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## **Compensation Claims Arising from the Downing of Ukrainian Airlines PS752**

CFM Lawyers is a Vancouver based aviation law firm. We act for victims of aviation accidents across Canada and internationally. We have received many calls from the media, local community and passengers' families for information regarding possible claims for compensation arising from the downing of UIA Flight PS 752.

We have prepared this summary of the avenues to compensation for family members impacted by the downing of Ukrainian Airlines Flight 752. The purpose of this summary is to provide family members with basic, accurate information regarding their legal situation. It is not intended to provide legal advice on any particular claim. Please contact us directly using the contact details below if you require legal advice regarding a possible claim.

### **Possible Avenues for Compensation**

There are a number of possible avenues for compensation arising from the downing of Ukrainian International Airlines Flight PS 752. One avenue is a claim against the airline, UIA, in Canada under the international conventions which govern claims against airlines on international flights. Another avenue is a claim against the State of Iran. It is also possible that family members may have a claim for travel accident insurance benefits. Because insurance policies often have a short claim period, this issue is addressed first.

### **Travel Accident Insurance – URGENT**

If your family member purchased their airline ticket on a credit card, it is possible the card included an accidental death/life insurance policy. These policies are complex and often have short periods in which to make a claim. For instance some credit card companies require notification of a claim within 90 days of the date of the accident, and some of them have even a shorter timeline for this. In order to protect any possible claim which your family may have, you should seek legal advice immediately as to the availability of insurance, and when and how a claim can be made. If you have not already retained a lawyer, we would be pleased to review this issue with you. Please contact anyone of our legal team below for assistance.

### **Claims Against the Carrier Are Governed by International Conventions**

Claims for compensation arising from the crash of Ukraine International Airlines Flight 752 will likely be governed by international conventions – either the Montreal Convention or its

predecessor the Warsaw Convention. Both Conventions have been enacted into law in Canada under the federal ***Carriage by Air Act***.

The issue of which convention will apply to any particular case is somewhat complicated. Canada has adopted the Montreal Convention. Iran has not. Iran is still governed by the Warsaw Convention. The question of which convention applies depends on a passenger's flight itinerary.

For Canadians (and others) travelling on round trip tickets from Toronto to Kiev to Tehran and back to Canada, claims for compensation could be brought under the Montreal Convention in a Canadian court. In legal terms, the courts of Canada would have jurisdiction over the case because Canada would be considered the country of "destination" under the Montreal Convention (notwithstanding the connection through Kiev). The courts of Canada would also likely have jurisdiction under the Warsaw Convention for any passenger whose destination on a one way ticket was Canada.

### **Compensation under the Montreal Convention**

The Montreal Convention establishes a two tiered system of liability. The carrier is strictly liable to pay compensation to a passengers' family in the event of an "accident" for provable damages up to an initial threshold of 128,821 Special Drawing Rights (\$232,000 CAD). This is the first tier of liability. For claims exceeding this amount, the onus is on the carrier to prove that the accident was not caused by negligence of the carrier. This is the second tier of liability. The precise amount of compensation payable will be determined by Canadian law. Canadian law requires individual assessment of compensation in fatal accident cases. The law varies somewhat from province to province but generally speaking, the law in each province provides for damages for the following elements:

1. Loss of financial support that the deceased family member would have provided to their dependents over the balance of their working life
2. Loss of valuable services the deceased family member would have provided to family members
3. Funeral expenses

Provincial law varies significantly on compensation for bereavement. British Columbia law does not permit recovery of compensation for bereavement. Alberta law provides for bereavement damages in fixed amounts. Ontario law does not permit claims for bereavement but does provide compensation for "loss of care, guidance and companionship".

### **Definition of "Accident" Under the Montreal Convention**

Based on international jurisprudence, a missile strike would likely be considered an "accident" under the Montreal Convention so the carrier could be held liable to compensate the passengers families. The question of whether the carrier was negligent for taking off in the circumstances (or other reasons) would come into play for claims which exceed the strict

liability monetary threshold. Any claim of negligence would be complicated and would almost certainly require a thorough investigation involving experts in aviation accident investigation, air safety, and risk assessment. It is important to note that the investigations which are underway are not intended to find legal responsibility for the crash. Under ICAO rules, the purpose of the investigation is to advance aviation safety and prevent recurrence. In order to prove negligence in a court of law, expert evidence will be required.

As an example, in the case of Malaysian Airlines 17, our firm brought a claim on behalf of the family of a Canadian passenger in the courts of Ontario on the basis that the missile strike was an “accident” and the carrier was negligent for routing the flight over an active combat zone where there was a known history of surface to air missiles being used. The case eventually settled for a confidential amount.

### **Claims against State of Iran**

It is also possible that Canadian families may have claims against the State of Iran. There are two possible avenues for this. The first is a “state to state” claim by the Government of Canada in the International Court of Justice based on violation of international law. There is precedent for bringing a “state to state” claim for compensation for family members in similar cases. In the 1980s, Iran brought a claim for compensation in the ICJ against the United States as a result of the downing in of an Iran Air flight by the USS Vincennes. The case was resolved by way of settlement.

A second, more complex, avenue could be to proceed with a claim by family members for civil damages against the State of Iran in the courts of Canada. Past attempts to sue the state of Iran in the courts of Canada have been dismissed on the basis of state immunity. State immunity is lifted in circumstances involving acts of terrorism which may include an offence against the Convention for the Suppression of Unlawful Activity against Civil Aircraft. In theory, a claim could be brought under the Justice for Victims of Terrorism Act. This is a highly complex legal issue which involves issues of criminal law, sovereign immunity, and other international conventions. This avenue has three main disadvantages. First, the defence of state immunity must be overcome. The courts of Canada are required to consider the defence of state immunity even if Iran does not defend case. Second, it puts family members in Iran at risk of potential reprisals for making public claims of terrorism against the Iranian state. Third, it is highly unlikely the state of Iran has any assets in Canada which could be used to satisfy any judgment. The last remaining assets in Canada appear to have been seized in 2018 pursuant to a court order in order to pay a judgment issued by an American court against the Iranian state.

### **Class Actions**

Class actions are a means of proceeding with court claims on behalf of a group of people with common claims in one court case brought by a representative person. Subject to court approval, the representative instructs the lawyers and makes decisions on behalf of all class

members. In a class action, the result in the representative case is binding on all other class members with a common claim.

We have extensive experience with class action claims but do not consider a class action to be the best option for passenger family members in the current circumstances. Our view is that the death of a family member is a serious legal matter which requires individual assessment. Family members do not have to participate in any class action. They have a right to opt out of any class action and pursue their own individual court case.

#### Contact CFM

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