Speaking Notes

Opening Luncheon of the McGill-IASL Conference on International Aviation Liability and Insurance

May 6, 2011

Esteemed colleagues, fellow jurists, ladies and gentlemen

I am honored to be with you today at the kind invitation of the members of the Conference organizing committee, who suggested that I talk to you about a subject that has been of keen interest to the members of the *National Airlines Council of Canada*, and to me personally, for the past few years: airline passenger rights. I have therefore brought with me everything that I need to share with you some of my reflections and thoughts regarding this challenging issue: my passion, my often bruising experience in dealing with this matter and, above all, my blood pressure medication. Now, while I am indeed here in my capacity as head of the NACC, I should point out that some of my less than flattering musings, sanctimonious posturing and/or befuddled reactions that you may hear or witness over the next few minutes in discussing some of the issues related to airline passenger rights are mine alone and do not necessarily represent the views and/or positions of the NACC's member airlines, although they most likely capture the spirit and essence of the afore-mentioned views and/or positions. Enough with the legal disclaimers…

I should start by pointing out that it is certainly not my intention today to enter into a technical discussion about various passenger rights regulatory regimes that may already exist, or that have been proposed in several key jurisdictions, including Canada, or whether such frameworks are consistent at all times with the provisions of other sources of international law in this matter, such as the Montreal Convention. You will hear some eminent experts speak on these points on a dedicated panel tomorrow. I am also not here to

pontificate on the need, or lack thereof, of such regimes in supposedly contestable or competitive sectors of economic activity, such as air transport, where the free market should decide how consumer service standards are set, like in most other "normal" industries. I think you can tell by the way I just phrased that on which side of the debate I would land with respect to that issue. But of course, the airline industry is not just another "normal" sector. That's exactly why I am here primarily as an airline manager who has figured out some basic facts of life: (1) taking care of our customers and compensating them, where appropriate, when things don't always go according to plan is sound business practice and makes commercial sense; (2) politicians are among our most frequent customers and (3) politicians make laws. So in light of these realities, how do we get back to a sane, rational policy debate on this issue, which in my view has been sorely lacking for some time now, and which should focus first and foremost on improving the overall customer experience?

To this end, allow me to indulge my inner child and to engage in some fantasizing and idealism about principles that should guide this discussion going forward anywhere in the world.

Idealistic thought No. 1: *If you are going to legislate on this issue in your jurisdiction, then make a* ***serious*** *effort to understand the workings and nature of the airline industry which, I think we can all agree, is one of the most challenging and complex businesses in the world*. This is exactly what the sponsor of a private member's bill introduced in the Canadian Parliament in 2009, which sought to establish an airline passenger rights framework, clearly failed to do. Indeed, Bill C-310, as it was known, was essentially a carbon copy of EU Regulation 261/2004, with respect to which I'll have plenty to say in a few moments. It was introduced, with a few cosmetic changes, into a very Canadian context of an air transport industry serving a sparse and widely-distributed population in the second largest land mass in the world, and dealing

with essentially two weather seasons in most of the country i.e. winter and July, as well as with barebones support infrastructure in many parts of our great north. Yet when I personally proposed a meeting as representative of the primary affected Canadian industry stakeholders with the individual in question while the bill was being drafted to ensure that he understood our unique challenges and to try to achieve a balanced approach, I was rebuffed. So when he proposed in his bill that airlines be forced to essentially open their doors and break out the meals and drinks after waiting on the ramp to de-ice for more than 60 minutes, which as we know can happen sometimes during a major snow event, or else face major penalties, I didn't get a chance to inform him that this was ILLEGAL per the ramp safety provisions of the *Canadian Aviation Regulations*. For this reason and the numerous other flaws in the bill, the NACC organized a multi-sector coalition composed of foreign airlines, airports from all regions, tourism-services and lodging providers, chambers of commerce, municipalities, and so on, to express opposition and get it voted down and soundly defeated in the House of Commons. So this wasn't just the usual suspects, that is to say, the airlines that took issue with this faulty piece of legislation, but rather a much broader segment of the travel and tourism economy representing hundreds of thousands of jobs and over **$100 billion** in annual economic turnover and output in Canada directly dependant on a healthy airline sector. Moral of the story: lawmakers need to make a serious effort to understand our industry and when they don't, call in your friends and leverage your considerable support as a key economic driver and facilitator to defend your interests. I really wish we'd see some more of that in other jurisdictions around the world.

Idealistic thought No. 2: *Focus on fair, proportionate compensation and reasonable duty of care – lose the vindictive penalties.* As I mentioned earlier, politicians are frequent flyers. Almost all of the time they, and other ordinary passengers, get to where they're going with little or no problem or issues. Sometimes, unfortunately, flights can be cancelled or bags mishandled. Haven't we all had the fantasy of sticking it to the airline when that happens? Well politicians, as lawmakers, can actually live out that fantasy and often times they do. Over $26 000 USD in fines *per passenger* if a flight in the US gets stuck for more than three hours in a horrendous line-up for de-icing at an already monstrously congested airport? What is that about?? Mother Nature combined with insufficient infrastructure capacity and the airline gets it up the wazoo?? Sounds fair to me... How about paying out over ten times in compensation than what was actually charged for a fare, as is often the case under the EU rules for a cancelled flight? Forget the lottery, just buy an airline ticket. And why are we as an industry all of sudden the open-ended guarantors against the effects of life's little inconveniences like a massive volcanic eruption that had most EU regulators dumb-founded for almost a week as to how to deal with the resulting catastrophic shutdown of their airspace, and following which it took the practically heroic efforts of a few airlines and IATA to get people moving again? The mind boggles. On the plus side, however, it makes for some great fantasy-themed bedtime stories for my four year-old. News Flash!! Unlimited duty-of-care obligations cost a LOT of money. Unreasonable and wholly-disproportionate compensation requirements cost a LOT of money. The airline industry, it DOESN'T have a lot of money! At a minimum, I was pleased to see the announcement by the Commission early last month that it would be reviewing the issue of proportionality and overall costs of the Regulation to the industry following the seismological and meteorological fiascos of 2010. We can only hope that the public consultation in this regard will be meaningful and that the appropriate adjustments will be made to the Community's legislation. Let's keep our fingers crossed.

Idealistic thought No. 3: *Enough with being responsible for the acts of others and for circumstances that in any other sane industry would clearly constitute force majeure.* The air transport system is a complex mix of service providers including airports, Air Traffic Control, de-icing operations, security screeners, and so on which, at all times, must work in almost symphonic harmony in order to ensure that everyone keeps moving safely and on time. Yet when something in the supply chain fails, the financial liability for the resulting service disruption inevitably falls on the air carrier, regardless of whether it is at fault or not. Flight delayed by slow or inefficient security screening? Call the airline. Spanish air traffic controllers out on another illegal strike? The airline will fix you right up with a hotel room, drinks and supper. Heathrow airport "buried" under ten centimeters of snow? Call 1-800-airline. When very rich insurers in the volcanic ash debacle matter-of-factly invoked force majeure provisions to wash their hands of the mess yet watched with incredulity while the EU Commission publicly wrote an unlimited blank cheque on behalf of the airlines in terms of duty of care liabilities, any reasonable observer could tell that this was not right. Yes of course we all needed to get families up from sleeping on the floor at Frankfurt-Main, but where was the shared responsibility of airports, and *especially* governments that had basically turned off the lights on the system and gone home? Excuse me for a moment while I take one of my blood pressure pills… Oh, and by the way, please don't waste my time with Art. 13 of EU 261, which half-heartedly establishes the principle of potential third-party liability over and above that of the airline's. The Commission seems to think that the airline as automated teller machine having the theoretical right to thereafter try to recoup its losses for the screw-ups of others is the appropriate answer to all this. When the industry in Europe attempted to seek compensation from BAA for the multi-million dollar losses resulting from the obvious mismanagement of what was essentially a minor snow event, they were made the following offer: NOTHING. No compensation, no breaks on future landing fees, not even a cup of coffee. And what about suing

governments in Europe for an appalling lack of diligence in re-opening crucial airspace well into the volcanic event? Are you kidding me??

And hold on tight when the judiciary starts getting involved in aircraft airworthiness issues and the interpretation of those most famous of legislative weasel words "extraordinary circumstances", and the glorious (for those in private practice, at least) litigation and billable hours that they have provoked over the years. In *Wallentin-Herman v Alitalia*, the European Court of Justice essentially ruled that a technical problem with an aircraft failed to constitute an "extraordinary circumstance" under EU 261, not only in the case of an absence to adequately maintain, but also when such a problem was discovered during regular maintenance. So in the latter case, what exactly can "extraordinary" mean anymore? Furthermore, the Court held that not only did a carrier need to establish that the circumstances surrounding the technical fault were *"extraordinary"* in nature, whatever the heck that means anymore given the preceding observation, it would also need to show that, and I quote: *"it could not have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned and, as a result, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able – unless it made intolerable sacrifices in the light of the capabilities of its undertaking at the relevant time – to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight"* end quote. Would you believe in its announcement last month of the review of EU 261, the Commission actually said that what I just read out to you ***clarified*** when a technical problem constituted an "extraordinary circumstance"?? To paraphrase that immortal line in that famous restaurant scene about faking the big O in the movie *When Harry met Sally: "*I'll have what they're having". All I can say is "rest in peace legal

clarity and operational certainty". This mess has now effectively ruled out in Europe technical or airworthiness issues with the aircraft as a defense against liability, unless of course a flock of geese flies into your engine. For reasons I will now explain, this not only creates utter confusion, it may also be getting dangerous.

Idealistic thought No. 4: *Do not undermine, through misguided consumer protection initiatives, the absolute and undisputed priority of one and all: aviation safety.* Now, at this point you're probably wondering what passenger rights have to do with safety, and whether my blood pressure medication is interacting poorly with the fish from lunch. Well you may be right on the latter point but allow me to elaborate anyways.

When in the now infamous *Bock* and *Sturgeon cases* the justices of the European Court essentially decided to play unelected legislator and re-wrote the ***clear and unambiguous*** provisions of EU 261 regarding financial compensation vs simple duty of care in the event of delays, they essentially opened up a Pandora's box in the form of an avalanche of claims against airlines for financial compensation in the event of arrival delays at destination that exceeded three hours. When this is combined with the interpretive mess created by *Wallentin-Hermann* with respect to technical causes and extraordinary circumstances, we start getting into some interesting scenarios to say the least. Why? Because, for example, every time a mechanic does a walk-around inspection of an A330 that has just landed in Paris from New York and one of its engines may be leaking oil, then that airline is now on a stopwatch thanks to the ECJ and basically has three hours to fix the problem and ensure that the aircraft is completely airworthy before it pushes back for the return flight. Failure to meet this deadline means a potential compensation liability on 300-seat wide-body of over

$270 000 for that one return flight. This "fix it or else" approach is, in my view, fundamentally inconsistent with a comprehensive, top down safety culture.

Now there are those who have said to me that suggesting that airlines would compromise safety to avoid paying out this compensation is beyond the pale. Those people need to hear me better. I am ***not*** suggesting that at all, I am saying that many national enforcement bodies in the EU, which have lovingly embraced the *Bock* and *Sturgeon* cases and have vowed to vigorously apply them, are also the same bodies that in many cases are responsible for direct aviation safety oversight in their respective jurisdictions and should essentially know better. In short, they have now created conflicting public interest mandates i.e. consumer protection vs safety because in the end, you do ***not*** either directly or indirectly impose or introduce ***any*** financial distraction or consideration in the same breath with safe flight operations. End of story, case closed and that is why we are, by far, the safest mode of transport in the world. Fortunately, the UK High Court agreed with IATA and a number of British carriers that *Bock* and *Sturgeon* needed to be reviewed and asked the ECJ to have another go at it. Let's hope they get it right so stay tuned.

As you may have remarked by now ladies and gentlemen, I am not one who is prone to ranting…seriously, I have no problem with talking about consumer rights frameworks as long as we keep the fundamentals I've proposed front and centre and infuse the debate with a sense of reason and balance. An anti-airline agenda may feel good to some consumer groups and certain politicians, but in the end it works against all of us given the critical role a vibrant and financially viable air transport system plays in our society. Thank you for indulging my inner child and enjoy the rest of the conference.