



Lawyers for Animal Welfare (LAW)

June 16, 2011

RE: Air Canada – No Legal Obligation to Ship Animals Bound for Laboratory Research

I. Background

On January 22, 2011, an Air Canada employee advised animal protection organizations that dozens of monkeys from breeding farms in China were being transported by Air Canada for use in Canadian research and experimentation initiatives.

Breeding and shipping monkeys for use in laboratory experimentation raises a number of animal welfare concerns. Most disturbing is the extreme social deprivation and physical pain that these animals frequently suffer. In response to calls that Air Canada should refuse to ship monkeys destined for experimentation, the airline publicly stated that a 1998 Canadian Transportation Agency (the “Agency”) ruling obliges it to accept monkeys as cargo.¹

It is our opinion that Air Canada is not legally obliged to accept monkeys as cargo. In accordance with the above noted 1998 Agency ruling, the *Competition Act*,² and the *Air Transportation Regulations*³ (the “Regulations”) of the *Canada Transportation Act*,⁴ Air Canada is legally entitled to refuse to ship animals bound for experimentation.

Air Transportation Regulations, SOR/88-58

Pursuant to Section 110 of the *Regulations*, Air Canada is required to file a tariff with the Agency as a condition of licensing. This tariff must specify the terms and conditions that apply to Air Canada’s carriage of international cargo shipments. Section 122(a)(viii) of the *Regulations* provides that an airline’s policy in respect of “refusal to transport passengers or goods” must be made clear. An airline may amend its tariff at any time (Section 124(1)). Air Canada’s international cargo tariff is titled the “Canadian Cargo International Rules and Rates Tariff No. Can-1” (the “Tariff”).

Section 105 of the Tariff sets out several conditions that must be met in order for Air Canada to accept shipments. Subsection 105(D) prohibits shipments that are “likely to endanger aircraft, persons or property or cause annoyance to passengers.”

¹ *Air Canada obliged to accept lab monkeys as cargo*, Toronto Star, January 24, 2011. Online: <http://www.thestar.com/news/article/927429--air-canada-obliged-to-accept-lab-monkeys-as-cargo?bn=1>.

² *Competition Act*, RSC 1985 c. C-34.

³ *Air Transportation Regulations*, SOR/88-58

⁴ *Canada Transportation Act*, SC 1996, C 10.

*Decision No. 10-A-1998, Canadian Transportation Agency*⁵

As noted above, Air Canada has publicly stated that a 1998 Agency decision requires the airline to continue to ship monkeys destined for experimentation. The decision Air Canada cites was issued in response to a complaint filed by the Primate Research Centre and Wildlife Reserve of Barbados Inc. when in 1994, Air Canada ceased transporting monkeys destined for experimentation. Air Canada's 1994 decision to stop transporting monkeys bound for experimentation was fueled by a number of complaints and feedback the airline received regarding the practice.

The issue before the Agency was whether Air Canada had violated the terms of its Tariff by refusing to carry the monkeys as cargo. The Agency ruled that while shipments that constitute an annoyance to passengers might be refused (as allowed by Section 105(D) of the Tariff), transporting monkeys did not constitute an annoyance to passengers. The Agency noted that a physical noise or odor observed by a passenger on an airplane carrying monkeys destined for research would constitute an annoyance, but there was no evidence that any of the correspondents who had contacted Air Canada were actual passengers or had experienced such an annoyance. It found Air Canada had contravened Section 110(f) of the *Regulations* by not applying the terms specified in its Tariff.

II. Impact of the Agency's Decision

As detailed below, we believe that the Agency's decision does not compel Air Canada to transport animals set apart for experimentation.

First, it is likely that the Agency would find Air Canada to be compliant with its Tariff if the airline ceased shipping animals in response to a complaint from a passenger who was on the same flight as the animals. In 2007, Air Canada stopped transporting beagles destined for experimentation after a passenger complained that he could hear the animals barking⁶ (*see Air Canada halts beagle shipments after passenger complaint*, Canwest News Service, June 12, 2007). The airline's decision was not challenged before the Agency.

Second, the Agency's decision does not require Air Canada to meet an additional burden or legal obligation. In contrast, the decision merely reiterates that Air Canada must respect the terms laid out in its Tariff, *an obligation the airline already had*.

III. Air Canada's Right to Revise its Tariff

Like other air carriers, Air Canada sets the terms of its tariff and may amend the same at any time. Pursuant to Section 124(1) of the *Regulations*, an airline may publish a supplement to its existing tariff for the purpose of amending such tariff. It may do so by filing the supplement or amendment

⁵ *Decision No. 10-A-1998, Canadian Transportation Agency*, January 1998. Online: <http://www.otc-cta.gc.ca/decision-ruling/drv.php?id=6686&lang=eng>.

⁶ *Air Canada halts beagle shipments after passenger complaints*, Canwest News Service, June 12, 2007. Online: <http://www.canada.com/topics/news/national/story.html?id=7eb6128f-2efa-44f2-86af-579ef2a08d0c&k=39953>.

with the Agency (*see* Section 115(1) of the *Regulations*). An amendment comes into force forty-five days after its filing date. Therefore, Air Canada can amend its Tariff by including provisions that would allow the airline to refuse shipments of animals destined for experimentation.

There are many ways that Air Canada could amend its Tariff to permit the airline to legally refuse to transport animals set apart for experimentation. For example, the airline could add a provision to its Tariff providing that it retains the right to refuse shipments that may harm its business interests and/or reputation. Consequently, if Air Canada received communications from customers who indicated that they were ethically opposed to the airline's animal transport policy or who stated that they would not use Air Canada's services until such policy was revised, Air Canada could cease transporting animals meant for experimentation and justify such decision by pointing to the potential lost revenue and/or tarnished reputation it would suffer if it did not do so. Alternatively, Air Canada's revised Tariff could state that the airline reserves the right to refuse to ship goods if it objects, in any way, to the character of the goods. It is highly unlikely that either such amendment would be struck down by the Agency.

IV. Limitations on Air Canada's Right to Revise its Tariff

The only statutory provisions that limit the content of an air carrier's tariff are contained in Section 111 of the *Regulations*. Section 111 mandates that the terms and conditions of a tariff: (i) be "just and reasonable" (Section 111(1)); (ii) do not subject any person to "unjust discrimination" (Section 111(2)(a)); (iii) do not give any person "undue or unreasonable preference or advantage" (Section 111(2)(b)); and (iv) do not subject any person "to any undue or unreasonable prejudice or disadvantage in any respect whatever" (Section 111(2)(c)).

*Del Anderson v Air Canada*⁷ is the leading decision where the Agency ruled on what constitute "unreasonable" and "discriminatory" terms in an air carrier's tariff. In *Del Anderson*—which dealt with Air Canada's domestic passenger tariff—the Agency held that an airline's commercial and operational obligations, as well as common practice within an industry, each speaks to whether terms are "unreasonable." Regarding "discriminatory" terms in a tariff, the Agency held that applying a term *equally to all customers* is most important.

If any amendments to Air Canada's Tariff were challenged on the grounds of being unreasonable or discriminatory, it is likely that the Agency would uphold the revised Tariff. To justify the legality of amending its Tariff, Air Canada could point to other international airlines which refuse to ship experimentation-destined animals, such as British Airways, United Airlines, and Virgin Atlantic. Air Canada could also argue that its policy to stop transporting animals set apart for experimentation is not discriminatory or unjust, as such policy would apply *equally to all customers* who requested such shipments. Finally, the airline could demonstrate that revising its Tariff is a sound business decision, for if it does not do so, it will lose customers who refuse to fly with the airline due to its policy to ship animals bound for research.

⁷ *Del Anderson v Air Canada*, Decision No. 666-C-A-2001, Canadian Transportation Agency, December 2001. Online: <http://www.otc-cta.gc.ca/decision-ruling/drv.php?id=18785&lang=eng>.

An air carrier's right to choose—and limit—what cargo it will accept is also exemplified by the tariff of WestJet (Canada's other major international carrier). Rule 17 of WestJet's international and transborder tariff⁸ provides that the airline “reserves the right to refuse to board or transport any goods which, in [WestJet's] sole opinion, are not appropriately packaged for flight or which are otherwise unsuitable for flight for any reason, including the weight, size or *character of the good* or to otherwise prohibit the use of such good on the aircraft” (emphasis added). The foregoing provision in WestJet's tariff has gone unchallenged. As such, it follows that Air Canada may also refuse to ship particular goods (i.e., animals destined for experimentation), based on the *character* of such goods.

V. Competition Act, RSC 1985, c. C-34

Section 75 of the *Competition Act* prohibits a company from refusing to do business with a person if such refusal would have an anti-competitive effect on the market. Based on the wording of Section 75 and how it has been judicially interpreted, it is our opinion that the provision does not prevent Air Canada from refusing to ship animals destined for experimentation.

Section 75's sole function is to prohibit anti-competitive effects. If Air Canada decided to cease transporting research-bound monkeys, such a decision would not be anti-competitive because it does not lessen or thwart competition. Further, a claim under Section 75 will fail if a corporation's refusal to deal with a particular person or company is based on objectively “justifiable business reasons,” including legitimate legal, reputational and regulatory concerns. The Competition Tribunal's (the “**Tribunal**”) first decision regarding Section 75 is *B-Filer v The Bank of Nova Scotia*⁹ (“**B-Filer**”), where the Tribunal ruled on the legality of a bank's decision to terminate its relationship with a client. In *B-Filer*, the Bank of Nova Scotia refused to engage in business with a client because it felt that the client's banking activities were questionable and rendered the bank susceptible to reputational damage. The Tribunal upheld the Bank of Nova Scotia's decision, holding that potential damage to the bank's reputation was a legitimate reason to refuse to deal with the client.

Pursuant to *B-Filer*, Air Canada may justify a decision to cease shipping animals destined for experimentation by arguing that such a decision is founded on “justifiable business reasons” – particularly, reputational concerns. It is a legitimate concern that Air Canada's reputation may suffer—and the airline may lose business—if it continues to transport animals bound for experimentation. The public's negative reaction to Air Canada's recent shipment of monkeys to research laboratories in Quebec supports the assertion that such practice may harm Air Canada's reputation.¹⁰ Moreover,

⁸ *Tariff Containing Rules Applicable to Scheduled Service for the Transportation of Passengers and Baggage or Goods from Points Inside Canada on the One Hand and Points Outside Canada on the Other Hand*, WestJet, April 20, 2009. Online:

www.westjet.com/pdf/internationalAndTransborderTariff.pdf.

⁹ *B-Filer v The Bank of Nova Scotia*, Competition Tribunal, 2005. Online: http://www.ct-tc.gc.ca/CMFiles/CT-2005-006_0159_38ODA-1222007-6003.pdf.

¹⁰ See *BUAV Calls on Air Canada to Stop Transporting Monkeys After Whistleblower Raises Concerns*, BUAV, January 24, 2011. Online: <http://www.buav.org/article/639/buav-calls-on-air-canada-to-stop-transporting-monkeys-after-whistleblower-raises-concerns>.

in the 1990s, when Air Canada transported live monkeys meant for zoos and experimentation, it received numerous complaints from individuals who stated that they would refrain from using the airline because of its animal transport policy.¹¹ In 1994, when Air Canada revised its policy and ceased shipping monkeys, the airline received congratulatory notes from many parts of the world.

In conclusion, it is Air Canada's self-selected Tariff provisions that compel the airline to ship monkeys destined for experimentation. Air Canada may amend its Tariff at any time to legally end this practice.

Yours sincerely,

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¹¹ See *Decision No. 10-A-1998*, Canadian Transportation Agency, January 1998. Online: <http://www.otc-cta.gc.ca/decision-ruling/drv.php?id=6686&lang=eng>.