise at fault – that is unreasonable.

#### Unconscionability

7. The Complainants submit that the exclusion from liability as outlined in the Tariff and conditions of carriage is unreasonable because it constitutes an unconscionable provision.
8. Waddams in *The Law of Contracts* 5<sup>th</sup> ed. (2005, Toronto: Canada Law Book) states, at para. 471, that while standard form exclusions from liability make sense in instances of equal bargaining power, that “[d]ifficulties however arise when a standard form printed document contains exclusionary provisions carefully drafted in favour of one party, and that party occupies a position of superior bargaining power”.
9. There is a clear inequality of bargaining power between the consumer and the airline in this particular instance, and generally in the situation of commercial air travel. Inequality of bargaining power arises out of the very nature of commercial air travel: air travel is often the only means of viable travel over long distances, in that other much slower means are often not practicable, especially where the traveler does not have the luxury of time to arrive at the destination, as in the instant case; in some cases, several remote communities, including in the north, are not readily accessible, especially in winter, by means other than by air, as in the instant case. Further, inequality of bargaining power is exacerbated where Air Canada is the sole provider of air travel to a destination in Canada.
10. Black’s Law Dictionary, 5<sup>th</sup> ed., at 1367, defines unconscionability as:

... whether under circumstances existing at the time of making of contract and in light of general commercial background and commercial needs of particular trade or case, clauses involved are *so one-sided as to oppress ... party*. Unconscionability is generally recognized to include an *absence of meaningful choice on the part of one of the parties to a contract, together with contract terms which are unreasonably favorable to the other party*... Typically the cases in which unconscionability is found involve gross overall one-sidedness or gross

one-sidedness of a term disclaiming a warranty, *limiting damages*, or granting procedural advantages.[emphasis added]

11. The standard form exclusion from liability – which is meant to apply in all cases including where Air Canada deliberately or negligently causes the harm -- therefore constitutes an unconscionable provision of the Tariff, and as such, is unreasonable. It negates meaningful choice in respect of travel with animals, especially for those in the position of the Complainants who had no or few other viable travel choices. It represents gross overall one-sidedness in respect of total exclusion of liability and thus negation of any damages or recovery.

#### “Inherent” Risks in Transport of Animals

12. The Agency, at paragraph 45, cites the “inherent fragility of living creatures” as a reason in support of the reasonableness of an exclusion from liability for any harm that befalls an animal while in the care and control of Air Canada. The Complainants submit that a finding of reasonableness on this basis is not supported by the evidence and would be an error.
13. First, Air Canada has not provided any evidence to suggest that animals are indeed inherently fragile such that exclusion from liability is justified. If animals were so inherently fragile as pertains to air travel, such that risk of harm was significant, it seems likely that no carrier would agree to transport them, even if excluded from liability for any harm that befalls them, because public reaction could well result in (perhaps significant) loss of business. Put another way, there is no evidence that Air Canada’s acceptance of liability in cases in which there is evidence it caused or contributed to the harm would open the floodgates and expose Air Canada to crippling damages. The onus is on Air Canada to establish, through evidence, such inherent fragility to the degree that justifies exclusion from liability, and Air Canada has not done so.
14. Second, the preliminary finding of the “inherent fragility of *all living creatures*” includes human beings. That is, human beings are arguably as “fragile” as other animals as pertains to air travel (as stated above, the onus is on Air Canada to prove otherwise, as Air Canada raised this argument). Yet, there is no exclusion from liability for illness, injury or death caused by Air Canada to humans. As such, since law relies on consistency of logic, there is no justification for exclusion from liability for harm to non-human animals, without more.
15. If the Agency bases its preliminary finding of reasonableness on the assumption that that animals are at greater risk of harm if transported in the bellyhold of the plane (versus the passenger cabin), then it is our submission that this should *increase* the liability of Air Canada, and not justify exclusion from liability, for the following reasons:
  - Most people who transport animals by air have no choice but to have them travel in the bellyhold (ie: carrier does not permit other choice).
  - The Agency appears to accept Air Canada’s position that exclusion from liability is justified in these situations, because things can occur in the bellyhold over which Air Canada has no control. Yet certainly, Air Canada has far more control

over the bellyhold of its own planes, including what is placed therein, in what position and what proximity to animals, air quality, temperature, monitoring of conditions, etc. – than does any passenger or customer. It is perverse to find exclusion from liability for the party with more control, while effectively imposing all the risk, damages and loss on the party with less or no control.

- Further, allowing an exclusion from liability to stand creates a disincentive for Air Canada to take all reasonable means to ensure the safety of animals transported in the bellyhold – which is within its means and only its means to do.
- Air Canada does not exclude itself from liability for harm done to baggage while in the bellyhold. There is thus no justification why a blanket exclusion from liability should apply to animate, versus inanimate, contents of the bellyhold.

#### Deemed Negligence

16. Air Canada does not impose a blanket exclusion from liability for harm done to humans in flight. Instead, Air Canada accepts that it could well be liable for such harm. In cases of harm to humans, some evidence must be provided by the claimant to show Air Canada is liable, and to what degree (ie: how much compensation, to the maximum cap established by the Tariff rules, is warranted). There is no reason why the situation need be any different when harm is done to animals. People get sick or injured while on flights for reasons that have nothing to do with Air Canada.
17. Air Canada does not impose a blanket exclusion from liability for damage done to baggage while in the custody, care or control of Air Canada. In fact, since baggage is carried in the bellyhold it is within the *exclusive* custody, care and control of Air Canada (that is, a passenger has no control over it during this time). As a result, a presumption is applied that if it arrives at the destination damaged, it was damaged as a result of acts or omissions of Air Canada. Absent evidence that the claimant was not responsible for any damage, all the claimant must show is how much compensation is justified (up to the maximum cap established by the Tariff rules).
18. Likewise, animals carried in the bellyhold are within the exclusive custody, care and control of Air Canada during this time. Air Canada has complete control over the conditions of carriage and, as such, the duty to prevent injury, loss, illness or death. It is Air Canada, and not the passenger, this is in the position to cause harm – or likewise to prevent harm – to such animal, through its acts or omissions. In such cases, if there is no evidence that the animal was ill or injured prior to being placed in Air Canada's control, then the presumption that the harm was caused by Air Canada should apply. Evidence to rule out that the animal was ill or injured before being taken into Air Canada's custody, in such a way as to lead to the harm at issue, might include veterinary records, autopsy reports, etc. If this is ruled out, then the claimant should be able to claim compensation to a capped limit that may be set. As stipulated in earlier submissions, such a cap should reflect the often significant emotional distress caused by loss of a companion animal (see cases cited in previous submissions, as well as *Ferguson v. Birchmount Boarding Kennels* [2006] O.J. No. 300).

19. To argue that exclusion from liability is justified because animals might get sick or harmed for reasons that have nothing to do with Air Canada is thus an argument built on nothing but an arbitrary distinction with no basis in logic or fact.
20. To permit Air Canada to impose the entire burden of risk, damages and loss, in the situation (as above) where Air Canada is deemed to be negligent, prevents a passenger from having any recourse at all for the wrong that is caused or could or should have been prevented by Air Canada. This constitutes an unfair disadvantage to the passenger.
21. As outlined above, there is nothing inherent in the carriage of animals that justifies exclusion from liability of harm to them when in Air Canada's control, and it is not impracticable for Air Canada to provide a compensation scheme as set out above. The statutory, commercial, and operational obligations of Air Canada do not contemplate that negligence is acceptable, or that passengers' rights should be abrogated simply because this might yield some financial benefit to Air Canada.
22. To require only that Air Canada provide notice to passengers of its exclusion from liability provisions, is not a remedy. In fact, it propagates the violation of passengers' rights as above.

#### THE TARIFFS ARE 'UNDULY DISCRIMINATORY'

23. The Agency, in its preliminary decision, found that the meaning of "discriminatory" mirrored that as defined by the Supreme Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as a "distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligation, or disadvantages on such individual or group not imposed on others....".
24. It is submitted that the provisions do draw a distinction based on a personal characteristic which imposes a burden, obligation or disadvantage on such individual or group not imposed on others.
25. In order to demonstrate whether discrimination has occurred, that the group or individual with the impugned personal characteristic necessarily must be compared to another group.
26. *Hodge v. Canada* 2004 SCC 65 outlines the selection of a comparator group, in that instance for the purposes of discrimination based on *Charter* grounds. In that case, the court states that:

*...the appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter.*

27. It is submitted that in this instance, the personal characteristic is possession or ownership of an animal which the customer must or has good reason to transport by air. Therefore, the appropriate comparator group is those air passengers who do not have animals with which they must fly.
28. By stating that the Tariff rules in respect of exclusion from liability are applied equally to all passengers traveling with animals, the Agency would be failing to find any comparator group at all, and would be simply referencing the subject group to itself. It is submitted that the analysis must compare the Complainants (and the effect on them as a result of the exclusion from liability) with a comparator group.
29. The burden or disadvantage is the complete exclusion from liability for harm to animals in the custody, care and control of Air Canada, versus the limitation of liability for damage done to inanimate baggage or to person.
30. Therefore, it is submitted that the Tariff rules which exclude liability for harm to animals are discriminatory. It is further submitted that the provisions are unduly discriminatory, because they do not allow animal owners any recourse whatsoever for loss, injury, illness or death of an animal being transported by air.
31. In Decision 666-C-A-2001, *Anderson v. Air Canada*, the Agency stated, in considering whether a term or condition of carriage was “unduly discriminatory” it must “adopt a contextual approach which balances the rights of the traveling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers operating in Canada”.
32. In Decision 666-C-A-2001, the Agency considered the meaning of “unduly”, and found there to be a requirement to balance the interests of the relative parties:

*The proper approach to determine if something is "undue", then, is a contextual one. Undue-ness must be defined in light of the aim of the relevant enactment. It can be useful to assess the consequences or effect if the undue thing is allowed to remain in place.*
33. Were the term or condition of carriage to remain, it is submitted that the consequence that would follow is forcing animal owners to make an untenable choice of accepting that there will be no recourse in the case of loss, versus not traveling by air with one’s animal or transporting one’s animal by air. The discriminatory term and condition requires the passenger to bear all the risk of the air travel while Air Canada bears none.
34. Risk could and should be more equitably apportioned, in such a way as to prevent vexatious or frivolous claims against Air Canada while at the same time acknowledging and providing compensation for the harm done to those who lose animals, particularly companion animals.
35. It is therefore submitted that the aim of the CTA, to ensure there is no unfair disadvantage to the extent practicable and barring inherent requirements of service, is met to a far greater degree by a compensation scheme that reflects the value of the animals to their owners or caregivers, than by a blanket exclusion from liability.

Conclusion

36. It is submitted that Tariff rules 200(A)(7) and 230(B)(1) are both unreasonable and unduly discriminatory, and should be disallowed. It is further submitted that rules 230(A)(1) and 230(C)(2) should not be applied to cap compensation for animals harmed in the bellyhold, as these rules are applied to limit liability to inanimate baggage and thus fail to take into account the value of companion animals to their owners.

SUBMITTED this 31<sup>st</sup> day of March, 2006.

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