

THE 2018 MCGILL AIR LAW “SPEED MOOT” COMPETITION

THE STATE OF MCGILLIA V. THE STATE OF CONCORDIA *IN THE MATTER OF STATE SUBSIDIES TO AIRLINES*

I. Background

1. For the purposes of this Case, both of the States relevant to the problem—McGillia and Concordia—are parties to the following multilateral agreements:
 - a. 1945 United Nations Charter (U.N. Charter)
 - b. 1944 Convention on International Civil Aviation (Chicago Convention), including the amendments thereto
 - c. 1969 Vienna Convention on the Law of Treaties
2. Air services between McGillia and Concordia are governed by a bilateral Air Services Agreement (ASA) negotiated and signed on 23 July 2010 and attached as Annex 1 to the Compromis. The ASA entered into force on 1 September 2010.
3. In accordance with the ASA, McGillia has designated two airlines to operate the agreed international services between McGillia and Concordia, namely, Peel Airlines and Chancellor Airways.
4. At the time of the entry into force of the ASA, Peel Airlines was the official State carrier of McGillia, and was 100 percent owned by the State of McGillia.
5. Chancellor Airways was at the same time 100 percent privately owned by nationals of McGillia, with a majority stake owned by a McGillian conglomerate heavily invested in space mining interests.
6. In spring 2014, McGillia was devastated by a series of snow-related disasters. Huge avalanches destroyed McGillian agriculture and caused massive damage to the capital city, Leckeyville. The government’s ill-conceived attempt to protect Leckeyville by redirecting a nearby river resulted in widespread flooding and a health epidemic brought about by the diseased water.
7. In late September 2014, the government of McGillia announced that it had taken emergency economic measures to recapitalize many of McGillia’s struggling industries and to restore confidence to the economy.
8. In April 2015 Wikileaks released a trove of internal communications by the McGillian government containing details about the period surrounding the economic emergency.
9. The e-mails revealed that Peel Airlines had sustained 30 million Canadian dollars’ worth of losses to that point in 2014.
10. According to the e-mails, the McGillian government first forgave Peel Airlines for seven million Canadian dollars in debts to the State of McGillia owed for unpaid airport charges and taxes.

11. The e-mails further revealed that McGillia then instead established a not-for-profit government corporation, provided it with 100 million Canadian dollars of capital and sold 100 percent of the shares of Peel Airlines to the government corporation, which continues to manage and operate Peel Airlines to this day.
12. The governmental e-mails also revealed that privately-owned Chancellor Airways was in severe financial distress at the time of the emergency and that the owners had previously lobbied the McGillian government for a government loan.
13. The McGillian government declined to invest State funds in a second airline, and instead brokered a sale of Chancellor Airways to Sherbrooke Airlines, which had long wanted an affiliate in McGillia's region of the world. Sherbrooke Airlines is the national airline of Sherbrookia and is 100% owned by the State of Sherbrookia.
14. To comply with McGillia's domestic laws on foreign ownership of airlines, as well as numerous bilateral agreements to which McGillia is a party, the sale was structured so that Sherbrooke Airlines would only purchase 49 percent of Chancellor Airways. The remaining 51 percent of shares are owned by nationals of McGillia.
15. As part of the sale agreement, Sherbrooke Airlines was given the right to select Chancellor Airways' Chief Executive and to appoint the majority of the members of Chancellor Airways' Board of Directors. Sherbrooke Airlines would also have a veto over route expansion by Chancellor Airways. However, Chancellor Airways retained its own distinct branding and corporate headquarters in McGillia, although it was renamed New Chancellor Airways.
16. Following the release of the Wikileaks e-mails, the Civil Aviation Authority of Concordia (CAAC) in late April 2015 issued notice that it was beginning proceedings to investigate both Peel Airlines and New Chancellor Airways on suspicion of unfairly benefiting from the receipt of State subsidies.
17. In July 2015, the CAAC released the result of its investigation, finding both airlines to be in receipt of State subsidies, and to have derived an unfair competitive advantage therefrom. The findings did not include any evidence of unfair pricing practices, as the rates charged by Peel Airlines and New Chancellor Airways on flights between McGillia and Concordia were in line with market conditions and competitive with those charged by Concordia's carriers.
18. McGillia and Concordia immediately began consultations under the ASA in response to Concordia's concerns.
19. Having failed to reach a satisfactory resolution of the matter via consultations, Concordia announced that, pursuant to the ASA, it was rescinding the operating authority of Peel Airlines and New Chancellor Airways to fly routes to and from Concordia.
20. In turn, McGillia then declared that it was exercising general international law rights of self-help, *tu quoque* and lawful retaliation to exclude all Concordian airlines from operating to, from, or within McGillian airspace. The Concordian announcement mentioned in paragraph 19 was by presidential decree and did not reference the ASA or any other treaty.

21. In September 2015, the two States entered into bilateral negotiations over their competing interpretations of the ASA, with particular regard to Concordia's actions in immediately rescinding the operating authority of McGillia's two designated carriers, McGillia's response, and the financial history of McGillia's airlines.
22. After six months of unsuccessful negotiations, both States agreed to bring their dispute before the International Court of Justice by way of this Compromis.

II. Action

1. The State of McGillia has asked the International Court of Justice to rule that:
 - a. Because McGillia's financial contributions to Peel Airlines are not in violation of Article 5 (Prices) of the bilateral ASA, and since that is the only provision of the ASA that deals with subsidies, McGillia is not in violation of the ASA.
 - b. Concordia's action in revoking the operating authority of McGillia's two carriers was impermissibly unilateral and violated the ASA.
 - c. Concordia's action in revoking the operating authority of New Chancellor Airways is particularly illegal because New Chancellor Airways receives no financial contributions from the State of McGillia.
 - d. McGillia's retaliatory actions against Concordia's airlines are legally appropriate.
2. The State of Concordia has asked the International Court of Justice to rule that:
 - a. McGillia's financial contributions to Peel Airlines provide an unfair competitive advantage in violation of Article 6 (Fair Competition) of the ASA.
 - b. Concordia's action in revoking the operating authority were consistent with Article 4 (Revocation and Suspension of Authorization) of the ASA.
 - c. Concordia is justified in revoking the operating authority of New Chancellor Airways, which derives an unfair competitive advantage from the receipt of State subsidies, even if those subsidies do not come directly from the State of McGillia.
 - d. McGillia's retaliatory actions against Concordia's airlines are legally inappropriate.

Annex 1: the Air Services Agreement

AIR SERVICES AGREEMENT *BETWEEN* THE GOVERNMENT OF THE STATE OF MCGILLIA AND THE GOVERNMENT OF THE STATE OF CONCORDIA [relevant extracts only]

The Government of the State of McGillia and the Government of the State of Concordia, hereinafter referred to as the Contracting Parties,

Being parties to the Convention on International Civil Aviation opened for signature at Chicago, on the 7 day of December 1944,

Desiring to conclude an agreement for the purpose of establishing air services between their territories,

Have agreed as follows:

ARTICLE 1 Definitions

For the purpose of this Agreement, unless otherwise stated:

- (a) the term "Aeronautical Authorities" means: for the State of McGillia and for the State of Concordia, their respective Ministries of Transport and Communications, or in either case any person or body authorized to perform any functions at present exercised by the said Authorities including the Civil Aviation Authority of each State;
- (b) the terms "Agreed Service" and "Specified Route" mean: international air service pursuant to this Agreement and the routes specified in the Annex to this Agreement respectively;
- (c) the term "Agreement" means: this Agreement, its Annex drawn up in application thereof, as well as any amendment to the Agreement or the Annex;
- (d) the terms "Air Service", "International Air Service", "Airline" and "Stop for non-traffic purposes" shall have the meaning respectively assigned to them in Article 96 of the Convention;
- (e) the term "the Convention" means: the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944, and includes any Annex adopted under Article 90 of that Convention and any amendment of the Annexes or the Convention under Articles 90 and 94 thereof, insofar as those Annexes and amendments have become effective for, or been ratified by both Contracting Parties;
- (f) the term "Designated Airline" means: the Airline which has been designated and authorized in accordance with Article 3 of this Agreement (Designation and Authorization);
- (g) the term "Territory" in relation to either Contracting Party shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of the Contracting Party, in accordance with Article 2 of the Convention;
- (h) the term "User Charge" means: a charge imposed on Airlines for the provision of airport, airport environmental, air navigation, or aviation security facilities or services including related services and facilities;

- (i) the term "Capacity" means: the combination of frequency per week and (the configuration of) the type of aircraft used on the route offered to the public by the Designated Airline(s).

ARTICLE 2 Grant of Rights

1. Each Contracting Party grants to the other Contracting Party the following rights for the conduct of international air transportation by the Designated Airline(s) of the other Contracting Party:
 - a. the right to fly across its Territory without landing;
 - b. the right to make stops in its Territory for non-traffic purposes; and
 - c. While operating an Agreed Service on a Specified Route, the right to make stops in its Territory for the purposes of taking up and discharging international traffic in passengers, baggage, cargo and mail, separately or in combination, including the freedom to take up and discharging international traffic to or from a third State. Nothing in paragraph 1 of this Article shall be deemed to grant the right for one Contracting Party's Airline(s) to participate in air transportation between points in the Territory of the other Contracting Party (cabotage).
2. Any intermediate points and/or points beyond may be served by the Designated Airline(s) of one Contracting Party without exercising fifth freedom traffic rights between those points and the Territory of the other Contracting Party. Such fifth freedom traffic rights may, however, be exercised by the Designated Airline(s) of one Contracting Party after having obtained prior approval of the Aeronautical Authorities of the other Contracting Party.

ARTICLE 3 Designation and Authorization

1. Either Contracting Party shall have the right, by written notification through diplomatic channels to the other Contracting Party, to designate two airlines to operate International Air Services on the routes specified in the Annex and to substitute another Airline for an Airline previously designated.
2. On receipt of such a notification and of applications from the Designated Airline, in the form and manner prescribed for operating authorizations and technical permissions, either Contracting Party shall, with minimum procedural delay, grant to the Airline so designated by the other Contracting Party the appropriate operating authorizations, provided that the Designated Airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Contracting Party considering the application or applications.
3. Upon receipt of the operating authorization of paragraph 2 of this Article the Designated Airline may at any time begin to operate the Agreed Services, in part or in whole, provided that it complies with the provisions of this Agreement.

ARTICLE 4 Revocation and Suspension of Authorization

1. Each Contracting Party shall have the right to withhold, revoke, suspend or limit the operating authorizations of an Airline designated by the other Contracting Party in event of any of the following:

- a. such airline is not able to prove upon request that the majority ownership and effective control of such airline are vested in nationals or corporations of the other Contracting Party or in that Party itself; or
 - b. in case that Airline has failed to comply with the laws and regulations referred to in Article 9 (Application of Laws, Regulations and Procedures) of this Agreement; or
 - c. in case the other Contracting Party is not maintaining and administering the standards set forth in Article 11 (Safety) and Article 12 (Aviation Security); or
 - d. in the event of failure by such Airline to qualify before the Aeronautical Authorities of the Contracting Party assessing the authorization, under the laws and regulations normally and reasonably applied to the operation of International Air Services by these Authorities in conformity with the Convention; or
 - e. in case the Airline otherwise fails to operate in accordance with the conditions prescribed under this Agreement.
2. Unless immediate action is essential to prevent further non-compliance with paragraph 1 of this Article, the rights established by this Article shall be exercised only after consultation with the other Contracting Party. Unless otherwise agreed by the Contracting Parties, such consultations shall begin within a period of sixty (60) days from the date of receipt of the request.
 3. This Article does not limit the rights of either Contracting Party to withhold, revoke, limit or impose conditions on the operating authorization of an Airline or Airlines of the other Contracting Party in accordance with the provisions of Article 12 (Aviation Security).

ARTICLE 5 Prices

1. Each Contracting Party shall allow Prices for air transportation to be established by each Designated Airline based upon commercial considerations in the marketplace. Intervention by the Contracting Parties shall be limited to:
 - a. prevention of unreasonably discriminatory Prices or practices;
 - b. protection of consumers from Prices that are unreasonably high or restrictive due to the abuse of a dominant position;
 - c. protection of Airlines from Prices that are artificially low due to direct or indirect governmental subsidy or support.
2. Each Contracting Party may require notification to its Aeronautical Authorities of Prices to be charged to or from its Territory by Airlines of the other Contracting Party.
3. Neither Contracting Party shall take unilateral action to prevent the inauguration or continuation of a Price charged or proposed to be charged by (a) an Airline of either Contracting Party for international air transportation between the territories of the Contracting parties, or (b) an Airline of one Contracting Party for international air transportation between the Territory of the other Contracting Party and any other country.

4. If either Contracting Party considers any such Price inconsistent with the considerations set forth in paragraph (1) of this Article, it shall request consultations and notify the other Contracting Party of the reasons for its dissatisfaction as soon as possible. These consultations shall be held not later than thirty (30) days after receipt of the request, and the Contracting parties shall co-operate in securing information necessary for reasoned resolution of the issue. If the Contracting Parties reach agreement with respect to a Price for which a notice of dissatisfaction has been given, each Contracting Party shall use its best efforts to put that agreement into effect. Without such mutual agreement, the Price shall take effect or continue to be in effect.

ARTICLE 6 Fair Competition

1. Each Contracting Party shall allow a fair and equal opportunity for each Designated Airline to compete in providing the international air transportation governed by this Agreement.
2. Each Contracting Party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination or unfair competitive practices adversely affecting the competitive position of a Designated Airline of the other Contracting Party.
3. Each Contracting Party shall allow each Designated Airline to determine, within the entitlements contained in the Annex, the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace.
4. Consistent with this right, neither Contracting Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type(s) operated by the Designated Airline(s) of the other Contracting Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention.
5. Neither Party shall impose on the other Party's Designated Airlines a first-refusal requirement, uplift ratio, no-objection fee, or any other requirement with respect to capacity, frequency or traffic that would be inconsistent with the purposes of this Agreement.

ARTICLE 9 Application of Laws, Regulations and Procedures

1. The laws, regulations and procedures of either Contracting Party relating to the entrance or entry into or departure from its Territory of aircraft engaged in the operation of the agreed international air services, or to the operation and navigation of such aircraft, shall be complied with by the Designated Airline(s) of the other Contracting Party upon entrance into, while within the Territory of the Contracting Party, and until and including departure from, the said Territory.

ARTICLE 11 Safety

1. Each contracting Party may request consultations at any time concerning safety standards in any area relating to air crew, aircraft or their operation adopted by the other Contracting Party. Such consultations shall take place within 30 (thirty) days of that request.

2. If, following such consultations, one Contracting Party finds that the other Contracting Party does not effectively maintain and administer safety standards and requirements in any such area that are at least equal to the minimum standards established at that time pursuant to the Convention, the first Contracting Party shall notify the other Contracting Party of those findings and the steps considered necessary to conform with those minimum standards, and that other Contracting Party shall take appropriate corrective action. Failure by the other Contracting Party to take appropriate action within 15 days or such longer period as may be agreed, shall be grounds for the application of Article 4 of this Agreement (*Revocation and Suspension of Authorization*).
3. Each Contracting Party shall see to it that each Designated Airline will be provided with communicative, aviation and meteorological facilities and any other Services necessary for the safe operations of the Agreed Services in conformity with the Chicago Convention and its Annexes.

ARTICLE 12 Aviation Security

1. The Contracting Parties agree to provide assistance to each other as necessary with a view to preventing unlawful seizure of aircraft and other unlawful acts against the safety of aircraft, its passengers and crew, airports and air navigation facilities and any other threat to security of civil aviation.
2. Each Contracting Party agrees to observe non-discriminatory and generally applicable security provisions required by the other Contracting Party for entry into the Territory of the other Contracting Party and to take adequate measures to inspect passengers and their carry-on items. Each Contracting Party shall also give sympathetic consideration to any request from the other Contracting Party for special security measures for its aircraft or passengers to meet a particular threat.
3. The Contracting Parties shall act in accordance with applicable aviation security provisions established by the International Civil Aviation Organization and its Annexes. Should a Contracting Party depart from such provisions, the other Contracting Party may request consultations with that Contracting Party. Unless otherwise agreed by the Contracting Parties, such consultation shall begin within a period of 60 (sixty) days from the date of receipt of such a request. Failure to reach a satisfactory agreement could constitute grounds for the application of Article 15 of this Agreement.
4. In accordance with their rights and obligations under international law, the Parties reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of this Agreement. Without limiting the generality of their rights and obligations under international law, the Parties shall in particular act in conformity with the following agreements: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo, 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague, 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal, 23 September 1971, and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal, 24 February 1988.
5. When a Contracting Party has reasonable grounds to believe that the other Contracting Party has departed from the aviation security provisions of this Article, the Aeronautical Authorities of the first Contracting Party may request immediate consultations with the Aeronautical Authorities of the other Contracting Party. Failure to reach a satisfactory agreement within 30 days from the date of such request shall constitute grounds to withhold, revoke, limit or impose conditions on the operating authorization

of an Airline or Airlines of that other Contracting Party. When required by an emergency, a Contracting Party may take interim action prior to the expiration of these 30 days.

ARTICLE 13 Consultation and Amendment

1. In a spirit of close cooperation the Aeronautical Authorities of the Contracting Parties may consult each other from time to time with a view to ensuring the implementation of, and satisfactory compliance with, the provisions of this Agreement.
2. Either Contracting Party may request consultations with a view to amend this Agreement. These consultations shall begin within sixty (60) days from the date of the receipt of the request by the other Contracting Party, unless otherwise agreed. Such consultations may be conducted through discussion or by correspondence.
3. Any amendment of this Agreement agreed upon by the Contracting Parties, shall come into force on the date on which the Contracting Parties have informed each other in writing, through the exchange of diplomatic notes, of the completion of their respective constitutional requirements.

ARTICLE 14 Settlement of Disputes

1. If any dispute arises between the Contracting Parties relating to the interpretation or application of this Agreement, the Contracting Parties shall in the first place endeavour to settle their disagreement by bilateral consultations and negotiations.
2. If the Contracting Parties fail to reach a settlement by negotiation, the disagreement may at the request of either Contracting Party be submitted for decision to the International Court of Justice.
3. The Contracting Parties undertake to comply with any decision given under paragraph 2 of this Article.

ARTICLE 15 Duration and Termination

1. Either Contracting Party may, at any time, give notice in writing through diplomatic channels to the other Contracting Party of its decision to terminate this Agreement.
2. Such notice shall be simultaneously communicated to the International Civil Aviation Organization. In such case this Agreement shall terminate 12 (twelve) months after the date of receipt of the notice by the other Contracting Party, unless the notice to terminate is withdrawn by agreement between the Contracting Parties before the expiry of this period. In the absence of acknowledgement of receipt of the notice of termination by the other Contracting Party, such notice shall be deemed to have been received fourteen (14) working days after the receipt of that notice by the International Civil Aviation Organization.

ARTICLE 16 Registration with ICAO

This Agreement shall be registered with the International Civil Aviation Organization.

ARTICLE 17 Applicability of Multilateral Agreements and Conventions

1. The provisions of the Convention shall be applicable to this Agreement.
2. If a multilateral agreement or convention, accepted by both Contracting Parties, concerning any matter covered by this Agreement, enters into force, the relevant provisions of that multilateral agreement or convention shall supersede the relevant provisions of this Agreement.
3. The Contracting Parties may consult each other to determine the consequences for the Agreement of the supersession, as mentioned under paragraph 2 of this Article and to agree upon required amendments to the Agreement.

ARTICLE 18 Entry into Force

This Agreement shall come into force on the first day of the second month following the date on which the Contracting Parties have informed each other in writing that the formalities, constitutionally required therefore in their respective countries, have been complied with.