

PROPOSED CLASS PROCEEDING

Action No: T-553-19

FEDERAL COURT

BETWEEN:

Annick Ward

Plaintiff

AND:

Flair Airlines Ltd.

Defendant

STATEMENT OF DEFENCE

1. The Defendant, Flair Airlines Ltd. ("**Flair**"), files this Statement of Defence expressly without attorning to the jurisdiction of the Federal Court of Canada, which jurisdiction Flair disputes.
2. Flair is a corporation incorporated pursuant to the laws of British Columbia and, contrary to paragraph 4 of the Amended Statement of Claim, is headquartered in Kelowna, British Columbia.
3. Flair denies each and every allegation in the Amended Statement of Claim, and puts the Plaintiff to the strict proof thereof.
4. The Amended Statement of Claim contains numerous instances of improper pleading of legal argument, citation of jurisprudence, and pleading of evidence, in particular with respect to the purported amendments to withdraw the Plaintiff's admission in the original Statement of Claim that the *Montreal Convention* has no application to these circumstances.
5. The Amended Statement of Claim fails to establish any reasonable foundation for:
 - a. The allegation that the Federal Court of Canada has jurisdiction in this matter;
 - b. The allegation that this matter would be appropriate to certify as a class proceeding; or
 - c. The Plaintiff's allegations of liability as against Flair.

Facts

6. This dispute arises out of a Contract of Carriage ("**Contract**") made between Flair and the Plaintiff. On August 22, 2018, the Plaintiff made an online booking with Flair for herself, Grant Shaigec, Emlyn Shaigec and Courtney Shaigec on Flight F8852 from Edmonton to Miami and a return flight on Flight F8851 from Miami to Edmonton (the "**Booking**"). The Booking was made by the Plaintiff through Flair's website at www.flyflair.ca.
7. At the time the Booking was made by the Plaintiff, Flair's online booking site contained certain Website Terms of Use (the "**Terms of Use**"), Terms and Conditions (the "**Terms and Conditions**") and Tariff and Reservation Terms and Conditions (the "**Reservation Terms and Conditions**"), each of which

constitute a part of the Contract.

8. The Terms of Use have been in effect since May 17, 2018. The Terms of Use contain a liability disclaimer which indicates, in part, that:

In no event shall Flair Airlines or its suppliers, agents and contractors be liable for any direct, indirect, punitive, incidental, special, economic, exemplary or consequential damages arising out of, or in any way connected with, the use of the Flair Airlines digital properties and Flair Airlines content or with the delay or inability to use the Flair Airlines digital properties or Flair Airlines content, including but not limited to any damages caused by any failure to perform, error, omission, deletion, interruption, defect, delay in operation or transmission, computer virus and other damage to computers computer networks or other property, communication line failure, theft, or destruction or unauthorized access to, alteration of or use of record or data or information or programs, whether such damages or injuries are based on contract, tort (including negligence), strict liability, or otherwise, even if Flair Airlines or its suppliers, agents, partners, and contractors have been advised of the possibility of such damages.

The total liability of Flair Airlines shall, in all cases, be limited to a maximum of the sum of one thousand dollars (\$1,000.00) in Canadian currency.

9. The Terms of Use applicable to the Booking also indicate that:

As a condition of your use of the Flair Air website and our other digital properties, you agree to defend, indemnify and hold harmless Flair from and against any and all claims, demands, suits, actions, proceedings, liabilities, damages, judgments, penalties, taxes, fines, costs and expenses, arising out of, or resulting from or otherwise connected to your use of our website or a breach of these Terms of Use.

10. Further, the Terms of Use applicable to the Booking also indicate that:

This User Agreement shall be deemed to have been made in the Province of Manitoba, Canada, and shall be governed in all respects by the laws of the Province of Manitoba, Canada, and the federal laws applicable therein...You agree and understand that you will not bring against Flair Air, or any of its affiliates or related entities, and the directors, officers, agents, partners, suppliers or and/or employees any class action lawsuit related to your access to, dealings with, or use of our website.

11. The Terms and Conditions have been in effect since May 17, 2018. Among the Terms and Conditions applicable to the Booking is a provision entitled Limitation of Liability which indicates that:

Flair strives to ensure that information is accurate and current. However, we make no representations to you about the accuracy of the information contained on the Flair website, or the reliability of the reservations services provided herein. This includes, without limitation, the availability of seating on any particular flight regarding fare class, flight number, price, departure and return dates and times, connecting flights and the like. Flair will accept no liability to you for any damages you may suffer, and in no event shall

Flair be liable to you for any direct, indirect, punitive, incidental, special or consequential damages arising out of or in any way connected with your use of the Flair website or the delay or inability to use this website, or for any information obtained or reservation made through the use of this website, whether based in contract, tort, strict liability or otherwise.

12. The Terms and Conditions applicable to the Booking also include an "Incorporation of Travel Tariff" provision. Among other things, that provision indicates that:

This Agreement, and any reservations made through the Flair website, are subject in all respects to the following: ... other tariffs that Flair has filed with applicable government authorities. These tariffs specify the rules and regulations concerning the rules, rates, regulations and conditions under which Flair will provide transportation services to guests and their goods ... These tariffs are incorporated by reference into the Flair website Reservations Agreement. If there is a conflict between the provisions found in the Flair website Reservations Agreement and any applicable tariff, the terms and provisions of the tariff shall apply.

13. The Reservations Agreement, as referred to in the Incorporation of Travel Tariff provision in the preceding paragraph, is synonymous with the Terms and Conditions.
14. The Reservation Terms and Conditions also contain pertinent information with respect to the Booking. In particular, the Reservation Terms and Conditions applicable to the Booking indicated that:

Flair and our air service provider reserve the right to change times, routings or cancel flights as needed. Flair Airlines and its air service provider (sic) assume no responsibility for any additional costs including but not limited to hotels, flights, car rentals or events.

NOTICE – SOLD SUBJECT TO TARIFF REGULATION

Notice of Contract Terms Incorporated by Reference

- Your contract of carriage with the carrier that provides you with carriage by air, whether international, domestic, or a domestic portion of an international journey is subject to this notice; to any notice or receipt of the carrier; and to the carrier's individual terms and conditions (Conditions), related rules, regulations and policies (Regulations) and any applicable tariffs.
- ...
- The Conditions, Regulations and any applicable tariffs of each carrier are, by this notice, incorporated by reference into and made part of your contract of carriage.
- The Conditions may include, but are not restricted to:
- ...
- Rights of the carrier and limits on the carrier's liability for delay or failure to perform a service ...

15. The Reservation Terms and Conditions that applied at the time of Booking contained a link to a Tariff relating to transborder travel, which had an issue date of August 20, 2018 although it did not come into effect until October 4, 2018 (the second “**Transborder Tariff**”)
16. The first Transborder Tariff came into effect on August 30, 2018 after having been issued the previous day.
17. A third Transborder Tariff came into effect on February 13, 2019.
18. Accordingly, the Contract expressly incorporated by reference the terms of the applicable Tariff from time to time. Further, the terms of each Tariff were expressly contemplated to change over time. Rule 3(C) of each of the Transborder Tariffs in effect between August 30, 2018 and February 13, 2019 (as described below) states:

Change Without Notice

Except as may be required by applicable laws, government regulations, orders and requirements, the Carrier’s rules, regulations and conditions of carriage are subject to change without notice; provided, that no such change shall apply to a contract of carriage after the carriage has commenced.

19. Where there was any conflict between the terms of the applicable Transborder Tariff and other terms of the Contract or other documents posted by Flair, the terms of the Transborder Tariff were to prevail. Rule 3(A) of the Tariff states that:

The content of this tariff are [sic] incorporated by reference into the Contract of Carriage. Should there be a conflict between this Tariff and the Contract of Carriage or any other document issued or posted by the Carrier, this Tariff will prevail.

20. Each of the Transborder Tariffs also indicated that , pursuant to Rule 3(D):

... All carriage of passengers and/or baggage shall be subject to the Carrier’s rules, regulations, and tariffs in effect on the date of commencement of carriage covered by the first flight listed on the ticket. Where required by local law or regulations, carriage of passengers and/or baggage shall be subject to the Carrier’s rules, regulations, and tariffs in effect on the date of ticket issuance.

21. There are no local laws or regulations exist in these circumstances that indicate that the carriage of passenger and/or baggage shall be subject to the Carrier’s rules, regulations and tariffs in effect on the date of ticket issuance.
22. The third Transborder Tariff contained a Passenger Recourse provision in Rule 3(E), as did the first and second Transborder Tariff, that reads as follows:

Passenger Recourse

Any compensation offered to passengers is offered pursuant to this Tariff and is, subject to applicable government regulations, in consideration and settlement of any claims a passenger may have against the Carrier, whatsoever. In the case of dispute with the Carrier, passengers should, as the first recourse, try to resolve any problem by dealing directly with the

Carrier. If the passenger has attempted to resolve a complaint with the Carrier and is still not satisfied, *the passenger hereby agrees to the exclusive jurisdiction of the Canadian Transportation Agency with regards to any disputes arising from or under this Tariff or a Contract of Carriage, except to the extent such dispute relates solely to bodily injury or death in which case the appropriate court shall have jurisdiction over such matter.* (emphasis added)

23. To the extent that the Terms of Use specify that the User Agreement shall be governed in all respects by the laws of the Province of Manitoba, Canada, and the federal laws applicable therein, and that this conflicts with the Tariff, the Tariff would prevail.
24. Flair cancelled certain Transborder routes, as itemized in paragraph 5 of the Amended Statement of Claim, on or about February 20, 2019 such cancellations to be effective February 28, 2019 (the “**Cancelled Routes**”). The Cancelled Routes included both legs of the round trip reflected in the Booking.

No Liability and No Jurisdiction

25. Flair specifically denies that it breached the Contract. Pursuant to the Contract, Flair had the right to cancel the routes that make up the Cancelled Routes.
26. In the further alternative, if Flair breached the Contract, which is not admitted but denied, Flair states that the Passenger Recourse provision of the Tariff, incorporated into the Contract, applies. The parties have contractually agreed that Canadian Transportation Agency (“**CTA**”) has exclusive jurisdiction with regard to this dispute, and accordingly the Federal Court of Canada lacks the jurisdiction to hear this matter.
27. In fact, the Plaintiff commenced proceedings before the CTA on the basis of the same allegations she now makes in the Amended Statement of Claim.
28. In response to paragraphs 20-22 of the Amended Statement of Claim, Flair specifically denies the applicability of the *Montreal Convention* and states that, in amending the original Statement of Claim which stated that the *Montreal Convention* had no application in these circumstances, the Plaintiff has withdrawn a legal admission and is not permitted to resile from that admission.
29. Flair states that the *Montreal Convention* has no application to the claim of the Plaintiff because no carriage was performed. Pursuant to Article 1 of the *Montreal Convention* as found in the *Carriage by Air Act*, RSC 1985, c C-26 :

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.

30. The Plaintiff appears to be advancing the remarkable proposition that an action for damages – which the Plaintiff admits cannot arise under the *Montreal Convention* absent carriage, which the parties agree did not occur here – must nevertheless be brought in accordance with that same *Convention* even in the absence of that *Convention*’s application. This is a nonsensical argument.
31. The Plaintiff also refers to the section of the *Montreal Convention* that nullifies contractual provisions that relieve or limit the liability of the carrier. Even if that provision applies in the absence of any carriage, the contractual provisions relied on by Flair address the appropriate forum and mechanism for advancing these claims, as opposed to relieving Flair from all or a part of them.


32. The final provision of the *Montreal Convention* relied on by the Plaintiff states that contractual provisions that infringe the rules of the *Montreal Convention* are null and void. Again, seeking to enforce this provision as against a contract to which the *Montreal Convention* does not apply simply makes no sense.
33. In sum, the Plaintiff seeks to invoke the *Montreal Convention* to nullify the provisions of the Contract that relieve or limit the liability of Flair, and the Passenger Recourse provision giving the CTA exclusive jurisdiction over the dispute, when the *Montreal Convention* has no application to the Plaintiff's claim.
34. In response to paragraphs 23-31 of the Amended Statement of Claim, Flair states that it complied with the terms of the Contract in all respects.
35. Flair further states that it offered the Plaintiff a full refund of the cost of the Booking, including the costs associated with the airfare of her family members. The Plaintiff accepted the full refund and a \$50 voucher for future travel on Flair.
36. In response to paragraph 32 of the Amended Statement of Claim, Flair specifically denies breaching a duty of good faith. Flair states that it complied in all respects with its contractual obligations to the Plaintiff, including offering a refund which the Plaintiff accepted. Flair in fact went further than it was contractually required by also offering an additional voucher, which offer the Plaintiff also accepted.
37. In response to paragraphs 33-35 of the Amended Statement of Claim, Flair specifically denies breaching the *Competition Act*, RSC 1985 c. C-34. At no time did Flair make any materially false or misleading representation as alleged, or at all. Flair adhered to the terms of the Contract throughout.
38. Flair further states that the Plaintiff's attempt to invoke the *Competition Act* with bald, unsubstantiated allegations is for the sole purpose of bolstering an otherwise unsustainable assertion that the Federal Court of Canada has jurisdiction over this matter.

No Damages

39. Flair specifically denies that the Plaintiff has suffered any damages and relies on the terms of the Contract.
40. Flair states that the Booking was fully refunded in addition to the \$50.00 voucher that was offered and accepted by the Plaintiff.
41. Alternatively, if Flair did breach the Contract, which is not admitted but denied, then the Plaintiff was herself negligent in failing to purchase travel insurance. In failing to purchase travel insurance for herself and her family, the Plaintiff courted the risk that the flights she booked could be cancelled. By seeking to make Flair responsible for the financial consequences of the Cancelled Routes on the Plaintiff, she seeks to make Flair an insurer of her travel plans.
42. Flair specifically denies paragraph 13 of the Amended Statement of Claim and states that none of the expenses listed in paragraphs 13 and 18 of the Amended Statement of Claim constitute compensable or recoverable damages.
43. The expenses listed in paragraph 13 of the Amended Statement of Claim are the costs of travelling with another airline. Flair denies any responsibility for such costs.
44. Further, Flair denies that punitive damages are appropriate or warranted in these circumstances, where Flair has acted at all times consistent with its contractual rights and obligations.
45. Further, and in the alternative, the Plaintiff is estopped from seeking to recover damages where she has accepted a full refund and a voucher for future travel.

46. Further, or in the alternative, if the Plaintiff suffered damages, which is not admitted but denied, Flair states that the Plaintiff failed to mitigate her damages. In particular, and among other things, the Plaintiff did not book replacement flights on an ultra-low-cost carrier comparable to Flair, thus incurring more significant costs than would be the case had a comparable carrier been chosen for the replacement flights.

Proposed Class Proceeding

47. Flair disputes that this matter is amenable to certification as a class proceeding. In particular, Flair asserts that another procedure and venue is preferable, namely, the CTA process upon which the parties agreed.
48. Further, Flair states that while the Plaintiff has not yet provided either proposed common issues or a litigation plan, the proposed Class is highly variable and widely differentiated in their circumstances such that the individual issues in this matter will not merely predominate over the common issues, but will overwhelm them to the extent that certification is not appropriate.
49. The impact of the Cancelled Routes varied significantly amongst the members of the putative Class. For example, upon notice of the Cancelled Routes being announced, carriage of some passengers, unlike the Plaintiff, had already commenced after having completed the outbound leg of their journey, and so only the inbound leg was cancelled.
50. If damages are payable by Flair, which is not admitted but denied, any such damages will be entirely dependent upon the particular impact of these circumstances on the individual Class members. Accordingly, significant and extensive individual damages assessments will be required.
51. Further, Flair states that punitive damages can only be certified as a common issue where the inquiry is founded on an examination of the Defendant's conduct and is unrelated to the particular effect that conduct has on the Plaintiff. As the circumstances of each individual Class member in relation to the cancellation of routes will be unique and variable, punitive damages are not an appropriate common issue. Flair again states that significant and extensive individual damages assessments will be required.
52. Further, if damages are payable, which is not admitted but denied, Flair states that aggregate damages are not appropriate in this matter as damages cannot be assessed on a global basis, in light of the unique circumstances of each individual Class member and the requirement for individual assessments of damages for each Class member.
53. Flair anticipates advancing further arguments against the certification of this matter upon receipt of the Plaintiff's certification application and proposed common issues.
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Location of Trial

54. Flair disagrees with the Plaintiff's suggestion that this action be tried at Montreal, QC. The parties, witnesses and relevant documents are all located in either Vancouver or Edmonton, and accordingly one of those venues would be best suited as the venue for the trial of this matter.

Dated: September 6, 2019

per:  _____

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