IN THE MATTER OF AN ARBITRATION

BETWEEN

AIR CANADA

(hereinafter the "Company" or "Air Canada")

AND

IAMAW District Lodge 140

(hereinafter the "Union" or "IAM")

Sole Arbitrator:	Christine Schmidt
For Air Canada:	Christopher Pigott, Counsel John Beverage, Senior Director of Labour Relations
For IAM:	Ian Roland, Counsel David Flowers, President, L.L. 2323 James Oprea, Shop Committee Chair, Tech Ops. David Freeman, General Chairperson, D.L. 140 Paul Lefebvre, General Chairperson, D.L. 140 John J. Smiley, Secretary-Treasurer, L.L. 2323

This hearing was held in Toronto on October 29 and December 12, 2018.

AWARD

Introduction

1. I was appointed by Air Canada (the "Company") and the International Association of Machinists and Aerospace Workers and its District Lodge 140 ("IAM" or the "Union") pursuant to a Memorandum of Agreement ("MOA") dated November 16, 2017 to hear the above referenced policy grievance. Though I first attempted to resolve the grievance by way of a mediated settlement, no resolution was achieved. The matter proceeded to hearing on December 12, 2018.

2. As provided for in the MOA, the hearing proceeded by way of will-say statements and briefs filed in advance of the hearing. The parties chose not to cross-examine on the will-says, I sought clarification in respect of some facts at the hearing, and I heard oral submissions.

3. At issue is Air Canada's Workwear Standards Book ("Workwear Standard" or "Standard") - the grooming standard that is part of a larger Company-wide uniform program. The Union alleges that the Standard violates article 1.02 of the collective agreement by prohibiting employees from wearing any cap other than the Company cap with Air Canada logo. In addition, the Union says that the new rule defies a long standing past practice of employees wearing baseball caps with the IAM logo. Finally, the Union alleges that the new cap requirement flies in the face of an arbitration award of Arbitrator Sylvestre issued on September 16, 1987, which dealt with the same issue and the same parties, and the same collective agreement language.

4. It should be noted that the wearing of the Company cap is not a mandatory component of the Standard. However, if an employee chooses to wear a cap, it must be the Company cap. The parties agree that, prior to the implementation of the new cap

requirement, if an employee chose to wear a cap at work, he could wear either a Company cap or the IAM cap.[1]

5. The Company says that the new cap requirement is a reasonable exercise of management rights.

Background and Facts

6. The Union's members are employees engaged in technical, maintenance and operational support for the Company. They work in a wide variety of positions in three Company branches: Maintenance, Cargo and Airports.

7. The parties refer to employees at Air Canada as working in "above the wing" or "below the wing" positions. The former are customer-facing positions such as flight attendants, check-in counter employees and customer service employees, among others. They work in public areas at the airport or on aircraft. Above the wing employees have a grooming standard called Airports Standards Book ("Airport Standard"). They are required generally "to present an impeccable image." Among other things, they must wear Company pins on the right lapel of their jackets. However, they are permitted the option of wearing one other pin from a pre-approved list, which includes a union pin. The significance of pins will become apparent later in this award.

8. The employees represented by the IAM and to whom the new cap requirement applies hold "below the wing positions." With the exception of baggage agents, to whom the new cap requirement does not apply - they occupy a customer facing position to which the Airport Standard applies, and represent a small minority of the employees in the bargaining unit - the below the wing employees have no direct contact with customers. In fact, the vast majority of employees affected by the new cap requirement do not work in spaces accessible to customers or the public. A small minority of them can be seen from a distance by customers and the public when they are on or boarding aircraft, or in the airport when they are looking down on the tarmac. The three Company

[1] The Company's cap is now grey (with the red Air Canada logo) for Airport and Cargo employees and black (with the red Air Canada logo) for Maintenance employees. Prior to the cap requirement, it had been blue (with the Air Canada logo). The IAM cap is blue with the Union logo.

will-says state employees "may" come into contact with customers or the public when in uniform.

9. There is no reference to pins of any sort in the Workwear Standard applicable to below the wing positions. However, the Company says that IAM members in Airports and in Cargo are permitted to wear pins, including pins in support of the Union. The Union's members in Maintenance, however, are not permitted to wear any pins, as they are considered to pose a safety hazard for that category of worker. The Union submits that, regardless of whether its members are entitled to wear pins, they do not do so.

History of IAM caps and Sylvestre Award

10. For many years prior to 1985 IAM members wore caps with a variety of logos when at work. In or about September 1985, during collective agreement negotiations, as a pressure tactic and to show union solidarity, the Union distributed caps with an IAM logo to its members in Toronto. In response, the Company issued a directive that only Company caps (which were then blue with the Air Canada logo) could be worn. The Union grieved the Company directive. The Sylvestre award found the Company to have interfered with lawful activity on behalf of the Union in violation of article 1.02 of the collective agreement.

11. Since the issuance of the Sylvestre award, and for more than three decades until the recent cap requirement was implemented early last year, the affected employees have had the option of wearing the IAM cap or the Air Canada cap and have done so at work to show support for the Union.

The New Workwear Standard

12. Since Air Canada exited protection under the *Companies' Creditor Arrangement and Protection Act* well over a decade ago, it has launched many initiatives to its refresh its brand and corporate image.[2] The new Company-wide uniform program and

[2] Other significant steps taken have included the redesign of cabin interiors and airport spaces like the Maple Leaf Lounges, dedicated check-in areas for business class customers, improved concierge services and the enhancement of onboard services for premium customers.

grooming standards for all Air Canada employees, among which the Standard is one, are a part of that larger "refresh and rebranding" initiative, a massive and expensive undertaking that has taken years to complete.

13. To put it succinctly, the goal of the new uniform program is to have consistent Company-wide uniform standards for all employee groups thereby ensuring an unvarying, harmonized appearance vis-a-vis the public. The Company's "internal work and external market research demonstrate that employee grooming and consistency across employee uniforms play a role in the Air Canada brand and customer experience."[3] The Company considers it important from a visible branding perspective that all employees, including those employees who do not interact with customers, present a consistent and uniform appearance to the public. Accordingly, the Company seeks to eliminate all brands other than Air Canada, including the IAM logo, as they "could interfere with a singular focus on the Air Canada brand."[4]

14. In support of the Company-wide uniform initiative, the Company tracks customer experience metrics, including the IPSOS-Reid survey and customer letters of feedback. The metrics, tracked on a monthly basis focus on trends in the following areas: handling delay/cancel events, cabin grooming: washroom, cabin grooming: seat and tray, ground and air experience, baggage delivery, boarding announcements, lounge experience, boarding process, friendliness, attitude, courtesy, helpfulness, check-in process, employee grooming, wayfinding (lounge). For the Toronto airport, from December 2016 through July 2018, in the area of employee grooming (for all Company employees) the metrics show "helpfulness" and "employee grooming" focus areas with the highest ratings.

15. The parties agree that they have not sought to bargain the new cap requirement.

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[3] See paragraph 14 of Ms. Rosa Morano's will-say (Program Manager- Product Design and Brand Marketing).

[4] See paragraph 9 of Mr. Peter Rowbotham's will-say (Manager – Airports and Analysis at Air Canada)

Collective Agreement

16. The relevant collective agreement provision is article 1.02. It reads, in part:

> ...
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> No employee covered by this Agreement will be interfered with, restrained, coerced, or discriminated against by the Company, its officers or agents, because of membership in or lawful activity on behalf of the Union.

17. The Union also directs me to relevant provisions of the *Canada Labour Code* that restrain employers from interfering in lawful union activities:

> 8(1) Every employee is free to join the trade union of their choice and to participate in its lawful activities.
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> 94(3) No employer or person acting on behalf of an employer shall
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> (a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person [...]
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> (vi) [...] exercised any right under this Part.
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> (b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on them by this Part.

IAM Position

18. The Union submits that that the arbitral consensus is that the wearing of union apparel in the workplace is lawful union activity and a legitimate exercise of freedom of expression that attracts the protections of the *Canada Labour Code* and the collective agreement. It says that freedom of expression - a constitutionally protected freedom - is a critical freedom in the labour context to employees and unions and to society as a whole. The Union submits that Charter values are routinely considered when, as in cases like this, arbitrators are asked to balance the interests of employees and

employers as well as assess what is reasonable under the promulgation of workplace rules.[5]

19. The only issue, says the Union, is whether Air Canada has any legitimate business interest in prohibiting the lawful activity at issue here – wearing caps with the IAM logo - and whether the policy that precludes employees from doing so is reasonable in all the circumstances.

20. The Union argues that to restrict what is protected union activity, an employer must establish a legitimate interest that would be adversely affected by the protected activity in question, in this case the wearing of union caps. The Union directs me to the of-cited quoted passage from Arbitrator Outhouse in a "button" case involving *Canada Post Corp. v. Canadian Union of Postal Workers* (1986), 26 L.A.C. (3rd)(*"Outhouse"*):

> Stated quite simply, it is that an employer must be able to show some overriding interest in order to justify restricting an employee's freedom of expression, particularly where the employee seeks to exercise that freedom in the pursuit of a lawful union activity. Such overriding interests will frequently, as demonstrated in the above cases, take the form of maintaining an orderly work-place as well as good customer relations. Thus, employees are not entitled, while at work, to express themselves either in verbal or written form in a manner which is calculated to disrupt production or bring the employer into disrepute with its customers. On the other hand, absent any interference with production or harm to customer relations, an employee's freedom of expression and the right to participate in lawful union activities cannot validly be circumscribed by the employer.

21. The Union asserts that to succeed in defending a policy, which interferes with what is clearly lawful union activity and a legitimate exercise of freedom of expression,

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[5]See *Canadian Union of Postal Workers v. Canada Post Corp.*, [1993] C.L.A.D. No. 1116 (Canada Arb) (Christie); *United Food and Commercial Workers, Local 401 v Gateway Casinos GP Inc (cob Palace Casino)*, [2007] AGGA No.13 (Alberta Arb) (McFedridge) (*"UFCW"*); upheld on judicial review; [2007] AJ No 1582 (ABQB); appeal allowed on different grounds, 2009 ABCA 114; *Telus v. T.W.U.*, [2007] B.C.C.A.A.A. No.177 (Canada Arbitration) (Sims) (*"Telus"*); *National Steel Car Ltd. v. U.S.W.A., Local 7135*, [1998] O.L.A.A. No. 932 (Ont Arb) (Craven); *White Spot Ltd. v. Food Service Workers of C.A.I.M.A.W., Local 112*, [1991] B.C.C.A.A.A. No. 137 (BC Arb)(McPhillips); *Andres v Canada Revenue Agency*, 2009 PSLRB 36 (Mooney);; *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* 2002 SCC 8; *Re Air Canada and Canadian Airlines Employees Association*, [1985] C.L.A.D. No.76 (Canada Arb) (Brent).

Air Canada must present evidence of actual harm to its business as opposed to mere inferences of potential harm, although it may be appropriate in certain circumstances to infer or predict actual harm.[6] Even if Air Canada is able to show that the protected union activity will adversely affect the Company's business interests, the policy restricting the lawful activity must be reasonable under the *KVP* test.[7]

22. The evidence adduced by the Company does not support its Workwear Standard prohibiting the wearing of IAM hats, in the Union's submission. This is so especially given the Sylvestre award, where the wearing of IAM caps was not found to threaten Air Canada's corporate image, and given that employees represented by the IAM have since then been wearing IAM caps without any incident that could be said to harm Air Canada's public image, its operations or its customer relations. The Union argues there is simply no potential let alone predictable harm that can be demonstrated.

23. In addition, the Union submits that the Sylvestre award, which was not the subject of judicial review, addressed the same issue between these same parties, with very similar submissions about Air Canada's objective of promoting its image. In the Union's submission, I am compelled to follow the Sylvestre award unless I determine it to have been clearly wrong.[8] The Union argues that the right to wear IAM caps is properly read into article 1.02 of the collective agreement, as the Company raised no objection for approximately 30 years.

Air Canada Position

24. Air Canada submits that the new cap requirement is a reasonable exercise of its management rights. Absent specific language to the contrary – and there is no language on caps at issue in this collective agreement - management has the right to implement the cap requirement in the Workwear Standard so long as it is reasonable.

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[6] *Overwaitea Food Group Ltd. Partnership v. UFCW, Local 1518*, [2006] BCAAA No 106 (BC Arb) (Larson), affirmed on appeal: [2006] BCLRBD No 193 (BC LRB).
[7] *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co* (1985), 16 L.AC 73 (Ont Arb) (Robinson) ("*KVP*").
[8] *Canadian Union of Public Employees, Local 4000 v. Aramark Canada Ltd.*, [2011] O.J. No. 6151 (Ont. Div. Ct.); *Brewers' Warehousing Ltd. and United Brewery Workers*, [1954] 5 L.A.C. 1797.

25. Specifically, the Company's new cap requirement is part of a broader Company-wide strategy to enhance the Air Canada brand and improve customer experience, which is a critical and legitimate business interest. In the Company's submission, even those employees who do not engage with Air Canada customers or the public directly, but who are visible to or may come into contact with them, are "brand ambassadors" and it is important that they display the Air Canada brand in a conspicuous manner consistent with other Company employees. The Company submits that it has demonstrated by way of objective evidence the importance of ensuring consistency in the customer experience, including the appearance of employees while in uniform. The uniformity and consistency in employee appearance enhances the Air Canada brand and contributes to a better customer experience. The Company points out that the IAM has provided no evidence to challenge the Company's basis for implementing the new cap requirement.

26. The Company argues that the cases upon which the IAM relies in support of its position are very different from this one. It says the majority of them attempt to strike the balance between employer interests and those of employees and their unions in the context of collective bargaining or labour disputes, where the Company seeks to limit employees' expression of support for the union that represents them. That, the Company submits, is not the case here.

27. The case relied on heavily to support its position is a relatively recent decision issued by Arbitrator Davie in September 2016 involving the Company and the trade union that represents flight attendants, the Canadian Union of Public Employees ("*CUPE*" or "Davie award").[9]

28. The *CUPE* case involved the same Company-wide rebranding initiative, and the applicable collective agreement language was essentially identical. Flight attendants had been able to wear CUPE lanyards for many years. However, the new Airports Standard prevented them from wearing any lanyard other than the Air Canada lanyard when in the airport, in uniform and en route to the aircraft. CUPE grieved the

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[9] *Canadian Union of Public employees (Grievance re: the Uniform Policy of the Company)*, September 19, 2106 (Davie).

implementation of the new lanyard requirement. Arbitrator Davie upheld the new lanyard requirement as reasonable.

29. The Company points out that in the *CUPE* case, as in this one, the bargaining agent was not consulted with respect to the lanyard requirement, and, like here, CUPE argued that Air Canada needed to demonstrate by way of objective evidence that the use of the CUPE lanyard had caused harm to Air Canada's operations or reputation or customer relations, and cited several of the same awards that IAM relies upon in this matter.

30. Among those cases quoted by Arbitrator Davie in her decision was the *Outhouse* decision, including the oft-cited passage reproduced above. In the Company's submission, Arbitrator Davie rejected as overly broad the "test" set out in the *Outhouse* passage. In her view, considering the cases dealing with uniforms and the wearing of union paraphernalia, the only test is whether the employer's rule or policy is reasonable.

31. The Company directs me to the portion of the *Davie* decision where she articulates the view that the most analogous cases to the one before her, were those where employees were required to wear a uniform and those which addressed the right of employees to wear union pins or similar paraphernalia at work. In balancing the interests of the Company and the employee, the test "continued" to be that the rule must be reasonable. In balancing the interests of Air Canada to promote its brand and image against those of CUPE's members to engage in union activity, Arbitrator Davie considered the objective evidence before her of the legitimacy of Air Canada's business interest. She found the degree and quality of that evidence sufficient to displace the interests of CUPE's members to express support for their bargaining agent.

32. The Company submits that those factors relied upon by Arbitrator Davie in upholding the lanyard requirement as reasonable should equally apply in the case of the cap requirement for the IAM bargaining unit. Arbitrator Davie found it to be a matter of common sense for a Company to establish a uniform policy seeking to standardize its corporate image to the public. She also found that she had some objective evidence indicating that employee grooming and consistency was an important aspect of the customer experience. Finally, the Arbitrator took into account that the Company did not

prohibit employees from wearing union pins, if they so chose to do so, which afforded the flight attendants some measure of support for their union.

33. The Company acknowledges that its Maintenance employees are not permitted to wear union pins for safety reasons. As mentioned above, however, it says that IAM members in Airports and in Cargo are permitted to wear union pins if they wish.

34. As for the Sylvestre award, the Company submits that the analysis and findings do not apply. The Company's prohibition in that case was undertaken during collective bargaining in direct response to the IAM initiative of distributing Union caps. Arbitrator Sylvestre determined that the Company had been as concerned with forbidding employees from showing Union membership as it was with promoting and protecting the Company corporate image in issuing the prohibition.[10] In the Company's submission, the Sylvestre award in no way incorporates a right to wear IAM caps into the article 1.02 of the collective agreement.

IAM Reply

35. In reply, with respect to the Sylvestre decision, the Union points out that Air Canada argued in 1987, as it does now, that, in prohibiting the display of the IAM logo, it was seeking "to promote and protect its corporate image, warrant a professional look for its employees and make sure that they only wore the prescribed clothes." The Union says that the Company is erroneously suggesting that the Sylvestre award establishes a test of improper motive. Most importantly, the Union submits that that the effect of the new cap requirement in this case is the same as it was when the Sylvestre case was decided: it prevents employees in this bargaining unit from expressing support for their Union.

36. With respect to the Davie decision, the Union submits that even on Arbitrator Davie's analysis as applied to the lanyard decision, the IAM grievance must succeed. The employees affected by the cap requirement are not customer-facing who walk

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[10] In applying what he set out was the test drawn from Arbitrator Christie in *Re Pacific Western Airlines Ltd and Canadian Airline Employees' Association* 29.L.A.C. (2nd) 1 quoting Arbitrator Shime in *Re Dominion Stores Ltd. and U.S.W.* (1976) L.A.C. (2nd) 401) where "at the very least" and on the balance of probabilities the employee's appearance must threaten the company's image and therefore threaten loss of business to the Company.

through the airport on their way to the aircraft, they are below the wing employees, who wear caps (when they wear them) not pins and have done so for more than three decades commencing in the circumstances leading to the Sylvestre award.

Decision

37. The issue in this case arises from the Company's unilateral decision to implement a new grooming standard that permits only grey caps with the Air Canada logo when an employee in the bargaining unit chooses to wear a cap. Effectively the new rule eliminates the long-standing entitlement that bargaining unit employees enjoyed to wear IAM caps.

38. I do not intend to analyze in detail all of the jurisprudence provided to me. I have carefully read all the awards. The *Telus* award provides a comprehensive review of the jurisprudence, including most of the authorities cited by the parties in this matter. In my view, three other cases – the Outhouse award, the Sylvestre award and, in particular, the Davie award – merit further analysis.

39. The Outhouse award, unlike this case, involved circumstances where bargaining unit employees of Canada Post spontaneously began sporting buttons in support of an upcoming day of protest aimed at Government policy. The employer instructed the employees to remove the buttons. The Outhouse award did not involve the introduction by the employer of a new rule enacted pursuant to a customer relations strategy concerning the employer's uniform requirements, which is this case before me. It was not a dress code case, involving the employer's uniform requirements. The unique circumstances in the Outhouse award, together with similar circumstances in awards involving protest buttons and T-shirts, prompted Arbitrator Outhouse to require the employer in that matter to justify its stance against the employees expression of protest on the basis that it interfered with production or caused harm to customer relations. The employer in that matter could not do so, and thus the grievance was upheld.

40. In my view, (and this appears to be the opinion as well of the arbitrator in the Davie award) the Outhouse award does not establish a universal test requiring every employer in every case involving limitations on union activity/expression to prove that,

but for the limitation, production or customer relations will be compromised. What Arbitrator Outhouse did in that matter was endeavour to strike the right balance between the interests of the employer and the trade union in the unique factual context that was before him, for the purpose of deciding if the employer's directive to remove the protest buttons was reasonable. In determining the reasonableness of the employer's reaction, the balance bar was set appropriately at the level it was for that set of facts.

41. The issue in the case before me is whether the Company's enactment of a workplace rule with respect to permissible workwear, though it effectively would end the long-established entitlement of bargaining unit employees to wear IAM caps, is reasonable. That requires a balancing of interests, and in the circumstances of this case, I do not think it appropriate to require the employer to demonstrate harm to customer relations or to production in order to justify the rule. It is sufficient, as Arbitrator Davie stated in the Davie award, for the Company to show some objective evidence in support of its interest.

42. Here, though, is where I believe the Company has fallen short. In the Davie award, there was some persuasive, objective evidence in support of the Company's desire for consistency in the employees' workwear, which justified the Company's insistence that any lanyard worn by employees must be the Company's lanyard. Here, the evidence was very general, sparse, and impressionistic, grounded in rather vague customer experience metrics, in circumstances where the employees impacted by the rule are not engaged in public contact jobs, and are for the most part unseen by customers. I note that the Company's written arbitration brief makes almost no mention of the evidence upon which it relies to support what otherwise seems a sensible desire to achieve consistency and harmony in workplace dress and appearance. The impact of that otherwise rational objective on these below the wing employees is the suppression of their desire to continue a decades old habit of expressing support for their trade union. In order to sustain that result in favour of the Company, the evidence, though it need not prove harm to Air Canada's legitimate business interests, must be more robust than the information relied upon by the Company. In my view, the information lacks

objectivity and the Company has failed to draw a clear and objective link between the new cap requirement for these below the wing employees and the Company's business interests.

43. This is especially so in light of the Sylvestre award, which I note appears not to have been argued before Arbitrator Davie. That matter determined the same important issue for the same parties on the basis of the same collective agreement language that is front and center in this case. True, the context was different. It was obvious to the arbitrator in that case that Air Canada was as concerned, if not more so, with tamping down expressions of union support during collective bargaining as it was with promoting its image. The facts in this case do not lead to the same conclusion. However, I do not see much in the analysis of the Sylvestre award, or other such similar awards, which suggests employer motivation is key in the determination of whether an employer's rule or policy is reasonable. Moreover, it seems to me that there are good reasons for avoiding that sort of inquiry, as it may well lead to lengthy and contentious litigation.

44. The better approach is to focus on the rule or policy itself, and ask, is it reasonable in all the circumstances having regard to the competing interests of the employer and the employees. As Arbitrator Sims observed in at paragraph 69 in the *Telus* case:

> The real issue is whether the Employees proven interests justify a policy that overrides these fundamental rights, and whether the policy is reasonable in the circumstances. In my view the KVP test encompasses fidelity to both statutory and collective agreement provisions, including the application of charter like values, in its first two steps, so the analysis is essentially the same no matter which way the analysis is undertaken.

45. Finally, in circling back to the Davie award, I note the arbitrator in that matter expressed the view that there was very little to choose between the positions of the parties. It was an extremely close call in all of the circumstances. A significant factor that swayed the arbitrator in Air Canada's favour was that the bargaining unit employees had the option of expressing their union support through the wearing of union pins. That appears to have been a viable option that was, in fact, exercised by

flight attendants. While it may be that some (but not all) of IAM's members could express themselves in similar fashion, the wearing of pins does not appear to be a cultural aspect of this bargaining unit of below the wing employees.

46. For all of these reasons, I find that the new cap requirement is not reasonable, and as such, the Company is in violation of article 1.02 of the collective agreement. The grievance is upheld. The Company is directed to remove the requirement in the Workwear Standard that IAM members must wear only Air Canada issued caps.

Dated at Toronto, Ontario, this 31st day of January 2019.

Christine Schmidt, Sole Arbitrator