Translated from the original French

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000814-166

DATE: November 10, 2022

PRESIDING: THE HONOURABLE MARIE-CHRISTINE HIVON, J.S.C.

Gilbert McMullen
Plaintiff

v.

Air Canada
Defendant

JUDGMENT

TABLE OF CONTENTS

I. OVERVIEW

[1] On March 18, 2012, Aveos closed its doors and permanently ceased its aircraft overhaul and maintenance activities due to financial difficulties. The closure resulted in the immediate dismissal of over 2,200 unionized and non-unionized workers, who were former Air Canada workers, including the plaintiff, working in Aveos's operational and overhaul centres, primarily in Montreal, Mississauga, and Winnipeg.

[2] The plaintiff is the representative of these workers in a class action instituted against Air Canada, which was authorized by a judgment of this Court on May 15, 2018[1] (**Authorization Judgment**) and which identified the principal questions of fact and of law and the conclusions sought by the class action as follows:

> [TRANSLATION]
>
> [99] **IDENTIFIES** as follows the principal questions of fact and of law that will be dealt with collectively:
>
> (a) Did Air Canada commit a fault by violating paragraph 6(1)(*d*) of the *Air Canada Public Participation Act* before June 22, 2016?
>
> (b) Is Air Canada liable for the damages suffered by the plaintiff and the Class members?
>
> (c) What are the damages suffered by the plaintiff and the Class members?
>
> (d) Are the plaintiff and each of the Class members entitled to punitive damages?
>
> (e) Did the spouses of the Class members suffer direct and immediate injury?
>
> [100] **IDENTIFIES** the conclusions sought by the class action to be instituted as follows:
>
> **MAINTAIN** the plaintiff's class action on behalf of all the Class members;
>
> **CONDEMN** Air Canada to pay an indemnity for loss of employment income to the plaintiff and to each Class member;
>
> **ORDER** the collective recovery of the claims of the Class members for loss of employment income;
>
> **CONDEMN** Air Canada to pay an amount corresponding to the loss of value of the benefits lost since their dismissal;

---

1 2018 QCCS 2020.

ORDER the collective recovery of the claims of the Class members for the loss of value of the benefits lost since their dismissal;

CONDEMN Air Canada to pay $20,000 to the plaintiff and to each Class member for the trouble, inconvenience, and moral damage caused by Air Canada;

ORDER the collective recovery of the claim for trouble, inconvenience, and moral damage;

CONDEMN Air Canada to pay $10,000 in punitive damages to the plaintiff and to each Class member;

CONDEMN Air Canada to pay, on all the amounts set out above (except the condemnation to pay punitive damages), interest at the legal rate and the additional indemnity set out in article 1619 C.C.Q., as of the date of service of this application for authorization to institute a class action;

RENDER any other order that the Court deems necessary to safeguard the rights of the parties;

THE WHOLE, with legal costs, including expert fees, the cost of the notice to members, and other related costs.

[3] The plaintiff amended these conclusions in an amended originating application dated October 1, 2021, and at the hearing. Thus, the conclusions sought are the following:

[TRANSLATION]

MAINTAIN the plaintiff's class action on behalf of all the Class members;

CONDEMN Air Canada to pay an indemnity for loss of employment income to the plaintiff and to each of Class member;

ORDER the individual recovery of the claims of the Class members for loss of employment income;

CONDEMN Air Canada to pay an amount corresponding to the loss of value of the benefits lost since their dismissal;

ORDER the individual recovery of the claims of the Class members for the loss of value of the benefits lost since their dismissal;

CONDEMN Air Canada to pay $15,000 to the plaintiff and to each Class member for the moral injury suffered by all the members, that is, the stress, doubts, loss of self-esteem, insecurity, feelings of injustice, and loss of enjoyment of life;

ORDER the collective recovery of moral damages for the Class members who were employees of Aveos, that is, a total of $32,970,000;

> **ORDER** the individual recovery of moral damages for the spouses of the employees;
>
> **CONDEMN** Air Canada to pay the individual claims of the members for additional moral damage such as psychological problems and insomnia, family problems, divorces, and suicides;
>
> **CONDEMN** Air Canada to pay $109,900,000 in punitive damages, that is, $50,000 to the plaintiff and to each of the Class members who were employees of Aveos and **ORDER** the collective recovery of this amount;
>
> **CONDEMN** Air Canada to pay, on all the amounts referred to above (except the condemnation to pay punitive damages), interest at the legal rate and the additional indemnity set out in article 1619 C.C.Q., as of the date of service of this application for authorization to institute a class action;
>
> **CONVENE** the parties before the Court, at a date to be determined, within a maximum of 60 days following the date on which the judgment becomes final, to specify the terms of the publication of the notices to members and the terms of distribution of the amounts payable to the Class members;
>
> **RENDER** any other order that the Court deems necessary to safeguard the rights of the parties;
>
> **THE WHOLE**, with legal costs, including expert fees, the cost of the notice to members, and other related costs.

[Emphasis added.]

[4] The persons included in the group of workers for which the plaintiff obtained the status of representative are the following (**Class**):[2]

> [TRANSLATION]
>
> All former unionized or non-unionized workers who were employed in Air Canada's operational and overhaul centres in Montreal, Mississauga, and Winnipeg, including the overhaul of components, engines, and airframes (heavy maintenance), who suffered injury arising from Aveos's closure on March 18, 2012, until June 22, 2016, due to Air Canada's failure to maintain operational and overhaul centres in accordance with paragraph 6(1)(*d*) of the *Air Canada Public Participation Act*, as well as the spouses, heirs, and successors of those former workers, if applicable.
>
> For the purposes of this class action, "spouses" are persons who are married or in a civil union with each other, as well as persons who live together and represent themselves publicly as a couple, regardless of how long they have been living together, the whole in accordance with section 61.1 of the *Interpretation Act*, CQLR, c. I-6;

---

2 Authorization Judgment at para. 98.

[5] In support of its action for compensatory and punitive damages, the plaintiff alleges the following:

5.1. As of 1988, paragraph 6(1)(*d*) of the *Air Canada Public Participation Act*[3] (***Act***) imposed the legal obligation on Air Canada to maintain operational and overhaul centres for its aircraft in Montreal, Winnipeg, and Mississauga (**Centres**);

5.2. Air Canada subcontracted the operation of the Centres and the maintenance and overhaul of its aircraft to Aveos pursuant to services contracts, many of which were exclusive, and transferred its experienced, skilled workers to it for that purpose;

5.3. Thus, before March 18, 2012, the maintenance and overhaul of Air Canada's aircraft was essentially performed by Aveos at the Centres previously operated by Air Canada, by the former workers of Air Canada, who had become employees of Aveos;

5.4. As of Aveos's closure on March 18, 2012, until a legislative amendment was made to paragraph 6(1)(*d*) of the *Act* on June 22, 2016, Air Canada was in breach of its legal obligations, as well as its articles, by failing to maintain the Centres within the meaning of the *Act*, which had the effect of terminating the employment of hundreds of employees transferred from Air Canada to Aveos;

5.5. What is more, Air Canada intentionally provoked Aveos's demise to avoid such legal obligations, by implementing a scheme with the objective of eventually moving the maintenance and overhaul activities abroad and thus benefit from colossal savings;

5.6. In so doing, Air Canada committed faults giving rise to its liability towards the plaintiff and the class members and is liable not only for the compensatory damages caused, but also for punitive damages, in view of its intentional fault;

5.7. Moreover, Air Canada's breach of the *Act* was previously confirmed by judgments of the Superior Court and the Court of Appeal of Quebec, and it is abusive for Air Canada to re-litigate this issue.

[6] Air Canada disputes the faults alleged against it and submits the following:

6.1. There is *res judicata* on the issue of Air Canada's compliance with its obligations under paragraph 6(1)(*d*) of the *Act*, further to a judgment rendered on May 25, 2011, by Newbould J. of the Ontario Superior Court

---

[3] R.S.C. (1985), c. 35.

of Justice (**Newbould Judgment**), which is a peremptory exception to the plaintiff's action;

6.2. In addition, since Air Canada's compliance with the *Act* was previously confirmed by the Newbould Judgment, it is abusive for the plaintiff to raise this issue again;

6.3. A release signed on January 8, 2009, by the unionized members of the Class, the International Association of Machinists and Aerospace Workers (**IAMAW**),[4] and Air Canada is such that the plaintiff and the Class members are precluded from bringing this action;

6.4. In any event, in June 2016, a declaratory amendment to paragraph 6(1)(*d*) of the *Act* was adopted, retroactively confirming the interpretation advanced by Air Canada and the absence of any breach of the *Act* during the period in dispute;

6.5. In the alternative:

6.5.1. Aveos's demise was not provoked by Air Canada. On the contrary, at all times relevant to this dispute, Air Canada proposed and implemented several tools and took steps to support Aveos's business, without success. The complete closure was a surprise for Air Canada, which had never considered such a scenario. It was caused by Aveos's financial difficulties arising from its inability to attract clients other than Air Canada and to offer services at competitive prices;

6.5.2. Air Canada's breach of the *Act* is not a civil fault giving rise to its liability towards the plaintiff and the Class members;

6.5.3. Even if Air Canada committed a civil fault, which it denies, there is no causal connection between such a fault and the damages suffered;

6.5.4. In any event, the plaintiff's action is prescribed as it was instituted more than three (3) years after Aveos's demise;

6.5.5. The compensatory damages claimed are unfounded or exaggerated, and the punitive damages are inadmissible.

---

[4] In French, the Association internationale des machinistes et des travailleurs et travailleuses de l'aérospatiale (**AIMTA**).

II. ISSUES

[7] This dispute raises the following issues, identified as preliminary exceptions by Air Canada, but which will be analyzed with the issues on the merits:

7.1. Is the Newbould Judgment *res judicata* with respect to the plaintiff's action and therefore a peremptory exception to that action?

7.2. Is the Release signed on January 8, 2009, by the IAMAW and Air Canada such that the plaintiff and the Class members are precluded from bringing this action?

[8] The issues on the merits are the following:

8.1. Did Air Canada breach paragraph 6(1)(*d*) of the Act before June 22, 2016?

8.2. If so, does such breach constitute a fault giving rise to Air Canada's liability?

8.3. Did Air Canada act in bad faith and intentionally provoke Aveos's demise?

8.4. If so, is Air Canada's fault the direct and immediate cause of the compensatory damages claimed by the plaintiff?

8.5. If so, does Air Canada's conduct give rise to punitive damages?

8.6. If so, is the plaintiff's action prescribed in accordance with the applicable rules?

8.7. If so, what is the impact of the Release invoked by Air Canada on the admissibility of the plaintiff's action?

8.8. If so, are the compensatory damages claimed well-founded?

[9] In the event that the Court concludes that damages for the loss of employment income and benefits should be awarded, the issue of the method to be used to calculate such damages has been deferred to a second stage of the hearing at the parties' request.[5]

[10] At the hearing, the plaintiff confirmed that he was renouncing the right to invoke foreign law for the portion of the claim concerning the Class members who worked at the

---

5 See the submissions of the plaintiff and the defendant at the hearing held on October 26, 2021.

Winnipeg and Mississauga Centres at the time of Aveos's closure and that Quebec law applies to the entire action before the Court.[6]

III. SUMMARY OF THE FINDINGS OF FACT AND OF LAW

[11] Between March 18 and 20, 2012, Aveos successively ceased its activities and closed its doors. The 2198[7] Class member workers lost their jobs. These experienced, skilled workers had been working on the maintenance and overhaul of the aircraft in Air Canada's fleet for several years, first as employees of Air Canada, and following their transfer, as employees of Aveos.

[12] All the members who testified at the hearing said that their job at Air Canada and then at Aveos was a source of great pride[8] and provided them with advantageous and better-than-average employment conditions.[9] For many, these jobs were a dream come true,[10] the culmination of their careers.[11]

[13] The definitive loss of their employment caused them significant emotional[12] and economic[13] shock, which was serious[14] in some cases.

[14] The plaintiff's action seeks to allow these workers to obtain a remedy from Air Canada, which they hold liable.

[15] Let us consider this.

[16] In light of the evidence adduced and for the reasons set out in this judgment, the Court concludes as follows:

> 16.1. At all times between March 18, 2012, and June 22, 2016, the date of the legislative amendment relieving Air Canada of its obligation to maintain the operational and overhaul Centres in Montreal, Mississauga, and Winnipeg, Air Canada was in breach of its legal obligations;

---

6 See the minutes of hearing of October 8, 2021.

7 Plaintiff's written submissions at para. 281.

8 The Court refers in particular to the testimony of Renald Courcelles, Denis Cantin, Simon Drainville, Marc Landry, and Marc Henry.

9 The Court refers in particular to the testimony of Denis Cantin, Simon Drainville, Glen O'Connor, Pierre Barbagallo, Jason Stratton, Stéphane Meunier, and Marc Henry.

10 The Court refers in particular to the testimony of Jean-Daniel Grenier, Renald Courcelles, Denis Cantin, Simon Drainville, Marc Landry, Pierre Barbagallo, and Ian Robbins.

11 The Court refers in particular to the testimony of Renald Courcelles, Denis Cantin, Marc Landry, Pierre Barbagallo, Jean-Daniel Grenier, Chrystiane Bénard, and Ian Robbins.

12 The Court refers in particular to the testimony of Annie Bellemare, Renald Courcelles, Denis Cantin, Simon Drainville, Marc Landry, Glen O'Connor, Chrystina Flynn, Pierre Barbagallo, Jason Stratton, Stéphane Meunier, and Jean-Daniel Grenier.

13 The Court refers in particular to the testimony of Annie Bellemare, Renald Courcelles, and Denis Cantin.

14 The Court refers in particular to the testimony of Yvan Poitras.

16.2. This breach constitutes a civil fault giving rise to Air Canada's liability;

16.3. However, Air Canada did not act in bad faith and did not intentionally provoke Aveos's demise;

16.4. Air Canada's breach of its legal obligations following Aveos's closure is the direct and immediate cause of the compensatory damages claimed by the plaintiff;

16.5. Air Canada's conduct does not give rise to punitive damages;

16.6. Moreover, because the plaintiff's action was instituted more than three years after the date of Aveos's closure, a portion of the damages claimed is prescribed. That being said, Air Canada's breach of its legal obligations constitutes a continuing fault that caused equally continuing damage. Therefore, the portion of the plaintiff's action concerning the damages suffered in the three years preceding the institution of the plaintiff's action in April 2016 is admissible;

16.7. The release agreed to between the IAMAW and Air Canada in January 2009 is not a peremptory exception to the plaintiff's action;

16.8. Last, the plaintiff has established the existence of pecuniary and non-pecuniary damages sustained that are admissible for all the Class members. Individual recovery of these damages is appropriate, and the parties must submit to the Court a detailed proposal regarding the proof required and the method of calculating all the damages awarded by this judgment within 90 days.

IV. FACTS

[17] To analyze the issues raised in this case, the Court took into account all the relevant facts arising from the testimony rendered and the documentary evidence filed.

[18] It is useful to group together the main relevant facts and to provide an overview of the corporate history of Air Canada and Aveos, of the *Act* and its relevant amendments, and of the contractual relationship between Air Canada and Aveos. It is also worth addressing the facts surrounding the transition of the employee Class members from one entity to another, the facts that took place in the month before Aveos's closure, and the evolution of the situation following Aveos's closure.

[19] Last, it is important to review the content of the judgments rendered by the Ontario Superior Court of Justice, and of the Superior Court of Quebec and the Court of Appeal of Quebec in two separate cases, which are related to this case to varying degrees.

1. CORPORATE AND LEGISLATIVE HISTORY

[20] The parties agree on the following facts regarding the corporate history of Air Canada and Aveos:[15]

- **1937**: Air Canada was founded under the name "Trans-Canada Airlines";
- **1958**: Trans-Canada Airlines obtained certification as an Approved Maintenance Organization (**AMO**);
- **1964**: It changed its name to Air Canada;
- **1988**: The *Act* was adopted, and Air Canada obtained its certificate of continuance under the *Canada Business Corporations Act*. Air Canada then became a private corporation;
- **1988–2003**: Air Canada's maintenance services and the aircraft overhaul centres were an internal department of Air Canada: "Air Canada Technical Services" or "**ACTS**";
- **2003** (April 1): Air Canada filed for protection under the *Companies' Creditors Arrangement Act* (**CCAA**);
- **2004**: Air Canada presented its plan of arrangement and reorganization (July 12), which was approved by its creditors (August 17) and ratified by the Ontario Superior Court of Justice (August 23);
- Air Canada's holding company would now be ACE Aviation Holdings Inc.;
- ACTS was constituted as a stand-alone entity (**ACTS** or **ACTS L.P.**), also held by ACE, but the new ACTS now took care of only "heavy" maintenance and overhaul of the aircraft. Air Canada kept the line maintenance of its aircraft. Air Canada obtained a new approved maintenance organization (**AMO**)[16] certificate from Transport Canada (number 32-03). The certificate held until then by Air Canada authorizing heavy maintenance and overhaul activities (number 6-58) was transferred to ACTS and subsequently to Aveos;
- **2006**: Various services contracts were signed between Air Canada and ACTS for the heavy maintenance and overhaul of Air Canada's aircraft;
- **2007**: ACE sold its shares in ACTS L.P. to a consortium of investors by the names of Sageview Capital LLC, KKR Private Equity Investors L.P., and Woodbridge Holdings (**Consortium**);

---

15 See the chronologies filed by the parties in the court record.

16 An "*organisme de maintenance agréé*" or "OMA" in French.

- **2008**: ACTS changed its name to Aveos Fleet Performance Inc. or Aveos Performance Aéronautique Inc.;

- January 8, **2009**: An agreement[17] was reached between Air Canada, Aveos, and the IAMAW union regarding the transfer of some of Air Canada's unionized employees to Aveos, performing the maintenance and overhaul of Air Canada's aircraft. Under this agreement, the employees of Air Canada in question were provided with options regarding their transfer to Aveos (**Agreement of January 8, 2009**);

- January 31, **2011**: The Canada Industrial Relations Board (**CIRB**) issued an order creating distinct bargaining units for the employees who would be transferred to Aveos and ordering the parties to comply with the Agreement of January 8, 2009.[18] The CIRB also ordered the implementation of the "Heavy Maintenance Separation Program";

- March 18, **2011**: An action was filed before the Ontario Superior Court of Justice by the IAMAW and David Ritchie seeking to prevent the transfer of Air Canada's employees to Aveos;

- April 13, **2011**: Newbould J. of the Ontario Superior Court of Justice dismissed the IAMAW's motion for an interlocutory injunction;

- April 15, **2011**: Deadline for Air Canada's employees to make their choice under the Agreement of January 8, 2009;

- May 25, **2011**: Newbould J. rendered the Newbould Judgment on the merits and dismissed the action of the IAMAW and Mr. Ritchie;

- July **2011**: 1,819 of Air Canada's unionized employees were officially transferred to Aveos;

- March 18, **2012**: Aveos's heavy maintenance and "airframe" overhaul sectors were closed and the 1,308 employees who worked there were dismissed. Aveos filed for protection under the CCAA;

- March 20, **2012**: Aveos's other employees were dismissed, and a Chief Restructuring Officer (or CRO) was appointed by the Superior Court of Quebec;

---

17 The parties and certain documents use the term "Memorandum of Agreement" or "MOA" when referring to this agreement (**Agreement of January 8, 2009**), exhibit D-1.

18 Exhibit D-4.

- April 17, **2012**: The Attorney General of Quebec filed a Motion to institute proceedings for a declaratory judgment against Air Canada;

- February 4, **2013**: The Honourable Martin Castonguay J.S.C., granted the Motion to institute proceedings for a declaratory judgment against Air Canada, finding that since Aveos's closure in March 2012, Air Canada was in breach of paragraph 6(1)(*d*) of the Act (**Castonguay Judgment**);

- November 22, **2013**: Aveos went bankrupt and the proceedings under the CCAA came to an end;

- November 3, **2015**: The Court of Appeal of Quebec dismissed Air Canada's appeal of the Castonguay Judgment (**CA Judgment**);

- December 30, **2015**: Air Canada filed an application for leave to appeal the CA Judgment to the Supreme Court of Canada;

- April 4, **2016**: The plaintiff instituted this action;

- June 22, **2016**: The *Act to amend the Air Canada Public Participation Act and to provide for certain other measures*[19] was adopted, and subsection 6(1) of the *Act* was amended (**2016 Legislative Amendment**);

- June 28, **2016**: Air Canada discontinued its application for leave to appeal to the Supreme Court of Canada.

2. THE *ACT* AND ITS AMENDMENTS

[21] The statutory provision underlying this action is set out in paragraph 6(1)(*d*) of the *Act*. At all times relevant to the dispute until the enactment of the 2016 Legislative Amendment, this provision read as follows:

6. (1) The articles of continuance of the Corporation shall contain	**6.** (1) Les clauses de prorogation de la Société comportent obligatoirement :
(a) [Repealed, 2001, c. 35, s. 1]	*a)* [Abrogé, 2001, ch. 35, art. 1]
(b) provisions imposing constraints on the issue, transfer and ownership, including joint ownership, of voting shares of the Corporation to prevent non-residents from holding, beneficially owning or controlling, directly or indirectly, otherwise than by way of security only, in the aggregate voting shares to which are attached more than twenty-five per cent, or any higher percentage that the Governor in Council may by regulation specify, of the votes	*b)* des dispositions qui imposent des restrictions sur l'émission, le transfert et la propriété, ou copropriété, d'actions avec droit de vote de la Société afin d'empêcher des non-résidents d'être les détenteurs ou les véritables propriétaires ou d'avoir le contrôle, directement ou indirectement, autrement qu'à titre de garantie seulement, d'une quantité totale d'actions avec droit de vote qui confèrent

[19] S.C. 2016, c. 8 (Bill C-10).

that may ordinarily be cast to elect directors of the Corporation, other than votes that may be so cast by or on behalf of the Minister;	plus de vingt-cinq pour cent – ou le pourcentage supérieur prévu par règlement du gouverneur en conseil – des droits de vote qui peuvent normalement être exercés pour l'élection des administrateurs de la Société, à l'exception des droits de vote pouvant être exercés par ou pour le ministre;
(c) provisions respecting the counting or prorating of votes cast at any meeting of shareholders of the Corporation and attached to voting shares of the Corporation that are held, beneficially owned or controlled, directly or indirectly, by non-residents so as to limit the counting of those votes to not more than twenty-five per cent, or any higher percentage specified for the purposes of paragraph *(b)*, of the total number of votes cast by shareholders at that meeting;	*c)* des dispositions régissant le compte ou la répartition au prorata des votes exercés à une assemblée de ses actionnaires et attachés à ses actions avec droit de vote qui sont détenues ou contrôlées – directement ou indirectement – par des non-résidents ou qui sont la véritable propriété de ceux-ci, de manière à limiter la proportion de ces votes à vingt-cinq pour cent – ou le pourcentage supérieur prévu pour l'application de l'alinéa *b)* – du nombre total des votes exercés à cette assemblée;
(d) provisions requiring the Corporation to maintain operational and overhaul centres in the City of Winnipeg, the Montreal Urban Community and the City of Mississauga; and	*d)* des dispositions l'obligeant à maintenir les centres d'entretien et de révision dans les villes de Winnipeg et Mississauga et dans la Communauté urbaine de Montréal;
(e) provisions specifying that the head office of the Corporation is to be situated in the Montreal Urban Community.	*e)* des dispositions fixant le siège social de la Société dans la Communauté urbaine de Montréal.
...	[...]

[Emphasis added.]

[22] As explained in section IV-7 of this judgment, the interpretation and application of this section were the subject of judicial debate before the Superior Court and the Court of Appeal of Quebec in the context of the Attorney General of Quebec's application for declaratory judgment in connection with the factual situation existing after Aveos's closure.

[23] The Newbould Judgment also addressed this issue in light of the factual situation existing in the spring of 2011, before Aveos's closure. This portion of the Newbould Judgment was characterized as mere *obiter dictum* by the Castonguay Judgment and the CA Judgment. The Court will return to this.

[24] Following the 2016 Legislative Amendment, paragraph 6(1)(*d*) read as follows:

66. (1) The articles of continuance of the Corporation shall contain	6. (1) Les clauses de prorogation de la Société comportent obligatoirement :
...	[...]
d) provisions requiring the Corporation to carry out or cause to be carried out aircraft maintenance activities, including maintenance of any type relating to airframes, engines, components, equipment or parts, in Ontario, Quebec and Manitoba;	d) des dispositions l'obligeant à exercer ou à faire exercer des activités d'entretien d'aéronefs, notamment toute forme d'entretien relatif aux cellules, aux moteurs, aux éléments constitutifs, à l'équipement ou aux pièces, en Ontario, au Québec et au Manitoba;
...	[...]
Maintenance activities	Activités d'entretien
(4) For the purpose of carrying out or causing to be carried out the aircraft maintenance activities referred to in paragraph (1)(d) in Ontario, Quebec and Manitoba, the Corporation **may**, while not eliminating those activities in any of those provinces, change the type or volume of any or all of those activities in each of those provinces, as well as the level of employment in any or all of those activities.	(4) Sans éliminer l'exercice d'activités d'entretien d'aéronefs en Ontario, au Québec ou au Manitoba, la Société **peut,** dans le cadre de l'exercice des activités visées à l'alinéa (1)d) dans chacune de ces provinces, modifier le type ou le volume d'une ou de plusieurs de ces activités dans chacune de ces provinces ainsi que le niveau d'emploi rattaché à ces activités.

[Emphasis added.]

[25] The plaintiff acknowledges that since this amendment, Air Canada is no longer under the obligation to maintain the Centres in Montreal, Winnipeg, and Toronto. In fact, he has limited his proceeding to the period between Aveos's closure on March 18, 2012, and June 22, 2016, the date the 2016 Legislative Amendment was enacted.[20]

[26] For better understanding, the Court will use the terms "heavy maintenance", "maintenance", and "overhaul" interchangeably to refer to the activities that were conducted at the Montreal and Winnipeg Centres, as opposed to "light maintenance" or "line maintenance". Moreover, it is admitted that the activities that were conducted at the Mississauga Centre had more to do with line maintenance.

---

20 Amended originating application dated October 1, 2021, at para. 38.

3. HISTORY OF THE CONTRACTUAL RELATIONSHIP BETWEEN AIR CANADA AND AVEOS FROM 2007 TO 2011

3.1 The maintenance and overhaul contracts

[27] On September 24, 2004, in the wake of Air Canada's plan of arrangement, ACTS (which would become Aveos) was constituted as a stand-alone entity and was entrusted with the maintenance and overhaul of Air Canada's aircraft. At the time, Air Canada kept its light or "line" maintenance activities. This type of maintenance takes only a few hours and is often done at night.[21]

[28] The maintenance and overhaul of Air Canada's aircraft continued to be performed in the same Centres, by the same employees.

[29] Air Canada and ACTS then agreed on a framework agreement setting out the general contractual conditions binding the parties. On October 1, 2006, that agreement was replaced by a new framework agreement ("General Terms Agreement for Technical Services" or GTA) (**Framework Agreement**).[22]

[30] Concurrently, on October 1, 2006, the parties entered into other services contracts, in particular for the maintenance[23] and overhaul[24] (or heavy maintenance services in the case of airframes[25]) of the airframes or girders, engines, and components of the aircraft in Air Canada's fleet:[26]

[31] The airframe maintenance and overhaul contract[27] states:

> 31.1. The maintenance and overhaul services will be performed at ACTS's premises (section 1.5);
>
> 31.2. The contract has a term of three years (section 1.6);
>
> 31.3. ACTS is the exclusive provider of all airframe maintenance and overhaul services for Air Canada's aircraft (section 1.7).

---

21 The Court refers to the testimony at the hearing of Air Canada's representative, George Psycharis, then the Director of airframe and engine maintenance, and Gilles Néron, then the Director of maintenance business strategy. See also the CA Judgment at paras. 24, 197, and 198.

22 Exhibit D-16.

23 Exhibit D-16, continuous numbering at 0402.

24 Exhibit D-16, continuous numbering at 0402.

25 See in particular, exhibit D-16, section 1.3, continuous numbering at 0362, and exhibit D-1, section II.2.

26 See in particular exhibit D-16, section 1.3, continuous numbering at 0362.

27 *Services Agreement for Airframe Heavy Maintenance Services*, exhibit D-17.

[32] The engine maintenance contract[28] states:

32.1. The services will be performed at ACTS's premises in Dorval, Quebec;[29]

32.2. The contract is in force until September 30, 2013 (section 1.4);

32.3. ACTS is the exclusive provider of all engine maintenance and overhaul services for Air Canada's aircraft (section 1.7).

[33] The components maintenance contract[30] states:

33.1. The services will be performed at ACTS's premises in Dorval, Quebec;[31]

33.2. The contract is in force for a term of seven years (section 1.5);

33.3. The contract provides limited exclusivity for the services performed by ACTS for the overhaul of components, depending on the type of Air Canada aircraft, with certain exceptions (sections 1.6, 2.1).

[34] At the same time, Air Canada and ACTS also agreed that Air Canada would provide general services to ACTS pursuant to an agreement (**Agreement for the provision of general services**),[32] which was later replaced by an amended agreement dated January 1, 2007.[33] The services offered included basic corporate services for accounting, payroll, labour relations, pension fund management, legal services, etc.[34]

[35] In June 2007, Aveos replaced ACTS and continued to perform the maintenance and overhaul contracts referred to above in the Montreal, Winnipeg, and Mississauga Centres.

[36] On March 12, 2010, in the context of Aveos's recapitalization, Aveos and Air Canada entered into various agreements providing for the purchase by Air Canada of 1,750,000 common shares of Aveos Holding Company in exchange for the payment of a total price of $17,500 and a full and final release from all claims or rights of action for any fact that had occurred beforehand.[35] In this respect, on the same day, the parties also entered into a full and final settlement of pending disputes and ancillary matters between them, in particular their dispute concerning the cost of labour stipulated in the airframe maintenance and overhaul contract.[36]

---

28 Exhibit D-17, continuous numbering at 0443.
29 Exhibit D-17, section 1.5, continuous numbering at 0446.
30 Exhibit D-17, continuous numbering at 0472.
31 Exhibit D-17, section 1.4, continuous numbering at 0475.
32 Exhibit D-15.
33 *Amended and Restated Master Services Agreement*, exhibit P-50.
34 See in particular exhibit D-15, section 2.3, continuous numbering at 0340.
35 Exhibit D-18.
36 *Dispute Settlement and Ancillary Matters Agreement*, exhibit D-20.

[37] As part of that settlement, they also amended:

37.1. The Framework Agreement with respect to the dispute resolution process concerning invoicing.[37] Air Canada agreed not to retain payment of the first $5 million of disputed invoices from Aveos;[38]

37.2. The Agreement of January 8, 2009, and the airframe maintenance and overhaul contract,[39] primarily to provide for the payment by Air Canada of additional service fees up to a maximum annual amount of $20 million,[40] on certain conditions.

[38] On March 31, 2010, Air Canada and Aveos entered into an "Amended and Restated Term Note" in the amount of $22 million.[41] That agreement refers to a Aveos's $22 million debt to Air Canada, and provides that Aveos will pay this amount, interest-free, in six installments of $3,666,666, starting on July 1, 2011, at the latest.[42]

[39] It was also agreed that if, on the date of a scheduled installment payment, Aveos's liquidity was under a threshold defined in the agreement, the payment would be deferred to the next date, and the subsequent installments would be deferred accordingly.[43]

[40] In May 2011, Joe Kolshak became Aveos's new President and Chief Executive Officer. He explained that when he took on this role, the objective of the strategy he wanted to implement was to transform Aveos so that it would no longer be an airline company [TRANSLATION] "expenditure" and would become a genuine, independent, and profitable maintenance and overhaul services company. He asked the company's board of directors for a few weeks to submit his strategy to improve Aveos's performance and achieve his objective.

[41] On July 8, 2011, he presented his action plan to Aveos's board of directors, of which Michael Rousseau of Air Canada was a member.[44] His action plan included a document entitled "Strategic Review – Phase 1".[45] The Court accepts the following from that document:

41.1. It states that Aveos must complete its transformation "from an airline cost

---

37 Exhibit D-20, section 13, continuous numbering at 0756.
38 Exhibit D-20, section 13d, continuous numbering at 0758.
39 Exhibit D-21.
40 Exhibit D-21, section 14.8, continuous numbering at 0784.
41 Exhibit D-19.
42 The date is the earliest of the following dates: July 1, 2011, or the "Certification Date", i.e., the date defined as such in the letters transferring Air Canada employees, exhibit D-19, continuous numbering at 0725, 0726, and 0744.
43 Exhibit D-19, section 2.3(a)(b), continuous numbering at 0726.
44 In July 2011, Mr. Rousseau held the position of Executive Vice President and Chief Financial Officer at Air Canada. He held that position until he was appointed President and Chief Executive Officer in 2021.
45 Exhibit P-70.1.

center into a separate commercially and market oriented MRO [Maintenance, Repair, Overhaul]";[46]

41.2. A three-phase strategy was proposed for 2011–2016;

41.3. The first phase, entitled "Secure a future", aimed to secure Air Canada's continued maintenance operations and then diversify its client base and achieve its full potential in targeted sectors of the market;[47]

41.4. An analysis of Aveos's technical, commercial, and corporate strengths and weaknesses revealed the following:

- It was noted that Aveos had the following internal weaknesses: "Broad service offering and footprint, legacy / AC focused rather than market opportunity focused"; "uncertain / cyclical pipeline in some business units"; "high cost base (e.g. labor rates, facilities, overhead and productivity driven by seasonal airframe demand in Canada) and strong Canadian dollar must be offset";[48]

- With respect to the narrowbody aircraft maintenance service, it was noted that the cost of labour was not competitive for all types of aircraft. Aveos favoured a hybrid solution between maintaining a service offering in Canada or elsewhere and using external subcontractors;[49]

- As for the airframe maintenance of widebody aircraft, it was noted that the cost of Canadian labour was prohibitive, that the turn around time was too long compared to the market and that Aveos planned to gradually withdraw from this market when the contract expired;[50]

- With respect to the component maintenance service, the document stated that efforts were needed to reduce the "Turn Around Time" (or "TAT") while focusing on services offered for A320 and Embraer 170/190 aircraft;[51]

- As for the engine maintenance service, Aveos planned to support the needs of older aircraft engines, while developing the capacity

---

46 Exhibit P-70.1, continuous numbering at 1335.
47 Exhibit P-70.1, continuous numbering at 1350.
48 Exhibit P-70.1, continuous numbering at 1339.
49 Exhibit P-70.1, continuous numbering at 1341.
50 Exhibit P-70.1, continuous numbering at 1342.
51 Exhibit P-70.1, continuous numbering at 1344.

> to maintain CF34 engines, primarily by acquiring the testcell required for this type of engine.[52]

[42] The maintenance and overhaul operations of Air Canada's aircraft by Aveos were categorized based on the importance of the work to be done and its performance was organized according to a work schedule based on the aircraft's flight hours or other objective factors, in particular those approved or dictated by the regulatory authorities and the manufacturers.[53] Moreover, subject to certain exceptions, Air Canada had some leeway to determine exactly when an aircraft would be sent for specific maintenance or overhaul.[54]

[43] This leeway was used, for example, during the busy season to avoid being deprived of aircraft while conducting an overhaul, and to defer it to a later date, within an accepted window. The work schedule could therefore vary depending on the aircraft's cycle of use.

[44] The evidence reveals that the contractual relationship between Air Canada and Aveos was affected by several disputes concerning the invoicing of services and their payment, whether the services were offered by Aveos or by Air Canada, as will be described in greater detail below. That situation was not new and already existed in March 2010 when the invoicing dispute resolution process was modified.[55]

[45] Thus, in December 2011, the contractual relationship was as follows:

45.1. The parties were bound by services contracts by which Aveos performed almost all the maintenance and overhaul of the aircraft in Air Canada's fleet;

45.2. It is not contested that the contracts were in fact scheduled to expire in the following order:

45.2.1. The airframe maintenance and overhaul contract in June 2013;

45.2.2. The component maintenance contract in September 2013;

45.2.3. The engine maintenance contract in 2015.

---

52 Exhibit P-70.1, continuous numbering at 1347.
53 The Court refers to the testimony of George Psycharis and Gilles Néron.
54 The Court refers to the testimony of George Psycharis and Gilles Néron.
55 Exhibit D-20.

[46] Last, it is admitted that Air Canada and Aveos had an interdependent contractual relationship.[56]

3.2 The transfer of Air Canada's employees to Aveos and the agreements reached

[47] In 2004, when ACTS was constituted as a stand-alone entity, independent from Air Canada, the companies agreed that Air Canada's unionized employees who performed the activities transferred to ACTS would be assigned to ACTS but would remain employees of Air Canada.

[48] In the context of the sale of ACTS to the Consortium in 2007, the status of the unionized employees assigned to ACTS by Air Canada remained unchanged, and they continued to perform the same duties, now on behalf of Aveos and under its management.

[49] In the wake of these transfers, in December 2006, the IAMAW (the union representing Air Canada's unionized workers concerned by the transition of maintenance and overhaul activities) filed complaint 26054-C[57] against Air Canada and Aveos before the CIRB.

[50] Those proceedings were suspended, and on January 8, 2009,[58] the Agreement of January 8, 2009, was reached, to provide for the contingency that the CIRB ordered the separation of the bargaining units. That agreement allowed the issues remaining in dispute to be settled and included the following objectives:[59]

> 50.1. Facilitate the orderly transition of the employees concerned from Air Canada to Aveos, in accordance with the choice expressed by each employee;
>
> 50.2. Establish the employment terms and conditions applicable to Air Canada's employees who chose to become employees of Aveos.

[51] The triggering of the obligations set out in the Agreement of January 8, 2009, was subject to certain conditions, including the conclusion of an agreement between Air Canada and Aveos providing that Aveos would remain the exclusive provider of airframe maintenance and overhaul services as defined in the "Service Agreement for

---

56 As confirmed at the hearing, in particular by the testimony of Calin Rovinescu, then Air Canada's President and Chief Executive Officer, and Gilles Néron. See also the plaintiff's written submissions, Section IV.A.

57 See exhibit D-1, continuous numbering at 0001.

58 Exhibit D-1.

59 Agreement of January 8, 2009, exhibit D-1, continuous numbering at 0002.

Airframe Heavy Maintenance Services" (also referred to between the parties as "heavy maintenance services"[60]), at least until June 30, 2013.[61]

[52] The Agreement of January 8, 2009, also provided the options available to the employees concerned.[62] It is important to note that employees who did not make a choice and communicate it before a certain date were deemed to have chosen to become employees of Aveos.[63]

[53] The evidence reveals that most of the employees concerned had to choose to be transferred to Aveos because their position at Air Canada had been abolished.[64]

[54] Last, the agreement provided a release (**Release**), which is the basis of Air Canada's peremptory exception argument.[65]

[55] Also on January 8, 2009, Aveos, Air Canada, and IAMAW entered into a Letter of Agreement,[66] providing that if work that would normally be performed by the unionized employees represented by the IAMAW was assigned to a party other than Aveos or Air Canada, notice had to be given to the union, which could submit the issue to arbitration in the event of dispute.

[56] On January 22, 2009, the CIRB declared that the Agreement of January 8, 2009, was a full and final settlement of complaint No. 26054-C and ordered the parties to cooperate in its implementation.[67]

[57] A few months later, on June 8, 2009, the IAMAW and Air Canada agreed to extend the terms and conditions of the collective agreements in force for an additional period of 21 months,[68] primarily to allow Air Canada to access additional funds to improve its liquidity and avoid having to place itself under CCAA protection.[69] Certain terms and conditions of the Agreement of January 8, 2009, were adapted accordingly by this agreement.[70]

[58] On January 31, 2011, the CIRB granted an application for a declaration of the sale of a business presented by Air Canada and Aveos and dismissed the application for a

---

60 See in particular exhibit D-1, section II.2, continuous numbering at 0004.
61 Exhibit D-1, section II.2, continuous numbering at 0004.
62 Exhibit D-1, section III, continuous numbering at 0004.
63 Exhibit D-1, section IV.4, continuous numbering at 0006.
64 The Court refers in particular to the testimony of Gilbert McMullen, Denis Cantin, Marc Landry, Glenn O'Connor, Pierre Barbagallo, Jason Stratton, Moteellal Manic, Yvan Poitras, and Jean-Daniel Grenier.
65 Exhibit D-1, section IX.13, continuous numbering at 0014.
66 Exhibit D-29.
67 Exhibit D-2.
68 From July 1, 2009, to March 31, 2011, exhibit D-4, continuous numbering at 0049.
69 Exhibit D-3, continuous numbering at 0025.
70 See in particular exhibit D-3, continuous numbering at 0028.

declaration of a single employer presented by the IAMAW.[71] The CIRB concluded as follows:[72]

> **NOW, THEREFORE**, it is hereby declared by the Canada Industrial Relations Board that:
>
> (1) the sale of assets and liabilities pursuant to the Asset Purchase Agreement dated June 22, 2009, between ACTS LP and Aveos Fleet Performance Inc., as it is now designated, constitutes a sale of business within the meaning of section 44 of the *Code*;
>
> (2) Aveos Fleet Performance Inc. is the successor employer to Air Canada Technical Services (ACTS) Limited Partnership; and
>
> (3) Aveos Fleet Performance Inc. and Air Canada constitute distinct employers and the IAMAW's application for a declaration of single employer pursuant to section 35 of the *Code* is hereby dismissed.
>
> [Emphasis added.]

[59] The CIRB also declared the following:[73]

> **AND FURTHERMORE**, the Canada Industrial Relations Board hereby declares that the January 8, 2009 MOA, as amended by the June 8, 2009 MOA, the **Heavy Maintenance Separation Program** ordered pursuant to Order No. 9996-U, and the present Order properly and fully dispose of all matters arising from the sale of business from ACTS LP to Aveos Fleet Performance Inc. or related to the consequences of such sale, whether under the Code, the applicable collective agreement or otherwise.
>
> [Emphasis added.]

[60] The Heavy Maintenance Separation Program in question was attached as a Schedule to the order (Heavy Maintenance Separation Program).[74] That agreement provided for an indemnity payable by Air Canada to the transferred unionized employees upon the occurrence of certain conditions, including Aveos's bankruptcy or insolvency if it occurred before June 30, 2013.

[61] Thus, in July 2011, 1,819 Air Canada employees were transferred to Aveos, which led to the following situation:

61.1. 2,204[75] unionized and non-unionized employees of Aveos were former employees of Air Canada who continued to perform the same

---

71 Exhibit D-4.
72 Exhibit D-4, continuous numbering at 0050.
73 Exhibit D-4, continuous numbering at 0051.
74 Exhibit D-4, continuous numbering at 0060.
75 Plaintiff's written submissions at para. 281.

maintenance and overhaul work on Air Canada's aircraft;

61.2. They performed this work in the same premises as when they were employees of Air Canada, that is, at the Montreal, Winnipeg, and Mississauga Centres.

[62] That situation remained unchanged until Aveos's closure on March 18, 2012.

[63] Following Aveos's closure, Air Canada in fact paid the indemnity set out in the Separation Indemnity Agreement to the unionized employees concerned. The amount of the indemnity represented a total of almost $55 million.[76]

[64] Air Canada considers that pursuant to paragraph 9 of that agreement, the payment made released it from all other obligations towards these employees further to Aveos's closure. It also considers the Release to be a peremptory exception to the plaintiff's action.

[65] The plaintiff submits instead that although the amounts received must be deducted from any amount of compensatory damages claimed, they represent compensation provided in the context of the transfer of these employees in the event of Aveos's closure and have no impact on the admissibility of its action for damages arising from the faults alleged against Air Canada.

4. THE NEWBOULD JUDGMENT

[66] On May 25, 2011, the Ontario Superior Court of Justice rendered a judgment in the context of an application brought by the IAMAW for an injunction and a declaratory judgment.

[67] In its application, the union sought declaratory conclusions in the context of the sale of the maintenance and overhaul operations of Air Canada's aircraft to Aveos. In particular, the union sought a declaration that by transferring the maintenance and overhaul work as well as its employees to Aveos, Air Canada was no longer in compliance with the articles of the corporation and no longer maintained Centres in Montreal, Winnipeg, and Mississauga.

[68] The Newbould Judgment dismissed the union's declaratory applications in view of the fact that the union was bound by the Release set out in section 13 of the Agreement of January 8, 2009, and that it could not circumvent it or the CIRB's orders.

---

[76] See exhibit D-31, continuous numbering at 0868, and the testimony of Salvatore Ciotti, at the time Air Canada's Senior Director of Financial Services and Operations.

[69] Newbould J. found:[77]

> [59] The parties bargained for labour peace. IAMAW on behalf of its members waived any further litigation (« any claim, demand or grievance ») arising from the transitioning of employees to Aveos except under the terms of the Transition MOA. By its terms, the release precluded this application from being brought.
>
> [Emphasis added.]

[70] That conclusion resolved the proceeding. However, and although it was not necessary for the conclusions of his judgment,[78] Newbould J. nevertheless analyzed another issue submitted to him, that of whether, in light of the circumstances existing in May 2011, Air Canada was in breach of its obligations under paragraph 6(1)(*d*) of the *Act*.

[71] He stated the following:[79]

> [60] In light of my previous findings regarding standing and the effect of the release clause, it is not necessary to deal with the argument of IAMAW that Air Canada is not in compliance with its articles of continuance that require that it shall maintain operational and overhaul centres for its aircraft or their components in the City of Winnipeg, the City of Mississauga and the Montreal Urban Community. However, in light of the extensive arguments made in this application, I shall do so.
>
> ...
>
> [66] Aveos, like ACTS LP before it, does heavy maintenance work under contract to Air Canada. At the time ACTS was formed, Air Canada seconded its employees to ACTS who did the maintenance work for ACTS. The secondment agreement was later assigned to ACTS LP and then to Aveos when Aveos acquired the business from ACTS LP. This was the situation at the time of the Transition MOA in January 2009.
>
> [67] In 2007, ACE sold ACTS LP to Aveos in an asset sale in which Aveos acquired the equipment necessary to carry out the overhaul of aircraft, engines and aeronautical components. In addition, Air Canada sold to Aveos the Engine Maintenance facility at Dorval. The other hangars and component shops used for maintenance, repair and overhaul functions, including the aircraft, engine and component overhaul facilities in Winnipeg, Mississauga and Dorval were and are leased by Air Canada to Aveos.
>
> ...
>
> [75] Nowhere in the debates referred to by IAMAW is there any indication that Parliament was concerned with whether the persons who did the maintenance work at the three locations were employed by Air Canada or by another entity under contract with Air Canada. The speech to Parliament by Mr. Minaker, the

---

77 Exhibit D-5 at para. 59, continuous numbering at 0078.
78 Exhibit D-5 at para. 60 *et seq.*, continuous numbering at 0078.
79 Exhibit D-5 at para. 60 *et seq.*, continuous numbering at 0078 *et seq.*

> member of the government in power in whose riding the Winnipeg overhaul maintenance facility was located, and relied on by IAMAW, indicated that the concern being addressed in ACPPA was that the facilities remain where they were and that jobs remain in Winnipeg. No mention was made of any other labour issues at all … .
>
> [81] My conclusion is that IAMAW has not established that Air Canada is in breach of its articles by contracting out maintenance work to ACTS LP and now Aveos. On my reading of the legislation, and thus the articles of Air Canada, there is nothing to prevent Air Canada from contracting that work out.
>
> …
>
> [83] Air Canada maintains that apart from what Aveos is doing under contract, Air Canada is carrying out operational and overhaul work in Montreal, Winnipeg and Toronto. This leads to the question what is meant by the term "operational and overhaul centres" in Air Canada's articles and in ACPPA.
>
> …
>
> [96] The requirement in ACPPA that Air Canada was to include in its articles an obligation to main[tain] [*sic*] operational and overhaul centres was vague, and no doubt purposely so. I conclude that IAMAW has not established on the record that Air Canada has not on its own maintained operational and overhaul centres in Montreal, Winnipeg and Mississauga.
>
> [97] In summary I find that Air Canada does maintain operational and overhaul centres in those cities by maintaining overhaul operations under its contracts with Aveos and by itself maintaining certain overhaul functions through its line maintenance operations.

[Emphasis added.]

[72] Air Canada submits that this judgment has acquired the authority of *res judicata* with respect to the parties in this case and that it resolves the issue of whether Air Canada was in compliance with the *Act*, solely by its line maintenance activities, despite Aveos's closure.

5. THE PERIOD FROM JANUARY TO MARCH 2012 AND THE CLOSURE OF AVEOS

[73] In January 2012, Aveos's financial situation continued to be difficult, and according to Mr. Kolshak at the hearing, it was getting worse.

[74] According to Aveos, some of Air Canada's actions exacerbated the situation, for example:

74.1. The launch of a request for proposals process for the renewal of the airframe and component maintenance and overhaul contracts;

74.2. The deferral of certain scheduled maintenance by Air Canada; and

74.3. The numerous disputes regarding Aveos's invoices, which delayed payment by Air Canada.

[75] The Court accepts the following from the evidence of the events that took place during this period.

5.1 The request for proposals process

[76] In January 2012, Air Canada launched a request for proposals process to investigate market conditions, in particular for airframe and component maintenance and overhaul, and ultimately enter into new contracts as each of the existing services contract in force with Aveos expired. This process was actually launched in January 2012, although certain steps were taken in January 2011.[80]

[77] According to Air Canada, this process was unrelated to the difficulties that Aveos was experiencing and was in no way a hidden agenda to protect itself in the short term against the harmful effects of Aveos's imminent closure, whether provoked or not.[81] Rather, it was due to the fact that the airframe overhaul service contract was expiring in June 2013, and part of the component contract was expiring in September 2013, and it was simply the normal course of action to initiate a process that allowed it to find out what was available in the market[82] so it could negotiate a better agreement with Aveos, or failing that, give future contracts to a third party.

[78] In the plaintiff's view, it was a preparatory manoeuvre by Air Canada that would allow it to be ready to make a commitment to a third party upon the advent of what it intended to provoke, that is, Aveos's demise.

[79] In addition, he submits that merely by launching such a process in January 2012, Air Canada harmed Aveos's reputation in the market, in particular in its attempts to obtain lucrative contracts with third parties.

[80] Mr. Kolshak confirmed that Aveos participated in this process before closing but that the parties were still in the very early stages of the process.

[81] The evidence reveals the following regarding the request for proposals process for the renewal of these contracts:

[82] Gilles Néron, then the Director, Strategy & Commercial, and his team were directly involved in Air Canada's process in this regard.

---

80 See in particular exhibit P-27.

81 The Court refers in particular to the testimony of George Psycharis and Gilles Néron at the hearing.

82 The Court refers in particular to the testimony of George Psycharis and Gilles Néron at the hearing.

[83] With respect to the airframe overhaul contract:

83.1. This process was initiated much earlier, in January 2011, when a questionnaire entitled "Supplier Qualifications and Capabilities Questionnaire" was sent to the invited suppliers;[83]

83.2. However, it was only on January 6, 2012, that the Request for Proposal bearing number RFP #20120106 was sent to certain invited suppliers, including Aveos, for airframe maintenance.[84] This document stated the following, among other things:

- The cover letter stated, "Air Canada's focus is to reduce its maintenance expense while maintaining the highest standard of quality. ... It should be noted that while we will continue our emphasis on high quality, we are most importantly expecting to achieve substantial reductions in total airframe costs.";[85]

- Item 1.4.2 provided the following regarding the date of the services provided:[86]

> This RFP covers services to be provided beginning June 2013 and will last for a period of no less than 12 months from the start date. Additional year options may be considered at Air Canada's discretion.
>
> For informational purposes, Air Canada has provided a maintenance schedule that includes events from June 2012-May 2013. Any proposal should also include pricing for checks captured within this time period, as well as a readiness plan for accommodating a June 2012 start-up.

[Emphasis added.]

- According to Georges Psycharis, then the Director of Engines and Airframe Maintenance at Air Canada, awareness of the availability of suppliers as of June 2012 was purely exploratory and relevant to a possible transition period;[87]

- There was no mention of any condition or criteria requiring performance, in whole or in part, at the Centres, or even in

---

83 Exhibit P-27.
84 Exhibit P-30.
85 Exhibit P-30, continuous numbering at 578.
86 Exhibit P-30, continuous numbering at 585.
87 The Court refers in particular to the testimony of George Psycharis at the hearing.

Canada.[88]

83.3. It concerned the airframe maintenance of the A320F, A330, B767, B777, and ERJ aircraft, that is, essentially all aircraft in Air Canada's fleet at the time;

83.4. In January 2012, Air Canada evaluated the first round of answers received from suppliers. Mr. Néron's team prepared a presentation compiling the analysis of the answers.[89] The document provided the following, among other things:

- A timeline for the process situated it entirely between January 6 and March 1, 2012. The last step of this timeline, scheduled for March 1, 2012, was titled: "ExCom approval sought to proceed to MOU(s)";[90]

- The formulation of two "likely scenarios for airframe maintenance sourcing", that is, the "Mid 2012: Short-term Implementation" scenario and the "Mid 2013: Long-term planning" scenario;[91]

- The description of the first scenario states, "Scenario based on the belief that labor talks with Aveos will escalate rapidly leading to short-term contract termination; Quick awarding of contract based on value and capacity to accommodate AC fleet; Likely short term contracts (1-2 years); Strong focus on suppliers ability to maintain fleet availability and reliability; Term: H2 2012 – H1 2014 (2 years)";

- The description of the second scenario states: "Scenario based on original planned mid-2013 start date following the expiry of current Aveos contract; Thorough process to award long-term contracts based on complete value proposition... .; Focus on maximizing value for the lowest possible price; Term: H2 2013 – H2 2016 (3.5 years +)";

- In both scenarios, the analysis points to huge savings when the lowest bid is compared with Aveos's proposal, that is, a price difference of between 63% and 83%, depending on the aircraft model and the scenario.[92]

83.5. On March 20, 2012, two days after Aveos's closure, Air Canada

---

88 Exhibit P-30, continuous numbering at 0591.
89 Exhibit P-19.
90 Exhibit P-19, continuous numbering at 0297.
91 Exhibit P-19, continuous numbering at 0305.
92 Exhibit P-19, continuous numbering at 0306, 0310, and 0314.

produced an evaluation of the second round of answers received from the bidders.[93] The budget forecast was becoming clearer. The evaluation included the following:

- A third scenario was developed for long-term planning as of September 2012. However, the description of the first scenario was slightly different. It stated, "Scenario based on the belief that 'groundhog' will escalate rapidly leading to short-term contract termination". The plaintiff infers from the terms used by Air Canada in this excerpt that there was a hidden agenda. Although he was responsible for the team that prepared this document, Mr. Neron was unable to confirm what this term referred to;[94]

- The third scenario was described as follows: "Scenario based on new contract kicking into plan September 2012; Thorough process to award long-term contracts based on complete value proposition (price, quality of service, reliability, etc.); Focus on maximizing value for the lowest possible price; Term: Q3 2012-H2 2016 (5 years +)";

83.6. On May 2, 2012, Air Canada produced the evaluation of the third round of answers.[95] It stated that substantial savings were still expected for 2012–2016, as were shorter turn around times.[96] It was noted that the third scenario, which was mentioned at the presentation on March 20, 2012, was developed following Aveos's bankruptcy ("Following Aveos bankruptcy, we have modeled a long-term scenario starting September-2012 for airframe maintenance sourcing");[97]

83.7. On August 20, 2012, Air Canada produced the evaluation for the fourth round of answers.[98] This evaluation stated the following:

- "Having completed the Technical Team evaluations as well as four rounds of bidding, the team is prepared to make recommendations that should result in savings of ~50% for the 777 and A330s, and potentially ~70% on the 767s against the Aveos baseline spend";[99]

83.8. On January 18, 2013, Air Canada produced an analysis of the bids received for components maintenance ("CpFH"), which was also relevant

---

93 Exhibit P-20.
94 Exhibit P-20, continuous numbering at 0327.
95 Exhibit P-21. This evaluation was completed on May 9, 2012, exhibit P-22.
96 Exhibit P-21, continuous numbering at 0383.
97 Exhibit P-21, continuous numbering at 0389. This statement also appears in exhibit P-23, continuous numbering at 0456.
98 Exhibit P-23. This evaluation followed the evaluation of the technical aspect dated July 18, 2012, exhibit P-24.
99 Exhibit P-23, continuous numbering at 0451.

to the process for airframe maintenance and overhaul:

- It provided the following regarding the premises used to renew the airframe maintenance contract:[100]

> When this process began the PMO acknowledged some basic assumptions:
>
> - Airframe: expectation that market-based sourcing effort would likely follow
>
> - Acknowledgment within AC and Aveos that Aveos was not cost competitive
>
> - Aveos did not see future in provisioning airframe maintenance

[Emphasis added.]

- With respect to the objective of the request for proposal process, Air Canada stated, "RFP issued to market in January 2012 with objective to begin transition to new provider(s) in summer 2012".[101]

[84] At the hearing, Mr. Kolshak confirmed that for the widebody airframe maintenance contract, he knew that the market prices were lower than Aveos's, because its labour costs were higher. He expected that the contract with Air Canada would not be renewed and that these activities would be phased out.[102] He was a bit more optimistic for the narrowbody airframes, because there was less competition.

[85] With respect to the component overhaul contract:

85.1. The process started at the end of 2011, out of Air Canada's desire to know more about and better understand the prices in effect in the market and to develop options for the provision of these services;[103]

85.2. The questionnaire given to the invited suppliers entitled "Supplier Qualifications and Capabilities Questionnaire"[104] was dated March 2012. Item 3.1 of the questionnaire stated the following:[105]

> 3.1 Canadian Content
>
> Supplier is asked to provide an overview of how they might provide

---

100 Exhibit P-31, continuous numbering at 0612.
101 Exhibit P-31, continuous numbering at 0616.
102 As stated in exhibit P-70.1.
103 Exhibit P-31, continuous numbering at 0611.
104 Exhibit P-32.
105 Exhibit P-32, continuous numbering at 0686.

> a Canadian solution for components maintenance, repair, and overhaul services. If Supplier has existing facilities within Canada, please describe below. If Supplier does not have existing facilities, please describe willingness of Supplier to develop capabilities within Canada, including location(s) and a proposed timeline.
>
> [Emphasis added.]

85.3. On March 28, 2012, a Request for Proposal bearing number RFP #20120328, was sent to certain invited suppliers for component maintenance and overhaul. On April 25, 2012, a version 3 of the document stated the following in its preamble:[106]

> Based on recent events related to the liquidation of Air Canada's primary components maintenance provider, Air Canada is now issuing a Request-for-Proposal (RFP) to support its ongoing components maintenance requirements. ...
>
> Air Canada has a strong preference for working with a Global MRO which has an interest and ability to provide component repair and overhaul services in Canada, specifically within the Montreal and Winnipeg regions.
>
> Supplier's ability to do so will be weighted significantly by Air Canada during the bid evaluation process. Discretion over employment and other business structure elements to fulfill these considerations will be entirely the Supplier's.
>
> Air Canada will evaluate proposals by considering various criteria, outlined below:
>
> - Supplier's ability or willingness to develop a Canada-based solution for the provision of component repair and overhaul services (see section 3.2 of the RFP document);
> - ...
> - Supplier's ability or willingness to perform a percentage of Air Canada's component repair and/or overhaul work in Montreal and/or Winnipeg ...
>
> [Emphasis added.]

85.4. On May 29, 2012, Air Canada assessed the first round of answers received from the suppliers.[107] This document stated that the possibility of the selected supplier acquiring Aveos's assets was still being

---

106 Exhibit P-36, continuous numbering at 0720. The content of the preamble is repeated in section 3 of the document entitled "RFP Evaluation Criteria", items 3.1 and 3.2 of the document, exhibit P-36, continuous numbering at 0734 and 0735.

107 Exhibit P-37.

considered;[108]

85.5. Other analyses for certain components were also conducted during the summer and fall of 2012;[109]

85.6. On January 18, 2013, Air Canada stated the following in an evaluation of the bids received:[110]

- On the premises used:[111]

> When this process began the PMO acknowledged some basic assumptions: ...
>
> - Components: expectation that Aveos would play a significant role in AC's components maintenance solution
>
> - Aveos invested in state-of-the-art components facility in recent years and believed to be only marginally more expensive than competitors
>
> - Loss of AC components business would jeopardize Aveos' viability as going concern and AC could be negatively impacted by this in multiple ways.

[Emphasis added.]

- As for the process undertaken, Air Canada explained the following:[112]

> Benchmarking suggested market ~40% below then-current Aveos pricing; great deal of skepticism internally around this gap (expectations in the rage of 10-15%)
>
> Initially, AC determined to pursue sole-source negotiation with Aveos for core CpFH components (80% of volume) and carve out some part families for selective outsourcing
>
> Following 1-month of discussions, Aveos presented proposal in late January '12
>
> - Proposals from Aveos yielded, at best, a 5% reduction from then-current rates

---

108 Exhibit P-37, continuous numbering at 0769.
109 See in particular exhibits P-39 to P-42.
110 Exhibit P-31.
111 Exhibit P-31, continuous numbering at 0612.
112 Exhibit P-31, continuous numbering at 0614.

> In early March the team began preparation of a comprehensive RFP as a contingency measure.[113]

- Air Canada stated the following on the impact of Aveos's demise on the process it had launched:[114]

> Closure of Aveos presented cost reduction opportunity, but ensuing discussions with the CRO added significant complexity to the process
>
> ...
>
> CRO Intervention
>
> - Legal negotiations with Aveos CRO altered the sourcing process
>
> - Structural changes to parts list to segment those for which Aveos facility had capabilities
>
> - Removal of all suppliers not able or well-suited to meet the demands of the CRO (i.e., perform ~50% of work in former Aveos Facility)
>
> - AC continued sourcing of 'non core' components
>
> - ... purchase of former Aveos facility relieved AC of any CRO obligations, allowing AC to resume more traditional RFP process.
>
> [Emphasis added.]

- With respect to the criterion of performing the work in Canada, the document referred to the preamble of the request for proposals set out above.[115]

[86] In connection with the request for proposals process, it appears that in the winter of 2012, Air Canada also prepared a contingency plan for the provision of maintenance services for its aircraft, in case certain events related to Aveos occurred. There are differing versions within Air Canada regarding what triggered that measure.

[87] According to Mr. Néron, who was given the mandate to prepare such a plan by his superior, Mr. Butterfield, the purpose was simply to fill in a gap because every company needs a contingency plan, even more so when it is dependent on one supplier, as was the case with Aveos. He explained that this plan was still in the draft stage when Aveos's

---

113 See also continuous numbering at 0618.
114 Exhibit P-31, continuous numbering at 0620.
115 Exhibit P-31, continuous numbering at 0652.

closed. He added that he was never informed of Aveos's formal notice dated February 14, 2012, in which the company threatened to close its doors.

[88] According to the testimony of Salvatore Ciotti, then the Senior Director of Financial Services and Operations at Air Canada, this plan contemplated the possibility of a renegotiation of the contracts with Aveos, it being understood that Aveos would continue to operate.

[89] The contingency plan was included in a presentation dated February 24, 2012, entitled "ACM Contingency Plan".[116] It identified the following scenarios and their impact on Air Canada:[117]

89.1. The *status quo* where Aveos would continue its activities at a slower pace, with a possible interruption in the event of its inability to pay salaries: increase in Aveos's current work for airframes, engines, and components;

89.2. CCAA proceedings: potential need to inject funds for continued service and to take steps with Aveos's part suppliers;

89.3. Sale of all or part of Aveos's assets: new supplier; quality may be affected; complexity in supplier management;

89.4. Sale of the contracts: new supplier with varying impacts; according to Mr. Néron, this scenario was never seriously considered;

89.5. Orderly liquidation of Aveos: highly complex transition to a new supplier base. This scenario was also not under serious consideration by Air Canada.

[90] As for airframe maintenance and overhaul, the plan provided the following, in parallel with the request for proposals process:[118]

> Current Status
>
> - Have identified immediate term capacity
> - Capacity availability responses received today (February 24, 2012)
> - If necessary, selected emergency suppliers may be brought to Montreal in the next two weeks to develop readiness plans

---

116 Exhibit D-30.
117 Exhibit D-30, continuous numbering at 0855.
118 Exhibit D-30, continuous numbering at 0857.

[91] It also stated that it would be necessary to identify the available leeway in the work scheduled with Aveos and to obtain pre-approval for any heavy maintenance to be done at Aveos.[119]

[92] According to the schedule in place at that time, heavy maintenance was scheduled six to eight times a week until April 22, 2012. Air Canada estimated the potential savings each time maintenance was not assigned to Aveos as ranging from US$90,000 to over US$800,000.[120]

[93] Air Canada had scheduled planned engine maintenance 16 or 17 times in the following 60 days and estimated the potential savings each time maintenance was not assigned to Aveos at between US$250,000 and US$580,000.[121]

[94] As for the components, Air Canada was considering the possibility of working with AAR-Aircraft Services Inc. (**AAR**) in the short term to develop an immediate response plan for repairs and the supply of parts.[122]

5.2 Discussions between Aveos and Air Canada, January–March 2012

[95] In addition to its steps regarding the request for proposals process and the contingency plan, Air Canada also had many discussions with Aveos and its counsel regarding Aveos's situation and their respective contractual complaints.

[96] The Court accepts the following from the evidence.

[97] On December 26, 2011, Mr. Kolshak provided Aveos's financial information for the period ending in November 2011, and the forecasts for the 2011 year-end. The net revenue from Air Canada was greater than what Aveos had budgeted for 2011.[123]

[98] On February 14, 2012, Aveos sent Air Canada a formal notice through its counsel.[124] It claimed that Air Canada had breached its contractual undertakings because it had "knowingly engaged in egregious delaying tactics to avoid payment of undisputed debts and other obligations owed to Aveos. Air Canada's actions have jeopardized Aveos' very existence". Aveos requested a high-level meeting and stated that unless such a meeting was held, it would be forced to take all measures to reduce its losses, including the possible closure of Aveos's operations in Canada. More specifically, it alleged the following against Air Canada:[125]

- Air Canada's bad-faith unilateral reduction of airframe maintenance work

---

119 Exhibit D-30, continuous numbering at 0857.
120 Exhibit D-30, continuous numbering at 0858.
121 Exhibit D-30, continuous numbering at 0860.
122 Exhibit D-30, continuous numbering at 0861.
123 Exhibit P-70, continuous numbering at 1377 and 1388.
124 Exhibit P-70.2, continuous numbering at 1406.
125 Exhibit P-70.2, continuous numbering at 1406 –1407.

> while insisting that Aveos continue operations from all legacy facilities, without providing offsetting compensation or maintenance volume;
>
> - Air Canada's outsourcing of heavy maintenance activities resulting in the labor arbitrator's prohibition on laying off excess airframe employees, without providing offsetting compensation to Aveos;
> - Air Canada's outright failure to reimburse Aveos for the costs associated with unproductive excess employees retained by Aveos when such employees were retained at the request of Air Canada;
> - Air Canada's failure, without justification, to make payments to Aveos in violation of the Services Agreement for Airframe Heavy Maintenance Services as of October 1, 2006;
> - Air Canada's false calculation of unionized and non-unionized post-employment liability in breach of the Pension and Benefits Agreement dated June 22, 2007 (as amended);
> - Air Canada's apparent bad-faith undermining of Aveos by improperly reducing engine maintenance activities year-over-year;
> - Air Canada's apparent bad-faith outsourcing of engine maintenance to Aveos competitors in violation of Aveos's exclusivity rights under the General Terms Agreement for Technical Services effective as of October 1, 2006; and
> - Air Canada's imposition on Aveos of prohibitively expensive non-industry standard repairs of BER APUs.
>
> ... Aveos intends to hold Air Canada responsible for all damages its conduct has caused to Aveos, which to information and belief exceeds $45 million.

[Emphasis added.]

[99] The next day, February 15, 2012, Air Canada answered[126] and categorically denied Aveos's accusations. A second letter from Aveos's counsel followed on February 18, 2012, in response to Air Canada's letter dated February 15, 2012,[127] reiterating the threat of closure in the absence of a meeting and a discussion concerning the issues raised by Aveos.

[100] On February 21, 2012, Mr. Kolshak told Mr. Rousseau that he was concerned because Air Canada had asked Aveos to return all the engines belonging to it that Aveos had in its possession.[128]

[101] The same day, in another email exchange, Mr. Kolshak told him that some Air Canada employees "are spreading the word that we are filing ... the consequences of this type of talk can be disastrous".[129]

---

126 Exhibit D-71.
127 Exhibit P-70, continuous numbering at 1412 and 1413.
128 Exhibit P-70.6, continuous numbering at 1416.
129 Exhibit P-70.5, continuous numbering at 1415.

[102] According to Mr. Rovinescu, Air Canada knew at that time that Aveos was in financial difficulty, that it was in an [TRANSLATION] "insolvability zone". It was not expecting the complete and definitive closure of its activities, however, but rather their continuation in one form or another following Aveos's reorganization.[130]

[103] It is from this perspective that Air Canada acknowledges having deferred or suspended certain planned maintenance activities in the days or weeks preceding the closure, within the available leeway period for such maintenance, in order to protect itself and ensure access to its aircraft.[131] According to Air Canada, this decision had only a very small negative financial impact on Aveos.

[104] Air Canada estimates that but for these deferrals, it would have had to pay Aveos approximately $8 million out of a total annual amount of $450 million, an amount it characterizes as insignificant.[132]

[105] On February 22, 2012, a meeting was held between Air Canada and Aveos during which Aveos asked Air Canada to make certain concessions.[133] Air Canada answered by letter on March 1, 2012.[134] It denied all the allegations against it set out in the letters from Aveos's counsel. It stated that it could not accede to all the concessions sought by Aveos but that it was open to discussing some of the requests.

[106] It is worth reproducing an excerpt from that letter:[135]

> [O]ur recent decision to review our maintenance schedule and implement certain maintenance deferrals results from the significant uncertainty caused by your stated intentions regarding Aveos' ability and desire to continue to operate and Aveos' explicit threats to cease operations. We have done this to protect our operations pending greater clarity.
>
> It is our interest that this unplanned maintenance deferral be a temporary measure as it is imperative that we restore our fleet maintenance program as quickly as possible to minimize risk of operational disruptions.
>
> Air Canada's overriding and immediate interest is that our airframes, engines, components and other parts and equipment are repaired and returned as required no matter what course of action Aveos ultimately adopts. It would be prudent and responsible for both parties to explore, with all possible speed, arrangements to ensure the expeditious performance of the work. We suggest, as we continue to explore options for further cooperation, that we task a team

---

130 The Court refers in particular to the testimony of Calin Rovinescu, Michael Rousseau, Gilles Néron, and George Psycharis at the hearing.

131 The Court refers in particular to the testimony of Michael Rousseau, Gilles Néron, and George Psycharis at the hearing.

132 That is, 50% of the amount of $16 million alleged by Aveos in exhibit P-74 at para. 3. See also the testimony of Gilles Néron.

133 See in particular exhibit P-70, continuous numbering at 1425.

134 Exhibit P-70.7, continuous numbering at 1426.

135 Exhibit P-70.7, continuous numbering at 1426 and 1427.

> from both sides to work out, cooperatively (on a "without prejudice", confidential basis) precisely what is required to achieve that objective with a view to minimizing the adverse financial and logistical consequences of your current situation. ...
>
> [Emphasis added.]

[107] On March 8, 2012, Mr. Kolshak described discussions with Mr. Rousseau and the hope of resolving the difficulties between the companies. He wanted to defer all irremediable decisions to Aveos's board of directors, which was scheduled to meet the next day, and required certain financial and operational undertakings from Air Canada to obtain additional time to negotiate.[136] That included the resumption of scheduled maintenance and the payment of certain amounts.

[108] The next day, on March 9, 2012, Mr. Rousseau answered[137] that before responding to Mr. Kolshak's requests, he required more information, including information on Aveos's ability and desire to provide the agreed service to Air Canada. He wanted to hold a meeting with certain interested parties in New York the following week. He concluded by stating, "With better clarity on the company's plans and the visibility of lender/shareholder objectives, Air Canada will be in a much better position to discuss constructive actions to meet our common objectives".

[109] On March 13, 2012, Mr. Kolshak informed Mr. Rousseau that he would send him a "term sheet" for his comments in preparation for his meeting in New York the following Thursday.[138]

[110] On March 14, 2012, Mr. Kolshak sent Mr. Rousseau an email setting out Aveos's request:[139]

> Attached is our ask. It has essentially four elements:
>
> 1. Cash to bridge us over the 2 week period $10.8M (5.3M 2011 Supplement, $1.5M transition invoice & 3.8 M Q1 2012 supplement)
> 2. Resume AF & Engine inductions
> 3. Agree not to setoff payments over the two week period
> 4. Cooperate & assist with the EMC monetization
>
> We can discuss this either before tomorrow's meeting or during. I would also like to see anything you plan on presenting tomorrow.

---

136 Exhibit P-70, continuous numbering at 1417.
137 Exhibit P-70, continuous numbering at 1369.
138 Exhibit P-70, continuous numbering at 1428.
139 Exhibit P-70.10, continuous numbering at 1418.

[111] The next day, March 15, 2012, Mr. Rousseau sent Mr. Kolshak Air Canada's short-term financing proposal,[140] which included the following:

> Further to our discussions and exchanges, I'm writing to confirm Air Canada's offer to provide short term financing to Aveos to help it meet its short term cash requirements until March 30, 2012.
>
> Air Canada hereby offers to lend Aveos amounts up to a maximum of $5 million (the "Loan") to be advanced in one or several tranches ... with a first Advance to be available as of March 16, 2012, all on the following terms and conditions:
> ...

[112] Air Canada's offer was subject to certain conditions, including the financing term, which was to be until March 30, 2012, at the latest, and an undertaking by Aveos not to bring legal protection proceedings under any bankruptcy or insolvency statute before that date. In conclusion, Air Canada added:[141]

> Air Canada is willing to reasonably cooperate with Aveos to explore opportunities in respect of Aveos' efforts to assign its engine and/or components maintenance businesses, without however, in any way affecting or waiving any of Air Canada's rights, including its rights to consent to such assignment under any agreement between Aveos and Air Canada.
>
> [Emphasis added.]

[113] According to Mr. Rovinescu, Air Canada's openness to Aveos assigning some of its contracts was in keeping with its desire to help Aveos find a solution to its financial difficulties.

[114] This letter was accompanied by an email from Mr. Rousseau to Mr. Kolshak stating the following:[142]

> Dear Joe,
>
> I am presenting Air Canada's offer to provide short term financing to Aveos to help it meet its short term cash needs which we estimate at up to $5 million. We'll need to fully understand these requirements and are available to speak this evening to review the initial cash utilization requirements and to firm up the amount of the initial advance.

[115] On March 16, 2012, the various stakeholders held a call to discuss the situation.[143]

[116] On March 17, 2012, Mr. Rousseau sent a "Debtor In Possession" or "DIP" financing proposal and confirmed that after an unproductive discussion the day before, Air Canada would not propose any other short-term financing. The proposal provided for

---

140 Exhibit P-70.11, continuous numbering at 1420 *et seq.*; exhibit D-22.
141 Exhibit P-70.11, continuous numbering at 1422.
142 Exhibit D-22.
143 Exhibit P-70.12, continuous numbering at 1401.

the payment of $15 million, subject to several conditions, including the continuation of Aveos's operations for the maintenance and overhaul of Air Canada aircraft in Aveos's possession and the aircraft that Air Canada would provide to Aveos.[144]

[117] Air Canada specified that this proposal was made in the context of Aveos's expected judicial reorganization under the bankruptcy and insolvency statutes.[145]

[118] On March 18, 2012, Aveos filed an application for an initial order under the CCAA,[146] in particular requesting a stay of proceedings against Aveos and the appointment of FTI Consulting Canada Inc. as monitor.

[119] All of Air Canada's representatives stated that they found out about Aveos's closure on March 18, 2012, and that this drastic decision took them by surprise.

[120] On March 19, 2012, an initial order was issued,[147] providing the following in particular:

120.1. Ordering the stay of proceedings against Aveos and its officers and directors;

120.2. Declaring that Aveos could cease its operations, temporarily or permanently;

120.3. Declaring that Aveos could terminate its employees' employment, temporarily or permanently; and

120.4. Appointing FTI Consulting Canada Inc. to act as monitor.

[121] On the evening of March 19, 2012, Aveos refused Air Canada's DIP offer, characterizing it as disappointing and unacceptable.[148]

[122] The next day, March 20, 2012, the monitor filed its first Report,[149] which provided the following:

122.1. As a result of the Superior Court order , Air Canada made a $15 million DIP financing offer on March 19. That offer was subject to several conditions and guarantees;

122.2. Aveos and its lenders refused the offer, because in their view, it was

---

144 Exhibit D-23, section 6h, continuous numbering at 0811.
145 Exhibit D-23, introductory paragraph, continuous numbering at 0807.
146 Exhibit P-74.
147 Exhibit D-6.
148 Exhibit D-24.
149 First Report to the Court submitted by FTI Consulting Canada Inc., in its capacity as Monitor, exhibit P-72.

unacceptable and did not concern the payment of the amounts owing by Air Canada to Aveos. In addition, the offer did not provide the liquidity required to keep Aveos's operations viable and to maintain the employment of its employees.[150] Despite the seriousness of the crisis, Aveos and Air Canada did not meet with each other;

122.3. Once informed of the situation, the lenders confirmed their intention not to make additional funds available to Aveos. Accordingly, Aveos's board of directors, which did not have access to any additional liquidity, decided to terminate the company's operations and remaining employees on March 20, 2012.[151]

[123] The same day, a second order was issued, providing for the appointment of a Chief Restructuring Officer.[152]

[124] On March 28, 2012, Mtre Pierre Legault, Assistant Deputy Minister of the Business and Regulatory Law Portfolio at Justice Canada, issued a memorandum expressing his opinion that Air Canada was in compliance with paragraph 6(1)(*d*) of the *Act* after Aveos's closure,[153] for the reasons set out in greater detail below.

[125] On March 29, 2012, hearings were held before the Standing Committee on Transport, Infrastructure and Communities on the subject of Aveos's closure and Air Canada's intentions.[154] At that time, the President and Chief Executive Officer of Air Canada, Mr. Rovinescu, testified and stated the following:

125.1. Air Canada had no intention of repurchasing Aveos;[155]

125.2. Air Canada was in compliance with the *Act* despite Aveos's cessation of operations, in particular considering the Newbould Judgment and the legal opinion referred to above requested and provided by Transport Canada;[156]

125.3. Air Canada was planning to prioritize an overhaul and maintenance service supplier that could offer a solution providing for the performance of the work in Canada while being viable and competitive.[157] Such a supplier would have access to a pool of specialized employees and

---

150 Exhibit P-72 at paras. 12 and 13.
151 Exhibit P-72 at paras. 16 and 17.
152 Exhibit D-7.
153 Exhibit D-12.
154 Exhibit P-85.
155 Exhibit P-85 at 5.
156 Exhibit P-85 at 2. The Court refers in particular to the testimony of Mr. Rovinescu at the hearing.
157 Exhibit P-85 at 7.

employment opportunities would thus be offered and encouraged.[158]

[126] A representative of the federal Department of Transport and the attorney from Justice Canada who issued the legal opinion referred to above on Air Canada's compliance with paragraph 6(1)(*d*) of the *Act* and with its articles of continuation also testified. They stated the following:

126.1. The Department of Transport was of the view that Air Canada was in compliance with the *Act* despite Aveos's closure, considering that:

126.1.1. Paragraph 6(1)(*d*) of the *Act* required Air Canada to incorporate into its articles of continuation an obligation to maintain the Centres. Because Air Canada's articles contained such a provision, Air Canada was in compliance with the *Act*;

126.1.2. Air Canada was in compliance with the equivalent provision in its articles of continuation because, as described in the Newbould Judgment, it performed aircraft maintenance activities in the three cities in question;

126.1.3. Indeed, they were of the view that in that other case, "the judge gave strong indication that quite apart from the work done by Aveos, Air Canada would likely continue to be in compliance with its articles by maintaining certain overhaul functions through its line maintenance operations in Montréal, Mississauga, and Winnipeg" and that "I think it's possible for Air Canada to be in compliance even if Aveos has disappeared, and I think the judge has left that door open";[159]

126.1.4. The attorney assessed the chances of success of an action contesting Air Canada's compliance with the *Act* following Aveos's closure as low, stating, "What I'm saying is that if ACPPA is being violated now, as the opposition argues, there is nothing to stop a court from independently finding that after a complaint is brought".[160]

[127] On April 3, 2012, the Chief Restructuring Officer filed his first report with the Court. It stated that on the date of his appointment, Aveos had $12 million in its coffers.[161]

---

158 Exhibit P-85 at 7.
159 Exhibit P-85 at 12.
160 Exhibit P-85 at 14.
161 Exhibit D-26 at para. 21, continuous numbering at 0838.

[128] On April 6, 2012, Air Canada published a news release in which it stated the following:[162]

> The closure of Aveos's facilities will not have an impact on Air Canada's day-to-day aircraft maintenance and repair activities or on its scheduled operation. This day-to-day maintenance work is performed directly by Air Canada at its own facilities across Canada – including Montreal, Winnipeg, Vancouver and Toronto – by Air Canada's 2,300 maintenance employees.
>
> ...
>
> Air Canada has a strong preference for working with a Global MRO which has an interest and ability to provide component, repair and overhaul services in Canada, with particular emphasis given to Montreal, Winnipeg, Vancouver and Toronto. There exists a pool of well-trained, qualified and talented people available in these cities.

[Emphasis added.]

[129] On April 11, 2012, Air Canada sent a letter to the Minister of Justice and the Attorney General of Quebec, the Honourable Jean-Marc Fournier, in response to a letter from him dated April 3, 2012.[163] Air Canada confirmed its position that it considered itself to be currently in compliance with the *Act* despite Aveos's closure. It based its opinion on the Newbould Judgment and the legal opinion referred to above filed with the Standing Committee on Transport, Infrastructure and Communities.

[130] On April 20, 2012, an order was issued approving the process submitted for Aveos's liquidation.[164] It is important to note that the process for selling Aveos's assets comprised several steps, such as the receipt and analysis of offers to purchase by potential buyers, including their proposal regarding Aveos's employees who would be expected to become employees of the buyer.[165]

[131] On May 1, 2012, the Chief Restructuring Officer filed his second report.[166] He concluded as follows:

> 55. The CRO is of the view that the continuation of the CCAA Proceedings provides the Company with an opportunity to complete the Divestiture Process, which may lead to the restart of one or more divisions, create employment opportunities for some former Aveos employees and enhance the value to be recovered by the Secured Lenders whose collateral is currently funding the CCAA process.

---

162 Exhibit D-27.
163 Exhibit D-67.
164 Exhibit D-8.
165 Exhibit D-8 at 6, continuous numbering at 0811.
166 Exhibit D-25, continuous numbering at 0825.

[132] On May 2, 2012, Air Canada filed a *de bene esse* motion with the Court to lift the stay of proceedings in its regard and allow it to confirm the termination of the maintenance service contracts binding it to Aveos.[167]

[133] On May 16, 2012, the monitor filed its seventh report, describing the possible impact of Air Canada's proceedings to terminate the contracts with Aveos.[168] It stated the following:

> 26. The Monitor is advised by the Debtors that the uncertainty created by the Air Canada Motion may well be impacting the Divestiture Process as parties are expressing concern over Air Canada's willingness to participate in the Divestiture Process and support a potential acquirer of the Aveos business.
>
> 27. The Monitor favours and continues to favour a solution that would ensure Air Canada's full cooperation and would allow a better aligning Air Canada's requests for proposal with the Divestiture Process to maximize the Divestiture Process' chances of success. The Monitor invites Air Canada and Aveos to pursue their discussions to address Air Canada's concerns and to avoid the legal confusion created by the pendency of the Air Canada Motion to avoid any possible chilling effect on the Divestiture Process.
>
> [Emphasis added.]

[134] On May 30, 2012, following Air Canada's withdrawal of its *de bene esse* motion, Aveos and Air Canada agreed to terminate the contracts binding them, except for the engine maintenance and overhaul contract, which was replaced by a new agreement that would be assigned in the context of Aveos's liquidation process, by August 15, 2012, at the latest, failing which it would be terminated.[169]

[135] On June 5, 2012, the monitor submitted its eighth report to the Court. It stated that Air Canada and Aveos had reached an agreement concerning issues that were the subject of Air Canada's *de bene esse* application, resulting in Air Canada withdrawing its proceeding.[170] According to the monitor, this agreement improved the chances of successfully selling the engine and component maintenance operations, despite the inherent risks of the liquidation process.[171]

[136] On August 24, 2012, an application for authorization to assign the engine maintenance and overhaul contract was presented to the Court. It was granted the same day. The order confirmed the assignment of the contract to Lufthansa Technik AG, despite challenges by another bidder and by the IAMAW, which submitted that the second proposal would save 100 to 150 jobs in Canada.[172]

---

167 Exhibit D-9.
168 Exhibit P-80.
169 Exhibit D-10.
170 Exhibit D-28.
171 Exhibit D-28 at para. 18, continuous numbering at 0847.
172 Exhibit D-11, in particular at paras. 12 and 30–32, continuous numbering at 0156 and 0159.

5.3 Aveos's revenue from Air Canada

[137] Air Canada and Aveos accuse each other of defaulting on the payment of invoices. The plaintiff takes the position that the invoices that went unpaid by Air Canada, especially in the months preceding the cessation of Aveos's operations, were an important trigger of Aveos's insolvability.

[138] It was only in September 2013 that the parties agreed to remit amounts, without admission of liability, in exchange for mutual releases, including for the outstanding invoices.[173] An amount of approximately $12 million was thus paid. The agreement reached between the parties at the time included a schedule stating that Air Canada had $128 million (including tax) in outstanding Aveos invoices[174] and that Aveos had $116 million (including tax) in outstanding Air Canada invoices.[175]

[139] As for the volume of business that Air Canada provided to Aveos in 2012, some numerical evidence was adduced, and Gilles Néron was called to provide additional details in this regard.

[140] Overall, the amounts paid by Air Canada to Aveos for services rendered from 2008 to 2012 were as follows:[176]

2008 (12 months)	2009 (12 months)	2010 (12 months)	2011 (12 months)	2012 (part)
$507,867,453	$513,778,710	$365,487,091	$445,746,345	$117,124,574

[141] These numbers show that the amounts paid for the performance of the service contracts could vary significantly from one year to the next.[177]

[142] For 2011, an amount of over $37 million was included in the total amount for work invoiced before 2011 and paid in 2011. In comparison, for 2012,[178] an amount of over $35 million was paid for work invoiced in 2011.[179]

[143] The plaintiff contests the relevance of including amounts paid in 2012 for work invoiced in 2011.

---

173 Exhibit D-73.

174 That is, an amount of $136 million from which the $7.9 million credit note is deducted, exhibit D-73, *Schedule B*.

175 Exhibit D-73, *Schedule A*.

176 Exhibit D-72.

177 For example, there was a decrease of approximately 29% between 2009 and 2010 and an increase of approximately 18% between 2010 and 2011.

178 That is, by October 2012 at the latest, according to the numbers submitted in exhibit P-84.

179 Exhibit P-84.

[144] If we accept this position and deduct the $37 million in revenue in 2011 and $35 million in 2012, we are left with an invoiced amount of $408 million for 2011 and $82 million for 11 weeks in 2012. After annualizing the latter amount, we are left with a volume of work of $388 million for 2012, a 5% reduction in comparison to 2011.

[145] Taking into account the amounts invoiced in the preceding year and paid in the current year, we get the amount of $445 million for 2011 and an annualized amount of $423 million for 2012, also a 5%.reduction

[146] A comparison of work on a monthly basis for the periods from January 1 to March 18 for 2011 and 2012 reveals the following:[180]

	January	February	March 1 to 18	Total
2011	$39,175,469.39	$36,415,773.34	$26,450,362.08	$102,041,604.81
2012	$33,025,270.19	$32,251,847.23	$22,360,724.65	$87,637,842.07

[147] Thus, when compared on a monthly basis, there is a reduction in the assigned work of approximately 16% in 2012, compared to the same period in 2011.

5.4 The employee Class members

[148] On March 18, 2012, Aveos was the owner of the Montreal Centre's physical facilities, on land belonging to Air Canada. For the Winnipeg and Mississauga Centres, however, it rented facilities belonging to Air Canada.[181]

[149] In February 2012, Aveos employed 2,620 workers, 88% of whom were unionized.[182] Close to 2,000 of them were transferred from Air Canada in July 2011, thus following other workers who were transferred before them.[183] Ultimately, 2,198 former workers of Air Canada and Aveos are Class members.[184]

[150] Aircraft maintenance and overhaul activities can be performed only by an experienced, specialized workforce. It appears that the Centres' workers were experienced, and many of them had acquired specific knowledge, skills, and experience,

---

180 Exhibit P-84.

181 Aveos's Petition for the Issuance of an Initial Order dated March 18, 2012, and affidavit of Mr. Kolshak, exhibit P-74. See also the testimony of Mr. Kolshak's testimony at the hearing.

182 Aveos's Petition for the Issuance of an Initial Order dated March 18, 2012, at para. 53 and affidavit of Mr. Kolshak, exhibit P-74.

183 Exhibit P-74 at para. 57.

184 Plaintiff's written submissions at para. 281.

primarily through a comprehensive training program offered internally by Air Canada over the years.

[151] In this regard, it appears that training by level and in blocks was given by Air Canada in its premises. Thus, apprentice level 1 to 4 (each level requiring six months), junior level 1 to 4 (each level requiring six months), and mechanic level 1 to 4 (each level requiring one year) were offered to the employees progressing within the company.[185]

[152] Air Canada issued training certificates. For example, the plaintiff was given a certificate for having completed 735 hours of general and professional training and four years of practical training.[186]

6. THE PERIOD SUBSEQUENT TO AVEOS'S CLOSURE

6.1 The maintenance of Air Canada's aircrafts following Aveos's closure

[153] On August 31, 2012, Air Canada signed a letter with AAR, amending an existing agreement dated April 12, 2012, entrusting to it the airframe maintenance and overhaul of its A319, A320, and A321 narrowbody aircraft for the period from September 2012 to September 2017.[187]

[154] This agreement was further to request for proposals #20120106 dated February 10, 2012, for airframe maintenance and overhaul.[188]

[155] The maintenance and overhaul of widebody aircraft was entrusted in its entirety outside Canada.

[156] Engine maintenance and overhaul were entrusted to Lufthansa Technik in Germany, except for certain small engines, which were entrusted to a company in Ville Saint-Laurent.

[157] Component maintenance and overhaul were done mainly by AAR in the State of New York. This company eventually opened an engineering centre in Ville Saint-Laurent.

[158] Accordingly, subject to some exceptions, it appears that for the entire period in dispute after Aveos's closure, airframe, engine, and component maintenance were done outside Canada. This factual situation was also noted in the conclusions of the Castonguay Judgment and the CA Judgment on the issue.

---

185 The Court refers in particular to the testimony of Gilbert McMullen, Renald Courcelles, Marc Landry, and Glenn O'Connor at the hearing.

186 Exhibit P-13.

187 Exhibit P-73.

188 Exhibit P-73 at 5.

6.2 Air Canada's payment of the indemnity under the Agreement of January 8, 2009

[159] As set out below, Aveos's closure in March 2012 was a condition precedent to the payment of the indemnity pursuant to the Heavy Maintenance Separation Program.[189]

[160] Indeed, because the termination of employment of Aveos's unionized employees took place before June 30, 2013, Air Canada was required to pay, and in fact paid[190] an indemnity equal to two weeks' pay for each completed year of continuous service, up to a maximum of 52 weeks, to the employees in question.

[161] On September 12, 2012, arbitrator Martin Teplitsky rendered a decision in the context of a dispute between Air Canada and IAMAW regarding the payment of the indemnity.[191]

[162] The decision set out the terms of the 1,500 severance payments, totalling $55 million.

[163] Air Canada defined the notion of continuous service as follows in the explanatory letters sent to Aveos's former unionized employees in December 2012:[192]

> [TRANSLATION]
>
> **Continuous Service**: Corresponds to the number of completed years of service since your last hiring date at Air Canada and the date of your termination of employment due to Aveos's insolvability. ... For example, if you joined Air Canada four years and seven months ago, you have four years of continuous service.

[164] Therefore, the number of years of continuous service took into account the cumulative years worked at Air Canada and Aveos.

[165] The letter also stated the following:[193]

> [TRANSLATION]
>
> On January 31, 2011, the Canada Industrial Relations Board issued order No. 9996-U, which led to the creation of separate bargaining units for Aveos's employees.
>
> According to the terms of that order, Air Canada was required to compensate Aveos's employees represented by the IAMAW who were employed by Aveos

---

189 Exhibit D-4, continuous numbering at 0060.
190 The Court refers in particular to the testimony of Salvatore Ciotti of Air Canada at the hearing.
191 Exhibit D-31.
192 Exhibit P-14.
193 Exhibit P-14.

> on the date of issuance of the order that led to the creation of distinct bargaining units (January 31, 2011), if certain events occurred.
>
> [Emphasis added.]

7. THE DECLARATORY JUDGMENTS OF THE SUPERIOR COURT OF QUEBEC AND THE COURT OF APPEAL OF QUEBEC

7.1 The Castonguay Judgment

[166] On April 17, 2012, the Attorney General of Quebec filed a Motion to institute proceedings for a declaratory judgment against Air Canada in response to Aveos's closure in the preceding weeks. This proceeding was amended to add the Attorney General of Manitoba as intervenor in November 2012[194] (**Motion for declaratory judgment**).

[167] The proceeding concerned the interpretation of paragraph 6(1)(*d*) of the *Act* in light of the situation that existed since Aveos's closure and the transfer of the activities that Aveos performed for Air Canada to third parties, located mostly outside Canada.

[168] On February 4, 2013, the Honourable Martin Castonguay granted the Motion for declaratory judgment,[195] concluding as follows:

> [TRANSLATION]
>
> [281] **DECLARES** that the maintenance and overhaul tasks referred to in paragraph 6(1)(*d*) of the Act include the overhaul of components, engines, and airframes (heavy maintenance);
>
> [282] **DECLARES** that the defendant is in breach of the Act by failing to maintain operational and overhaul centres for the overhaul of its aircraft on the territory of the Montreal Urban Community;
>
> [283] **DECLARES** that the defendant must continue to perform or have performed the maintenance and overhaul of the components, engines, and airframes (heavy maintenance) of its aircraft on the territory of the Montreal Urban Community;

[169] To arrive at these conclusions, the Castonguay Judgment provided an analysis of the following subjects:

169.1. The general history of Air Canada, particularly regarding maintenance;

169.2. The interaction between Aveos and Air Canada regarding the maintenance of its fleet, in light of regulatory standards;

---

194 Exhibit P-7.
195 Exhibit P-8.

169.3. The consequences of Aveos's demise, that is, the events that precipitated its collapse, the analysis of the expert evidence, and the impact of Aveos's absence on the maintenance of Air Canada's fleet.

[170] The Castonguay Judgment decided legal issues concerning the following:

170.1. The argument of *res judicata* raised by Air Canada further to the Newbould Judgment rendered on May 25, 2011, in a dispute involving the IAMAW and Davis Ritchie against Air Canada and Aveos;

170.2. Air Canada's argument that it was in compliance with the *Act* because it maintained operational and overhaul centres in Winnipeg, Mississauga, and the Montreal Urban Community;

170.3. Air Canada's argument that it was in compliance with the *Act* because its articles of incorporation include the statement set out in paragraph 6(1)(*d*) of the *Act*.

[171] It is important to note that the plaintiff renounced his right to proceed with his *de bene esse* application for authorization to file in the record the transcript of examinations held in the file before the Honourable Martin Castonguay and specified that the purpose of filing exhibit P-71 was solely to illustrate the evidence adduced before Castonguay J., not as proof of its content in this case, with certain exceptions for excerpts of evidence filed and identified separately.[196]

7.2 The judgment of the Court of Appeal of Quebec

[172] Air Canada was dissatisfied with the Castonguay Judgment and appealed before the Court of Appeal of Quebec. The issues on appeal, as formulated by the Court of Appeal, were as follows:

172.1. Is it necessary to revise the findings in the trial judgment regarding the fact that Air Canada no longer maintains the centres it operated when the *Act* came into force in the Montreal Urban Community, in Winnipeg, or in their surrounding areas, nor does it maintain equivalent activities?

172.2. Does the Attorney General of Quebec have the interest required to challenge this factual situation, and did it choose the appropriate remedy? What about the intervenor, the Attorney General of Manitoba?

172.3. Does the factual situation noted by the trial judge, if any, violate paragraph 6(1)(*d*) of the *Act*?

172.4. Is it necessary to correct the formulation of the conclusions of the trial

---

196 See the minutes of hearing of October 22, 2021.

judgment?

[173] On November 3, 2015, after a detailed analysis, the Court of Appeal of Quebec dismissed Air Canada's appeal.[197]

[174] The Court notes the following from the reasons of the CA Judgment.

[175] The Court of Appeal reviewed the background to the adoption of the Act. It reached the following conclusions, among others, further to a reading of the *Act* as a whole and of the parliamentary debates surrounding its enactment:

175.1. Parliament clearly wanted to transform Air Canada, a Crown corporation, into a private company, and that is indeed what it did by adopting the *Act*;[198]

175.2. However, because the corporation was the product of substantial collective investment, although now deemed counter-productive, costly, and ill-suited to global competition, Parliament nevertheless wanted to preserve certain assets considered politically important.[199] On April 12, 1988, when it announced to the House of Commons that a bill would be tabled resulting in the privatization of Air Canada, it quoted the words of Deputy Prime Minister Mazankowski, including the following excerpt:

> The major operational and overhaul centres which have been built up over the years in Montreal, Toronto, and Winnipeg are sources of great pride for Air Canada and fundamental to the success of this airline. No centres will be degraded. The overhaul base in Winnipeg will continue as a prominent and integral function of Air Canada and an aircraft fleet will continue to be maintained there. These centres which have been built up over the years will be continued as the airline builds for the future in the new market-driven environment.
>
> [Emphasis added.]

175.3. The Court of Appeal also found that [TRANSLATION] "the inclusion of paragraphs (*d*) (preservation of the operational and overhaul centres run by the corporation in certain cities) and (*e*) (peremptory establishment of the location of the head office) met requirements of national geopolitics, but also reflected the desire to ensure that the new company would be Canadian, by physically tying it to certain regions of the country".[200]

---

197 CA Judgment, exhibit P-9.
198 CA Judgment at para. 15.
199 CA Judgment at para. 15.
200 CA Judgment at para. 17.

[176] The Court of Appeal explained the transfer of maintenance and overhaul activities from Air Canada to ACTS, and then to the entity that would become Aveos, as well as the conflicts surrounding the transfer of Air Canada's unionized jobs to ACTS.

[177] In response to the first issue, whether it was necessary to revise the findings of the Castonguay Judgment regarding the fact that Air Canada no longer maintained the Centres it operated in 1988 or their equivalent at the specified locations in the territory of the former Montreal Urban Community, in Winnipeg, or in their surrounding areas, the Court of Appeal concluded as follows:

177.1. After a thorough analysis of the evidence, the trial judge found that Air Canada, although it still had (through its own staff or otherwise) certain maintenance activities in the Montreal and Winnipeg areas, no longer maintained the centres it operated at the time the *Act* came into force and was no longer conducting equivalent activities there, either directly (by its own employees) or indirectly (through the intermediary of subcontractors, outsourcers, or other service providers);[201]

177.2. Regarding Air Canada's argument that the trial judge's findings of fact were contrary to the Newbould Judgment with respect to Air Canada's compliance with the *Act*, the Court of Appeal specified that there was no *res judicata* considering the absence of identity of parties and of cause. In addition, it confirmed the Castonguay Judgment's finding that Newbould J.'s remarks on this subject were clearly *obiter dictum*.[202] The Court added the following:

> [TRANSLATION]
>
> [70] This opinion does not have the scope of a simple presumption sometimes referred to in the commentary and the case law to describe the effect of a finding of fact made in a judgment that does not have the effect of *res judicata* on another dispute – or such presumption has been rebutted in this case. It is an ordinary fact that the trial judge could of course consider and that he did in fact consider. However, for obvious reasons, it cannot be deemed conclusive, because – and this is crucial – the context of the dispute before the judge was not the same, nor was the issue to be tried. Indeed, the delegation of Air Canada's heavy maintenance activities to Aveos was being challenged before Newbould J., but Aveos no longer exists, and the activities entrusted to it have now been entrusted to others, which operate mostly outside the Montreal and Winnipeg areas (and more precisely, even outside Canada). It is this most recent factual situation that was discussed before the Superior Court of Quebec and on which the judgment under appeal ruled. In 2011, it was open

---

201 CA Judgment at para. 52.

202 CA Judgment at paras. 63 –68.

> to Newbould J. to opine, in *obiter*, that Air Canada was in compliance with the *Act* by sub-contracting its heavy maintenance activities to Aveos (which operated in the same premises) or that Air Canada was still conducting heavy maintenance activities and line maintenance at that time, but that finding did not bind the judge in this case, who ruled in 2013 on the basis of the evidence adduced before him on an entirely different cause of action.
>
> [71] In short, in light of all the contradictory evidence submitted to him, including the Newbould Judgment, the trial judge concluded as follows:
>
> > [TRANSLATION]
> >
> > [247] As we have seen, besides the subcontract granted to Standard Aero for one family of engines, the reality is that there is no longer any heavy maintenance in Winnipeg. The only maintenance carried out there by A/C is line maintenance for transit aircraft.
> >
> > [248] The situation in Montreal is no better. While some work done during line maintenance may be characterized as "*révision*" or "overhaul", it is a trivial amount compared to what was done there up until March of 2012. In light of the evidence as a whole, the facts do not support the position put forward by A/C.
>
> [72] There is nothing to add to this two-fold conclusion, and even less in light of the applicable standard of review.
>
> [Emphasis added.]

[178] In response to the second issue, regarding the Attorney General of Quebec and the Attorney General of Manitoba's interest to act, and the appropriateness of the action for declaratory judgment instituted, the following excerpts of the analysis of the Court of Appeal's judgment are relevant:

> [TRANSLATION]
>
> [77] To respond to these grounds, it is necessary to first consider the essential character of the dispute. The issue of interest or standing, like the issue of the appropriate procedural vehicle, cannot be severed from the identification of the legal issue. Let us consider this.
>
> [78] The answer is obvious. The issue here is whether Air Canada is in compliance with paragraph 6(1)(*d*) of the *Act*, which requires a determination of the meaning and the scope of this provision. That is the heart of the debate. ... But the fact that the parties do not agree on the meaning of paragraph 6(1)(*d*) of the *Act* changes nothing about the nature of the case, which is to interpret this provision and then verify whether there is in fact compliance here. That is the issue in dispute and it is from this perspective that the Court must

assess (1) the interest of the Attorney General of Quebec and the Attorney General of Manitoba (below at para. [79] *et seq.*) and (2) the appropriateness of the procedural vehicle chosen to assert this interest (below at para. [94] *et seq.*).

...

[80] With respect, it seems to me that, on the contrary, the Attorney General of Quebec has the legal interest required to debate these issues. The same is true for the Attorney General of Manitoba, who has sufficient interest to intervene.

[81] In general, it would no doubt be difficult to imagine the attorneys general of the provinces or of Canada routinely intervening in private legal disputes between private legal parties or actively getting involved in the control of the internal affairs of corporations. Air Canada is a legal person established for a private interest, and at first glance we could therefore think that its decisions are not only outside the field of public law, but also outside the field of the public interest and thus even outside the ordinary scope of the attorneys general.

[82] However, there are situations where issues of public interest justify the action of the attorneys general and even that of other litigants, as recognized, for example, in *Downtown Eastside* and *Manitoba Metis Federation Inc. v. Canada (Attorney General)*. What is the case here? Are the meaning of paragraph 6(1)(*d*) of the *Act*, and whether Air Canada breached it, issues of public interest, which, in regard to standing and interest to act, justify the broad approach adopted in *Downtown Eastside* and *Manitoba Metis Federation Inc.*?

[83] That is the case. Public law and the public interest are indeed at issue here as a result of the legislative framework specific to the corporation. The legislative decision pursuant to which a public entity becomes a private entity and the statute that express this desire fall within the field of public law, in particular because they concern property of the State, and more specifically the property it chooses to dispose itself of. It also hardly needs to be stated that it is a decision of public interest. Similarly, any mandatory conditions imposed by Parliament on such transition from the public to the private domain are all matters of public law, public interest, and public order.

[84] It is precisely such a law that is at issue in this case. It is necessary to ascertain the meaning of the conditions it provides and verify their application. Although it has become a legal person established for a private interest generally governed by the *Canada Business Corporations Act*, Air Canada remains subject to the *Act*, the prescriptions of which, it should be recalled, prevail. The issue in dispute is therefore not simply an issue of private law, but also one of public law in that it concerns matters of public interest (the maintenance of the Montreal and Winnipeg overhaul centres). Of course, there is nothing constitutional about this case, but issues or matters of [TRANSLATION] "public interest" are not limited to that field.

...

> [87] The issue raised by the attorneys general is indeed justiciable (it is a classic issue of interpreting the statute and verifying its application to a specific factual situation) and serious (it is an important issue). In fact, Air Canada does not contest this.
>
> ...
>
> [90] That is certainly the case here, where the Attorney General of Quebec, assisted by the Attorney General of Manitoba, has presented a motion for declaratory judgment seeking a determination as to whether Air Canada is in compliance with the *Act*. Others may certainly have had an interest in the suit (such as the Attorney General of Canada, directors appointed under the *Canada Business Corporations Act*, shareholders or the current or former workers of Air Canada or even those of Aveos, in the circumstances), but their interest in no way disqualifies the respondents, who also have the interest to act and to assert a particularly useful perspective on the issue.

[Emphasis added.]

[179] In response to the third issue, whether Air Canada was in compliance with paragraph 6(1)(*d*) of the *Act*, the Court of Appeal conducted a detailed analysis, including:

179.1. A grammatical and textual analysis of the provision (at para. 122 *et seq.* of the CA Judgment); and

179.2. An overall and contextual analysis of the *Act*, including the internal legislative context (at para. 140 *et seq.*), the external legislative context (at para. 164 *et seq.*), and other external elements (at para. 202 *et seq.*).

[180] In the context of the grammatical and textual analysis of paragraph 6(1)(*d*) of the *Act*, the Court of Appeal found as follows:

180.1. [TRANSLATION]

> "It is not necessary to go on at length about the fact that if Parliament did not want the centres in question to be maintained or if it had chosen to defer entirely to Air Canada in this regard, it simply would not have included paragraph 6(1)(*d*) or provided for the inclusion of this restriction in the corporation's articles (articles which the corporation must comply with in principle). But what is the scope and the exact measure of the intent expressed by Parliament here? That is what the Court must now determine";[203]

180.2. [TRANSLATION]

> ""To maintain" or "*maintenir*" is thus to ensure the continuity of a situation,

---

[203] CA Judgment at para. 123.

thing, or state – in this case of the operational and overhaul centres operated by Air Canada in Montreal and Winnipeg (as well as Mississauga). Again, the choice of terminology is not insignificant and provides quite a clear indication of Parliament's intention;"[204]

180.3. [TRANSLATION]

"The articles require Air Canada to maintain centres (***les** centres* in French) in Winnipeg, Mississauga, and Montreal, which suggests that it must maintain them *as they existed and were known* at the time the *Act* was adopted. In contrast, the use of an indefinite article would have simply indicated a general obligation to maintain operational and overhaul centres in these cities, whatever the centres may be and whatever they have become;"[205]

180.4. [TRANSLATION]

"By this wording, Parliament has also clearly indicated its intention to compel Air Canada to keep the Montreal and Winnipeg centres, if not in their current state (that of 1988), at least in essence. Because, once again, if Parliament did not intend to ensure this continuity, why would it have required the corporation to include this restriction in its articles. We need not be reminded that Parliament does not usually speak in vain;"[206]

180.5. [TRANSLATION]

"On its face, we can surely say that Parliament could not have wanted the centres protected by paragraph 6(1)(*d*) of the *Act* to be empty shells. Maintaining the Montreal and Winnipeg Centres can therefore mean only one thing, that is, keeping them active, operating them. This is reflected in the vocabulary used by Parliament, in particular the use of the verb "maintain", which even supports the inference that it wanted the centres to maintain a level of activity comparable to that at the time the *Act* was adopted. Alone, the wording does not allow us to go further."[207]

[181] As part of its overall and contextual analysis of paragraph 6(1)(*d*) of the *Act*, the Court of Appeal first analyzed the internal legislative context of the *Act* and found as follows:

---

[204] CA Judgment at para. 132.
[205] CA Judgment at para. 133.
[206] CA Judgment at para. 135.
[207] CA Judgment at para. 137.

181.1. [TRANSLATION]

> "If the statutory provision instituting this primacy is to have a useful effect … and achieve its purpose (which section 12 also imposes), Air Canada cannot be permitted to escape, *de jure* or *de facto*, the application of the *Act* by relying on the general provisions of the *Canada Business Corporations Act.* Indeed, in paragraph 7(*b*), Parliament prohibited the corporation, its shareholders, and its directors from making (and therefore, necessarily, from amending) any articles or by-laws that are inconsistent with "the provisions included in its articles of continuance pursuant to subsection 6(1)" ("*toute disposition visée au paragraphe 6(1)*"), and prescribed the primacy of this provision in paragraph 2(3), because it intended the corporation, its shareholders, and its directors to act in compliance with the statutory restrictions in question;"[208]

181.2. [TRANSLATION]

> "How should it be said? Parliament very carefully ensured the application of paragraph 6(1) and of the clauses it requires to be included in the articles. Could it at the same time have wanted the corporation, its shareholders, or its directors to be free to circumvent the articles by their actions and subject the articles to only the *Canada Business Corporations Act*, as if it were, to use the expression proposed by Air Canada, a [TRANSLATION] "strictly corporate obligation"? That is highly unlikely."[209]

[182] The Court of Appeal specifically addressed the issue of Air Canada's leeway as to how it may comply with its legal obligations:

> [TRANSLATION]
>
> [153] … It is easy to see that the *Act* does not intend to freeze Air Canada's maintenance activities. The obligation regarding the operational and overhaul centres is in fact formulated in a general manner and there is no minimum employee level or any specific minimum volume of activity or other similar guarantee. This is understandable, given the nature of Air Canada's business, its commercial environment, market fluctuations, etc. In this regard, it is normal that the continuity sought by Parliament does not require absolute fixity of the activities referred to in paragraph 6(1)(*d*), as aircraft maintenance requirements and techniques will obviously change, as will the business itself and the economic conditions in which it exists. For example, when it enacted the statute, Parliament was aware that Air Canada was planning to purchase several Airbus aircraft, which have different maintenance requirements and methods. Parliament did not need to enter into details in this respect, which fall under management of the business, and in this sense, it should be recognized that Air

---

208 CA Judgment at para. 148.
209 CA Judgment at para. 149.

> Canada has some freedom in the manner that it implements the obligation imposed on it by paragraph 6(1)(*d*).
>
> [154] That being said, this freedom does not go so far as to allow it to overstep the *Act*. Rather, it is clear from the text and the internal context of the *Act*, more specifically paragraphs 6(1)(*d*) and 7(*b*) and subsection 2(3), that Parliament wanted to preserve the essential activities of the centres, both quantitatively and qualitatively, and to ensure that Air Canada acted accordingly. To say that the corporation could close the centres in question or reduce their activities beyond a certain threshold for business reasons amounts to ignoring paragraph 7(*b*) and subsection 2(3) and also ignoring the text of subsection 6(1).
>
> [155] In a way, it could be said that, with respect to the restrictions set out in subsection 6(1), Parliament made the appropriate commercial and business decision in advance by peremptorily fixing Air Canada's share ownership, by requiring it to maintain its Montreal, Winnipeg, and Mississauga operational and overhaul centres in the future, by specifying that its head office is to be situated in Montreal, and by requiring it to operate its business accordingly.
>
> [156] Last, in regard to the restriction concerning the operational and overhaul centres, it should also be noted that Parliament, as we will see, was confirming a choice (that is, a commercial orientation) made and announced by Air Canada itself, and that is the political basis of the legislative decision made in 1988.
>
> * *
>
> [157] Thus, based on the wording and the internal context of the *Act*, Air Canada, its directors, and its shareholders must maintain – that is, retain the substance and state of – the Montreal and Winnipeg overhaul centres as they existed in 1988 to avoid breaching the *Act*.
>
> [158] This also necessarily means that only a legislative amendment would allow Air Canada to depart from this obligation, as would be the case if it wanted to avoid the restrictions the *Act* imposes on it in regard to its share ownership or its head office.
>
> [Emphasis added.]

[183] In its analysis of the external legislative context, the Court of Appeal concluded as follows:

> [TRADUCTION]
>
> [164] The external context of the *Act*, as can be seen in this case by the parliamentary debates, is to the same effect and reinforces the idea that Parliament wanted to compel Air Canada to comply with the statutory requirements prescribed by subsection 6(1) as if it were a direct legislative obligation, which could be amended only by statute. This context also confirms that there was a fairly specific vision for the activities of the operational and overhaul centres at the time and that the general intention was indeed to protect the *status quo*, reflecting Air Canada's business model at the time.

...

[193] From all these parliamentary debates, and despite some delays, resistance, detours, and confusion specific to this type of discussion, it appears that the intention was indeed to require Air Canada to maintain its operational centres in Montreal and Winnipeg (as well as Mississauga), and maintain them substantially in that state, by pursuing the overhaul (heavy maintenance) activities conducted at the time the *Act* was adopted. More specifically, the intention was to preserve the centres' activities by preventing them from relocating (thereby promising that the situation that occurred in Winnipeg a few years earlier would not be repeated) or downsizing, which would have been the equivalent of shutting down, or close to it, leaving only an empty shell.

[194] That corresponded exactly to the vision proposed by Air Canada as the basis for its privatization as well as the commitments made with respect to the Montreal and Winnipeg centres in view of that privatization.

[195] Overall, the debates reflect an intention that coincides exactly with what emerges from the wording and internal context of the *Act*: the restriction set out in paragraph 6(1)(*d*), like those in the other paragraphs, moreover, applies to Air Canada in the same way as if it was stated directly in the *Act* and entails the same obligation, which cannot be amended without amending the *Act* itself.

...

[199] The Montreal and Winnipeg centres are the overhaul centres described by Mr. Jeanniot above, while the Toronto centre is a [TRANSLATION] "large line maintenance base". It is these centres, each with their own specific activities, that Air Canada operated at that time, that were intended to be protected for various social and political reasons.

[200] In 1988, Air Canada was in fact planning to continue operating its Montreal and Winnipeg overhaul centres (and its Mississauga operational centre) and even undertook to do so, excluding their closure, their relocation, or the reduction of their activities, while retaining the possibility of opening centres elsewhere (in particular in Vancouver), to satisfy the potential increased demand for heavy maintenance. This emerges from the parliamentary debates and is what Parliament wanted to enshrine. It also wanted any change to the corporation's business model to be subject to the prior amendment of the *Act*, thereby creating an exception to the *Canada Business Corporations Act*.

[Emphasis added.]

[184] After a [TRANSLATION] "lengthy interpretive exercise",[210] the Court of Appeal found that there was no error in the Castonguay Judgment finding that paragraph 6(1)(*d*) of the *Act*:[211]

> [TRANSLATION]
>
> [I]mposes on Air Canada the obligation to maintain in Montreal and Winnipeg the centres it operated in 1988, when the *Act* was adopted, in a manner that ensures their continuity and preserves their importance. Through the application of subsection 2(3) and paragraph 7(*b*), this obligation has the same force and effect as if Parliament had stated it directly.
>
> [Emphasis added.]

[185] The Court of Appeal added the following:

> [TRANSLATION]
>
> [211] This proposition, which flows from the wording and internal context of the *Act*, is confirmed by several external elements, which also confirm that, for political and social reasons, Parliament wanted to avoid a scenario that had previously occurred in Manitoba in the 1960s and to ensure the continuity of the activities conducted by Air Canada in those centres, that is, the overhaul activities, as defined at the time, or their equivalent.
>
> [212] The obligation resulting from paragraph 6(1)(*d*) of the *Act* is therefore not an obligation subject only to the *Canada Business Corporations Act*, the implementation of which would depend solely on the rules, means, and recourses set out in that statute.
>
> [213] This therefore means that because Air Canada, either itself or through a subcontractor, no longer operates the overhaul centres in Montreal and Winnipeg that it previously operated (that is, that it no longer carries out in those locations the operations described by the trial judge that it used to carry out there, or their equivalent, which operations have for the most part been transferred outside Canada), it is in breach of not only its articles, but also the *Act*.
>
> [214] It is of no consequence that the decision made by Air Canada and its directors was based on reasons that might be deemed valid from a business perspective. Such reasons cannot justify violating the law and cannot make the transgression disappear, no more than they can justify ignoring it.
>
> ...
>
> [217] In short, the business judgment rule does not permit violations of the law and is irrelevant to determining whether such a violation has occurred. Compliance with paragraph 6(1)(*d*) of the *Act* does not depend on the

---

210 CA Judgment at para. 210. The Court refers to the complete analysis set out in paragraphs 118 –201 of the CA Judgment CA.

211 CA Judgment at para. 210.

> assessment made by Air Canada's directors as to whether it was commercially appropriate to comply with this provision or their business judgment in this regard.
>
> [218] Of course, as was explained above, the implementation of paragraph 6(1)(*d*) implies, in practice, that the corporation and its directors were given a certain leeway – techniques evolve, maintenance rules change, labour needs fluctuate, other operational and overhaul centres open, etc. The corporation must adapt to a changing market and to economic conditions that are also in flux. This leeway, however, cannot go so far as to allow it to eliminate the Montreal and Winnipeg centres or transform them into secondary centres or centres of little importance or places where the equivalent of what was done there in 1998 is no longer done there. In other words, the leeway afforded the corporation and its directors with respect to the centres remains tightly circumscribed by paragraph 6(1)(*d*), which does not authorize any radical change in business model, like the change that occurred in this case after 2012, which was a departure from the previous model.
>
> [219] A parenthetical remark is in order. We could even wonder whether this departure began to manifest itself in 2004, when Air Canada's restructuring under the *Companies' Creditors Arrangement Act* led to the creation of ACTS as a stand-alone entity, the prelude to its subsequent mutation into Aveos and the establishment of a subcontractor relationship with that company. But it is not necessary to rule on that point, because, despite the change in model and perhaps due to it, the Montreal and Winnipeg centres were maintained. In any event, the respondents did not complain about it, and that is not the issue here.
>
> [220] Last, it is possible that the commercial (or technical) reality in fact required Air Canada to make the significant change to its maintenance activities that it made in 2012. In 2012, things were no longer done and perhaps could no longer be done the same way as in 1988. The corporation may have been pursuing a commercially legitimate objective. That objective, however, met with the critical impediment of paragraph 6(1)(*d*) of the *Act*. Only Parliament (as it previously did with respect to paragraphs 6(1)(*a*), (*b*), and (*c*) can release the corporation from its obligation under this provision, which it has not done (or, at least, not yet).
>
> [Emphasis added.]

[186] As for the minimum threshold of activities at the Centres that would allow Air Canada to comply with the *Act*, the Court of Appeal stated the following:

> [TRANSLATION]
>
> [231] The answer to this, however, is that, given the nature of the dispute, it would have been difficult for the Superior Court to fix the threshold to which Air Canada refers or venture to describe in detail the activities the corporation had to repatriate to the Montreal overhaul centre. Because although the situation reveals a breach, it is not easy to determine prospectively the point at which Air Canada will be considered to have substantially complied with its obligation under paragraph 6(1)(*d*) of the *Act*.

> [232] This difficulty is inherent to the debate, however, and in fact to the obligation set out in paragraph 6(1)(*d*) of the *Act*.
>
> [233] The legislative intent in this regard was discussed earlier: to ensure the sustainability of the Montreal centre (and the Winnipeg centre), so that Air Canada would continue to do there what it did when the *Act* was adopted, that is, principally overhaul work (heavy maintenance). Parliament did not say more. It was not required to prescribe the catalogue of activities that the corporation had to maintain to comply with paragraph 6(1)(*d*), and it therefore abstained from doing so. That was prudent, given the evolutive nature of maintenance standards and practices, the applicable regulatory framework, the very business of Air Canada, etc. But, precisely because of this evolving nature, which Parliament anticipated, it should be understood – and this is indeed explained in the trial judgment – that paragraph 6(1)(*d*) merely set a sort of general point of comparison, against which Air Canada's future activities, even if they changed, would have to be assessed.
>
> [234] In other words, Parliament prescribed maintaining the Montreal centre (and the one in Winnipeg), which implied that the essence of the activities carried out there in 1988, *or the equivalent*, be maintained. From the moment that Air Canada's business led it to close this centre or reduce the activities of that centre to the point where they were no longer equivalent to those carried out there in 1988, it was in breach of the *Act*.
>
> [235] The trial judge went no further, and thereby made a sufficiently precise ruling for Air Canada to know what to expect. Moreover, the judge's conclusions are a summary of the reasons in which he explained the scope of the obligation incumbent on Air Canada. His reasons are repeated and supplemented in this judgment. That is sufficient. Had the judge detailed his conclusions by fixing a number of employees or a volume of activity, Air Canada could rightly have complained of undue interference in its business.
>
> ...
>
> [244] Perhaps we may have wanted conclusions 281 and 283 to mention the fact that the obligation resulting from paragraph 6(1)(*d*) would be satisfied by the performance of [TRANSLATION] "work equivalent" to that performed at the time the *Act* was adopted. In fact, that is not necessary, because that is clearly what the trial judge's reasons suggest and that these reasons confirm. That clarification is implicit and an integral part of the judge's conclusions, which therefore do not need to be interfered with.
>
> [Emphasis added.]

[187] Accordingly, the Court of Appeal confirmed that since Aveos's closure, Air Canada was in breach of paragraph 6(1)(*d*) of the *Act* and that only a legislative amendment could relieve Air Canada from this legal obligation.

[188] It is important to note at this point that Air Canada has confirmed that if the Court does not accept its argument based on *res judicata* with respect to the Newbould Judgment, it will not challenge the conclusions of the Castonguay Judgment or the CA

Judgment that will be applicable to it, under reserve of its argument based on the declaratory nature of the 2016 Legislative Amendment.[212]

8. THE JUNE 2016 LEGISLATIVE AMENDMENT

[189] Paragraph 6(1)(*d*) of the *Act* was amended on June 22, 2016, to reduce Air Canada's obligation to maintain the Centres.

[190] When the bill that led to this legislative amendment was under consideration, debates were held before the House of Commons and the Senate, as were hearings before the Standing Committee on Transport, Infrastructure and Communities. Certain excerpts from those debates and hearings were adduced into evidence.

[191] On April 15, 2016, a second reading of Bill C-10 took place in the House of Commons.[213]

[192] On April 20, 2016, the Minister of Transport, Marc Garneau, participated in the debate.[214] He stated that it was necessary to clarify the *Act* to avoid further disputes.[215]

[193] During these debates, other speakers for the opposition took the position that:

193.1. The proposed amendments would have the effect, for all practical purposes, of legalizing job losses in Canada;[216]

193.2. Air Canada's promise to create jobs did not take into account the jobs lost when Aveos's closed;[217]

193.3. The settlement of the litigation in question included a significant caveat, that is, the conclusion of definitive agreements between Air Canada and Bombardier for the purchase of CSeries aircraft.[218] In the interim, litigation would simply be suspended.

[194] On May 4, 2016, Mr. Rovinescu, then the President and Chief Executive Officer of Air Canada, testified,[219] and on June 7, 2016, the debate moved to the Senate for a second reading of Bill C-10.[220]

---

212 Air Canada's written submissions at para. 349.
213 Exhibit D-33, Debates of the House of Commons of April 15, 2016, continuous numbering at 0914 and 0915.
214 Exhibit D-33, continuous numbering at 0940 *et seq*.
215 Exhibit D-33, continuous numbering at 0940 and 0941.
216 Exhibit D-33, continuous numbering at 0916.
217 Exhibit D-33, continuous numbering at 0926.
218 Exhibit D-33, continuous numbering at 0927.
219 Exhibit P-76.
220 Exhibit D-33, continuous numbering at 0987 *et seq*.

V. ANALYSIS

1. DID AIR CANADA BREACH PARAGRAPH 6(1)(*d*) OF THE *ACT* BEFORE JUNE 22, 2016?

[195] Air Canada takes the position that at all times relevant to this dispute, it was in compliance with its obligations under the *Act*. It submits the following arguments in support of its position:

195.1. The Newbould Judgment has acquired the authority of *res judicata* between the parties, and the plaintiff is barred from applying to the Court in this case;

195.2. In the alternative, the 2016 Legislative Amendment is declaratory and defeats the conclusions of the CA Judgment with respect to the interpretation of paragraph 6(1)(*d*) of the *Act*;

195.3. In the alternative, the plaintiff is abusing procedure by requiring issues that were already decided by the Newbould Judgment to be decided again.

[196] The plaintiff, for his part, submits that the CA Judgment decided the issue of the interpretation of paragraph 6(1)(*d*) of the *Act* and its breach by Air Canada during the period in dispute and that Air Canada is abusing procedure by submitting this issue to the Court again.

[197] Thus, to decide the issue of whether Air Canada was in breach of paragraph 6(1)(*d*) of the *Act* during the period from March 2012 to June 2016, the Court must determine the scope of application of the Newbould Judgment and the CA Judgment to this case, as well as whether the 2016 Legislative Amendment is declaratory.

[198] For the reasons set out below, the Court concludes as follows:

198.1. The Newbould Judgment does not have the authority of *res judicata* in this case;

198.2. The 2016 Legislative Amendment is not declaratory;

198.3. Neither Air Canada nor the plaintiff abused procedure by submitting the issue of Air Canada's compliance with the *Act* for analysis;

198.4. Air Canada breached the *Act* continuously during the entire period between March 18, 2012, and June 22, 2016.

1.1 The authority of *res judicata*

1.1.1 Legal principles

[199] Article 2848 of the *Civil Code of Québec* (**C.C.Q.**) defines the authority of *res judicata* as follows:

> **2848.** The authority of *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.

[200] The triple identity of parties, object, and cause is therefore required for the absolute presumption to apply.

[201] The authority of *res judicata* binds only the parties to a dispute with respect to its object and its cause. In this sense, the issue decided is definitively settled between the parties.[221] This authority is also applicable for judgments rendered in other provinces.[222]

[202] The authority of *res judicata* concerns the conclusions of the judgment. It may extend to the reasons of the judgment when they form a part of the conclusions or the implicit judgment resulting therefrom, that is, [TRANSLATION] "that which constitutes a necessary consequence of the conclusions", to prevent contradictory judgments.[223] However, the reasons that are not necessary to support the conclusions do not acquire the authority of *res judicata*, nor are they subject to appeal.[224]

[203] The "cause" of a demand is [TRANSLATION] "the juridical or material fact that is the direct and immediate basis for the right claimed".[225] In *Globe Technologie inc. c. Rochette*,[226] the Court of Appeal noted that it [TRANSLATION] "includes a material element (the facts of the case) and a formal, abstract element (the legal characterization of those facts".

[204] In *Ungava Mineral Exploration inc. c. Mullan*,[227] the Court of Appeal found that to determine whether there is identity of cause, it must be considered whether, [TRANSLATION] "with respect to the factual situation at issue here, the effect of the

---

221 See *Gingras c. Procureur général du Canada*, 2018 QCCS 5647 [**Gingras**] at para. 56.

222 See *Gingras*, *supra* note 221 at para. 49, citing *Boucher v. Stelco Inc.*, 2005 SCC 64 and article 3155 C.C.Q.

223 *Gowling Lafleur Henderson, s.e.n.c.r.l., srl c. Lixo Investments Ltd.*, 2015 QCCA 513 [***Gowling***] at paras. 20 and 21; *Jean-Paul Beaudry ltée c. 4013964 Canada inc.*, 2013 QCCA 792 [***Beaudry***], at paras. 37 and 38.

224 Catherine Piché, *La preuve civile*, 6th ed. (Montreal: Yvon Blais, 2020) 1,702 pp at 773 and 774; *Beaudry*, *ibid.* at paras. 39 and 40.

225 Léo Ducharme, *Précis de la preuve*, 6th ed. (Montreal: Wilson & Lafleur, 2005) at 252, cited in *Gowling*, *supra* note 223 at para. 23.

226 2022 QCCA 524 at para. 17 [***Globe***].

227 2008 QCCA 1354 [***Ungava***] at para. 72, cited in *Gowling*, *supra* note 223 at para. 25.

application of the rule of law invoked in the second action is equivalent to the effect of the application of the rule of law invoked in the first …".

[205] In *Roberge v. Bolduc*, the Supreme Court noted that the essence of the legal characterization of the facts alleged must be identical for there to be identity of cause.[228] This is the case when the two actions are directly derived from the same conduct.[229]

[206] The Supreme Court stated the following:[230]

> First, it is clear that a body of facts cannot in itself constitute a cause of action. It is the legal characterization given to it which makes it, in certain cases, a source of obligations. …
>
> It is equally clear that a rule of law removed from the factual situation cannot be a cause of action in itself. The rule of law gives rise to a cause of action when it is applied to a given factual situation; it is by the intellectual exercise of characterization, of the linking of the fact and the law, that the cause is revealed. …
>
> … When the essence of the legal characterization of the facts alleged is identical under either rule, it must follow that there is identity of cause.
>
> [Emphasis added.]

[207] Thus, the factual situation must be essentially the same in both cases, the fault must consist of the same breaches, or the same facts must give rise to the litigious rights.[231]

[208] The "object" of a demand is [TRANSLATION] "the immediate legal benefit sought in bringing it, namely the right whose implementation is desired"[232] or that the party seeks to have recognized.[233] In *Pesant c. Langevin*,[234] the leading case rendered by the Court of King's Bench, which continues to be followed in the case law,[235] identity of object was defined as follows:

> The object of an action is the benefit to be obtained in bringing it. Material identity, that is identity of the same physical thing, is not necessarily required. This perhaps forces the meaning of "object" somewhat, but an abstract identity of right is taken to be sufficient. "This identity of right exists not only when it is exactly the same right that is claimed over the same thing or over one of its parts, but also when the right which is the subject of the new action or

---

228 *Roberge v. Bolduc*, [1991] 1 S.C.R. 374 [**Roberge**] at 417.

229 *Ungava*, *supra* note 227 at para. 74, cited in *Gowling*, *supra* note 223 at para. 28.

230 *Roberge*, *supra* note 229 at 416 and 417.

231 *Ungava*, *supra* note 227 at paras. 58–62; *Gowling*, *supra* note 223 at para. 37. See also the Authorization Judgment, *supra* note 1 at para. 48.

232 *Globe*, *supra* note 226 at para. 21.

233 *Gowling*, *supra* note 223 at para. 44.

234 (1926) 41 B.R. 412 at 421, cited in *Gowling*, *supra* note 223 at para. 46.

235 See in particular *Roberge*, *supra* note 228 at 414.

> the new exception, though not absolutely identical to that which was the subject of the first judgment, nevertheless forms a necessary part of it, is essentially included in it, as by being a subdivision or a necessary sequel or consequence". In other words, if two objects are so related that the two arguments carried on about them raise the same question regarding performance of the same obligation between the same parties, there is *res judicata*.

[209] Although the remedies sought in the two actions may be distinct, there will be identity of object to the extent that the actions seek to assert the same right.[236] However, the object will be new if an identical right is claimed over a different thing or if a different right is claimed over the same thing.[237]

[210] Last, identity of parties refers to legal identity rather than physical identity.[238] This includes identity acquired through representation.[239]

[211] As for the rule of *stare decisis* or the authority of precedent:[240]

> [TRANSLATION]
>
> [47] [It] implies the obligation for a court to follow the rule of law set out in a precedent set by a higher court or a court of the same level. It is a general and impersonal standard, akin to a statutory or regulatory provision.
>
> [48] In Quebec law, a court is not bound by a judgment of a court of the same level or even that of a court of a higher level of another province.
>
> [Emphasis added.]

[212] In *Canada (Procureur général) c. Imperial Tobacco Ltd.*,[241] the Court of Appeal stated:

> [TRANSLATION]
>
> [127] An argument based on *stare decisis* is less onerous than *res judicata* because it requires only a similar or analogous factual matrix. The rule of *stare decisis* is a principle "under which a court must follow earlier judicial decisions when the same points arise again in litigation". Of course the rule applies to judgments of the Supreme Court, particularly in matters of public law, like this one, where the parties participated in the prior public debate on the specific issue in dispute.
>
> [128] The Court has said it before. [TRANSLATION] "A source of stability and structure for the legal system, *stare decisis* is one of the cornerstones of the

---

236 *Gowling*, *supra* note 223 at para. 49.
237 *Roberge*, *supra* note 228 at 413.
238 Roberge, supra note 228 at 411.
239 Roberge, supra note 228 at 411.
240 *Gingras*, *supra* note 221 at paras. 47 and 48.
241 2012 QCCA 2034 at paras. 127 and 128.

rule of law. This principle not only affords litigants predictability in judicial decision-making, but it also protects them against the arbitrary exercise of this power".

[Emphasis added.]

[213] Recently, in *R. c. Lapointe*,[242] the Court of Appeal stated:

[TRANSLATION]

[30] The rule of *stare decisis* comes from English law; it aims to guarantee certainty in the law and in fact constitutes one of the foundational principle of the common law. It promotes predictability, enhances fairness and reduces arbitrariness. Similarly, it makes justice more efficient and economical and discourages the multiplication of judicial proceedings.

[31] The rule of *stare decisis* is two-fold. The first type is "vertical" or "hierarchical" *stare decisis*. It requires that courts follow the precedents of a higher jurisdiction. The second type is "horizontal" or "collegial" *stare decisis*. It applies to the decisions of the same level of court. The first step is to investigate vertical *stare decisis*.

[32] The case law has identified several conditions for the application of vertical *stare decisis*. First, the decision establishing the precedent must come from a hierarchically higher court. Indeed, the logic inherent to vertical *stare decisis* is partially related to the right of appeal and relies on an essentially hierarchical conception of the judicial order. This hierarchical aspect means that a court is bound by the decisions of another higher court that is part of the same hierarchy. In this way, the Superior Court is bound by the decisions of the Court of Appeal and the Supreme Court of Canada, but not by those of another Canadian appellate court, although those decisions can be persuasive, without being binding.

[33] Next, *stare decisis* only applies to the *ratio decidendi* of the decision that serves as a precedent, as Binnie J. strongly asserted in *R. v. Henry*, "[t]he objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience".

[34] The concept of *ratio decidendi* is therefore intrinsically linked to both the factual situation in which the dispute arises and, in matters of statutory interpretation, the wording of the law to be interpreted. Indeed, the facts relevant to the dispute must not be reasonably distinguishable from those of the precedent relied upon; only a similar or analogous factual framework will lead to the application of the *stare decisis* rule. As the Supreme Court stated, "there is no independent force to be found in selective quotations from a portion of the reasons unless regard is had to issues raised and the context in which the quotations are found". Similarly, the use of *stare decisis* is dangerous when the

---

[242] 2021 QCCA 360 [***Lapointe***] at paras. 30–35.

> legal principle at issue is not the same. Thus, in matters of statutory interpretation, the interpretation of another statute, even if the same words are used, cannot give rise to the application of *stare decisis*. It may remain, however, an important, even persuasive, interpretative argument, but the interpretation must nonetheless be carried out in accordance with accepted principles.
>
> [35] When the rule of vertical *stare decisis* applies and the lower court disagrees with the binding decision of the hierarchically higher court, it can certainly explain in its reasons what it considers problematic with the binding precedent, but it cannot refuse to apply it.
>
> [Emphasis added.]

[214] Even more recently, the Superior Court, citing *Lapointe*, stated the following:[243]

> [68] Recently, in *R.* v. *Lapointe*, the Court of Appeal issued a reminder that the rule of *stare decisis* requires a court to follow the precedents of a higher court. In *Lapointe*, the trial judge had disregarded a precedent of the Court of Appeal on the basis that this precedent had been superseded by a subsequent decision of the Supreme Court of Canada. The Court of Appeal concluded that in doing so, the trial judge had committed an error of law. The Court stated that *stare decisis* is a fundamental rule designed to ensure certainty of law and to promote predictability and fairness while discouraging arbitrariness. The rule also makes justice more efficient and economical and discourages the multiplication of legal proceedings.
>
> [69] Thus, the Superior Court is bound by the decisions of the Court of Appeal when the rule of law at issue is the same and the facts relevant to the dispute cannot reasonably be distinguished from those of the precedent relied upon. When the "lower court disagrees with the binding decision of the hierarchically higher court, it can certainly explain in its reasons what it considers problematic with the binding precedent, but it cannot refuse to apply it".
>
> [70] The principle of *stare decisis* applies here. In *Air Canada*, the Court of Appeal applied the same sections of the CPA. The facts at the root of the dispute are indistinguishable.
>
> [71] In any event, the reasoning of the Court of Appeal in *Air Canada* is sound and has been applied by the Superior Court in subsequent class action proceedings. There is no reason to depart from it.

[215] That being said, in Quebec civil law, especially in private law matters, the rule of *stare decisis* is not applied with the same rigour.[244]

---

243 *Mihoubi c. Priceline.com*, 2022 QCCS 25 at paras. 68–71.

244 See e.g., *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201 at para. 27. See also *Service de remorquage Direct inc. c. Ville de Montréal*, 2017 QCCS 5065 at paras 8–12; *Teasdale c. Osborn*, 2020 QCCS 4435 at note 4.

[216] The *obiter dictum* set out in a judgment falls outside the application of the rule of *stare decisis*. It is a judge's remark or incidental opinion that is not essential to support the judge's decision.[245]

1.1.2 Discussion

[217] The portion of the Newbould Judgment that is relevant to the issue of *res judicata* states the following:

> [96] The requirement in ACPPA that Air Canada was to include in its articles an obligation to main[tain] operational and overhaul centres was vague, and no doubt purposely so. I conclude that IAMAW has not established on the record that Air Canada has not on its own maintained operational and overhaul centres in Montreal, Winnipeg and Mississauga.
>
> [97] In summary I find that Air Canada does maintain operational and overhaul centres in those cities by maintaining overhaul operations under its contracts with Aveos and by itself maintaining certain overhaul functions through its line maintenance operations.

[Emphasis added.]

[218] Air Canada submits that these conclusions in the Newbould Judgment have the authority of *res judicata* with respect to the plaintiff and the Class members who were represented by the IAMAW union in that other case.

[219] According to Air Canada, this identity of parties determinatively distinguishes this case from the situation in the declaratory judgment proceeding instituted by the Attorney General of Quebec and decided by the Castonguay Judgment and the CA Judgment.

[220] The Court must determine whether the extended reflection of Newbould J. in his judgment regarding Air Canada's possible compliance with the *Act* through both the operations it transferred to Aveos and its line maintenance activities in Canada, acquired the authority of *res judicata*.

[221] For the Newbould Judgment to have such an effect in this case, there must be identity of parties, cause, and object.

[222] With respect to identity of parties, it is true that one of the parties in the case that led to the Newbould Judgment is not the same as in the case that led to Castonguay Judgment and the CA Judgment. The issue here is whether the two parties in this case are the same as in the case that led to the Newbould Judgment.

[223] According to Air Canada, the union represents its members, that is, the unionized Air Canada employees transferred to Aveos who made that choice. It submits that,

---

[245] Albert Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit*, 4th ed. (Cowansville, QC: Yvon Blais, 2007) at 417.

through representation there is sufficient identity of parties, and therefore the unionized Class members are bound by the Newbould Judgment.

[224] The Court understands that the unionized Class members were parties to the case that led to the Newbould Judgment through the union. There is therefore identity of parties in their regard. That being said, for all the non-unionized Class members, no such identity exists.

[225] Although the issue of identity of parties allows the Court to depart from the authority of *res judicata* only in part, in the Court's view, the absence of identity of cause allows it to decide the issue completely.

[226] As discussed above, the cause includes a material element (the facts of the case) and a formal, abstract element (the legal characterization of those facts). For there to be identity of cause, the alleged factual background to which the law was applied by the previous court must be identical or at least sufficiently similar. In other words, the judgment must concern the same thing.

[227] The "cause" of the dispute between the parties before Newbould J. concerned the transfer of Air Canada's employees to Aveos and the delegation of the maintenance and overhaul activities at the Centres, the whole in light of the factual situation that prevailed at the time.

[228] The CA Judgment in fact explains that the context submitted to Newbould J. was quite different. In terms of chronology, it was just before the transfer of nearly 2,000 of Air Canada's unionized employees to Aveos, with the expectation that Aveos would perform the maintenance and overhaul of Air Canada's aircraft from the Montreal, Winnipeg, and Mississauga Centres instead of Air Canada.

[229] Aveos's closure and the definitive cessation of the maintenance and overhaul of Air Canada's aircraft at the Centres was a major change and, according to the CA Judgment, a [TRANSLATION] "momentous"[246] one in the analysis of the weight to assign to the Newbould Judgment.

[230] In this case, the plaintiff's action concerns Air Canada's liability towards the Class members, in a factual context that is sufficiently similar, if not identical, to the one analyzed in the CA Judgment, and quite different from the one analyzed in the Newbould Judgment.

[231] The Court therefore finds that the factual context analyzed in the Newbould Judgment negates the existence of identity of cause. Accordingly, the Newbould Judgment does not have the authority of *res judicata* in this case.

---

[246] CA Judgment at para. 70.

[232] The application of the rule of *stare decisis*, which is less onerous than the principle of the authority of *res judicata*, is of no assistance to Air Canada. Indeed, as the Newbould Judgment is the judgment by a court of the same level from another province, it has no precedential value.[247] What is more, for the reasons set out above, the factual context of the dispute before Newbould J. was so different from the one in this case that it cannot be considered similar or analogous.

[233] Last, it must be concluded, as the Castonguay Judgment and the CA Judgment did, that this part of the analysis of the Newbould Judgment in any event constitutes an *obiter dictum* that in no way binds the Court.

[234] Indeed, Newbould J. introduced his analysis in the following terms:

> [60] In light of my previous findings regarding standing and the effect of the release clause, it is not necessary to deal with the argument of IAMAW that Air Canada is not in compliance with its articles of continuance that require that it shall maintain operational and overhaul centres for its aircraft or their components in the City of Winnipeg, the City of Mississauga and the Montreal Urban Community. However, in light of the extensive arguments made in this application, I shall do so: ...
>
> [Emphasis added.]

[235] It was an opinion issued after the Judgment had already rejected the union's position in its entirety. What motivated this analysis was the fact that the argument had been debated by the parties.

[236] In light of the foregoing, the Court finds that the Newbould Judgment does not have the authority of *res judicata* or of precedent in this case. It is a fact of which the Court may take notice and assess its probative value.

1.2 The declaratory nature of the 2016 Legislative Amendment

1.2.1 Legal principles

[237] Air Canada argues that the 2016 Legislative Amendment enacted on June 22, 2016, is declaratory and clarifies the meaning that paragraph 6(1)(*d*) of the *Act* has always had, rather than merely amending its content prospectively.

[238] It bases its position on the Supreme Court judgment in *Régie des rentes du Québec v. Canada Bread Company Ltd.*,[248] which states:

> [26] It is settled law in Canada that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation: L.-P. Pigeon, *Drafting and Interpreting*

---

[247] See *Gingras*, *supra* note 221 at para. 48.

[248] 2013 SCC 46 at paras. 26 –28.

> *Legislation* (1988), at pp. 81-82. As this Court acknowledged in *Western Minerals Ltd. v. Gaumont*, 1953 CanLII 70 (SCC), [1953] 1 S.C.R. 345, such forays are usually made where the legislature wishes to correct judicial interpretations that it perceives to be erroneous.
>
> [27] In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 562. As a result, declaratory provisions operate less as legislation and more as jurisprudence. They are akin to binding precedents, such as the decision of a court: P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at p. 248. Such legislation may overrule a court decision in the same way that a decision of this Court would take precedence over a previous line of lower court judgments on a given question of law.
>
> [28] It is also settled law that declaratory provisions have an immediate effect on pending cases, and are therefore an exception to the general rule that legislation is prospective. The interpretation imposed by a declaratory provision stretches back in time to the date when the legislation it purports to interpret first came into force, with the effect that the legislation in question is deemed to have always included this provision. Thus, the interpretation so declared is taken to have always been the law: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 682-83.

[Emphasis added.]

[239] By definition, however, a declaratory act is retroactive.[249] It is an exceptional measure and it should not be assumed that Parliament intended to avail itself of it. The wording of the act must it expressly order or implicitly require such an interpretation.[250]

[240] French author Roubier, cited in scholarly commentary, specified that two principal characteristics indicate that an act is declaratory: it [TRANSLATION] "concerns a point where the legal rule is unclear or controversial" and it [TRANSLATION] "sanctions a solution that could have been adopted by the case law alone".[251]

[241] A declaratory act will clarify an earlier provision, whereas an amending act will amend the provision prospectively.

1.2.2 Discussion

[242] Adopted or amended legislation is prospective. A statute will apply retroactively only exceptionally, and Parliament must provide for it explicitly or the wording of the statute must implicitly require it.

---

249 Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) (**Côté**) at para. 1856.

250 *Gustavson Drilling (1964) Ltd. v. Ministre du Revenu national*, [1977] 1 S.C.R. 271 at 279.

251 Roubier, Paul, *Le droit transitoire: conflits des lois dans le temps*, 2nd ed. (Paris: Dalloz/Sirey, 1960) 249 et seq., quoted in Côté, *supra* note 249 at paras. 1842 and 1843.

[243] The question is therefore whether the 2016 Legislative Amendment amends the *Act* in the future or whether it is declaratory.

[244] In this case, the parliamentary debates confirm that Parliament did not intend to pass amendments that would be retroactive or declaratory.

[245] It is relevant to reproduce the following examples from the debates, which reveal the opposite intent, in compliance with the rule:

245.1. On April 15, 2016, during the speech pf Kate Young, Parliamentary Secretary to the Minister of Transport, at the second reading of Bill C-10, *An Act to amend the Air Canada Public Participation Act and to provide for certain other measures*, Ms. Young said:[252]

> Mr. Speaker, I am pleased to rise today to commence debate at second reading of Bill C-10, amendments to the *Air Canada Public Participation Act*. These amendments seek to modernize legislation to allow Air Canada to more effectively respond to the evolution of market conditions while continuing to support jobs for skilled workers in Canada's aerospace sector. This bill would amend the provisions of the Air Canada Public Participation Act dealing with Air Canada's operational and overhaul centres. ...
>
> As members are aware, the Attorney General of Quebec took legal action against Air Canada following the closure of Aveos Fleet Performance in 2012, accusing the carrier of non-compliance with these provisions of the *Air Canada Public Participation Act*. In light of Air Canada's investments in aerospace in Canada, including aircraft maintenance, Quebec has since announced its willingness to discontinue its pursuit of that litigation.
>
> This creates an appropriate context for us to modernize the Air Canada Public Participation Act. This legislation is now close to 30 years old. It was created to enable the privatization of Air Canada, which occurred in 1989. Specifically, I am referring to paragraph 6(1)(d), which calls for Air Canada to have in its articles of continuance:
>
> > provisions requiring the Corporation to maintain operational and overhaul centres in the City of Winnipeg, the Montreal Urban Community and the City of Mississauga;
>
> ...
>
> The air transport sector has greatly evolved since 1989. Now it is common for global air carriers to outsource aircraft maintenance and to distribute their supply chain across different geographic areas, with a view to being more efficient. This is the competitive

---

252 Exhibit D-33, *House of Commons Debates* (15 April 2016), continuous numbering at 0914 and 0915.

> environment within which Air Canada operates. Other air carriers, Canadian and international, are not subject to the same obligations regarding their maintenance facilities. That means that they can seek out efficiencies in ways that Air Canada cannot. ...
>
> [Emphasis added.]

245.2. During the debates of April 18, 2016, the Parliamentary Secretary to the Minister of Public Services and Procurement added:[253]

> Nearly three decades have passed since deregulation took effect, and it is now time to update the Air Canada Public Participation Act to reflect the evolution in the aviation sector. I am referring particularly to the obligation in paragraph 6(1)(d) that requires Air Canada to include in its articles of continuance "provisions requiring the Corporation to maintain operational and overhaul centres in the City of Winnipeg, the Montreal Urban Community and the City of Mississauga".
>
> To be viable as a going concern in today's air carrier industry means that inputs from the supply chain must be cost competitive, and that includes the provision of aircraft maintenance.
>
> Air Canada is the only carrier, both domestic and international, that has obligations such as these. All of the other carriers, including other Canadian air carriers, are free to take advantage of competitive undertakings to support their aircraft maintenance.
>
> The Province of Quebec, with intervening support from the Province of Manitoba, and Air Canada have been litigating the matter of that company's aircraft maintenance for a number of years.
>
> This began with the insolvency in March 2012 of Aveos Fleet Performance, a third-party provider of aircraft maintenance repair and overhaul services. On February 17 of this year, the Province of Quebec and Air Canada mutually agreed to pursue an end to their differences in favour of a better way forward.
>
> Then, on March 14, the Province of Manitoba and Air Canada announced a collaboration of their own ... the establishment of centres of excellence for aircraft maintenance, one in Montreal, and the other in Winnipeg.
>
> ...

---

253 Exhibit D-33, continuous numbering at 0925.

> The centre of excellence in Winnipeg is expected to create 150 jobs, starting in 2017, with the possibility of further expansion and job creation in the future. These are net new job increases.
>
> ...
>
> The legislation, as it is currently written, lent itself to this litigation about how it should be interpreted. That is why this government is proposing to amend the Air Canada Public Participation Act to remove any doubt that Air Canada can seek best-in-class, cost-competitive aircraft maintenance wherever it is offered, a choice to which all other air carriers are entitled.

[Emphasis added.]

[246] The Honourable Judy A. Sgro, Liberal member from Humber River – Black Creek, affirmed the following on the matter:[254]

> Other air carriers, Canadian and international, are not subject to the same obligations regarding their maintenance facilities. That means they can seek out efficiencies in ways that are simply not available to Air Canada, a fact that places Air Canada at a competitive disadvantage. Bill C-10 would help to establish a new balance. ...
>
> ... I think our job as legislators is to make sure that companies competing in Canada have a level playing field, have the flexibility they require to do well, and not be held back by legislation and things that occurred in 1989 or 1997.
>
> We need to be realistic. It is 2016. If we want our national carriers and our companies to be able to compete on a broader scale, we have to make sure that we take the handcuffs off and that we provide the opportunities for them.

[Emphasis added.]

[247] On April 20, 2016, Minister of Transport Marc Garneau invoked the need to clarify the *Act* to avoid further disputes.[255] The member for Outremont accused the government of trying to amend the *Act* retroactively while claiming to clarify it.[256] The Minister also raised the need to immediately offer Air Canada more leeway with respect to maintenance activities for its airplanes so that it could do battle with its competitors on an even playing field.[257]

[248] On May 4, 2016, the President and Chief Executive Officer of Air Canada was heard.[258] He said he would like the *Act* to be clarified or greater certainty to be provided. However, what is most apparent from his remarks is the desire to amend the Act to free

---

254 Exhibit D-33, continuous numbering at 0931 and 0932.
255 Exhibit D-33, continuous numbering at 0940 and 0941.
256 Exhibit D-33, continuous numbering at 0941.
257 Exhibit D-33, continuous numbering at 0942 et 0943.
258 Exhibit P-76 at 1.

Air Canada from its constraints. The following justifications for the requested change were provided:[259]

> Thank you for allowing me to speak to you today about the importance of modernizing the Air Canada Public Participation Act and, more specifically, about Air Canada's position on Bill C-10.
>
> ...
>
> To start, I would like to say that we support this bill, especially because it is designed to allow Air Canada to be more competitive in a global context. The bill recognizes that the airline industry has undergone a dramatic transformation since Air Canada's privatization nearly three decades ago. It acknowledges that Air Canada is a fully private sector company, owned by private sector interests, operating in a highly competitive global industry. ...
>
> I will say a few words also on the evolution of the industry and the competitive landscape. ...
>
> Low-cost carriers – virtually all of whom outsource aircraft maintenance – also emerged over the last 20 years. Canada's own WestJet launched in 1996 and today operates with about 40% market share domestically, without any restrictions or obligations whatsoever under its constating documents regarding where it performs maintenance or how many jobs it should directly or indirectly protect.
>
> ...
>
> Turning to maintenance specifically, until the 1980s, network airlines such as Air Canada generally insourced all aircraft maintenance. The maintenance, repair, and overhaul business – so called MRO – was not the independent and competitive industry it has now become.
>
> Maintenance typically represents 10%-15% of an airline's costs and it's one of the largest cost buckets. Outsourcing certain activities to qualified MROs around the world, which actively compete for this work, has become a normal, healthy, and essential development in our capital-intensive, highly competitive, and low-margin business.
>
> ...
>
> Bill C-10 acknowledges the changes in the industry and provides the greater flexibility and certainty of interpretation Air Canada requires to compete globally. Air Canada will be able to determine, at its commercial discretion, the volume and type of aircraft maintenance it does globally and in Canada, including the work done in Manitoba, Quebec, and Ontario, and who performs this work, based on competitive proposals from suppliers.
>
> No other airlines in Canada – and to our knowledge no other airline in the world – is subject to maintenance restrictions such as those imposed on Air Canada

[259] Exhibit P-76 at 1 and 2.

> by the act ... . We expect the same flexibility to use our business judgment, because at the end of the day we compete in the same markets for the same customers.
>
> We have concluded settlement agreements with the Government of Quebec and the Government of Manitoba, which should create more aerospace maintenance jobs in Canada. We have agreed to collaborate to help establish centers of excellence in each of these provinces, which should be capable of attracting work from other airlines if competitive.
>
> ...
>
> The ACPPA was adopted over a quarter century ago, in the context of an air travel industry that was completely different. Hindsight is 20/20, and I mean no disrespect to its framers when I say that it should have accounted for the possibility the industry would change, even if it was not possible to anticipate all eventualities.

[Emphasis added.]

[249] On May 16, 2016, the debate continued in the House of Commons for the third reading of Bill C-10.[260] On June 1, 2016, the member for Newmarket – Aurora supported the Bill and the decision to modernize the *Act*. The following exchange then took place with the member for Jonquière:[261]

> **Ms. Karine Trudel (Jonquière, NDP)**: Madam Speaker, I would like to thank my colleague for his speech.
>
> The government often says that it supports families, the middle class, and workers. Expediting the bill and retroactively changing the law will result in the loss of 2,600 jobs. ...
>
> **Mr. Kyle Peterson**: Madam Speaker, I just want to straighten out the premise of the question.
>
> There is no retroactivity in this bill. There will be no retroactive effect. Anything in this bill will start whenever the bill becomes law, so we do not have to worry about that.
>
> I am not necessarily convinced that 2,600 jobs will be lost either. What I am concerned about is that if we do not get these amendments done, if we do not get this act changed, there will be considerably more losses. Air Canada will have to compete effectively with one arm tied behind its back in the competitive global marketplace. That is what I am afraid of. I am convinced it will cost way more than 2,600 jobs, if we do not let Air Canada compete with both hands, and ready to go.

[Emphasis added.]

---

260 Exhibit D-33, continuous numbering at 0956 *et seq*.
261 Exhibit D-33, continuous numbering at 0976.

[250] On June 7, the debate went to the Senate for a second reading of Bill C-10. The following excerpts are relevant:[262]

> The landscape of aircraft fleet maintenance has changed radically since then, with aircraft becoming so sophisticated that heavy maintenance is required less often. Equipment, labour and R&D are all very expensive, so much so that only specialized companies with the ability to spread out costs over many clients - in other words, those providing services to many different airlines - can operate profitably. That is why most airlines today outsource their heavy maintenance work to those specialized companies, and that is what Air Canada does.
>
> [Translation]
>
> Honourable senators, you will remember that, in 2003, Air Canada filed for protection under the Companies' Creditors Arrangement Act. In order to avoid bankruptcy, it underwent restructuring and divested a number of its divisions, including its heavy maintenance services. These were sold to private investors who established a new company called Aveos, which continued to do the heavy maintenance on Air Canada aircraft. However, to ensure that it would be profitable, Aveos went after new clients, new airlines. Unfortunately, the results were mixed and Aveos was forced to declare bankruptcy and close its doors in 2012. Consequently, 2,600 workers, mostly in Montreal and Winnipeg, suddenly found themselves unemployed. These workers went through an extremely difficult time. We know that a few hundred were able to find jobs in the same sector. Some retired, but many others had to resign themselves to finding a job in another sector under much less advantageous conditions. Others still have not found a job. But what could be done?
>
> Efforts to find buyers for Aveos were unsuccessful. The Government of Canada at the time realized that it could do nothing. Some wanted Air Canada to resume doing the heavy maintenance of its aircraft, but that would have created new financial problems for the company.
>
> Out of concern for the plight of the employees put out of work, the Government of Quebec took Air Canada to court, accusing it of violating section 6 of the Air Canada Public Participation Act, because it was no longer operating the maintenance centres as it had promised in 1988.
>
> The Quebec Superior Court and, in November 2015, the Quebec Court of Appeal found in favour of the Quebec government. Air Canada decided to take the matter to the Supreme Court.
>
> [English]
>
> That's where things stood at the beginning of this year, when some major developments occurred - developments that were excellent news for Canada's aerospace industry, for the cities concerned, Montreal and Winnipeg, and, of course, for the workers. In February, Air Canada announced that it would be buying 45 of Bombardier's CS300 aircraft, with an option to purchase 30 more, representing a crucial order for the C Series aircraft. Then Air Canada reached an agreement with the Quebec government whereby it committed to having the

---

262 Exhibit D-33, continuous numbering at 0987 *et seq*.

> heavy maintenance of those airliners performed in the province for a period of at least 20 years. This commitment opened the door to the creation in Quebec of a centre of excellence for the maintenance of C Series performed in Montreal or the province for aircraft purchased by a number of different airlines. If all goes well, the Quebec government expects the centre of excellence to generate 1,000 new jobs over 15 years.
>
> In March, Air Canada and the Manitoba government signed an agreement requiring the airline to bring three of its maintenance suppliers and partners to Winnipeg to set up new operations. This move will result in 150 new jobs next year.
>
> These developments will mean hundreds of future aeronautics jobs for Canada. However, there is one hitch. We need to free Air Canada of its 30-year-old shackles so that it can operate in a modern environment, not the world of 1988, not the world of DC- 8s and DC-9s, but the world pre-WestJet and pre-Porter.
> ...
>
> ... Air Canada would no longer be required by law to maintain the operational and overall centres that existed in 1988.
>
> Under the bill, the corporation would have to "... carry out or cause to be carried out aircraft maintenance activities ..." in the provinces stipulated, language less restrictive than the original. The bill also specifies that Air Canada will be able to change the type and volume of the maintenance activities it carries out, as well as the level of employment in these activities.
>
> Those amendments will allow Air Canada to enjoy the same flexibility as its competitors and organize its maintenance activities in the best possible way in a changing industry.
>
> ...
>
> The bill, as drafted, requires Air Canada to conduct aircraft maintenance in Canada, in the three provinces mentioned, but it's true that the company is not required to conduct a specific volume of work. The fact is that Air Canada already conducts heavy maintenance of its aircraft outside Canada. What it doesn't want is a legal sword of Damocles hanging over its head indefinitely that would force the company to revert to the heavy maintenance centres as they existed in 1988. This sword of Damocles is still hanging over its head. In exchange for freedom from this old-world restriction, Air Canada is committed to creating two heavy maintenance centres of excellence: one for C Series aircraft in Quebec and one for other aircraft in Winnipeg. That is the exchange we're talking about.

[Emphasis added.]

[251] Moreover, the 2016 Legislative Amendment includes nothing to justify finding that Parliament had the express intention to confer a declaratory nature on the *Act* and retroactively amend the interpretation of this provision as:

> 251.1. expressed by Parliament when it was adopted in 1988;

251.2. understood and applied by Air Canada from 1988 to 2012;

251.3. confirmed by the Castonguay Judgment and the CA Judgment.

[252] The Court also finds that the debates around the adoption of the 2016 Legislative Amendment reveal a desire to amend Air Canada's obligations in the future and [TRANSLATION] "free it of its shackles",[263] rather than make an exception to the prospective effect of laws and declare that such shackles never existed. The question of the possible retroactive effect of the amendment was the subject of specific debates, and Parliament could have decided to include such a declaration in the amendment. It did not do so.

[253] Air Canada's argument is therefore rejected.

[254] Because the Court has rejected the *res judicata* argument and that based on the declaratory nature of the 2016 Legislative Amendment, for the reasons given in paragraph 188 of this judgment, it finds that Air Canada's position is that it does not challenge the Castonguay Judgment or the CA Judgment, which are applicable to it.

1.3 Abuse of procedure

1.3.1 Legal principles

[255] Even in the absence of the triple identity required for *res judicata* to apply, a party may be prohibited from relitigating an issue that was decided in another legal proceeding involving that party.

[256] In this case, the plaintiff argues that this doctrine applies against Air Canada, who was a party to the legal proceedings that led to the Castonguay Judgment and the CA Judgment, while Air Canada invokes *res judicata* against the plaintiff, who was a party via the IAMAW to the legal proceedings that led to the Newbould Judgment.

[257] This doctrine has been developed around the concept of abuse of procedure committed by a party who tries to relitigate in circumstances where such relitigation would undermine the principles of economy, consistency, finality, and the integrity of the administration of justice.[264]

[258] In the leading case of *Toronto (City) v. C.U.P.E.,*[265] the Supreme Court of Canada had the following to say about it:

---

263 Exhibit D-33, continuous numbering at 0987 *et seq.*

264 *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (**City of Toronto**) at para. 37.

265 *City of Toronto, ibid.* at paras. 35, 37, 42, and 50.

258.1. Abuse of process is described at common law as proceedings unfair to the point that they are contrary to the interest of justice;

258.2. This doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute;

258.3. One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined;

258.4. The attraction of the doctrine of abuse of process is that it is unincumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process;

258.5. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case. In this respect, the Supreme Court added:[266]

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> [52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously

---

266 *City of Toronto*, *supra* note 264 at paras. 51 and 52.

> unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in Danyluk, *supra*, at para. 80.
>
> [Emphasis added.]

[259] The doctrine of abuse of process defined in *City of Toronto* applies to abuse of procedure in Quebec.[267] It is included in the second paragraph of article 51 of the *Code of Civil Procedure* (C.C.P.) as "a use of procedure that is excessive or unreasonable" and that would "defeat the ends of justice".[268]

1.3.2 Discussion

[260] Air Canada argues that by challenging the Newbould Judgment, even where is no perfect triple identity, the plaintiff is committing an abuse of procedure and should be barred by a peremptory exception.

[261] Air Canada's position can be summarized as follows:

261.1. Even if we accept the conclusions of the CA Judgment on the lack of identity of cause between the Newbould Judgment and the proceedings for a declaratory judgment (one of them based on the transfer of Aveos's unionized employees and the other on Aveos's demise), the plaintiff is not free to flout the conclusions of the Newbould Judgment by once again challenging them in this proceeding.[269]

261.2. In doing so, the plaintiff is attempting to relitigate an issue that has already been decided in a proceeding before another legal forum in which he was a party, namely, that Air Canada was complying with the *Act* only in its line maintenance activities;[270]

261.3. The stability of judgments and judicial consistency require that a party may never relitigate an issue that has already been decided, and the Court must intervene to punish abuse by dismissing the plaintiff's action;

261.4. According to Air Canada, if the IAMAW had brought the application for a declaratory judgment in 2012, it would clearly have been dismissed as an abusive attempt to circumvent the conclusions of the Newbould

---

267 *Construction S.Y.L. Tremblay inc. c. Agence du revenu du Québec*, 2018 QCCA 552 at paras. 20 and 22; *G.J. c. Auguste*, 2019 QCCS 1267 at paras. 10 –12.

268 *ArcelorMittal Exploitation minière Canada c. SNC-Lavalin inc.*, 2021 QCCS 202 at para. 30. See also Denis Ferland & Benoît Emery, *Précis de procédure civile du Québec (arts. 1-301, 321-344 C.C.P.)*, 6th ed., vol. 1 (Montreal: Yvon Blais, 2020) 2000 at paras. 1-578 and 1-579.

269 Argument outline of Air Canada at para. 334.

270 Argument outline of Air Canada at para. 343.

Judgment.

[262] The plaintiff also seeks the dismissal of Air Canada's defence in this case, in that it raises the same arguments as those already rejected in the Castonguay Judgment and the CA Judgment, thus constituting an abuse of procedure. His position can be summarized as follows:

262.1. Air Canada is attempting to relitigate the findings of fact and law in the Castonguay Judgment an the CA Judgment concerning the illegality of Air Canada's conduct in the wake of Aveos's demise;

262.2. This proceeding arises from the same facts as the proceeding for a declaratory judgment and from more extensive evidence on the conduct of Air Canada;

262.3. The conclusions of the Castonguay Judgment and the CA Judgment, including the reasons for those judgments which are inextricably linked, constitute the starting point of this proceeding by the plaintiff, and Air Canada cannot challenge them without committing an abuse of procedure;

262.4. The conclusions of the expert Bernard Adamache, filed by Air Canada, as to the reasonable minimum threshold for Air Canada's maintenance activities in Canada to ensure compliance with the *Act* should be rejected given the analysis actually performed by the expert, which was more of an attempt to dispute the findings of the CA Judgment.

[263] As for the allegation by Air Canada that the plaintiff is trying through this proceeding to relitigate an issue already decided in the Newbould Judgment, the Court refers to its analysis and findings detailed above on the absence of identity of cause between the two instances, defeating the principle of *res judicata* of the Newbould Judgment in this case.[271]

[264] In light of the major change in the factual situation in the wake of Aveos's demise, in addition to the reasons and findings in the Castonguay Judgment and the CA Judgment that issued rulings on this new state of affairs, it would appear that the plaintiff is not attempting to relitigate the same issue decided in the Newbould Judgment. The Court concludes that the plaintiff's action in this case does not constitute abuse of procedure.

[265] As for the plaintiff's allegation that Air Canada is attempting through its defence to relitigate an issue already decided in the Castonguay Judgment and the CA Judgment – namely, the conclusion that Air Canada has been in breach of the *Act* since Aveos shut

---

[271] See section V.1(1.1) of this judgment.

down despite its line maintenance activities – the Court concludes that this also is not an abuse of procedure, for the following reasons:

265.1. Air Canada submits a *res judicata* argument based on identity of the parties, an argument that is somewhat different from the argument made before the Court of Appeal because the plaintiff was not a party to that other proceeding;

265.2. If the Court rejects the argument of *res judicata* made by Air Canada – which it does in this judgment – Air Canada clearly states that it [TRANSLATION] "does not call into question the conclusions of the Castonguay Judgment or the Court of Appeal Judgment, which will apply to it";[272]

265.3. Although the Court has rejected the argument based on *res judicata*, the plaintiff has failed to convince the Court that it was actually abusive. Because, in these circumstances, Air Canada submits to the conclusions of the Castonguay Judgment and the CA Judgment and therefore to the reasons that for inextricable parts of those judgments, the Court finds that its defence does not constitute an abuse of procedure.

[266] Accordingly, both parties' arguments invoking abuse of procedure are rejected.

1.4 Analysis of Air Canada's breach of the *Act*

[267] In light of the above, the Court concludes that the issue of Air Canada's breach of paragraph 6(1)(*d*) of the *Act* following Aveos's demise is resolved by the CA Judgment, which, as noted above, Air Canada does not challenge.

[268] Furthermore, even though the CA Judgment is not formally binding on the Court, there is no reason to set it aside.

[269] The conclusions of that judgment and its underlying reasons are consistent with the conclusions this Court has reached in light of the evidence adduced here with respect to the interpretation paragraph 6(1)(*d*) of the *Act* should receive.

[270] Accordingly, the Court accepts the following elements relating to the interpretation to be given to paragraph 6(1)(*d*) of the *Act* and the breach of that provision by Air Canada, as a basis for the analysis of the plaintiff's action in this case:

270.1. When the *Act* was enacted in 1988, Parliament included paragraph (*d*) in response to national geopolitical imperatives, but also to reflect the will to ensure the Canadian character of the new company by physically tying it

---

[272] Argument outline of Air Canada at para. 349.

to some parts of the country;[273]

270.2. Since Aveos shut down, Air Canada no longer maintains the Centres it operated there when the *Act* came into force, nor does it carry out equivalent activities;[274]

270.3. As for the interpretation that paragraph 6(1)(*d*) of the *Act* should receive, the Court of Appeal determined:

270.3.1. "To maintain" is equivalent to ensuring the continuity of a situation, thing, or state, in this case the Centres operated by Air Canada in Montreal and Winnipeg (as well as Mississauga);[275]

270.3.2. To maintain ***the*** Winnipeg, Mississauga, and Montreal Centres means to maintain them *as they existed and were known* when the *Act* was passed; [276]

270.3.3. Parliament's clear intention was to compel Air Canada to keep the Montreal and Winnipeg Centres, if not in the same state (as in 1988) then at least in essence; [277]

270.3.4. Parliament could not have wanted the Centres protected by paragraph 6(1)(*d*) of the *Act* to be empty shells. Maintaining the Montreal and Winnipeg Centres can therefore mean only one thing, that is, keeping them active, operating them, at a level of activity comparable to what existed when the *Act* was adopted.[278]

270.4. As for the leeway given Air Canada in the activities it carries out at those Centres:

270.4.1. the *Act* does not impose a minimum employee level or a specific minimum volume of activity. The continuity sought does not require absolute fixity of activities, considering that maintenance and servicing requirements and techniques are bound to change;[279]

270.4.2. This freedom is limited and does not allow Air Canada to

---

273 CA Judgment at para. 17.
274 CA Judgment at para. 52.
275 CA Judgment at para. 132.
276 CA Judgment at para. 133.
277 CA Judgment at para. 135.
278 CA Judgment at para. 137.
279 CA Judgment at para. 153.

overstep the *Act*. The essential activities of the Centres must be substantially preserved, both quantitatively and qualitatively. The Centres may not be shut down and their activities may not be reduced below a given threshold. Air Canada cannot transform them into secondary centres of little importance or into locations where the tasks performed are no longer equivalent to those performed there in 1988;[280]

270.4.3. The Centres with their specific activities as they existed in 1988 are what Parliament was looking to protect, for both social and political reasons;

270.4.4. Even if Air Canada is pursuing a commercially legitimate objective, it cannot circumvent the critical impediment of paragraph 6(1)(*d*) of the *Act*;[281]

270.4.5. Any change to Air Canada's business model thus defined requires a legislative amendment.

[271] Therefore, to comply with its legal obligations, Air Canada was required to maintain the Centres in the same state as in 1988 or in their essence or equivalent and at a comparable level of activity, without changing the business model, which it failed to do between March 18, 2012, and June 22, 2016.

2. DOES AIR CANADA'S BREACH OF PARAGRAPH 6(1)(*d*) OF THE *ACT* CONSITUTE A FAULT INCURRING ITS LIABILITY?

[272] Not every breach of an *Act* necessarily constitutes a civil fault incurring the liability of its author towards third parties.

[273] The issue is whether Air Canada's breach of paragraph 6(1)(*d*) between March 2012 and June 2016 constitutes a civil fault likely to incur its liability towards the plaintiff and the Class members.

[274] For the reasons detailed below, the Court concludes that Air Canada's breach of the *Act* constitutes a civil fault.

2.1 Legal principles

[275] The general civil liability regime based on fault is set out in article 1457 C.C.Q., which provides:

---

[280] CA Judgment at paras. 154, 157, and 218.
[281] CA Judgment at para. 220.

> 1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.
>
> [Emphasis added.]

[276] The breach of a regulatory or legislative provision setting out a rule of conduct can therefore be a source of civil liability in certain circumstances.

[277] The analytical framework to determine whether the breach of a legislative provision in a given situation also constitutes a fault likely to incur the liability of its author evolved over the course of a series of Supreme Court judgments.

[278] The issue was first addressed in *Morin v. Blais*,[282] in 1977, in a dispute that concerned the breach of a traffic sign as the source of a civil fault in a traffic accident. The Supreme Court stated the following: [283]

> The mere breach of a regulation does not give rise to the offender's civil liability if it does not cause injury to anyone. However, many traffic provisions lay down elementary standards of care and make them binding regulations at the same time. Breach of such regulations constitutes civil fault. In cases where such fault is immediately followed by an accident which the standard was expressly designed to prevent, it is reasonable to presume that there is a causal link between the fault and the accident, unless there is a demonstra-tion or a strong indication to the contrary.
>
> [Emphasis added.]

[279] Thus, according to *Morin*, if the breached legislative provision states an elementary standard of care, breaching it constitutes a civil fault and the accident immediately following the breach of the rule is presumed to have been caused by this fault.

[280] In 2008, in *St. Lawrence Cement Inc. v. Barrette*,[284] the issue was once again considered by the Supreme Court but under different circumstances. The application of the teachings in *Morin* was limited.[285]

---

282 [1977] 1 S.C.R. 570 (***Morin***).
283 *Morin*, *supra* note 282 at 579 and 580.
284 2008 3 S.C.R. 393 (***St. Lawrence Cement***)
285 *St. Lawrence Cement*, *supra* note 284 at paras. 32–36.

(3) Fault and Violation of the Law

> [32] Standards provided for in statutes and regulations also place limits on rights and on the exercise thereof. Many examples of this can be found in the Civil Code of Québec, in zoning rules and in environmental standards. As a result, the question of the relationship between violations of the law and civil liability needs to be examined.
>
> [33] As we noted above, the general rules of civil liability set out in art. 1457 C.C.Q. are based on fault (Baudouin and Deslauriers, at p. 149). [TRANSLATION] "This is a universal concept, since it applies every time a victim alleges that a person who caused injury is liable under the general rules" of art. 1457 C.C.Q. (P.-G. Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile?" (1984), 44 R. du B. 222, at p. 223). To answer this question, the standards provided for in statutes and regulations, often called "legislative standards", must be analysed in light of the basic concept of civil fault.
>
> [34] In Quebec civil law, the violation of a legislative standard does not in itself constitute civil fault (*Morin v. Blais*, 1975 CanLII 3 (SCC), [1977] 1 S.C.R. 570; Compagnie d'assurance Continental du Canada v. 136500 Canada inc., [1998] R.R.A. 707 (C.A.), at p. 712; Jobin, at p. 226). For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. *1457 C.C.Q.* (Union commerciale Compagnie d'assurance v. Giguère, [1996] R.R.A. 286 (C.A.), at p. 293). The standard of civil fault corresponds to an obligation of means. Consequently, what must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct. This rule applies to the assessment of the nature and consequences of a violation of a legislative standard.
>
> ...
>
> [36] In Quebec, art. 1457 *C.C.Q.* imposes a general duty to abide by the rules of conduct that lie upon a person having regard to the law, usage or circumstances. As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct — the content of which may be reflected in the relevant legislative standards — having regard to the law, usage and circumstances.
>
> [Emphasis added.]

[281] It follows from this leading case that:

281.1. The legislative standard must be analyzed "in light of the basic concept of civil fault";

281.2. The violation of a legislative standard does not in itself constitute civil fault;

281.3. The offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person within the meaning of article 1457 C.C.Q.;

281.4. The standard of civil fault corresponds to an obligation of means;

281.5. What must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct;

281.6. The content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context;

281.7. It is up to the judge to determine the applicable standard of conduct, the content of which may be reflected in the relevant legislative standards.

[282] In 2019, in *Kosoian v. Société de transport de Montréal*,[286] the Supreme Court was once again asked to rule on the notion of civil fault in relation to the breach of a legislative standard. It stated the following:

> [42] Under Quebec civil law, art. 1457 C.C.Q. imposes on every person "a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another". An extracontractual civil fault occurs where a person who is endowed with reason fails in this duty by acting in a manner that departs from the conduct of a reasonable, prudent and diligent person in the same circumstances ... . In this sense, fault is a [translation] "universal concept" that applies in any lawsuit based on art. 1457 C.C.Q. (*St. Lawrence Cement Inc.* at para. 33, quoting P.-G. Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile? " (1984), 44 R. du B. 222 at 223).
>
> [43] The standard of conduct that a reasonable person is expected to meet corresponds to an obligation of means ... . The general rules of extracontractual civil liability do not demand [TRANSLATION] "total infallibility", nor do they require the "conduct of a person endowed with superior intelligence and exceptional skill who is capable of foreseeing and knowing everything and who acts properly in all circumstances" (Baudouin, Deslauriers and Moore, vol. 1, at No. 1-195).
>
> [44] It goes without saying, moreover, that the reasonable person test takes into account the nature of the activity in issue. ...
>
> [47] The content of the law governing the work of the police determines, to some degree, the scope of "the duty of prudence and diligence that applies in a given context" (see *St. Lawrence Cement*, at para. 36). In a civil liability action, a court will therefore have to assess a police officer's conduct in light of the limits imposed by, among other things, constitutional and quasi-constitutional enactments, criminal and penal legislation and the constituting statutes and codes of ethics of police forces ... .

---

[286] 2019 SCC 59 (***Kosoian***) at paras. 42 *et seq.*

[48] A violation of such statutory or regulatory rules of conduct can often, absent special circumstances, be considered a **civil** fault ... . This will particularly be the case where a provision itself lays down an elementary standard of prudence or diligence ... .

[49] In other words, while, as stated in art. 1457 para. 1 C.C.Q., a reasonable person must of course comply with the rules of conduct imposed by law, these rules do not create obligations of result under the general rules of civil liability (with regard to this concept, see Crépeau, at pp. 11-12). In St. Lawrence Cement, the Court rejected the proposition that the violation of statutory or regulatory rules constitutes an objective "civil fault" that requires a form of strict liability regardless of the prudence and diligence exercised by the person who caused the injury, having regard to the circumstances: ...

[50] Under Quebec civil law, it is not enough to show that a police officer's conduct was unlawful. The obligation resting on the officer remains an obligation of means, even where compliance with the law is in issue. To obtain reparation, the plaintiff must first establish the existence of fault within the meaning of art. 1457 C.C.Q., that is, a departure from the conduct of a reasonable police officer in the same circumstances. This is not to say that the general rules of civil liability are lax. As I will explain below, the standard of conduct expected of police officers is justifiably high: a police officer who acts unlawfully cannot easily escape civil liability by relying on his or her ignorance or misunderstanding of the law.

...

[64] In short, police officers sometimes commit a civil fault if they act unlawfully, even where their conduct is otherwise consistent with the training and instructions they have received, with existing policies, directives and procedures and with the usual practices. It is all a matter of context: the question is whether a reasonable police officer would have acted in the same manner. In assessing a police officer's conduct, a court must therefore [translation] "give significant weight to the external circumstances" and "avoid the perfect vision afforded by hindsight" ... .

[65] In this regard, I emphasize that a police officer's conduct must be assessed in light of the law in force at the time of the events (*Hill*, at para. 73; *St-Martin*, at para. 94; L. (J.), at para. 5; *Communauté urbaine de Montréal v. Cadieux*, [2002] R.J.D.T. 80 (Que. C.A.), at paras. 39-41). An officer can hardly be faulted for applying a provision that was presumed to be valid, applicable and operative at the relevant time (*Guimond v. Quebec (Attorney General)*, 1996 CanLII 175 (SCC), [1996] 3 S.C.R. 347, at para. 14).

...

[93] Unlike the majority of the Court of Appeal, it is my view that the circumstances of this case, including the training Constable Camacho received, cannot render his conduct reasonable. It is true that, as stated in the trial judge's decision, the STM taught police officers that it was an offence to disobey the pictogram indicating that the handrail should be held (paras. 210-11 and 270). As I explained above, such training must be taken into account in assessing a police officer's conduct. However, the fact that police officers have received training does not authorize them to lay aside their own judgment. Here, despite

> the training received, the very sight of the pictogram should at least have raised a doubt in the mind of a reasonable police officer as to whether it created an offence.
>
> [94] In the circumstances, and in light of Ms. Kosoian's protests, Constable Camacho could not reasonably be certain that he was acting within his powers. He should have refrained from giving her a statement of offence and then made further inquiries as to the meaning of the pictogram and the scope of the by-law. ...
>
> [Emphasis added.]

[283] As the Supreme Court specified, absent special circumstances, the violation of statutory or regulatory rules of conduct can often be considered a civil fault. This will particularly but not exclusively be the case where a legislative provision itself lays down an elementary standard of prudence and diligence.

[284] Nevertheless, to find that there is a civil fault, it must be considered whether, in violating the legislative standard, the person at fault acted like a reasonably prudent and diligent person placed in the same circumstances. This means that the Court must:

284.1. Take into consideration the content of the applicable legislative standards and their impact on the scope of the obligation of prudence and diligence necessary in a given context that takes into account the nature of the activity at issue;

284.2. Assess the conduct, by assigning significant weight to external circumstances and avoid the 20/20 vision afforded by hindsight;

284.3. Determine the applicable standard of conduct, having regard to the law, usage, and circumstances, the content of which may be reflected in the relevant legislative standards. What must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct. This rule applies to the assessment of the nature and consequences of a violation of a legislative standard.

[285] When a company is subject to a law specifically regulating its business, as is the case here, the obligations created by such law will be added to those imposed under the ordinary law, subject to an express legislative provision to the contrary.[287]

---

[287] *St. Lawrence Cement, supra* note 284 at paras. 97 and 98. See, for example, *Léger* c. *Bell Canada*, 2006 QCCS 4924 at paras. 105 and 106.

2.2 Discussion

[286] In addition to the rules of ordinary law that apply to everyone, Air Canada is subject to the obligations specifically set out in the *Act* that authorized its privatization.

[287] It must be determined whether the breach of the *Act* constitutes a fault within the meaning of art. 1457 C.C.Q.

[288] As discussed above, the restrictive component of Air Canada's obligation under paragraph 6(1)(*d*) of the *Act* to maintain the Centres was confirmed by the CA Judgment, which describes its intensity.

[289] In fact, it appears from Air Canada's conduct between 1988 and 2012, as well as from the testimony of some Air Canada past representatives[288] and its expert Mr. Adamache,[289] that this legislative obligation was the main reason Air Canada was compelled to perform the maintenance and overhaul of its aircraft at the Centraes, rather than follow the evolution of the business model in the industry.

[290] When analyzing this issue, it must be considered whether the obligation in paragraph 6(1)(*d*) had an impact on the scope of Air Canada's obligation of prudence and diligence in the context of Aveos ceasing its activities, which obligation must take into account the nature of the activity at issue, that is, aircraft maintenance and overhaul.

[291] Both the wording of paragraph 6(1)(*d*) of the *Act* and the interpretation it received from Air Canada over the two decades preceding the closure of Aveos, which also involves the costs and constraints required by compliance with this obligation, confirm that the legislative obligation had a significant impact and added to the standard of conduct Air Canada had to adopt with regard to the maintenance and overhaul of its aircraft

[292] This raises the question of whether Air Canada was negligent or careless in the particular circumstance of each of its acts or all of its conduct when, the day after Aveos ceased its operations, it did not actually keep the Centres in service.

[293] The source of paragraph 6(1)(*d*) of the *Act* reveals that Parliament's intention in imposing this excessive obligation under the general law on Air Canada, was to preserve Canadian expertise manifested in the skills developed by specialized workers at the Centres[290] and to maintain these jobs in the prescribed cities, despite Air Canada's privatization.[291]

---

288 See especially exhibits D-32 and P-76.

289 See the Adamache Report, exhibit P-74 at para. 93.

290 See especially the excerpts of parliamentary debates in exhibit D-32. See also the CA Judgment, especially paras. 185, 190, 193, 194, 195, and 199.

291 See the CA Judgment, especially paras. 173, 175, 177–179, 183, and 199.

[294] While such an obligation did not appear to overly constrain Air Canada in 1988 when it was adopted, as appears from the arguments at the parliamentary debates of its then-President and Chief Executive Officer,[292] the situation subsequently changed radically, given the evolution of the industry and the market and the ability of air carriers to benefit from significant savings by outsourcing maintenance and overhaul operations to countries where labour costs are much lower.[293]

[295] That said, the legislative provision has remained unchanged and Air Canada complied with it until March 2012.

[296] To a large extent, the consequences that this legislative provision had sought to avoid, that is, the permanent closure of the Centres and the loss of skilled jobs in the prescribed cities, materialized, even if it is taken for granted that some employees eventually found work elsewhere, with another employer in a related field, and that some limited activities were eventually handed over to other companies in Canada.

[297] That said, one thing remains: since March 18, 2012, and for the entire period at issue, the volume of maintenance and overhaul activities entrusted by Air Canada to Montreal and Winnipeg is insignificant compared to what was done in the Centres from 1988 to March 2012.

[298] While the legislative objective behind Air Canada's obligation was clearly identified by Parliament and understood and accepted by Air Canada when it was privatized,[294] and Air Canada's breach of this obligation caused the undesirable consequences it was intended to prevent, the Court cannot conclude that the obligation under paragraph 6(1)(*d*) was a standard of elementary care the mere violation of which is equivalent to a civil fault.

[299] That said, the analysis of the overall context and the specific circumstances in which Air Canada violated the *Act* from March 2012 to June 2016 has persuaded the Court that Air Canada did not act in a reasonably prudent and diligent manner in the circumstances.

[300] Air Canada did not take reasonable means to comply with the *Act*, as appears from the following evidence showing that Air Canada:

300.1. Clearly indicated in the days after Aveos shut down that it had no intention of repurchasing Aveos or directly rehiring the employees to reopen the Centres.[295] This decision was the result of Air Canada's own economic

---

[292] See in particular the CA Judgment at para. 173.

[293] To this end, see the position of the Air Canada expert, Adamache Report, exhibit P-74. See also the parliamentary debates, exhibit D-33.

[294] See in particular the CA Judgment at paras. 173 and 183.

[295] Exhibit P-85. The Court primarily refers to the testimony of Mr. Rovinescu and Mtre Louise-Hélène Sénécal at the hearing.

and strategic considerations; [296]

300.2. Prior to Aveos's closure, did not systematically and unequivocally integrate in its call for tenders to replace its aircraft maintenance service providers the obligation for some of the activities to be carried out in Montreal, Winnipeg, or Mississauga, or even more broadly, in Canada, in order to comply with its legal obligations;

300.3. After Aveos's closure, did not require from its new aircraft maintenance service providers, the obligation to carry out the activities in Canada in the cities identified in the *Act*, let alone at the Centres;

300.4. Left it up to potential providers to chose where the maintenance work would be carried out, specifying that Air Canada's primary goal was to make substantial savings, which made it practically fanciful to think that they would choose the Centres, in the context of the industry in 2012;

300.5. Even after analyzing the bids received, it never considered or took any steps to maintain the Centres itself in the absence of sub-contractors willing to do so;

300.6. Ultimately entered into agreements with providers by accepting that almost all the work would be carried out outside Canada and, in all circumstances elsewhere than at the Centres, allowing it to benefit from the colossal savings[297] announced during the call for tenders process;

300.7. Did nothing to repatriate the necessary certificate from the regulatory authorities that would allow it to carry out the activities transferred to Aveos, a procedure which, according to Air Canada's expert, would have taken six to eight months.

[301] What appears from the evidence is that Air Canada shirked its obligation to maintain operational Centres, placing the choice of whether bear this burden on the shoulders of its providers.

[302] The fact that sub-contracting these services was deemed acceptable to allow Air Canada to comply with its legal obligation does not free it from this obligation when the subcontractor closes. Aveos was never subject to the obligation in paragraph 6(1)(*d*). At all relevant times, Air Canada remained subject to it.

[303] Thus, the day after Aveos's demise, and in spite of this demise, Air Canada was required to act prudently and diligently to comply with the standard of conduct imposed

---

296 Exhibit P-85.

297 The Court refers primarily to the testimony of Mr. Gilles Néron, who assessed savings of about $150 million annually since Aveos's closure.

on it, that is, the standard set out in the *Act*, which it failed to do. That being the case, its conduct is faulty and incurs its liability.

[304] Air Canada explained its conduct by arguing that it sincerely believed that it was complying with the *Act* in carrying out only the line maintenance of its aircraft in Canada. It used the excerpt from the Newbould Judgment cited earlier to change its historically held position on the level of activity required to maintain the Centres and comply with the *Act*. As stated above, that judgment does not have the authority of *res judicata* in this case. Furthermore, the Court adopts as its own the analysis and conclusions of the CA Judgment, which came to the opposite conclusion when presented with the fact that the Centres are no longer operational and must truly be excluded from the analysis of Air Canada's compliance with the *Act*.

[305] To justify its inaction in the aftermath of Aveos's closure, Air Canada relies on the legal opinion cited above, issued by Justice Canada on March 28, 2012, to the following effect:

> 305.1. Paragraph 6(1)(*d*) requires only that Air Canada's articles include the provisions set out under paragraph 6(1)(*d*), not that Air Canada maintain the Centres in the three cities identified;[298]
>
> 305.2. The question is therefore whether Air Canada complies with its articles by maintaining its line maintenance operations, in the absence of Aveos;
>
> 305.3. The Newbould Judgment discusses Air Canada's compliance even though the issue did not need to be decided;
>
> 305.4. The chances of success of an action against Air Canada based on the *CBCA* are low. A legislative amendment compelling Air Canada to carry out all of its maintenance and overhaul work in Canada or to preserve the historic levels of maintenance and overhaul work in Canada is likely to raise problems with respect to external trade.[299]

[306] Yet, as stated above, the author of this opinion specified on March 29, 2012, that if an action were instituted to contest Air Canada's compliance with the *Act* following Aveos's closure: "there is nothing to stop a court from independently finding that after a complaint is brought".[300]

[307] Finally, in April 2012, The Attorney General of Quebec brought proceedings for a declaratory judgment seeking a declaration that Air Canada had been in breach of the *Act* ever since Aveos's closure and that it had to continue carrying out the maintenance

---

298 Exhibit D-12, continuous numbering at 0172.
299 Exhibit D-12, continuous numbering at 0176.
300 Exhibit P-85 at 14.

and overhaul work at the Centres or having it carried out. This proceeding alleged the following, *inter alia*:[301]

> 307.1. The cessation of Aveos's activities placed Air Canada in breach of its legal obligations under the *Act* in that it no longer maintained overhaul centres in Montreal;
>
> 307.2. Air Canada confirmed in writing on April 11, 2012, that, in its view, it was in compliance with the *Act* by maintaining its line maintenance activities, without carrying out component, engine, and airframe overhaul;
>
> 307.3. The scope of the legal obligation was to carry out the maintenance and overhaul of aircraft components, engines, and airframes, particularly in light of the precision and positions expressed by the various speakers when the *Act* was passed in 1988.
>
> 307.4. When Aveos ceased its operations, Air Canada was still required to fulfill its obligations under the *Act*.

[308] Accordingly, Air Canada acting prudently and diligently could no longer entirely rely on these elements, now judicially contested, and continue to maintain an honest belief that it was in compliance with the *Act*.

[309] There was a nascent judicial debate on that very question, with the risks it involved for Air Canada. Moreover, an error in the interpretation of a statute or ignorance of the law does not constitute an excuse for or a defence against its breach.

[310] The Court also accepts that Air Canada did not change its conduct following the Castonguay Judgment in February 2013 or after the CA Judgment in November 2015. Instead, it opted to seek a legislative amendment,[302] which it obtained, but that ultimately would release it only on June 22, 2016.

[311] Air Canada's obligation to maintain the Centres in Montreal, Winnipeg, and Mississauga is one of means. In light of the above, it appears that Air Canada did not take any reasonably serious steps to comply with the *Act* after Aveos closed.

[312] Accordingly, the Court concludes that the ongoing breach of the *Act* by Air Canada during the period from March 2012 to June 2016 constitutes a civil fault within the meaning of art. 1457 C.C.Q., of a nature to incur its liability.

---

301 Amended originating application for a declaratory judgment, exhibit P-7.

302 The Court refers to the testimony of Mr. Rovinescu on the discussions and steps taken in this regard.

3. DID AIR CANADA ACT IN BAD FAITH AND INTENTIONALLY PROVOKE THE DEMISE OF AVEOS?

[313] The plaintiff also criticizes Air Canada for orchestrating Aveos's demise intentionally and in bad faith, which placed it in breach of paragraph 6(1)(*d*) of the *Act.* This second alleged fault includes but is broader than the first.

[314] The plaintiff alleges that Air Canada intentionally provoked the closure of Aveos, the loss of its employees' jobs, and the cessation of the maintenance and overhaul activities for Air Canada's aircraft at the Centres, and that it should be found liable for the damage arising from this wrongful conduct, including punitive damages.

[315] According to the plaintiff,[303] Air Canada's conduct is faulty in that:

315.1. It implemented a strategy to replace Aveos as Air Canada's exclusive provider, in breach of their exclusivity agreements after the transfer of its employees was completed;

315.2. It substantially reduced the work given to Aveos shortly after this transfer of employees and withheld significant amounts owed to it, causing it to suffer financial difficulties that forced it to seek *CCAA* protection ;

315.3. It could not have been unaware that the demise of Aveos would place it in breach of the *Act*;

315.4. It concealed the impending end of maintenance carried out in Canada during the hearing before Newbould J.;

315.5. It also reneged on the public undertakings it had made to keep these maintenance services in Canada.

[316] The Court concludes, for the reasons set out below, that the plaintiff has failed to discharge his burden of establishing, on a balance of probabilities, that Aveos's demise was caused by Air Canada's bad faith or intentional fault.

3.1 Legal principles

[317] Every person is bound to exercise his or her civil rights in accordance with the requirements of good faith.[304] This conduct is expected of any relationship, be it contractual or extracontractual.[305]

---

303 Plaintiff's argument outline at paras. 160 and 161.
304 Article 6 C.C.Q.
305 *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 (**Houle**).

[318] In *Houle v. Canadian National Bank*,[306] the Supreme Court of Canada added the following about this conduct:

> Contractual liability and liability in tort may coexist where third parties are at issue. The fact that two parties entered into a contract does not shelter them from the extracontractual liability they may incur outside the contractual sphere.

[319] Good faith is examined against conduct that is excessive and unreasonable,[307] or without any consideration for the interest of others, or even conduct engaged in with the intent to harm others.

[320] Good faith is presumed and it belongs to the party alleging bad faith to prove it. This burden is onerous.

[321] An intentional fault is conduct [TRANSLATION] "motivated by an intent to harm that therefore aims, deliberately and voluntarily, to cause the prejudice".[308] However, an unwanted fault resulting from negligence or carelessness will not be considered an intentional fault.[309]

3.2 Discussion

[322] It is appropriate to review each of the elements raised by the plaintiff in support of his argument.

3.2.1 Implementation of a strategy to replace Aveos as Air Canada's exclusive provider, in breach of their exclusivity agreements after the transfer of its employees was completed;

[323] The last stage of the transfer of employees from Air Canada to Aveos was completed in July 2011. The parties acknowledge that there was a codependent relationship between the businesses at that time. Aveos was contractually bound to perform almost all the maintenance and overhaul work on Air Canada's aircraft.

[324] According to the plaintiff, following the transfer, when Air Canada no longer had any employment relationship with the workers, it implemented a strategy to replace Aveos as the exclusive provider, with the aim of achieving substantial savings.

[325] To support his position, the plaintiff refers to the following, among other things:

325.1. Air Canada implemented a large-scale cost reduction program to

---

306 *Houle*, *supra* note 305 at 165.

307 *Houle*, *supra* note 305; *Vachon* c. *Lachance*, [2002] R.R.A. 4 (Sup. Ct.). See also article 1375 C.C.Q.

308 Jean-Louis Baudouin, Patrice Deslauriers & Benoit Moore, *La responsabilité civile*, 9th ed., vol. 1 (Montreal: Yvon Blais, 2021) 1902 at paras. 1–187 (**Baudouin and Deslauriers**).

309 Baudouin, *supra* note 308.

increase its competitiveness and profitability.[310] The cost reduction objectives for 2012 were $500 million;

325.2. Air Canada was aware that the costs of the labour transferred to Aveos and assigned to maintenance and overhaul work was higher than market rates;

325.3. The services contracts between Air Canada and Aveos expired in June 2013;

325.4. Aveos needed the income from these contracts until their expiry and needed time to implement the strategic plan prepared by its new president at the time, Mr. Kolshak;

325.5. Air Canada launched a request for proposals in January 2012 for airframe, component, and engine maintenance contracts. These documents contain references to Air Canada's enquiries into the availability of potential providers as early as June 2012, its estimates of potential savings based on the information received from the bidders, and its preparation of various scenarios on the short- and medium-term future of Aveos;[311]

325.6. In particular, Air Canada identified the possibility that the airframe maintenance contract might end before it expired, in June 2012;

325.7. According to the plaintiff, a contingency plan was set up to prepare for Aveos's possible closure and the transfer of the maintenance services to external suppliers.

[326] It is true that several events that took place in the months leading up to Aveos's demise may have fueled concerns that Air Canada acted in bad faith or intentionally to harm Aveos.

[327] That is the case with the following chronological events:

327.1. On May 25, 2011, the Newbould Judgment was rendered. Air Canada misinterpreted it as allowing it to no longer carry out or have carried out the activities entrusted to Aveos at the Centres or even in Canada;

327.2. In July 2011, 1,819 unionized employees temporarily assigned by Air Canada to Aveos, and already working there, were finally transferred to Aveos and the employment relationship with Air Canada ended;

---

[310] The Court refers to the testimony of Mr. Rousseau at the hearing.

[311] See Section IV.5(5.1) of this judgment.

327.3. Starting in January 2012, Aveos's financial situation worsened. This is confirmed by Mr. Kolshak of Aveos and the Air Canada representatives;[312]

327.4. In the same period, starting in June 2013, Air Canada began the process for a request for proposals in anticipation of the expiry of the contracts with Aveos. The primary objective of Air Canada at the end of the day was to substantially lower maintenance costs.[313] This process quickly informed it of the significant difference between the costs proposed by Aveos for airframe maintenance, and what the market could offer;

327.5. Some information contained in the documents prepared in early 2012 are inconsistent with the testimony of Air Canada's representatives at the hearing. For example:

327.5.1. According to Air Canada, such a process requires time and it may be prudent to start it 18 months before a contract expires. However, this does not explain why it was relevant to know the availabilities of suppliers in June 2012. Air Canada's representatives attempted to justify, more or less precisely, the existence of this request by a need to plan for a period of transition between suppliers and to become familiar with the supplier's capacity;

327.5.2. With respect, the evidence reveals that this request also meets other imperatives;

327.5.3. Air Canada considered two likely scenarios for airframe maintenance, one in mid-2012, in the event of the early termination of the maintenance contract with Aveos, and the other in mid-2013, if the contract expired on the scheduled date.[314] Air Canada's interest in elaborating a scenario for the early termination of the contract with Aveos is evident in other documents prepared during the period from January to March 2012,[315] or after, but referring to the intention existing during that period;[316]

327.5.4. Such a scenario is not part of a simple process of preparing for the expiry of contracts within an 18-month window. Air Canada was preparing for the possibility that it might have to

---

312 The Court refers primarily to the testimony of Mr. Rovinescu and Mr. Rousseau at the hearing.
313 Exhibit P-30, continuous numbering at 0578.
314 Exhibit P-19.
315 Exhibit D-30.
316 Exhibit P-31.

go elsewhere to maintain its aircraft. As for the airframe maintenance of widebody aircraft, Mr. Kolshak confirmed that Aveos's prices were not competitive. He even offered the possibility to Mr. Rousseau of having the work done in San Salvador in the short term, which Mr. Rousseau refused;

327.6. On February 24, 2012, Air Canada prepared a first contingency plan. As stated above,[317] the versions of Air Canada's representatives differ on the primary objective of this plan.[318] A presentation dated February 24, 2012, identified various scenarios should Aveos undergo a reorganization, to varying degrees;

327.6.1. It is noteworthy that this document was prepared after the formal notice of February 14, 2012, in which Aveos threatened to close. However, Mr. Néron testified that he was unaware of this fact when he prepared the contingency plan;

327.6.2. The Court accepts from the evidence that preparing the contingency plan in February 2012 was not the result of chance. Air Canada was preparing for the possibility that it might have to compensate for the impact Aveos's reorganization might have on Air Canada, in whichever form;

327.7. Mr. Kolshak testified that the very existence of the process of a request for proposals jeopardized Aveos's efforts to find maintenance contracts with third parties. He described a conversation he had had with a potential client. It also made the creditors nervous.

[328] However, the evidence also reveals the following facts, that explain Air Canada's conduct:

328.1. The transfer of employees from Air Canada to Aveos in July 2011 followed discussions, the conclusion of agreements, and approvals, and Air Canada was entitled to outsource its maintenance and overhaul work to a third party, in this case Aveos;

328.2. Air Canada knew, as of January 2012, that Aveos was in trouble, or in the [TRANSLATION] "insolvency zone".[319] On February 14, 2012, the formal notice from Aveos to Air Canada even threatened the closure of the company;

328.3. As specified by Air Canada's representatives, its subsequent conduct

---

317 See paras. 86 et seq. of this judgment.
318 The Court refers to the testimony of Mr. Néron and Mr. Ciotti at the hearing.
319 The Court refers to the testimony of Mr. Rovinsescu at the hearing.

also aimed to protect its own interests in the face of Aveos's difficulties;[320]

328.4. The information in the request for proposal documents, and the contingency plan, also concern scenarios in which the contracts are terminated as scheduled in June 2013, and scenarios where Aveos, although subject to a reorganization, continued its maintenance and overhaul activities for Air Canada in one form or another;

328.5. As we will see, although the plaintiff argues that Air Canada substantially reduced the work entrusted to Aveos in the months leading up to the closure, the plaintiff has not proved that Air Canada would in fact have given the maintenance work destined for Aveos to other suppliers before March 18, 2012, in breach of the agreement binding them on this issue.[321]

[329] The analysis of this evidence as a whole has failed to convince the Court that Air Canada had a strategy to replace Aveos as its supplier starting in the summer of 2012, in breach of the exclusivity agreements.

3.2.2 The substantial reduction of the work given to Aveos shortly after the transfer of employees and the withholding of significant amounts owing by Air Canada, causing Aveos to suffer financial difficulties that forced it to seek *CCAA* protection

[330] The plaintiff also argues that Air Canada postponed maintenance work or unusually and intentionally withheld payment of invoices, which had a devastating effect on Aveos's already precarious financial situation.

[331] To support his position that Air Canada had reduced the work given to Aveos, the plaintiff submits that:

331.1. Mr. Kolshak testified that, as of late December 2011 and not after mid-February 2012 as Air Canada argues, Aveos noticed a reduction of the work given and the postponement or cancellation of scheduled maintenance, which resulted in an immediate reduction of income for Aveos;

331.2. Given the lack of prior notice to this effect, Aveos was prevented from giving the required 90-day notice to lay off employees due to the decreased volumes, and had to pay 700 employees to do nothing;

331.3. Aveos estimates the loss of income associated with these

---

320 The Court refers to exhibit P-70.7 and the testimony of Mr. Rovinescu, Mr. Rousseau, Mr. Néron, and Mr. Psycharis at the hearing.

321 Exhibits P-19 and D-16, section 1.5.2, continuous numbering at 0363.

postponements or cancellations at $16 million;[322]

331.4. Aveos's income for January, February, and March 2012 was lower than the income for the same period in 2011, which confirms Mr. Kolshak's testimony.

[332] With respect, considering the following, the Court does not share the plaintiff's position.

[333] In light of the analysis of the evidence on the revenue Aveos received from Air Canada, described in Section IV.5(5.3) of this judgment, the following should be accepted:

333.1. By carrying forward on a yearly basis Aveos's revenue from Air Canada for the period between January 1, 2012, and March 18, 2012, and comparing it to the annual revenue for 2011, there is a 5% decrease in 2012, regardless of whether the amounts invoiced the previous year but paid in the current year are included;

333.2. By comparing Aveos's revenue from Air Canada from January 1, 2012, to March 18, 2012, with the revenue for the same period in 2011, on a monthly basis, there is a 16% decrease in 2012, compared to the same period in 2011;

333.3. These variations in revenue do not appear unusual when compared to the increases or decreases in previous years.

[334] Furthermore, the evidence reveals the following:

334.1. Air Canada was not free to postpone or cancel the scheduled maintenance of its aircraft at will.[323] It had some leeway to postpone scheduled maintenance for a little while, in particular to take into consideration its aircraft requirements during the peak season;

334.2. No documentary evidence was adduced showing the unusual postponement of scheduled maintenance. There is also no convincing evidence that, prior to mid-February 2012, Air Canada postponed scheduled maintenance for no valid reason.

334.3. Aircraft maintenance and overhaul is cyclical. Mr. Kolshak confirmed this fact in his strategic plan of July 2011, where he acknowledged that this aspect had an impact on some sectors of activity, specifically

---

[322] *Petition for the issuance of an Initial Order*, by Aveos, dated March 18, 2012, exhibit P-74 at paras. 3, 78 and 79.

[323] See the references under note 54 of this judgment.

productivity;[324]

334.4. Air Canada acknowledged that it postponed some scheduled maintenance In the weeks leading up to Aveos's closure to protect its assets given Aveos's threat to close;

334.5. Although Mr. Kolshak claimed that Aveos paid 700 employees to do nothing, Class members who testified to confirm that they worked full-time[325] and even overtime.[326] Furthermore, the evidence does not reveal details linking the alleged postponements and how busy Aveos's employees were during this time.

[335] In light of the above, the Court concludes that if maintenance was postponed, the evidence does not show that these postponements were significant, unusual, or motivated by Air Canada's intent to harm or even its indifference to the interests of others.

[336] Air Canada's decision to postpone some maintenance following Aveos's formal notice, within the leeway available, can be explained without invoking an intentional fault by Air Canada. The effect of the decision may have ultimately harmed Aveos, but that does not make it a fault.

[337] The plaintiff also argues that Air Canada withheld significant amounts in unpaid invoices it owed Aveos, which greatly contributed to a liquidity crisis that caused it to close. He relies on the following elements:

337.1. On March 18, 2012, Air Canada claimed $102,417,500 from Aveos for services rendered and Aveos claimed $159,312,832 from Air Canada – a $57 million difference in favour of Aveos. When invoices marked with a "D" are subtracted ("D" for "Disputed"), for a total of $12,779,669, there is an outstanding balance of undisputed invoices of $44,220,331.[327] Were it not for these outstanding amounts, Aveos would have continued to operate;

337.2. The exchanges between the companies about invoicing were very tense. According to Mr. Kolshak, Air Canada was taking advantage of the dispute resolution process in place to ultimately weaken Aveos financially.

337.3. The Monitor's First Report, dated March 20, 2012, describes Aveos's liquidity crisis and the urgent need to receive payment of amounts owing

---

[324] Exhibit P-70.1, continuous numbering at 1339.

[325] The Court refers in particular to the testimony of Denis Cantin, Mario Vaugeois, and Yvan Poitras at the hearing.

[326] The Court refers in particular to the testimony of Mario Vaugeois at the hearing.

[327] Exhibit D-73.

by Air Canada the day after March 18, 2012;[328]

337.4. On May 2, 2012, Air Canada exacerbated the situation by filing a proceeding with the Court to allow it to terminate its exclusive maintenance services contracts with Aveos.[329] This proceeding created uncertainty about Air Canada's willingness to support a potential buyer for Aveos and undermined the liquidation process. [330]

[338] Air Canada argues:

338.1. The invoicing disputes between the companies were long-standing. In 2010, the parties had even implemented a dispute resolution process providing that Air Canada would pay the first $5 million of disputed invoices, whether or not they were due, to guarantee a certain level of revenue for Aveos;

338.2. Air Canada complained about the many errors and irregularities in the invoices issued by Aveos, which made processing them complicated and cumbersome, and delayed their payment;

338.3. The evidence has shown that Aveos also owed Air Canada large amounts for the services it rendered to Aveos;

338.4. Moreover, Air Canada's $159,312,832 (pre-tax) in outstanding invoices reflects an obvious calculation error, especially since the amount including taxes is $136,044,525, a lower amount. In reality, Air Canada had $128 million (including taxes) [331] of outstanding Aveos invoices and Aveos had $116 million (including taxes) of outstanding Air Canada invoices;[332]

338.5. The difference between the amounts owing to Aveos and those owing to Air Canada is not $44 million in favour of Aveos, as it argues, but $12 million;

338.6. The findings in the Monitor's First Report must be read with the note at the beginning of the report stating that, in her preparation she relied on information provided by Aveos without reviewing or auditing it or seeking

---

328 Exhibit P-72. The monitor, Toni Vanderlaan, was not called to testify at the hearing.

329 *Petitioner's De Bene Esse Motion for an Order Lifting the Stay of Proceedings to Confirm the Termination of Certain Contracts*, Exhibit D-9.

330 Monitor's Seventh Report by monitor Toni Vanderlaan, exhibit P-74 at paras. 21–27.

331 That is an amount of $136 million from which a credit of $7.9 million is deducted, exhibit D-73, *Schedule B*.

332 Exhibit D-73, *Schedule A*.

to verify its accuracy ;[333]

338.7. Furthermore, in the summer of 2011, Mr. Kolshak's strategic plan showed that Aveos was experiencing difficulties and that the future was uncertain.[334]

[339] The Court considers that the conclusions drawn by the plaintiff from the calculations concerning the outstanding invoices are inaccurate. Air Canada's proposition in this respect should be accepted. The Court therefore concludes that the plaintiff has failed to demonstrate Air Canada's bad faith or that it committed an intentional.

[340] The plaintiff also argues that Air Canada concealed the imminent termination of maintenance services in Canada from Newbould J. In light of the Court's conclusions on the absence of Air Canada's intentional fault or bad faith causing Aveos's demise,[335] this argument must also be rejected.

3.2.3 Air Canada could not have been unaware that Aveos's demise would place it in breach of the *Act* and it reneged on the public undertakings it had made to keep these maintenance services in Canada.

[341] According to the plaintiff, Air Canada had to prevent Aveos's demise to avoid breaching the *Act*.

[342] Therefore, having provoked this demise, Air Canada intentionally breached the *Act*.

[343] The Court concludes that Air Canada's fault is based on its failure to conduct itself prudently and diligently to comply with the *Act* after Aveos ceased its operations.

[344] This does not mean, however, that Air Canada was obliged to act to prevent Aveos's closure. It is conceivable that Aveos's continued operation would have allowed Air Canada to continue to comply with its legal obligation. That said, it could have decided to comply with its obligations in another way.

[345] The evidence reveals in fact that even Aveos did not intend to continue carrying out some of Air Canada's overhaul activities. Aveos could make this strategic choice. Air Canada would then have had to find alternatives to meet its legal obligations.

[346] Furthermore, as the representatives of Air Canada explained, while they understood that Aveos was in trouble, they did not necessarily consider that the solution chosen by Aveos's management would be simply to close. At the time, it could not be

---

333 Exhibit P-72 at para. 3.
334 Exhibit P-70.1.
335 See Section V.3(3.2) of this judgment.

ruled out that operations would resume or continue in another form following a reorganization.

[347] The plaintiff has therefore failed to convince the Court that Air Canada knew or should have known, before March 18, 2012, that its conduct would lead it to breach the *Act*.

[348] That said, and as concluded above, the day after Aveos closed, Air Canada failed to act prudently and diligently to comply with the *Act*. Its interpretation of the scope of its legal obligations and its conduct in seeking alternative solutions for its aircraft maintenance and overhaul confirm that it had largely diverged from its historical understanding of these obligations.

[349] The plaintiff, however, has not convinced the Court that this shift in position was in bad faith or that it constitutes an intentional fault.

[350] Lacking direct evidence of Air Canada's intention to provoke Aveos's demise, the plaintiff must prove it through presumption of facts.

[351] In light of the above, the Court finds that the facts and circumstances are not sufficiently serious, precise, and concordant to conclude that Air Canada was in bad faith or that its fault was intentional.

[352] Accordingly, the Court concludes that the plaintiff has failed to discharge his burden of proving that Air Canada committed an intentional fault. He has also failed to rebut the presumption that Air Canada acted in good faith.

4. IS AIR CANADA'S FAULT THE DIRECT AND IMMEDIATE CAUSE OF THE COMPENSATORY DAMAGES CLAIMED BY THE PLAINTIFF?

[353] To answer this question, the Court must determine whether Air Canada's breach of its legal obligation to maintain the Centres is the direct and immediate cause of the financial and moral damages claimed by the plaintiff and the Class members. These damages claimed allegedly arise from the Centres closing for good, resulting in the definite termination of their employment, under the same conditions.

[354] Insofar as the Court finds that Air Canada's fault is the cause of the damages claimed, a second question arises: Air Canada argues that the operational level required to comply with the *Act* is well below the level of operations at Aveos when it closed. Thus, did only some of the Class members suffer damages arising from Air Canada's fault and if so, which ones?

[355] For the reasons set out below, the Court concludes that Air Canada's fault is the direct and immediate cause of the compensatory damages arising therefrom, for all Class members.

4.1 Legal principles

[356] According to art. 1607 C.C.Q., damages must be an immediate and direct consequence of the fault committed. There must be a causal connection between the fault and the damage suffered. The damage must have been the logical, direct, and immediate consequence of the fault.[336]

[357] Authors Baudouin and Deslauriers note the following:[337]

> [TRANSLATION]
>
> **1-683** – *General position* – The only real constant in all the decisions is the rule that the damage must be the logical, direct and immediate consequence of the fault. This rule, stated many times by the courts, indicates a desire to limit the scope of causation and accept as causal only the event or events having a close logical and intellectual connection with the damage complained of by the victim. It is the source of a series of important corollaries and, in our view, explains why the case law excludes repercussive damage, does not accept the entire traditional theory of equivalent conditions, adopts adequate causation while adding to it the criterion of reasonable foreseeability, and ultimately places considerable importance on a break in the causal connection.
>
> [Emphasis added.]

[358] The evidence must simply make the existence of a direct connection between the fault and the damage more probable.[338] The causal connection need not be proved with certainty or beyond a reasonable doubt.[339]

[359] Evidence of causation may be made by presumption of fact,[340] that is, an inference from circumstances that are serious, precise, and concordant.[341] In this respect, authors Baudouin and Deslauriers added:[342]

> [TRANSLATION]
>
> **1-703** – *Presumption* – The case law therefore requires merely that a direct and immediate causal connection be established on a balance of probabilities. Sometimes this is equivalent to an actual reversal of the burden. If, for example, the plaintiff successfully establishes that one specific act, among all those that might have caused the damage, offers a higher degree of probability, he or she

---

336 Baudouin and Deslauriers, *supra* note 308 at para. 1-683; See also *Hogue* c. *Procureur général du Québec*, 2020 QCCA 1081 (application for leave to appeal to the Supreme Court refused, 39400 (February 25, 2021)) (***Hogue***) at paras. 42 et seq., and *Ville de Sherbrooke c. Homans*, 2021 QCCA 1866 at paras. 31 et seq., citing Hogue. See Roberge, *supra* note 228 at 442.

337 Baudouin and Deslauriers, *supra* note 308 at para. 1-683.

338 Baudouin and Deslauriers, *supra* note 308 at para. 1-706.

339 Baudouin and Deslauriers, *supra* note 308 at para. 1-706.

340 *St-Jean v. Mercier*, 2002 SCC 15 at para. 110; Baudouin and Deslauriers, *supra* note 308 at para. 1-706; *Montréal (Ville de) c. Biondi*, 2013 QCCA 404 (**Biondi**) at paras. 134 and 135.

341 Baudouin and Deslauriers, *supra* note 308 at para. 1-706.

342 Baudouin and Deslauriers, *supra* note 308 at para. 1-703.

> then places on the defendant's shoulders the burden of establishing with evidence to the contrary that the alleged fact is not the cause. The same is true when, in normal circumstances, the damage potentially resulting from the fault was normally foreseeable.

[360] The case law recognizes that when these inferences are not only possible but are also probable, logical, solid, and consistent with the evidence adduced, the causal connection will be established by presumption of fact.[343] The same is true in class actions where causation can be established for the whole class through extrapolation based on presumptions of fact, insofar as the proof is on a balance of probabilities.[344]

[361] The Court of Appeal recently analyzed the doctrine of adequate causation in *Hogue c. Procureur général du Québec*[345] and stated the following:

> [TRANSLATION]
>
> [49] The doctrine of adequate causation, occasionally combined with the doctrine of reasonable foreseeability of the consequences, may ultimately be effective because it [TRANSLATION] "selects from all the circumstances, conduct, or events that may have led to the occurrence of the harm ". It therefore makes it possible to discern, among all the *sine qua non* conditions of the harm, which of them are truly the direct, logical, and immediate cause of the harm. Adequate causation therefore seeks to [TRANSLATION] "distinguish the real cause of the harm from the mere circumstances of its occurrence or those that coincided with it".
>
> [Emphasis added.]

[362] It is not sufficient that the faulty act may have caused the damage in whole or in part. It must have actually caused it.[346]

[363] Repercussive damage is damage caused by damage. It does not allow for the establishment of a sufficient causal connection between the fault and the damage. Authors Baudouin and Deslauriers define it as follows:[347]

> [TRANSLATION]
>
> **1-684 – Generalities** – As we know, the case law follows the test of the direct nature of damage as decreed by the legislature. Determining what constitutes "direct" damage is complex and it would again be presumptuous to try to generalize. There is a trend, however. The courts do not recognize harm that is the immediate result of other harm caused by the fault rather than harm resulting from the fault itself. In other words, damage caused by damage is "indirect",

---

343 *Biondi*, *supra* note 340 at para. 135.
344 Baudouin and Deslauriers, *supra* note 308 at para. 1-704.
345 *Hogue*, *supra* note 336 at paras. 42 et seq.
346 *Primeau c. N.C.*, 2021 QCCA 1632 at para. 60, citing *Constructions Concreate ltée c. Procureure générale du Québec*, 2020 QCCA 570 at para. 56.
347 Baudouin and Deslauriers, *supra* note 308 at para. 1-684.

> repercussive damage, or "second degree" damage. This one trend, however, is unable to explain all the solutions offered in the case law. While it might justify the refusal to grant the cost of renting a truck to replace another damaged one, when that rental was required by the impossibility of repairing the first truck because of manufacturer's strike, it is harder to justify awarding compensation for nervous shock after seeing or hearing about an accident involving someone else.

[Emphasis added.]

[364] In *Infineon Technologies AG v. Option* consommateur,[348] the Supreme Court confirmed the distinction between (1) an indirect victim, who may obtain compensation for suffering direct damage arising from a fault, and (2) repercussive damage, which cannot be compensated under our civil law.

4.2 Factual and expert evidence relevant to the issue

4.2.1 The main relevant facts

[365] The factual evidence demonstrates that, from 1988 to 2012, activities at the Centres always required a significant number of unionized and non-unionized employees to perform basically all the maintenance and overhaul of the aircraft in Air Canada's fleet.

[366] Furthermore, it appears that in 1988, Parliament's intent when it imposed on Air Canada the obligation to maintain the Montreal, Winnipeg, and Mississauga Centres contemplated not only the physical premises, but also the jobs of the Canadian workers in those cities who had developed expertise in the field.

[367] As a result of this state of affairs, according to the plaintiff, the best way Air Canada could continue to comply with the *Act*, meet the maintenance and overhaul requirements of its fleet, and maintain the Centres in operation (including the aspect of maintaining the expertise of its employees) after Aveos's closure was to ensure that these same activities continued with the same employees and in the same Centres.

[368] Thus, according to the plaintiff, the damages suffered by the Class members are the direct and immediate consequence of Air Canada's decision to allow activities at the Centres to cease for good, which resulted in the skilled work force that Air Canada's legal obligation was designed to protect being let go.

[369] In particular, it is important to reiterate the following facts that are relevant to this analysis:

369.1. In 1988, when the *Act* was adopted and Air Canada was privatized, Air Canada employed 3,526 workers in its Centres, that is, 700 in Winnipeg,

---

[348] 2013 SCC 59 at para. 142.

2,200 in Montreal, and 600 in Mississauga;[349]

369.2. At the time, the maintenance and overhaul of Air Canada's entire fleet, which consisted of 114 aircraft, was carried out in the Centres;

369.3. In July 2011, eight months prior to Aveos's closure, 1,819 unionized Air Canada workers working at the Centres were transferred and officially became Aveos employees. They continued the same maintenance and overhaul of Air Canada's aircraft, in the same conditions, at the Centres. The employment relationship with Air Canada, however, ended;

369.4. The issue of the transfer was discussed in the House of Commons on March 2, 2011. The remarks of the Honourable Chuck Strahl, Minister of Transport, Infrastructure and Communities at the time, confirmed a promise made by Air Canada that every job would be maintained, under the same conditions:[350]

> Mr. Speaker, I just answered that question, but I had better go to my briefing notes because it is important that I read it out exactly.
>
> Employees would be given an option of transition to Aveos or remaining with Air Canada; either one. Further discussions would be required with the union, but the employees from Air Canada that elect to transition will receive the same salary, vacation benefits, pension and seniority benefits that they currently are entitled to. Once more, it promises that there will be no job losses.
>
> ...
>
> Mr. Speaker, long before this question hit the floor of the House of Commons and the Bloc finally woke up to this, we have been dealing with Air Canada on this for months. We wanted assurances. Are the jobs going to be secure? Will the maintenance facilities in Mississauga, Winnipeg and Montreal be maintained? Will the employees be saved? Will they have the same pension benefits, entitlements and so on? The answer is yes on all fronts. ...

[Emphasis added.]

369.5. When Aveos shut down, the 2,198[351] workers who are Class members had been working there since their transfer from Air Canada;

369.6. The workers who are Class members are unionized and non-unionized

---

349 According to the numbers in the Adamache Report, exhibit P-74 at 10.
350 Exhibit P-68, continuous numbering at 1280 and 1281.
351 Plaintiff's argument outline at para. 281.

workers. They are experienced and skilled, many are even highly skilled. They were trained by Air Canada in a targeted and ongoing training program,[352] specifically to carry out aircraft maintenance and overhaul for Air Canada's fleet as it evolved. When Aveos closed, they had many years of service, first as Air Canada employees and then as Aveos employees;

369.7. The workers' expertise is rare and their practice is regulated by Transport Canada;

369.8. Air Canada admitted that after Aveos's closure, the Class members formed a choice group of workers for any company ready to resume the activities in Canada;[353]

369.9. Following the permanent loss of their jobs, the Class members lost their wages and their employment benefits, which had been transferred with them from Air Canada to Aveos.

[370] Should the Court find that there is a causal connection between Air Canada's fault and the damages suffered by the Class members, Air Canada argues that is it appropriate to (1) establish a minimum threshold of employees required to allow Air Canada to comply with its legal obligations, and (2) determine which employee groups should keep their jobs.

[371] To do so, Air Canada filed an expert report prepared by expert Bernard Adamache. He prepared a report dated September 25, 2019, and a presentation to accompany his testimony at the hearing.[354]

4.2.2 The Adamache Report

4.2.2.1 The expert's qualifications

[372] The qualification of Mr. Adamache as an expert in aircraft maintenance and overhaul programs is not contested.

[373] However, the plaintiff has taken the position that he is not sufficiently removed to act as an expert, considering his prior working relationship with Air Canada.

[374] Specivically, the plaintiff submits that the fact Mr. Adamache was employed by Air Canada from 1995 to 2006 in various positions, including as Senior Director, System Line Maintenance and Senior Director, Regulatory Compliance, and then joined Jazz Air L.P.

---

352 The Court refers to the testimony of Mr. McMullen at the hearing and to exhibit P-13.

353 Exhibit P-85, testimony of Mr. Rovinescu from March 29, 2012, before the Standing Committee on Transport, Infrastructure and Communities, at 2 and 7.

354 Exhibit D-74.

as Director, Heavy Maintenance from 2006 to 2010, means that he was to some degree involved in the chronology of events leading up to the period at issue.

[375] According to the plaintiff, this closeness to his mandator impugns his credibility in this case. Without finding that there is bias of a nature to lead to the rejection of the expert's report, it is an element that will be considered when assessing the expert's overall credibility.

4.2.2.2 The expert's mandate

[376] The expert set out the questions he was asked to answer as follows:[355]

> 1. How have Air Canada's maintenance activities and maintenance-related employment evolved in Montreal, Mississauga, and Winnipeg since the passing of the ... "ACPPA" in 1988?
>
> 2. How has the Aviation maintenance industry evolved since 1988, with emphasis on trends facing the industry leading up to and throughout the period 2012-2016?
>
> 3. In the typical industry usage, what does it take for a center to qualify as an "*operational and overhaul center*"?
>
> 4. Taking into context industry trends, what would I expect Air Canada to have done following Aveos' closure in March 2012, with and without consideration the judgment by Justice Castonguay of the Quebec Superior Court dated February 4, 2013, regarding obligations under ACPPA ("the Castonguay Decision")?
>
> 5. How does this compare to Air Canada's actions during 2012-2016?

[377] It bears saying at this point that the expert surpisingly confirmed at the hearing that he had not read the Castonguay Judgment in its entirely or the CA Judgment for the purpose of his analysis, in particular to answer questions 3 to 5 of his mandate.

4.2.2.3 The expert's opinion

[378] The expert related the history of Air Canada's fleet and said that it was made up of 114 aircraft in 1988 and 213 aircraft in 2016.[356] Studying the evolution of Air Canada's fleet shows that between 1988 and 2007, the number of widebody planes increased considerably, going from 39 to 62, while the number of narrowbody planes decreased from 75 to 62, and 57 regional jets were added.

[379] In 2007, when ACTS's assets were sold to Consortium, Air Canada had a fleet of 207 aircraft.

---

355 Adamache Report at 2.
356 Adamache Report at para. 8.

[380] From 2007 to 2012, the situation remained practically unchanged, with a reduction in the fleet of two aircraft. Finally, from 2012 to 2016, there was a decrease in the number of narrowbody planes from 89 to 75, which was a return to 1988 numbers, an increase from 56 to 68 for widebody planes, and a significant reduction of regional jets from 60 to 25, for a fleet that ultimately included 168 aircraft.[357]

[381] During this time, the composition of Air Canada's fleet also evolved, as certain aircraft models were retired and new models were purchased.[358]

[382] In his history of Air Canada's maintenance and overhaul activities, the expert recounts that, in 1988, the Montreal Centre was devoted principally to the airframe and engine overhaul of widebody aircraft, and carried out most of Air Canada's component overhaul; the Winnipeg Centre was devoted to the overhaul of airframes for narrowbody aircraft, with some overhaul of components for those aircraft; and the Mississauga Centre principally carried out the day-to-day line maintenance support at the Toronto-Pearson airport.

[383] With respect to the period from 2004 to July 2011, Mr. Adamache said:

383.1. In 2004, when ACTS was constituted as a stand-alone entity separate from Air Canada, the latter assigned its 6/58 certificate to the former for the entire maintenance and overhaul aspect, and was issued a new 32/03 certificate to keep only the line maintenance;

383.2. The Montreal, Winnipeg, and Mississauga Centres basically maintained the same activities, other than some that were carried out in a new centre located in Vancouver;[359]

383.3. In July 2011, the situation was as follows: Aveos employed 1,362 employees in Montreal, 39 in Mississauga, 387 in Winnipeg, and 573 in Vancouver, including several of whom were Air Canada employees seconded to Aveos. Air Canada employees doing line maintenance were a separate group.

[384] For the period from July 2011 to March 2012, Mr. Adamache stated that, aside from the transfer of Air Canada employees to Aveos, there were no major changes to the activities carried out at the Centres.[360]

[385] For the period from March 2012 to 2016, which he considers to be the [TRANSLATION] "period of interest", the expert made the following findings:

---

357 Adamache Report, Table 1 at 4.
358 Adamache Report at para. 9.
359 Adamache Report at paras. 19–22.
360 Adamache Report at para. 24.

385.1. He confirmed that when Aveos closed, it would have taken Air Canada six to eight months to obtain a certificate equivalent to the 6/58 certificate it used to have from the regulatory authorities, allowing it to resume maintenance and overhaul activities;[361]

385.2. Air Canada first had to urgently, though temporarily, see to the maintenance and overhaul required in the short term, calling on a wide range of suppliers;

385.3. Second, longer term contracts were awarded to some suppliers. Airframe maintenance and overhaul was entirely entrusted to foreign companies, although some work was eventually entrusted to Premier Aviation in Trois-Rivières after that company was purchased by American provider AAR. The maintenance and overhaul of components and engines were entrusted to companies abroad and some local ones. The expert did not specify when the activities in Canada occurred, but estimated that over time, by 2016, a total of 571 employees spread over the various Canadian suppliers carried out maintenance and overhaul activities for Air Canada;[362]

385.4. The expert did not specify the proportion of Air Canada's aircraft maintenance and overhaul activities that was carried out in Canada compared to all such activities carried out there until March 18, 2012;

385.5. The expert also did not specify the resources required abroad with international suppliers to carry out Air Canada's aircraft maintenance and overhaul during that period.

[386] In answer to the second question of the mandate, the expert reviewed the evolution of the aircraft maintenance and overhaul industry since 1988.[363] He confirmed that aircraft fleet maintenance is classified into four (4) broad segments, that is, engines, components, airframes, and line maintenance.

[387] He added the following regarding the general market trend since the early 1990s:[364]

> Most airlines in North America are net outsourcers today, a trend that began in the 1990's and accelerated in the mid-2000's in airframe and has expanded to all segments.

[388] With respect to the industry trend concerning engine maintenance, he explained that since the 1990s, maintenance has been increasingly ensured by engine

---

361 Adamache Report at para. 27.
362 Adamache Report at paras. 31–36.
363 Adamache Report at paras. 37 *et seq.*
364 Adamache Report at para. 40.

manufacturers, through long-term service contracts. Engine maintenance requires a significant investment and a large volume of work to make it profitable.[365]

[389] With respect to the industry trend concerning component maintenance, he explained that the fragmentation of these operations led, more recently, to a consolidation of suppliers through mergers and acquisitions.[366] According to his observations, airline companies are increasingly outsourcing the maintenance of components, particularly by resorting to [TRANSLATION] "integrators". These options were not as readily available or as widespread in 1988 as they are today.[367]

[390] He concluded: "Airlines which choose to have a large component capability almost always need to attract third party work or volume from partner airlines to maintain adequate volumes".[368]

[391] Airframe maintenance is divided into four (4) "checks", or categories, from A to D, depending on the number of labour hours required to carry it out.[369] The exact meaning of these categories has evolved. However, for the heavier checks (C or D), the labour cost is more significant, representing 60 to 70% of the total maintenance cost, which led the industry to seek out, since the mid-1990s, the cheapest labour possible, without making too many compromises on the quality of the services,[370] particularly for the airframes of widebody aircraft.[371] Practically all North American carriers followed this trend.[372]

[392] The expert claims that this trend was a contributing factor in the creation of ACTS in 2004, which was part of Air Canada's strategy of "disaggregating its business" and ultimately making its former divisions, including ACTS, separate entities.[373]

[393] The expert drew the conclusion that airlines do less airframe heavy maintenance today, and that they did less during the period from 2012 to 2016, than they did in 1988.[374]

[394] In response to the third question, concerning the options open to Air Canada to [TRANSLATION] "keep the maintenance and overhaul centres in the cities of Winnipeg and Mississauga and Montreal", he explained that his mandate was to define what the expression "overhaul centre" means, as it is understood in the industry, and he opined that this expression is not commonly used.[375]

---

365 Adamache Report at para. 52.
366 Adamache Report at para. 57.
367 Adamache Report at paras. 66 and 67.
368 Adamache Report at para. 68.
369 Adamache Report at para. 69.
370 Adamache Report at para. 71.
371 Adamache Report at para. 72.
372 Adamache Report at para. 73.
373 Adamache Report at para. 74.
374 Adamache Report at para. 78.
375 Adamache Report at paras. 83 and 84.

[395] He explained his analysis as follows:[376]

> In the previous section, I have summarized three key trends that impacted Air Canada and its peers in North America between 1988 and 2012:
>
> - pressure successfully applied by OEM's to have airlines enter LTSA's and outsource engine maintenance,
> - low cost options for component pooling and maintenance, and;
> - continued outsourcing of airframe heavy maintenance, enabled by continued availability of lower labour cost options
>
> Below, I have outlined a series of options for how Air Canada could have acted in determining its maintenance footprint **in the face of both these trends and their ACPPA obligations and their interpretation under the Castonguay Decision**.

[Emphasis added.]

[396] As stated above, the expert did not read the Castonguay Judgment or the CA Judgment in their entirety, including the determinations the latter contains regarding the scope of paragraph 6(1)(*d*) of the *Act* to which Air Canada is subject.

[397] The first option he identified is the one where Air Canada is following industry trends. He concluded that after Aveos's closure, Air Canada was forced to outsource the maintenance and overhaul of engines, components, and airframes, in doing so, it was following the industry trend.

[398] the second option he identified was the one where, to comply with the interpretation of the *Act* accepted in the Castonguay Judgment, Air Canada established a centre for airframe heavy maintenance. He then developed four (4) scenarios, based on the scale of the operations required to comply with the Castonguay Judgment, that is:

398.1. The implementation of a small factory devoted to a single type of component for a particular model of aircraft;

398.2. The implementation of a factory for an airframe heavy maintenance line for narrowbody aircraft in Montreal and a second line in Winnipeg;

398.3. The implementation of a factory in Montreal and one in Winnipeg able to handle airframe heavy maintenance for the entire A320 aircraft series (about 100 aircraft);

---

[376] Adamache Report at para. 88.

398.4. The implementation of a factory in Montreal and one in Winnipeg able to handle airframe heavy maintenance for a fleet similar to Air Canada's 1988 fleet.

[399] None of the scenarios included engine or component maintenance.

[400] The expert opined that scenario (b) would have been sufficient and reasonable as a "rational minimum level of maintenance" in Canada for Air Canada to meet its legal obligation. At the hearing, he asserted:[377]

> It is my expert opinion that the single line, narrow-body facility described above (Table 8, option (b)) represents the most likely and most rational action Air Canada would have taken in the context of ACPA if it required to perform **some level** of heavy maintenance.
>
> [Emphasis added.]

[401] Thus, in the expert's view, 210 workers were required to perform the activities in scenario (b). Even with scenario (d), the most costly for Air Canada, the number of workers required was 597.

[402] With respect to scenarios (c) and (d), the expert said:[378]

> Scale options (c) and (d) are above-market level of insourcing and I do not believe it would have been economical for Air Canada to have done so unless forced. The outsourcing of narrow body heavy maintenance by Air Canada, WestJet, and Air Transat during this period (to external North and South American providers) suggests that it was more economical to have these facilities outsourced rather than in-house.
>
> [Emphasis added.]

[403] During his cross-examination at the hearing, when confronted with the CA Judgment stating that Air Canada could not change the status quo under the *Act*, he conceded that the second scenario did not allow for this. Only the fourth scenario did.

[404] It is worth noting that the expert did not raise any specific practical problems with implementing the centres needed to perform the work described in these scenarios, except for a delay of six to eight months to re-obtain the required certificate from the regulatory authorities.

[405] Finally, in response to the fourth question, Mr. Adamache suggested a study of the available work force in Canada's aeronautics industry to establish a proportion of new Air Canada employees that would be come from Class members taking for granted that Air

---

377 PowerPoint presentation of Mr. Adamache, from October 21, 2021, exhibit D-74 at 30.
378 PowerPoint presentation, *ibid.* at note 384.

Canada would have access to a pool of potential workers much larger than just the former employees who are Class members.

[406] He concluded that, in scenario (b), Air Canada would re-hire 40 of the workers who lost their jobs after Aveos's closure, and 170 workers that do not belong to the Class, for a total of 210 workers. In scenario (d), Air Canada would re-hire 93 employees who are Class members and 504 employees who do not belong to the Class, for a total of 597.[379]

4.3 Discussion

[407] Because the Court has decided that Air Canada did not commit a fault by intentionally causing Aveos's closure, the question is whether, as of March 18, 2012, Air Canada's failure to comply with paragraph 6(1)(*d*) of the *Act* is the direct, logical, and immediate cause of the damages claimed by the plaintiff and the Class members.

[408] As set out in section 1.4 of this judgment, the following must be accepted with respect to the content of the obligation under paragraph 6(1)(*d*) of the *Act*:

408.1. The obligation under paragraph 6(1)(*d*) of the *Act* responds to national geopolitical imperatives. The aim of the constraints imposed is to preserve the Centres for both social and political reasons;

408.2. Maintaining the Centres means ensuring their sustainability as they were in 1988 or in their essence. This forces Air Canada to operate them at a comparable level of activity;

408.3. While the *Act* does not set specific job or volume of activity thresholds, the activities must be preserved in substance, both qualitatively and quantitatively;

408.4. Closing the Centres or transforming them into secondary centres or centres of little importance is not possible. Air Canada must carry out the same work there, or its equivalent, as it did in 1988.

408.5. The *Act* prohibits any change to the business model. Only a legislative amendment can authorize it.

[409] The Court more particularly reiterates the following elements of the CA Judgment:

409.1. There was a fairly clear vision of the activity at the Centres at the time, and the objective was generally to protect the status quo of what was then Air Canada's business model;[380]

---

379 Adamache Report at 36 and 37.
380 CA Judgment at para. 164.

409.2. The question of maintaining the Montreal and Winnipeg Centres was explicitly and pointedly addressed during the parliamentary debates surrounding the adoption of the *Act*, repeatedly so. Some members (and a certain number of speakers) were highly concerned as to whether Air Canada would be free to continue to operate these Centers and how it would do so going forward: would it keep these Centres? Would it keep the same level of activities? Would there be the same number of employees? [381]

409.3. It bears recalling the following parliamentary debates quoted by the Court of Appeal that are relevant to the issue:[382]

> **Mr. David Orlikow (Winnipeg North)**: Mr. Speaker, my question is for the Deputy Prime Minister. In his statement this morning he makes it clear that the Chairman of Air Canada will vote in accordance with the directions of the private shareholders. How can the Minister guarantee the 2,300 employees of Air Canada in Winnipeg, and particularly the large number who work in the maintenance base, that the private shareholders will follow the commitment which the Minister is making in his statement today?
>
> **Hon. Don Mazankowski (Deputy Prime Minister and President of the Privy Council)**: Mr. Speaker, there is a firm undertaking in an Air Canada public release which is obviously endorsed by the Chairman of Air Canada and indeed the President of Air Canada. That is the same today as it was yesterday.
>
> **Mr. Blackburn (Brant)**: How about a year from now?
>
> Future of Winnipeg base
>
> **Mr. David Orlikow (Winnipeg North)**: Mr. Speaker, the Chairman of Air Canada made a statement based on instructions he received from the present owners. However, the Minister is proposing that in the future the Chairman will take his instructions from the private shareholders.
>
> What is to prevent the private shareholders, who are quite legitimately interested mainly in making a profit, from saying that it does not pay them to maintain the base in Winnipeg or bases in other cities? Surely the requirement is an assurance in legislation that the bases in Winnipeg and Toronto will be maintained at their present or higher levels.
>
> **Hon. Don Mazankowski (Deputy Prime Minister and President of the Privy Council)**: Mr. Speaker, I cannot imagine why the Hon. Member is so nervous about Winnipeg. It is a

---

381 CA Judgment at para. 167.
382 CA Judgment at para. 173.

> profitable maintenance centre, it does good service, and has dedicated employees. Air Canada has made a firm commitment.
>
> **Mr. Riis**: Remember the F-18.
>
> **Mr. Mazankowski**: In the event that the Hon. Member is not aware of everything that goes on there, in addition to maintaining its own aircraft Air Canada's Winnipeg maintenance base also performs maintenance contracts for other carriers and the airline will continue seeking out and bidding for these opportunities. It is a going concern. Why would you want to remove it, Mr. Speaker?
>
> [Emphasis added.]

409.4. Parliament intended to preserve the activities of the Centres by avoiding their move (promising that the situation that had occurred several years earlier in Winnipeg would not happen again) or their reduction, which would have been the equivalent or nearly of dismantling them, or nearly, and would have left no more than skeletons;[383]

409.5. It is of no consequence that the decision made by Air Canada and its directors was based on reasons that might be deemed valid from a business perspective. Such reasons cannot justify violating the law and cannot make the transgression disappear, no more than they can justify ignoring it;[384]

409.6. The implementation of paragraph 6(1)(*d*) of the *Act* implies, in practice, that the corporation and its directors were given a certain leeway – techniques evolve, maintenance rules change, labour needs fluctuate, other operational and overhaul centres open, etc. The corporation must adapt to a changing market and to changing economic conditions. This leeway, however, cannot go so far as to allow it to eliminate the Montreal and Winnipeg Centres or transform them into secondary centres or centres of little importance or into places where the equivalent of what was done there in 1988 is no longer done there. In other words, the leeway afforded the corporation and its directors with respect to the centres remains tightly circumscribed by paragraph 6(1)(*d*), which does not authorize a radical change in the business model, like the change that that occurred in this case after 2012, which was a departure from the previous model;[385]

409.7. Last, it is possible that the commercial (or technical) reality in fact required Air Canada to make the significant change to its maintenance

---

383 CA Judgment at para. 193.
384 CA Judgment at para. 214.
385 CA Judgment at para. 218.

> and overhaul activities that it made in 2012. The corporation may have been pursuing a commercially legitimate objective. That objective, however, met with the critical impediment of paragraph 6(1)(*d*) of the *Act*. Only Parliament can release the corporation from its obligation under this provision.[386]

[410] The Court of Appel also stated that:[387]

> [TRANSLATION]
>
> [231] [G]iven the nature of the dispute, it would have been difficult for the Superior Court to fix the threshold to which Air Canada refers or venture to describe in detail the activities the corporation must repatriate to the Montreal overhaul centre. Because although the situation reveals a breach, it is not easy to determine prospectively the point at which Air Canada will be considered to have substantially complied with its obligation under paragraph 6(1)(*d*) of the *Act*.
>
> [232] The difficulty is inherent to the debate, however, and in fact to the obligation set out in paragraph 6(1)(*d*) of the *Act*.
>
> [233] The legislative intent in this regard was discussed earlier: to ensure the sustainability of the Montreal centre (and the Winnipeg centre), so that Air Canada would continue to do there what it did when the *Act* was adopted, that is, principally overhaul work (heavy maintenance). Parliament did not say more. It was not required to prescribe the catalogue of activities the corporation had to maintain to comply with paragraph 6(1)(*d*) and therefore abstained from doing so. That was prudent, given the evolutive nature of maintenance standards and practices, the applicable regulatory framework, the very business of Air Canada, etc. But, precisely because of this evolutive nature, which Parliament anticipated, it should be understood – and this is indeed explained in the trial judgment – that paragraph 6(1)(*d*) merely set a sort of general point of comparison, against which Air Canada's future activities, even if they changed, would have to be measured.
>
> [234] In other words, Parliament prescribed maintaining the Montreal centre (and the one in Winnipeg), which implied that the essence of the activities carried out there in 1988, *or their equivalent*, be maintained. From the moment Air Canada's business led it to close this centre or reduce the activities at that centre to the point where they were no longer equivalent to those carried out there in 1988, it was in breach of the *Act*.
>
> [Emphasis added.]

[411] It is clear that the facts did not change between the CA Judgment and June 22, 2016, the end of the period at issue here. The finding that there is a breach remains the same.

---

386 CA Judgment at para. 220.

387 CA Judgment at paras. 231–234.

[412] Moreover, the scenarios developed by Air Canada's expert do not propose, as was the issue before the Court of Appeal, a way to comply going forward. They try to retrospectively establish what activities would have been sufficient for Air Canada to comply with the *Act* during the period at issue.

[413] First, it is appropriate to rule on the proposal of a minimum level of activity required by Air Canada to be in compliance with the *Act*. Indeed, the *Act* proposes scenarios of activity levels at the Centres that should suffice to meet Air Canada's legal obligations according to the industry's evolution.

[414] In light of the interpretation paragraph 6(1)(*d*) should receive and the evidence adduced, the Court concludes that the analysis and conclusions of the expert Adamache of the scenarios that would allow Air Canada to comply with the *Act* must be rejected for the following reasons.

[415] First, and most significantly, in his premises, the expert failed to take into consideration the teachings of the Court of Appeal on the scope of the legal constraints imposed on Air Canada. He therefore did not take them into account when developing the options available to Air Canada to minimally comply with its legal obligation.

[416] Thus, Mr. Adamache did not take into account the impossibility for Air Canada to (1) change its business model to follow market trends, or to (2) maintain activities that are not quantitatively or qualitatively equivalent to those carried out at the Centres in 1988. Nevertheless, the expert's analysis of the evolution of maintenance and overhaul practices in the industry reveals a strong trend to effect a real change in the business model.

[417] Furthermore, it can be concluded that the scenarios proposed by the expert all involve, to varying degrees, a change to Air Canada's business model, which is prohibited by the *Act*, in particular in light of the following:

417.1. All scenarios are limited to airframe maintenance and overhaul. None provides for the continuation of the maintenance and overhaul of components and engines, that is, what was also done at Aveos, for Air Canada's entire fleet.

417.2. The first three scenarios include a marked reduction in the volume of airframe maintenance and overhaul at the Centres. Overall, it is not even close to [TRANSLATION] "equivalent" to what was done in 1988.

417.3. Even the fourth scenario, the one concerning airframe maintenance of the identical number of aircraft as those in Air Canada's fleet in 1988, is not based on the changing requirements and the workforce needed to carry it out. It suggests airframe maintenance of 114 aircraft, Air Canada's entire fleet in 1988, whereas Air Canada's fleet in 2012 had 213 aircraft

and the activities at the Centres were never limited to airframe maintenance.

417.4. What is more, in comparison, it took more than 2,900 employees Montreal and Winnipeg alone to carry out this work in 1988, whereas the expert suggests 420 employees to carry out the work in 2012, of which only 69 are Class members.[388]

[418] The Court also points out that the expert's opinion that no engine or component maintenance should not be included, considering that it would be unreasonable to require that a supplier carry out these activities in Canada because they are not profitable, contradicts the evidence adduced. This evidence shows instead that Aveos had just equipped its workshop with leading edge technology for component maintenance and that it could be competitive in that area.[389]

[419] What is more, the evidence reveals that all the stakeholders had a common and clear understanding of the purport of paragraph 6(1)(*d*) of the *Act* in 1988 and for the decades to come. While it is true, as the Court of Appeal stated, that the activities carried out at the Centres could evolve over time depending on Air Canada's fleet and technological developments, the business model could not change to allow Air Canada to freely follow market trends in this respect.

[420] That is what the expert Adamache tried to argue, however. It is also what Air Canada had in mind after Aveos shut down, in particular in its statements to the parliamentary committee, cited above.[390] Air Canada firmly intended to change its business model. If it could do so while keeping activities in Canada, all the better. But that was not its priority, which was instead to effect a cost savings.[391]

[421] If Air Canada wrongly believed that it could legally make such a change in March 2012, it appears that the following events did not lead it to change its position:

421.1. The institution of proceedings for a declaratory judgment in April 2012, a few weeks after Aveos shut down, which directly concerned the scope of its legal obligations;

421.2. The Castonguay Judgment, dated February 4, 2013;

421.3. The CA Judgment, dated November 3, 2015.

---

388 Adamache Report at 4, 10, and 36.

389 See especially exhibit P-31, continuous numbering at 0612.

390 See especially the remarks of Mr. Rovinescu on March 29, 2012, before the Standing Committee on Transport, Infrastructure and Communities, exhibit P-85.

391 See especially exhibit P-75.

[422] As a result of Mr. Adamache's failure to take the CA Judgment into consideration when evaluating the legal constraints to which Air Canada is subject, combined with the apparent weaknesses of the scenarios suggested as being compliant with the *Act*, the Court must reject the expert's conclusions entirely.

[423] The Court states that the past employment relationship between the expert and the defendant, which lasted for several years, does not add to the expert's credibility, although this aspect is not in itself determinative in this case.

[424] The theories proposed by Air Canada through its expert collide with the only concrete fact adduced on the manner in which Air Canada directly or indirectly acted toward Aveos, of its legal obligation, that is, to ensure the permanence of the Centres by continuing to perform the same activities there, or their equivalent, with the same workforce, or its equivalent, from 1988 to March 2012.

[425] It may have been possible that a lower activity level at the Centres would have allowed Air Canada to comply with the *Act*. But Air Canada did not set forth a credible and convincing scenario in this respect that takes into account the constraints imposed by paragraph 6(1)(*d*) of the *Act*.

[426] The Court finds that Air Canada failed to prove that a specific threshold of maintenance and overhaul activity, different from what was taking place in 2012 at the Centres, would have allowed it to comply with the *Act*.

[427] The only probative evidence of the level of activity required at the Centres to allow Air Canada to comply with the *Act* is the assessment of the activities that were carried out there when Aveos closed, which were performed by former employees of Air Canada who are Class members, reflecting the evolution of these activities in a historical timeline from 1988 to March 2012.

[428] With Aveos's closure, Air Canada's aircraft maintenance and overhaul needs did not change. It had to quickly replace the work that was done by the Class members. Maintenance is regulated and had to meet the same requirements and schedules before and after March 18, 2012. The work was almost entirely outsourced to foreign companies that performed the work with their own employees.

[429] This therefore raises the issue of the causal connection between the failure to maintain the Centres and the definitive loss of jobs for the Class members.

[430] For the following reasons, the Court concludes that, in the particular circumstances of this case, the obligation to maintain the Centres cannot be separated from the need to have a skilled and experienced workforce to do the work – in this case, the workers who actively carried out the activities in question for Aveos in March 2012.

[431] First, while Aveos's closure was when damages occurred, or was a circumstance that coincided with the starting point of this occurrence – that is, the loss of employment

for the workers who are Class members – it is Air Canada's failure to maintain the Centres following this closure that caused the definitive loss of employment for the Class members and the resulting damages.

[432] Air Canada's legal obligation is the primary source of exclusive services contracts with Aveos, and the performance of maintenance and overhaul activities at the Centres up until March 2012. As soon as Air Canada no longer believed itself bound by such an onerous obligation, it became impossible to convince anyone to maintain the Centres.

[433] The obligation imposed on Air Canada may have been obsolete, but it ended only with the 2016 Legislative Amendment, on June 22, 2016.

[434] While Air Canada may have had a false impression of freedom as a result of the gradual transfer of responsibilities for the activities taking place at the Centres through a series of contractual and corporate steps culminating in the transfer of nearly 2,000 employees to Aveos in the summer of 2011, as well as the Newbould Judgment, the fact that its legal obligation was never transferred to Aveos and that Air Canada remained bound by it should be kept front of mind.

[435] Accordingly, had Air Canada complied with its obligation after Aveos's closure, it would have taken the necessary measures to resume or to have resumed the maintenance and overhaul activities at the Centres as soon as possible.

[436] The situation was perhaps more complicated given the assignment of the certificates and transfer of the employees to Aveos, but it was part of the risks of delegating this type of responsibility to a subcontractor who was ultimately no longer in a position to carry out its contractual obligations. Moeover, Air Canada's expert appeared to see no difficulty in reobtaining the required certification to resume these activities within six to eight months.[392]

[437] Admittedly, the *Act* gives Air Canada some leeway in how it can comply with its obligation. In fact, the CA Judgment recognizes this, from a prospective perspective.

[438] Following the CA Judgment, Air Canada never put the Centres or their equivalent back into operation. Thus, even though there could theoretically be other possibilities allowing Air Canada to comply with the *Act*, the evidence shows only a single way of doing so.

[439] Indeed, during the whole period it was in compliance with the *Act*, either directly or when it gave the work to Aveos, one thing remained constant: the heavy maintenance and overhaul of Air Canada's aircraft was carried out in specific locations designed for and adapted to the activities, with the same employees, that is, those who were transferred by Air Canada to Aveos and who were still working there in March 2012.

---

[392] Adamache Report at para. 27.

[440] These employees were first employed by Air Canada and then transferred, to Aveos in the same job, with the same conditions of employment, benefits, and pension funds. Their tasks did not change.

[441] These employees are precisely those who are part of the Class.

[442] The Court draws an inference from the serious, precise, and concordant facts and circumstances that the workforce required to operate the Centres after March 18, 2012, and carry out qualitatively and quantitatively equivalent activities there the same as the workforce required for this work at the Centres prior to March 18, 2012.

[443] The evidence adduced by Air Canada is not sufficient to rebut this presumption of fact.

[444] Thus, the actual cause of the damage suffered by the plaintiff and the Class members after Aveos's closure was Air Canada's failure to continue complying with its legal obligation.

[445] Strictly speaking, the damage does not arise from no longer being an Aveos employee. It results from no longer carrying out the activities at the Centres following the closure.

[446] As for the causal connection between Air Canada's fault and the claim for moral damages by the spouses of the former workers who are Class members, insofar as their claim is based on their personal suffering arising from the way the former workers were treated, the Court finds that these class members are indirect victims.

[447] In *Commission des droits de la personne et des droits de la jeunesse (X)* c. *Commission scolaire de Montréal*,[393] the Court of Appeal confirmed that indirect victims may be compensated if they are able to demonstrate that the harm is a direct and immediate result of the fault committed.

[448] In view of the foregoing, the Court concludes that Air Canada's fault is the direct and immediate cause of the damage suffered by the Class members following the definitive loss of their jobs at the Centres.

5. IF SO, DOES AIR CANADA'S CONDUCT GIVE RISE TO PUNITIVE DAMAGES?

[449] The plaintiff claims punitive damages from Air Canada because of the unlawful and intentional interference with the right to the safeguard of the dignity, honour, and reputation of Class members, based on sections 4 and 49 of the *Charter of human rights*

---

[393] 2017 QCCA 286 at paras. 56–60.

and freedoms[394] (**Quebec *Charter***), in relation to Air Canada's alleged intentional fault and bad faith.

[450] In *Quebec (Public curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*,[395] the Supreme Court of Canada defined an unlawful and intentional interference within the meaning of the Quebec *Charter* as follows:

> Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause. This test is not as strict as specific intent, but it does go beyond simple negligence. Thus, an individual's recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test.

[Emphasis added.]

[451] For the reasons given above leading the Court to conclude that there was no bad faith or intentional fault on Air Canada's behalf,[396] there is also reason to conclude that any interference that might have been committed with respect to the Class members' right to dignity and honour, does not constitute an intentional interference.

[452] Accordingly, this part of the claim must be dismissed.

6. IF SO, IS THE PLAINTIFF'S ACTION PRESCRIBED UNDER THE APPLICABLE RULES?

[453] Air Canada raises an exception to dismiss the plaintiff's action based on prescription. In its view, the action is based on an alleged fault and damage that materialized as soon as Aveos shut down on March 18, 2012. Because the proceedings were brought on April 4, 2016, more than three years after the underlying facts, the action is prescribed.

[454] In light of the above findings of the absence of intentional fault and bad faith on Air Canada's part, the Court will analyze the prescription argument only as it relates to the fault arising from the breach of the *Act*.

[455] The plaintiff contests that his action is prescribed, for primarily the following reasons:

455.1. The materialization of the compensable injury suffered by the class members depended on the outcome of the application for declaratory

---

394 CQLR, c. C-12.

395 [1996] 3 S.C.R. 211 at para. 121.

396 See Section V.3(3.2) of this judgment.

judgment brought in April 2012, which was still pending when this action was brought, due to Air Canada's motion for leave to appeal to the Supreme Court;

455.2. In the alternative, Air Canada's breach of the *Act* is a continuing fault that caused continuing damages between March 2012 and June 2016. Thus, while part of the proceeding may be prescribed, the portion concerning all the damages suffered between April 5, 2013, and June 22, 2016, are not.

[456] For the reasons below, the Court finds that the plaintiff's cause of action arose as soon as Aveos closed on March 18, 2012. He was able to be aware of Air Canada's fault and there is no doubt that the damages began to appear at that time.

[457] That said, Air Canada's fault is a continuing fault that caused equally continguing damages until June 2016. Thus, the portion of the claim relating to all the damages suffered in the three years prior to the institution of proceedings in April 2016, is not prescribed.

6.1 Legal principles

[458] Articles 2880, 2925 and 2926 C.C.Q. provide that:

> **2880**. Dispossession determines the beginning of the period of acquisitive prescription.
>
> The day on which the right of action arises determines the beginning of the period of extinctive prescription.
>
> **2925**. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.
>
> [Emphasis added.]

[459] The starting point of prescription is the first day the holder of the right could have taken action to assert it.[397] In extracontractual matters, it is the moment the three constituent elements of the remedy – fault, damage, and the causal connection – are united.[398] As the Court of Appeal stated in *Laniel Supérieur*:[399]

---

[397] *Matol Botanical International Ltd. c. Jurak*, 2012 QCCA 898 at para. 34, citing Pierre Martineau, *La prescription*, (Montreal: Les Presses de l'Université de Montréal, 1977) at 251 and 252.

[398] *Laniel-Supérieur inc. c. Régie des alcools, des courses et des jeux*, 2019 QCCA 753 (***Laniel Supérieur***) at para. 41.

[399] *Laniel Supérieur*, *supra* note 398 at para. 41.

> [TRANSLATION]
>
> The plaintiff must be in a position to know that a fault was committed against him or her and that it caused him or her damage. Mere doubts, concerns, suspicions, or conjecture about the constitutive elements of liability are insufficient to constitute the starting point of prescription. A serious basis for each of the constitutive elements of the action in liability are required.

[460] Sometimes, the existence of damage depends on the outcome of another legal proceeding. In such a case, the starting point of prescription is the date of the judgment.[400]

[461] As author Céline Gervais, now a judge at the Court of Québec, explained in her book *La prescription*:[401]

> [TRANSLATION]
>
> Subject to questions of fact inherent to each case, the principle drawn from the teachings of the Supreme Court in *Prévost-Masson* should be followed, and we should ask ourselves whether the creation and determination of the damage depend on the outcome of the other proceedings.

[Emphasis added.]

[462] Where continuing fault causes continuing damage, it should be considered that a fault is committed and damage is caused on a daily basis. A prescription period will then begin to run each day.[402]

[463] In a recent judgment,[403] the Court of Appeal stated the following on the notion of continuing fault causing continuing damage, in the context of the daily breach of a regulatory standard:

> [TRANSLATION]
>
> [15] As for the ground based on prescription, it is well founded.
>
> [16] When the appellant prepared his permit application, he knew that the sign at issue was installed in breach of applicable standards. As soon as he was informed by the Ministère that his permit application was suspended due to the unlawfully installed billboard, he was aware of the respondent's fault. ...
>
> [17] When the appellant was informed that his permit application was suspended, he had everything he needed to sue. He was aware of the fault and

---

400 See *Laniel Supérieur*, *supra* note 398 at paras. 48–50; *D'Anjou* c. *Thériault*, J.E. 2001-1017 (C.A.) at paras. 10, 16 and 22; *9106-0723 Québec inc. c. Baillargeon*, 2015 QCCA 1694 at paras. 1 and 2.

401 Céline Gervais, *La prescription*, (Cowansville, Qc.: Yvon Blais, 2009) at 113.

402 See *Gervais*, *supra* note 401 at 115 and 116. See also *St. Lawrence Cement*, *supra* note 284 at paras. 105 *et seq*.

403 *Montambault c. Outfront Media Canada/Média Outfront Canada*, 2021 QCCA 1907 (***Montambault***) at paras. 15 –21. See also *Dunkin'Brands Canada Ltd. v. Bertico inc.*, 2015 QCCA 624 (***Dunkin' Brands Canada***) at paras. 141–144.

> his damage (that is, his loss of anticipated income) and he knew that they arose from the fact that the respondent had refused to move its billboard, despite the incessant requests by the Ministère starting in January 2009.
>
> [18] Yet he did not sue, preferring instead to illegally install a billboard of his own in 2010.
>
> [19] The fact that, on October 20, 2015, the respondent requested a permit to install a new billboard while agreeing to demolish the billboard at issue does not change the situation that had existed since the beginning of 2009, when the appellant's permit application was suspended.
>
> [20] In this case, the damage is continuing and has occurred every day since the appellant was informed that his permit application was suspended because of the fault that is repeated daily by the respondent or the former owner of the billboard.
>
> [21] In the presence of such ongoing or repeated damages arising from a continuing fault, prescription begins to run anew every day. Accordingly, the judge made a palpable and overriding error by failing to acknowledge that the appellant could not claim damages for a period beyond the three years preceding the originating applicant, that is, those suffered as of November 25, 2014.
>
> [Emphasis added.]

[464] That judgment was followed in *Maheu* c. *Municipalité du Canton de Shefford*.[404] In that case, a municipality had failed to act despite a legal responsibility to do so. The Court said the following, quoting *Montambault*:

> [TRANSLATION]
>
> [63] The RCM did not implement the breaches, but failed to act, in spite of its responsibility under the *Municipal Powers Act*. It is an continuing fault that creates similar damage.
>
> [64] The Court of Appeal, in a recent judgment, said the following: [quoting *Montambault*]
>
> [65] The faults committed by Shefford and the RCM are continuous, the causes of action giving rise to them occur on a daily basis. The starting point begins anew each day. The remedy is not prescribed if it meets the conditions of section 1112.1 *M.P.*

---

[404] 2022 QCCS 769 at paras. 63–65. See also *Dunkin'Brands Canada*, *ibid.* at paras. 14 –144, and *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46 at para. 135, citing *Dunkin'Brands Canada*.

6.2 Discussion

[465] The Court does not share the plaintiff's position that the damages actually appeared for the fist time after the CA Judgment.

[466] The plaintiff may have believed that the CA judgment, like the Castonguay Judgment, confirmed Air Canada's breach of the *Act*. However, those judgments do not create a right; rather, they observe a state of affairs. They do not have an impact on the appearance of damage, nor do they create new damage.

[467] Furthermore, Air Canada's position and its intentions were known to the plaintiff shortly after Aveos's closure, as the plaintiff personally acknowledged at the hearing. They were publicly confirmed during hearings before the Standing Committee on Transport, Infrastructure and Communities on March 29, 2012, when Air Canada confirmed the following:

467.1. Air Canada had no intention of repurchasing Aveos;[405]

467.2. According to Air Canada, it was in compliance with the *Act* despite Aveos's cessation of activities, in particular considering the Newbould Judgment and a legal opinion requested and forwarded by Transport Canada;[406]

467.3. It intended to prioritize an overhaul and maintenance service supplier that could offer a solution providing for the performance of the work in Canada while being viable and competitive.[407]

[468] As for the material and moral damages claimed by the plaintiff, they appeared as of March 18, 2012. As of that date, the workers suffered the effects of losing their jobs and the uncertainty of what was to come. The testimony of several of them at the hearing is eloquent.

[469] Accordingly, the prescriptive period for the plaintiff's remedy began to run for the first time on March 18, 2012.

[470] However, the Court finds that Air Canada committed a fault by failing to maintain the Centres not only on that date but ever since then, continuously until the 2016 Legislative Amendment. This renewed fault causing damages on a daily basis constitutes a daily starting point of a new prescriptive period.

[471] Air Canada could have decided to comply with its legal obligation after the Castonguay or CA Judgments, or at any other point in time, by putting the Centres back

---

405 Exhibit P-85 at 5.
406 Exhibit P-85 at 2. The Court also refers to the testimony of Mr. Rovinsescu at the hearing.
407 Exhibit P-85 at 7.

in service, directly or indirectly. It did not. Had it done so, it would have put an end to the breach of the *Act* and the subsequent daily damages suffered by the plaintiff and the Class members.

[472] Air Canada admits that [TRANSLATION] "insofar as a final judgment had been rendered prior to the 2016 amendment coming into force, Air Canada would, of course, have been bound to comply".[408] If it goes without saying, then it is also a given that Air Canada shouldered the risks of this proceeding, namely, the risks of not complying with a continuing legal obligation that was the subject of a dispute and that a judgment eventually confirmed existed.

[473] Air Canada's fault of failing to comply with its legal obligation can be distinguished from cases where a one-time breach causes an incident and damage. In such cases, the breach occurs, and the incident is fully apparent. This could be, for example, a dismissal where a fault was committed and damage was caused.

[474] In this case, Air Canada's breach of its obligation to maintain the Centres continued every day from March 18, 2012, until June 22, 2016. Throughout this period, damage may have been caused to the Class members by Air Canada's continuing fault.

[475] Accordingly, the portion of the plaintiff's claim respecting all the damage suffered in the three years preceding the institution of the proceedings in April 2016 is not prescribed.

7. THE RELEASE AND ITS IMPACT ON THE ADMISSIBILITY OF THE PLAINTIFF'S ACTION

[476] Air Canada submits that the Release included in the Agreement of January 8, 2009, to which the IAMAW, Air Canada, and Aveos were parties, applies and that there was a transaction between the parties, confirmed by the CIRB and the Newbould Judgment. Accordingly, the Release has the authority of *res judicata* for the parties and constitutes a peremptory exception to the plaintiff's action.

[477] For the reasons below, the Court finds that the Release does not constitute a peremptory exception to the plaintiff's action.

7.1 Relevant facts

[478] As stated, in the sale of assets of ACTS LP to the Consortium in 2007, the unionized employees seconded by Air Canada to ACTS continued to be seconded to carry out the same functions, this time for Aveos, under the ACT's management.

[479] In the wake of these employee transfers, disputes erupted between the union and Air Canada, and the Agreement of January 8, 2009, was concluded. The Court reiterates

---

[408] Argument outline of Air Canada at para. 204.

that this agreement settled the remaining issues in dispute and pursued the following objectives:

> 479.1. Facilitate the orderly transition of the employees concerned from Air Canada to Aveos in accordance with the choice expressed by each employee;
>
> 479.2. Establish the employment terms and conditions applicable to Air Canada's employees who chose to become employees of Aveos.

[480] The obligations under the Agreement were subject to certain conditions, including the conclusion of an agreement between Air Canada and Aveos that the latter remain the exclusive provider of airframe maintenance and overhaul services, at least until June 30, 2013.[409]

[481] The Agreement provides for the Release, which reads:[410]

> 13. The parties acknowledge and agree that the terms of this Memorandum of Agreement together with the award of arbitrator Martin Teplitsky or such other arbitrator as he may designate and related orders or directions of the CIRB are exhaustive of the rights of any Air Canada Employee **affected by the sale of the business of ACTS LP** and that no party will assert any claim, demand or grievance **related or arising from the transitioning of Air Canada Employees to Aveos** except in accordance with this Memorandum of Agreement.
>
> [Emphasis added.]

[482] On January 22, 2009, the CIRB declared that the Agreement of January 8, 2009, was a full and final settlement of complaint No. 26054-C and ordered the parties to cooperate in its implementation.[411]

[483] On January 31, 2011, the CIRB granted an application for a declaration of the sale of a business presented by Air Canada and Aveos, and dismissed the application for a declaration of a single employer presented by the IAMAW.[412] The CIRB[413] declared as follows:

> **AND FURTHERMORE**, the Canada Industrial Relations Board hereby declares that the January 8, 2009 MOA, as amended by the June 8, 2009 MOA, the Heavy Maintenance Separation Program ordered pursuant to Order No. 9996-U, and the present Order properly and fully dispose of all matters arising from the sale of business from ACTS LP to Aveos Fleet Performance Inc. or related

---

409 Exhibit D-1, Section II.2, continuous numbering at 0004.
410 Exhibit D-1, Section IX.13, continuous numbering at 00147.
411 Exhibit D-2.
412 Exhibit D-4.
413 Exhibit D-4, continuous numbering at 0051.

> to the consequences of such sale, whether under the *Code*, the applicable collective agreement or otherwise.
>
> [Emphasis added.]

[484] As stated, the Heavy Maintenance Separation Program in question was offered by Air Canada on January 13, 2011,[414] and was appended to the CIRB order.[415] It is important to reproduce the following excerpts, which are relevant to the issue in dispute:[416]

> Air Canada proposes to offer a separation program to IAMAW-represented Aveos employees who were employed as of the date of the requested order establishing separate bargaining units for Aveos employees, as follows:
>
> 1) The separation program will consist of a maximum of 1,500 separation packages.
>
> 2) A separation payment under this program shall be an amount representing two weeks' pay for each completed year of continuous service at Air Canada and Aveos up to a maximum of 52 weeks, service to be calculated at the time of granting the separation package. The separation payment will be based on the eligible employee's base hourly rate for a 40-hour work week.
>
> 3) The separation packages, up to the maximum number expressed in para. 1 above, will be made available to IAMAW-represented employees at any time up to June 30, 2015, in the event that employees are permanently laid-off, or terminated or a temporary layoff becomes permanent as a direct result of Aveos ceasing to be the exclusive provider of heavy maintenance services to Air Canada, other than in circumstances described in para. 4 below. Such an event may occur before June 30, 2013, but no later than June 30, 2015.
>
> 4) The separation packages, up to the maximum number expressed in para. 1 above, will also be made available at any time up to June 30, 2013 to IAMAW-represented employees, in the event of an insolvency, liquidation or bankruptcy involving Aveos resulting in the cancellation of Air Canada-Aveos contracts and in the termination or permanent layoff of IAMAW-represented employees.
>
> ...
>
> 9) Any separation package extended to an employee by Air Canada under this separation program is inclusive of and in complete satisfaction of any and all payment **in lieu of notice of termination or layoff and severance pay to which an employee in receipt of the separation package may**

---

414 Exhibit D-4, continuous numbering at 0058.
415 Exhibit D-4.
416 Exhibit D-4, continuous numbering at 0060 and 0061.

> **be entitled from Air Canada and/or Aveos under the *Canada Labour Code*** ("the Code") **and under the applicable collective agreement**.
>
> 10) The separation payments contemplated by the Air Canada separation program fulfill any and all requirements for severance pay, in relation to employees in receipt of separation payments, in any adjustment program negotiated or arbitrated under Division IX of the *Code* and the provisions of section 228 may be invoked as may be necessary to confirm this result.
>
> [Emphasis added.]

[485] According to Air Canada, the Release included in the Agreement of January 8, 2019, encompasses and includes the plaintiff's action in this case and constitutes a peremptory exception to this action. In particular, it argues that:

485.1. The Release concerns both the transfer of Air Canada unionized employees to Aveos and the potential closure of Aveos;

485.2. The CIRB confirmed that the terms and conditions set out in the Agreement allowed Air Canada to fulfil the obligations incumbent upon it in connection with the sale of ACTS LP to the Consortium;

485.3. The Heavy Maintenance Separation Program and the CIRB orders were incorporated by reference into the Agreement and are consideration for the Release granted by IAMAW;

485.4. The Release is a transaction that has the authority of *res judicata* between the parties under articles 2631 and 2633 C.C.Q.;

485.5. The plaintiff's action seeks a second head of compensation for events that have already been settled between the parties;

485.6. The Newbould Judgment dismissed the IAMAW's proceeding based on the contents of the Release;

485.7. The Authorization Judgment states that it is a serious and potentially fatal argument:[417]

> [TRANSLATION]
>
> [42] Air Canada argues that the Agreement is a transaction within the meaning of article 2631 C.C.Q., which has the authority of *res judicata*. This transaction would make any claim for damages arising from a breach of the *Act* inadmissible, and the Newbould Judgment has already made a similar ruling. Identity of object, cause, and parties therefore exists, because the IAMAW was the duly appointed representative of the unionized employees.

---

[417] Authorization Judgment, *supra* note 1 at paras. 42, 49, and 50.

> [43] Air Canada's argument is serious and could even be a fatal defence on the merits of the case. However, at this stage, the Court cannot conclude that there is *res judicata*.
>
> ...
>
> [49] It remains to be determined whether the release, included in the Agreement, constitutes a transaction. While the wording of the release is clear, it bears pointing out that it was granted in January 2009, when Air Canada was not in breach of the *Act*. Did Air Canada scheme or manoeuvre to unlawfully discharge its obligations, as alleged in the application? Was it a strategy in bad faith? Evidence will have to be adduced to obtain answers to these questions, which will make a ruling on the scope of the release possible.
>
> [50] For example, if the evidence reveals that Air Canada has always acted in good faith and did not cause the demise of Aveos, the release could constitute a peremptory exception. However, if it is discovered that Air Canada acted in bad faith, then it might be found that the release is not a defence. Indeed, it would go against the basic principle of good faith to allow Air Canada on the one hand to obtain a release in exchange for some undertakings, while on the other hand, it manoeuvres against these undertakings while benefiting from the release.
>
> [Emphasis added.]

485.8. Moreover, the payment of compensation in lieu of notice of termination under the *Canada Labour Code* includes any moral damages due to the loss of employment. Thus, the portion of the claim for moral damages is clearly without merit.

[486] The plaintiff contests the inadmissibility argument and submits that:

486.1. The Release concerns only the transfer of unionized employees from Air Canada to Aveos, which does not include the plaintiff's action, which instead concerns the consequences of Air Canada's breach of the *Act*;

486.2. The dispute that led to the Newbould Judgment concerned the union's contestation of the very transfer of employees from Air Canada to Aveos, which is clearly covered by the Release, in contrast with the situation of the plaintiff's current proceeding, which is entirely different;

486.3. The compensation paid under the Heavy Maintenance Separation Program is not a peremptory exception to the plaintiff's action because it was intended to protect the employees from the potential instability of their new employer. It is not a compromise or given in exchange for any subsequent breach of the *Act* by Air Canada.

7.2 Legal principles

[487] Articles 2631 and 2633 C.C.Q. provide that:

> **2631.** Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations.
>
> A transaction is indivisible as to its subject.
>
> **2633.** A transaction has, between the parties, the authority of res judicata.
>
> A transaction is not subject to forced execution until it is homologated.

[488] It is up to the party claiming that there was a transaction to prove it on a balance of probabilities.

[489] For a transaction to have the authority of *res judicata* over a proceeding, the transaction and the proceeding must share an identity of parties, object, and cause.[418] In the event of a disagreement between the parties as to the scope of a transaction and release, it is up to the court to verify the object and the cause, and then to apply the triple identity test.[419]

[490] The Court refers to the legal principles applicable to the authority of *res judicata*, set out in Section V.1 (1.1.1) of this judgment.

7.3 Discussion

[491] The Release was concluded in the context of the transfer of unionized employees from Air Canada to Aveos. It clearly states that its objective is to prevent "any claim, demand or grievance related or arising from the transitioning of Air Canada Employees to Aveos".

[492] To agree with Air Canada's argument, it would be necessary to find that the proceeding brought by the plaintiff has the same cause as the Release, in other words, that it is related to or arising from the transfer of Air Canada employees to Aveos.

[493] What is more, the CIRB's order of January 31, 2011, specified that the Agreement of January 8, 2009, the Heavy Maintenance Separation Program, and the content of the order itself, "properly and fully dispose of all matters arising from the sale of business from ACTS LP to Aveos Fleet Performance Inc. or related to the consequences of such sale, whether under the *Code*, the applicable collective agreement or otherwise".

---

418 *Ustushenkova* c. *Lavigne*, 2020 QCCS 1405 at para. 120 (aff'd by the Court of Appeal on other grounds, 2021 QCCA 1932).

419 *Ustushenkova*, *supra* note 418 at para. 121.

[494] It therefore covers any dispute arising from the sale of ACTS's assets to Aveos, or related to the consequences of such sale, whether under the *Code*, the collective agreement or "otherwise".

[495] As for the Heavy Maintenance Separation Program, as confirmed by Mr. Ciotti, its aim was to mitigate the risk for the transferred unionized employees that their new employer might file for bankruptcy, in particular once the airframe maintenance contracts ended.

[496] The Court is of the view that the Release does not have the authority of *res judicata* over the plaintiff's action.

[497] Indeed, the union could very well have negotiated and obtained better transfer conditions for its employees and settled some of its disputes with Air Canada and, later, obtained additional financial protection for the employees, the whole in the context of the increased risks associated with a change of employer, in exchange for allowing Air Canada to execute its plan to transfer the employees, in the broader context of the sale of ACTS's assets to Aveos.

[498] The parties could also have released each other as to the consequences of the transfer.

[499] However, the fruits of such a negotiation cannot extend to all the consequences arising from the ongoing breach of the *Act* by Air Canada following Aveos's closure, that is, the commission by Air Canada of a subsequent and separate fault that is unrelated to the employee transfer.

[500] The proceeding brought is not based on Air Canada's failure as an employer or former employer as such. It does not concern a fault in the transfer of employees or the sale of ACTS's assets to Aveos or its consequences. It is based on Air Canada's breach of its legal obligations after its subcontractor closed.

[501] Air Canada argues that it is entitled to benefit from the consideration negotiated in exchange for payment of the compensation, that is, the effects it attributes to the Release. The Court disagrees. The compromise that was negotiated could not have the planned effect of allowing Air Canada to avoid the consequences of a future breach of the *Act*.

[502] Air Canada also argues that the Newbould Judgment recognized the validity of the Release and applied it against the union's proceeding in that other case. The objective of the union's proceeding was to prevent the transfer of employees from Air Canada to Aveos. The conclusion of the Newbould Judgment cannot be set up against the parties in a dispute involving a different cause.

[503] Air Canada's argument that the compensation paid to the unionized Class members is equivalent to compensation in lieu of notice that includes any moral damages arising from the loss of employment must also be rejected.

[504] Indeed, as the arbitrator Teplitsky recognized on September 12, 2012, in a ruling on a dispute between Air Canada and the IAMAW with respect to the payment of the compensation at issue:[420]

> [TRANSLATION]
>
> I must add that while the term severance pay is used, no payment was made at the time of termination. Rather, it is Aveos's bankruptcy, or the loss of the heavy maintenance contract, that triggered the payment. While any payment covers Aveos's obligations as regards severance pay under the *Canada Labour Code*, it is likely, given Aveos's bankruptcy, that the amounts paid in this respect were low or even nil.
>
> [Emphasis added.]

[505] Air Canada was no longer the workers' employer. Also, the compensation would have been owed even if Air Canada had resumed activities at the Centres directly or indirectly and the workers had regained their jobs.

[506] Finally, the Authorization Judgment does not decide the scope of the Release or the specific conditions in which it could constitute a peremptory exception. It recognizes that the question is a serious one and offers examples, leaving it to the judge on the merits to decide the issue.

[507] In light of the above, the Court concludes that the Release does not constitute a peremptory exception to the plaintiff's action.

[508] Moreover, it is important to add, as the plaintiff acknowledges, that if the compensatory damages claimed have already been offset in part by the payment made by Air Canada under the Heavy Maintenance Separation Program, the amounts received will have to be taken into account in assessing the damages suffered.

[509] Such an operation will have a limited impact, however, on the portion of admissible damages because the compensation can cover only a maximum period of 52 weeks of wages, and the damage that suffered for a little more than a year after Aveos's closure are prescribed.

8. QUESTIONS RELATING TO DAMAGES

[510] The plaintiff claims compensatory damages under his Amended originating application dated October 1, 2021, which was once again amended at the hearing:[421]

> 510.1. The individual recovery of financial losses;

---

420 Exhibit D-31, continuous numbering at 0876 and 0877.

421 See the minutes of the hearing, October 26, 2021.

510.2. The collective recovery of $15,000 for each of the former workers at the Centres as moral damages, for a total of $32,970,000;

510.3. The individual recovery of $15,000 for each spouse of a former worker at the Centres of Mississauga, Montreal, and Winnipeg, as moral damages;

510.4. The individual recovery of an additional amount for non-pecuniary damages that exceed the joint moral damages suffered by the members, for example, psychological issues, divorces, suicide attempts, and suicides;

[511] At the hearing, the plaintiff refined the composition of the Class members. From 2,204 former workers affected by the class action – that is, 1,785 members from the Montreal overhaul centre, 412 from Winnipeg, and 7 from Mississauga – 6 members have opted out, which brings the final number of former workers who are Class members to 2,198.[422]

8.1 Legal principles

[512] The principle of *restutio in integrum* applies to the members of a class action. The class members are entitled to damages for moral or material injury caused by the debtor.[423] The damages compensate for the loss sustained by the creditor and for the profit of which he or she has been deprived. A future injury will be admissible if it is certain and assessable.[424]

[513] To analyze loss of income, the debtor's salary before and after the fault at the source of the damage will be considered. The basis for calculating damages will be the debtor's salary over the last year.[425] In assessing loss of income, the income actually earned following the wrongdoing will be taken into account.

[514] Loss of benefits, including the loss of a pension fund, will be established through actuarial valuations.

[515] Proof by survey will be admissible if it is reliable and valid.

[516] Collective recovery of the claims of the members of a class action may be ordered where the evidence allows a sufficiently precise determination of the total amount of the

---

422 Plaintiff's argument outline at para. 281.
423 Article 1607 C.C.Q.
424 Article 1611 C.C.Q.
425 Baudouin and Deslauriers, *supra* note 308 at para. 1-485.

claim.[426] That is the case where the evidence allows for a certain approximation of the total amount of the claims, even if individual class member claims are not identical.[427]

8.2 Relevant facts

[517] In support of his claim for pecuniary and moral damages, the plaintiff submits evidence in the form of a survey from Christian Bourque, expert in public opinion surveying, based on data gathered and analyzed by Michel Bettez for the plaintiff.[428]

[518] Expert Bourque is of the view that the survey is reliable and valid, given the wording and presentation of the questions asked, the low margin of error arising from the pool of individuals targeted, and the high rate of respondents.[429] Despite the inadequacy of the questions asked about the moral damages suffered, the expert found that this did not affect the reliability of the survey.[430]

[519] The analysis of the survey carried out by Mr. Bettez reaches the following conclusions:

519.1. He extrapolates income losses of $64 million for 2012, for a Class made up of 2,000 people, and $50 million for 2013;[431]

519.2. He notes a significant reduction of benefits available to the respondents in comparison with the plan available before March 18, 2012;[432]

519.3. The respondents confirmed that they suffered moral damages to varying degrees, including stress, loss of self-esteem, humiliation, dark thoughts, insomnia, family tensions, financial difficulties, as well as fewer family vacations and social activities;[433]

519.4. The respondents confirmed that their spouses also suffered, to varying degrees, the abovementioned moral damages.[434]

[520] Furthermore, the plaintiff also called 20 representatives of the Class to testify, former workers, spouses of former workers, either unionized or non-unionized, who

---

426 Article 595 C.C.P.
427 *Lalande c. Compagnie d'arrimage de Québec ltée*, 2019 QCCS 306 at paras. 252–255; *Masson c. Telus Mobilité*, 2019 QCCA 1106 at paras. 76–78.
428 Exhibit P-52.
429 Exhibit P-52, continuous numbering at 1008 and 1009.
430 Exhibit P-52, continuous numbering at 1009.
431 Exhibit P-52.2 at 5–7.
432 Exhibit P-52.2 at 7.
433 Exhibit P-52.2 at 7 and 8.
434 Exhibit P-52.2 at 8.

worked in the Montreal, Winnipeg, and Mississauga Centres. He also filed the transcripts of the out-of-court examinations of a dozen class.[435]

[521] The evidence reveals that the class members suffered pecuniary damage during the period of the proceeding that is not prescribed, that is, after April 2013,[436] which includes loss of employment income, the pension plan, and other benefits.

[522] Both parties filed actuarial evidence,[437] each proposing a methodology for determining the pecuniary losses. That said, the parties agreed to complete and present this evidence during a second stage of the hearing.

[523] The evidence also reveals that an overwhelming majority of the class members suffered moral damages as a result of the definitive loss of their employment. Such damages were also suffered, to varying degrees, during the period of eligibility, that is, after April 5, 2013.

8.3 Discussion

[524] The Court concludes that Air Canada committed a continuing fault during the period at issue. Insofar as the plaintiff and the Class members suffered ongoing damages during the period of eligibility from April 5, 2013, to June 22, 2016, they are entitled to full compensation for such damages.

[525] As stated, the plaintiff asks for the individual recovery of pecuniary damages, given the inevitable fluctuation in the valuation of the damages suffered from one class member to the next.

[526] Thus, individual proof will be necessary to quantify these damages, taking into account the situation of each class member during the period from April 5, 2013, to June 22, 2016.

[527] As for the portion of pecuniary losses related to the pension plans, Air Canada argues that it cannot be held liable for the state of a plan administered by third parties, for Aveos employees. Thus, it cannot be held liable for the management of those plans, the allocation of contributions, or the state of those plans when they were wound up.

[528] It appears from the evidence that when employees were transferred from Air Canada to Aveos, there were two pension plan, one for unionized employees created in July 2011, and a second for non-unionized employees in effect since October 2007.[438]

---

435 Exhibit D-65.

436 Exhibit 52.2 at 6.

437 For the plaintiff, expert Daniel Gagné from Mallette, and for the defendant, the expert Denis Guertin from Aon.

438 The Court refers to the testimony of Mr. François Lord at the hearing and to exhibits P-54 and P-55.

[529] The arguments raised by Air Canada do not defeat the plaintiff's claim for losses related to the pension plans. However, a method to calculate such damages that will take into account the other conclusions of this judgment must be established.

[530] This methodology will have to take into account, *inter alia*, the Court's conclusions that the fault accepted as the origin of the damages suffered is Air Canada's breach of the *Act* following Aveos's closure, and not that Air Canada caused Aveos's closure.

[531] As requested by the parties, a second stage of the hearing will be scheduled to rule on this aspect of the claim.

[532] In support of his claim for the moral damages of the class members, the plaintiff seeks the collective recovery of $15,000 per class member.

[533] There is no doubt that, based on the evidence adduced, the class members suffered moral prejudice that may, at least in part, be similar, including loss of enjoyment of life, psychological suffering, and the inconveniences arising from the definitive loss of their employment. That being said, in light of the conclusions of this judgment regarding the prescription of part of the claim, the Court is unable to find that collective recovery of the moral damages would be appropriate.

[534] Accordingly, the individual recovery of these damages will be allowed and combined with the individual recovery exercise for additional amounts, as appropriate, for moral damages that exceed the joint moral damages suffered by the members, for example, for psychological issues, divorces, suicide attempts, and suicides.

[535] As for moral damages claimed for the spouses of the former workers, Air Canada maintains that they are not allowable because they are repercussive.

[536] The plaintiff contests this argument, submitting that they concern indirect victims.

[537] In this case, the moral damages arise from, among other things, the stress of becoming the sole financial provider,[439] the presence of family tension, the loss of family vacations, insomnia, etc.

[538] For the reasons set out in Section V-4(4.3) of this judgment, the Court concludes that they are indirect victims, insofar as they experienced personal suffering arising from Air Canada's fault.

[539] While they are indirect victims, the damage suffered is not repercussive. The damages are therefore allowable.

[540] In light of the above, it is appropriate to provide that the parties will submit to the Court, within 90 days, a detailed proposal on the method of proving and calculating all the

---

[439] The Court refers in particular to the testimony of Ms. Annie Bellemare at the hearing.

damages awarded in this judgment, by category or grouping if possible, as well as the proposals for the time and locations to include in the framework for recovery and publication of notices to class members. The Court will have to hold one or more hearings to decide this aspect, with possibly additional discovery.

VI. CONCLUSIONS

FOR THESE REASONS, THE COURT:

[541] **GRANTS** in part the plaintiff's class action on behalf of all the Class members;

[542] **CONDEMNS** Air Canada to pay the plaintiff and each of the Class members compensation for loss of employment income;

[543] **ORDERS** the individual recovery of the claims of the Class members for loss of employment income;

[544] **CONDEMNS** Air Canada to pay an amount representing the loss of the value of the lost benefits;

[545] **ORDERS** the individual recovery of the claims of the Class members for the loss of the value of the lost benefits;

[546] **CONDEMNS** Air Canada to pay an amount representing moral prejudice suffered, that is, the stress, self-doubt, lower self-esteem, insecurity, feelings of injustice, and loss of enjoyment of life;

[547] **ORDERS** the individual recovery of moral damages for the Class members who were Aveos employees;

[548] **ORDERS** the individual recovery of moral damages for the spouses of the employees;

[549] **CONDEMNS** Air Canada to pay the individual claims of the class members for additional moral damages such as psychological issues and insomnia, family problems, divorces, and suicides;

[550] **CONDEMNS** Air Canada to pay all the amounts listed above, plus interest at the legal rate and the additional indemnity set out in article 1619 C.C.Q., as of the date of service of the application for authorization to institute a class action;

[551] **ORDERS** the parties to submit to the Court, within 90 days of the date of this judgment, a detailed proposal on how the damages awarded in this judgment will be proved and calculated, by category or grouping if possible, as well as the proposals for the spacio-temporal framework for recovery and publishing the notices to members.

[552] **THE WHOLE**, with legal costs, including all the fees for experts, notices to members and other related costs.

MARIE-CHRISTINE HIVON, J.S.C.

Mtre Philippe Hubert Trudel
Mtre Jean-Marc Lacourcière
Mtre Anne-Julie Asselin
Trudel Johnston & Lespérance

Mtre Jean-François Bertrand
Mtre Élodie Drolet-French
Jean-François Bertrand, avocats inc.
Counsel for the plaintiff

Mtre Patrick Girard
Mtre Guillaume Boudreau-Simard
Mtre Alexa Teofilovic
Stikeman Elliott LLP
Counsel for the defendant

Dates of hearing: October 4 to 28, 2021