

# Strengthening Canada's Air Passenger Protection Regulations

August 2023

*Joint Submissions  
to the Canadian Transportation Agency*

*by Air Passenger Rights • Public Interest Advocacy Centre • Marina Pavlović*



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## Introduction and Executive Summary

These are the joint submissions of Air Passenger Rights [APR], the Public Interest Advocacy Centre [PIAC] and Professor Marina Pavlović on the Canadian Transportation Agency's [CTA] [consultation](#) on strengthening the *Air Passenger Protection Regulations* [APPR], and the associated [Consultation Paper](#) and [Backgrounder](#). We also signpost our concerns with the recent enabling legislation, the *Budget Implementation Act, 2023, No. 1*.<sup>1</sup>

Our overarching goals are to: (1) harmonize Canada's air passenger protection rules with the European Union's and those of other regimes; (2) simplify the rules to streamline and improve the outcomes and efficiency of dispute resolution; and (3) decrease disputes and tension between passengers and airlines.

We recommend adding rules to the *APPR* that are standard or required in international air travel regimes: an improved definition of denied boarding that is outcomes-based and knowable to consumers based on their available information; a single rule for entitlement to a refund that is applicable regardless of the cause for the flight disruption; and reduction of the timeline for providing a refund from 30 days to 7 days.

We then turn to the transition the CTA intends to make towards an "exceptional circumstances" standard in the *APPR*. We recommend following EU decisions that strictly limit extraordinary circumstances by clarifying that the following **are not** extraordinary: crew shortages; maintenance or safety issues short of terrorism or recalls of actual fleet equipment; labour disruptions of the carrier; known airport and other operational issues; and staff and third party contractor actions and omissions.

We recommend a single rule for the consumer's right to assistance (meals, accommodation, etc.) that is uniformly applicable to all flight disruptions irrespective of the cause and any advance notice.

We recommend abolishing the distinction between large and small carriers, or at least that the scope of "small carrier" be radically narrowed based on use of fleet equipment. This will greatly reduce the *APPR*'s complexity in redress by cutting the number of rules in half for the vast majority of Canadian air travellers.

We recommend elimination of the "knock-on" effect from the *APPR* or restricting it to directly implicated fleet equipment and on a next flight within 3 hours. Our rationale is the "knock-on" concept's dependence on information in the airline's exclusive control and complex evidence-intensive adjudication that may be disproportionate to the amounts at stake.

Finally, we recommend harmonizing the procedures for the payment of compensation owed in relation to flight disruptions, and creating a single uniform procedure that is applicable to all compensations owed for flight disruptions (flight delay, flight cancellation, and denied boarding).

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<sup>1</sup> Our comments are restricted to certain changes introduced in Division 23 (Air Travel Complaints); however, we reserve the right to comment on other Divisions introducing changes to financially support the *APPR*.

## Summary of Recommendations

**R-1.** Replace the definition of “denial of boarding” in s. 1(3) of the *APPR* with:

**denial of boarding** means the refusal to carry a passenger on a flight on which they hold a confirmed reservation — or on which they held a confirmed reservation before their itinerary was amended by the carrier without their consent — for a reason other than a failure by the passenger to:

- (a) present valid travel documentation;
- (b) present themselves at the airport at the required time for check-in; or
- (c) comply with health, safety or security requirements;

**confirmed reservation** means when the passenger has been issued a ticket or other document that indicates that the carrier has accepted and registered the reservation.

**R-2.** Add the following definition to s. 1(2) of the *APPR*:

**flight cancellation** means the failure to operate a flight that was scheduled and on which at least one passenger held a confirmed reservation.

**R-3.** Create a single rule for entitlement to a refund that is applicable regardless of the cause for the flight disruption, to replace ss. 17(2) and 18(1.1) of the *APPR*, clarifying that a passenger is entitled to promptly opt for a refund in the original form of payment in each of the following circumstances:

- (a) the passenger was denied boarding;
- (b) the passenger’s flight was cancelled; or
- (c) the passenger’s flight is delayed by more than three (3) hours compared to the departure time shown on the passenger’s original ticket.

**R-4.** Reduce the time line for providing a refund from 30 days (*APPR*, s. 18.2(1)) to 7 days.

**R-5.** Define “exceptional circumstances,” which relieve the carrier from paying passengers lump sum compensation for inconvenience caused by flight disruptions, as follows:

**exceptional circumstances** means circumstances that were not inherent to normal operations, were beyond the carrier’s control, could not have been avoided even if the carrier had taken all reasonable measures, and were not attributable, in whole or in part, directly or indirectly, to any of the following:

- (a) unavailability or shortage of flight crew or cabin crew or staff at the carrier or any third party with whom the carrier has a contractual relationship;
- (b) aircraft maintenance or safety issues, other than those caused by acts of sabotage or terrorism or a hidden manufacturing defect of the aircraft comprising the carrier’s fleet identified by the manufacturer or a competent authority

that affects flight safety;

- (c) labour disruptions at the airline or any third party with whom the carrier has a contractual relationship;
- (d) any situation that was known or should have been known to the carrier at the time the ticket was sold to the passenger; or
- (e) acts or omissions of the carrier, its agents or servants, or any third party with whom the carrier has a contractual relationship.

**R-6.** Create a single rule about right to assistance that is applicable uniformly to all flight disruptions, irrespective of the cause and any advance notice.

**R-7.** Expand the obligations of “large carriers” to apply to “small carriers.” Alternatively, replace the definition of “large carrier” in s. 1(2) of the *APPR* with:

***large carrier*** means a carrier that operates at least one large aircraft or one medium aircraft within the meaning of the *Air Transportation Regulations*.

**R-8.** Eliminate the knock-on effect provisions altogether. Alternatively, restrict the exception to the obligation to pay passengers lump sum compensation for inconvenience to:

- (a) the flight that actually experiences the exceptional circumstance; and
- (b) the next flight scheduled to use the same aircraft, provided that the next flight was scheduled to depart within three (3) hours of the previous flight’s scheduled arrival time.

**R-9.** Expand the scope of the *APPR*’s existing procedures for the payment of denied boarding compensation, set out in ss. 20(2)-(5) of the *APPR*, to apply to the payment of compensation for flight delay and cancellation and to replace the procedures set out in ss. 19(3)-(4).

**R-10.** Relax the 48-hour deadline in s. 20(2) of the *APPR* to a 7-day deadline.

**R-11.** Expand the obligation to provide detailed reasons for not paying lump sum compensation, set out in s. 19(4) of the *APPR*, to apply to the carrier’s refusal to pay denied boarding compensation.

## About the Authors

*Air Passenger Rights* [APR] is an independent nonprofit organization of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation.

APR's key predictions about the shortcomings and loopholes created by the *Transportation Modernization Act* and the *Air Passenger Protection Regulations* have been validated in the four years that have passed since the regulations came into force. APR's success is grounded in three factors:

- **Experience based.** APR's predictions and submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independent.** APR takes no government or business funding.
- **No business interest.** APR has no business interest in the aviation sector.

APR's presence on social media includes the [Air Passenger Rights \(Canada\)](#) Facebook group, with over 126,000 members, and the [@AirPassRightsCA](#) Twitter feed. APR was founded and is led by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

### Gábor Lukács, PhD (President)

Since 2008, Dr. Lukács has filed more than two dozen successful complaints with the Canadian Transportation Agency [CTA], challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers. In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking.

Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar,<sup>2</sup> the academic community,<sup>3</sup> and the judiciary.<sup>4</sup> Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,<sup>5</sup> in respect of air passenger rights. He successfully challenged the CTA's lack of transparency and the reasonableness of the CTA's decisions. In 2020, the Federal Court of Appeal allowed Dr. Lukács to intervene in the airlines' challenge to the *Air Passenger Protection Regulations*, noting that he "would defend the interests of airline passengers in a way that the parties cannot."<sup>6</sup>

<sup>2</sup> Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.

<sup>3</sup> [Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL](#), Institute for Air and Space Law, October 2018.

<sup>4</sup> *Lukács v. Canada*, 2015 FCA 140 at para. 1; *Lukács v. Canada*, 2015 FCA 269 at para. 43; and *Lukács v. Canada*, 2016 FCA 174 at para. 6.

<sup>5</sup> *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

<sup>6</sup> Order of the Federal Court of Appeal (Near, J.A.), dated March 3, 2020 in File No. A-311-19; see also *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211 at para. 8.

**John Lawford, Executive Director and General Counsel, Public Interest Advocacy Centre**

John Lawford is Executive Director and General Counsel of the Public Interest Advocacy Centre [PIAC], a national non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. Mr. Lawford has been with PIAC since July 2003 and was named Executive Director in September 2012. Mr. Lawford manages PIAC's advocacy and research in the areas of telecommunications, broadcasting, competition, e-commerce, privacy, air transportation and financial services law and policy from a consumer perspective.

Prior to coming to PIAC, Mr. Lawford was a research counsel at a major national law firm, specializing in medical-legal research. Mr. Lawford was also Research Director at a major Ottawa-based litigation firm. Mr. Lawford was Special Projects Director for Quicklaw Inc., a legal database company and now part of LexisNexis Canada, from 1992 to 1999. He has an undergraduate degree in English and a Law degree from Queen's University.

**Marina Pavlović, Associate Professor, Faculty of Law, University of Ottawa**

Marina Pavlović is an Associate Professor at the Faculty of Law, Common Law Section at the University of Ottawa and is a member of its Centre for Law, Technology and Society.

Her research expertise is in consumer rights in the cross-border digital society and technology policy and regulation. She was a counsel for the Canadian Internet Policy and Public Interest Clinic as an intervener before the Supreme Court of Canada in several landmark cases. She also appeared before the Canadian Radio-Television and Telecommunications Commission in the 2016-2017 Review of the Wireless Code and before both the House and Senate Committees, as well as the Canadian Transportation Agency, on Air passenger rights.













She holds a law degree from the Faculty of Law at the University of Belgrade (Serbia), an LL.M with concentration in Law and Technology from the University of Ottawa, and is called to the Ontario bar. Prior to joining the University of Ottawa, she acted as an in-house counsel for a telecommunication company in Belgrade (Serbia) and practiced (as an of-counsel) in the area of international commercial arbitration with a law firm in Salzburg (Austria).

## 1. Definitions and the Absence Thereof

Clear definitions that reflect the common and ordinary meaning of words are essential to the implementation and enforcement of every regulatory regime. Yet, the *Canada Transportation Act* does not define key concepts such as “flight cancellation” and “denial of boarding.” The *APPR* is also silent about the meaning of “flight cancellation” and represents a step backwards in defining “denial of boarding” unreasonably narrowly. The lack of definition of “flight cancellation” enables airlines to mislead passengers about their rights by euphemistically referring to flight cancellations as a “schedule change.” The unreasonably narrow definition of “denial of boarding” deprives passengers of compensation in many cases where compensation would have been owed prior to the *APPR* and continues to be owed under the European Union’s regime.

### Entitlement to Denied Boarding Compensation



		
Airline closes check-in counter before the published cut-off time		
Insufficient staffing at check-in counter causing passenger to miss their flight		
Airline moves passenger to a different flight without their consent		
Airline claims "outside our control" or due to "urgent maintenance"		
Aircraft departs full <i>and</i> airline admits responsibility		

We recommend harmonizing the *APPR*’s definitions with those of the European Union, which are also more consistent with Canada’s broader interpretation of denial of boarding prior to the *APPR*:

**R-1.** Replace the definition of “denial of boarding” in s. 1(3) of the *APPR* with:

**denial of boarding** means the refusal to carry a passenger on a flight on which they hold a confirmed reservation — or on which they held a confirmed reservation before their itinerary was amended by the carrier without their consent — for a reason other than a failure by the passenger to:

- (a) present valid travel documentation;
- (b) present themselves at the airport at the required time for check-in; or
- (c) comply with health, safety or security requirements;

**confirmed reservation** means when the passenger has been issued a ticket or other document that indicates that the carrier has accepted and registered the reservation.

**R-2.** Add the following definition to s. 1(2) of the *APPR*:

**flight cancellation** means the failure to operate a flight that was scheduled and on which at least one passenger held a confirmed reservation.



## A. Denied Boarding Compensation Under the European Union’s Regime

In sharp contrast with the *APPR*, *Regulation (EC) 261/2004* defines “denied boarding” as an outcome, based on simple facts that are within the passenger’s knowledge, irrespective of causes that are within the airline’s exclusive knowledge:

**2(j)** “denied boarding” means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

**3(2)** Paragraph 1 shall apply on the condition that passengers:

- (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,
- as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,
  - or, if no time is indicated,
  - not later than 45 minutes before the published departure time; or
- (b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.

In other words, under the EU’s regime, a passenger who is refused transportation does not have to prove that the flight was overbooked, but only has to prove that they held a “confirmed reservation” and that they “presented themselves for check-in” on time or that they “have been transferred” by the airline to a different flight. Both of these are within the knowledge of a passenger and can reasonably be proven.

## B. Denied Boarding Compensation Before and Under the *APPR*

Before the *Transportation Modernization Act [TMA]* and the *APPR* were enacted, the CTA held that:

[84] Where a carrier fails to check in passengers because of the absence of personnel at the counter prior to the cut-off time for check in, the Agency is of the opinion that it is reasonable that compensation be tendered:

- when passengers holding confirmed and ticketed reservations can demonstrate that they presented themselves at the ticket counter prior to the cut-off time for check in; and,
- when the ticket counter was closed.

[85] For greater clarity, where such passengers present themselves for boarding before the cut-off time, only to discover that the check-in counter has been closed, the carrier cannot avoid paying denied boarding compensation, regardless of whether or not the flight is fully booked, nor can it avoid liability by closing the check-in counter early.<sup>7</sup>

Also before the *TMA* and the *APPR*, the CTA established the notion of *de facto* or constructive denied boarding for situations where passengers' flights still operate but the passengers are moved to another flight without their consent. The CTA confirmed passengers' entitlement to compensation in such situations.<sup>8</sup>

The *APPR* has substantially narrowed the definition of "denial of boarding" by superimposing the requirement that the flight is actually *overbooked* at the time of boarding:

For the purpose of these Regulations, there is a denial of boarding when a passenger is not permitted to occupy a seat on board a flight because the number of seats that may be occupied on the flight is less than the number of passengers who have checked in by the required time, hold a confirmed reservation and valid travel documentation and are present at the boarding gate at the required boarding time.<sup>9</sup>

Under the *APPR*'s narrow definition, *de facto* or constructive denied boarding is not considered "denied boarding" because the unilateral change to the passengers' itinerary happens in advance and not at the airport, and the number of passengers present at the boarding gate is not greater than the number of seats available. This provides a loophole for airlines and offers no protection to passengers in these situations.

The case of Mia and Joel Mackoff, who held confirmed bookings on an Air Canada flight to Vancouver, is a real-life example of the harm caused by the the *APPR*'s narrow definition. When the Mackoffs presented themselves for check-in, they were refused boarding, because the airline's agent mistakenly believed that they did not meet some travel requirements. As a matter of fact, they were both eligible to travel. Air Canada refused to pay the Mackoffs denied boarding compensation under the *APPR*, because overbooking was not the reason for their denial of boarding.<sup>10</sup>

The Mackoffs were "denied boarding" in the common and ordinary sense of that phrase, and should have been compensated accordingly. Indeed, had the Mackoffs' case happened at an airport in the EU, they would have undoubtedly been eligible for denied boarding compensation under *Regulation (EC) 261/2004*.

The BC Civil Resolutions Tribunal [**CRT**], however, concluded that "denial of boarding" in the *APPR* can only be interpreted to mean denial of boarding *due to overbooking*, and agreed with Air Canada that no denied boarding compensation was owed to the Mackoffs under the *APPR*.<sup>11</sup> The CRT's analysis demonstrates the tension between the current *APPR*'s terminology and the common and ordinary meaning.

<sup>7</sup> *Nawrots v. Sunwing*, Decision 432-C-A-2013, paras. 84-85 (emphasis added).

<sup>8</sup> *Janmohamed v. Air Transat*, Decision No. 95-C-A-2016, paras. 19-20.

<sup>9</sup> *APPR*, s. 1(3) (emphasis added).

<sup>10</sup> *Mackoff v. Air Canada*, 2022 BCCRT 1121 at paras. 2 and 12-19.

<sup>11</sup> *Ibid* at paras. 26-29.

## 2. Right to a Refund

For close to twenty years, it has been settled law in Canada that passengers whose flights were cancelled by the airline for any reason are entitled to a refund of all amounts paid for unused services. This common sense principle, recognized as a “fundamental right,”<sup>12</sup> is deeply rooted in the common law and provincial and federal legislation, and has been expressly recognized by the House of Commons Transport Committee.<sup>13</sup> Regrettably, passengers’ fundamental right to a refund was not consolidated into the *APPR*’s previous incarnations. This unfortunate state of affairs caused considerable confusion and harm to the Canadian travel industry, the insurance industry, and to passengers.

We warmly welcome the proposal to consolidate passengers’ fundamental right to a refund into the *APPR*. We recommend the following amendments to the *APPR* to harmonize Canada with the standards of the European Union and the United States, and to reduce consumer disputes between airlines and passengers:

- R-3.** Create a single rule for entitlement to a refund that is applicable regardless of the cause for the flight disruption, to replace ss. 17(2) and 18(1.1) of the *APPR*, clarifying that a passenger is entitled to promptly opt for a refund in the original form of payment in each of the following circumstances:
- (a) the passenger was denied boarding;
  - (b) the passenger’s flight was cancelled; or
  - (c) the passenger’s flight is delayed by more than three (3) hours compared to the departure time shown on the passenger’s original ticket.
- R-4.** Reduce the time line for providing a refund from 30 days (*APPR*, s. 18.2(1)) to 7 days.

### A. Passengers’ Fundamental Right to a Refund in Other Jurisdictions

Passengers’ fundamental right to a refund for flights cancelled by airlines, irrespective of the reasons for the cancellation, is a universal commercial standard that is widely recognized outside Canada.

**European Union.** The key provisions of *Regulation (EC) 261/2004* on passengers’ fundamental right to a refund are as follows:<sup>14</sup>

- *Eligibility:* Denial of boarding, flight cancellation, or delayed by 5+ hours (irrespective of reasons).
- *Rights:* Refund and transportation to point of departure.
- *Time Line for Refund:* Within 7 days.
- *Form of Refund:* Cash, electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

<sup>12</sup> *Lukács v. Sunwing Airlines*, [CTA Decision No. 313-C-A-2013](#) at para. 15.

<sup>13</sup> *Emerging from the Crisis: A Study of the Impact of the COVID-19 Pandemic on the Air Transport Sector*, Report of the Standing Committee on Transport, Infrastructure and Communities (June 2021), p. 6, [Recommendations 22-24](#).

<sup>14</sup> *Regulation (EC) 261/2004*, Articles 4(3), 5(1)(a), 6(1)(iii), 8(1)(a), and 7(3).

**United States.** The United States Department of Transportation’s longstanding position has been that airlines must promptly refund tickets when the airline cancels the passenger’s flight or makes a significant change in the schedule and the passenger chooses not to accept the alternative offered by the carrier:

Since at least the time of an Industry Letter of July 15, 1996 [...] the Department’s Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.<sup>15</sup>

On April 3, 2020, the United States Department of Transportation issued an Enforcement Notice reminding airlines of their obligation to promptly refund passengers for cancelled flights, reaffirmed the aforementioned principles,<sup>16</sup> and reinforced its position in a subsequently issued FAQ:

Airlines and ticket agents are required to make refunds promptly. For airlines, prompt is defined as being within 7 business days if a passenger paid by credit card, and within 20 days if a passenger paid by cash or check.<sup>17</sup>

The United States Department of Transportation is currently conducting consultations to not only codify passengers’ fundamental right to a refund of flights that are cancelled or significantly delayed by the airline, but to also include situations where a flight does operate on time but a passenger decides to forego travel due to circumstances related to a serious communicable disease.<sup>18</sup>

**Israel.** In 2012, Israel passed the *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions)*, 5772-2012 [*ASL*],<sup>19</sup> whose key provisions on passengers’ fundamental right to a refund are as follows:

- *Eligibility:* Denial of boarding, flight cancellation, or delayed by 8+ hours (irrespective of reasons).
- *Rights:* Reimbursement of consideration (including fees, levies, taxes and other obligatory payments).
- *Time Line for Reimbursement:* Within 21 days.
- *Form of Reimbursement:* Original form of payment.

**Turkey.** In 2012, Turkey adopted its Regulation on Air Passenger Rights (SHY-Passenger), which mirrors the European Union’s *Regulation 261/2004*.<sup>20</sup>

<sup>15</sup> [Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01](#), at 23129 (Apr. 25, 2011) (emphasis added).

<sup>16</sup> [Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel](#), US DOT (April 3, 2020).

<sup>17</sup> [Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel](#), US DOT (May 12, 2020) (emphasis added).

<sup>18</sup> [Airline Ticket Refunds and Consumer Protections, 87 Fed. Reg. 51550-01](#), at 51576-51579 (Aug. 22, 2022).

<sup>19</sup> *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions)*, 5772-2012 in English; complete legislative history is [available in Hebrew](#).

<sup>20</sup> [SHY-Passenger in English](#), Articles 6(1)(a), 7(1)(3), and 9(1)(a).

## B. The State of the Law in Canada Before and After the 2019 APPR

Passengers' fundamental right to a refund was already established well before the *APPR*. The legislative provisions giving effect to this right are found in the *Canada Transportation Act* and the *Air Transportation Regulations*. Every air carrier operating an air service within, to, and from Canada must establish a "tariff,"<sup>21</sup> setting out clearly the airlines' policies with respect to certain enumerated matters, including:

refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,<sup>22</sup>

The tariff operates as the contract of carriage between the air carrier and passengers. The terms and conditions set out in the tariff are legally binding on the air carrier.<sup>23</sup> The terms and conditions are subject to the statutory requirement that they must be just and reasonable.<sup>24</sup>

In 2004, some 15 years before the *APPR*, the CTA already formally recognized that the aforementioned legislative provisions give rise to the right to a refund for passengers whose flights were cancelled by the airline for any reason.<sup>25</sup> In 2013, the CTA reaffirmed and recognized this as a "fundamental right."<sup>26</sup> In a second decision from 2013 and a subsequent 2014 decision, the CTA reaffirmed this right again.<sup>27</sup>

At the time the *APPR* was drafted, serious concerns were expressed about the *APPR*'s silence on passengers' existing fundamental right to a refund. It was predicted that this omission would cause confusion and enable abuse by the airlines.<sup>28</sup> Regrettably, the *APPR*'s past and current versions did not take these concerns into consideration.

The omission of passengers' fundamental right to a refund from the *APPR* did not negate that right, because the *APPR* is not a complete code. The provisions of the *Canada Transportation Act* and the *Air Transportation Regulations* giving rise to passengers' fundamental right to a refund were not amended or negated by the *TMA* nor by the *APPR*, and remain in full force. In short, passengers' fundamental right to a refund has always been and has remained the law, and part of the parties' contracts.

In March 2020, at the beginning of the COVID-19 pandemic, the Government of Canada engaged in a campaign to obscure the public's and passengers' understanding of the fundamental right to a refund under federal and provincial legislation, which likely led to financial benefits for airlines.

<sup>21</sup> *Canada Transportation Act*, s. 67(1); *Air Transportation Regulations*, SOR/88-58, s. 110(1).

<sup>22</sup> *Air Transportation Regulations*, SOR/88-58, ss. 107(1)(n)(xii) and 122(c)(xii) (emphasis added).

<sup>23</sup> *Canada Transportation Act*, s. 67(3); *Air Transportation Regulations*, SOR/88-58, s. 110(4).

<sup>24</sup> *Canada Transportation Act*, s. 67.2(1); *Air Transportation Regulations*, SOR/88-58, s. 111(1).

<sup>25</sup> *Re: Air Transat*, CTA Decision No. 28-A-2004.

<sup>26</sup> *Lukács v. Sunwing*, CTA Decision No. 313-C-A-2013 at para. 15.

<sup>27</sup> *Lukács v. Porter*, CTA Decision No. 344-C-A-2013 at para. 88; and *Lukács v. Porter*, CTA Decision No. 31-C-A-2014 at para. 33.

<sup>28</sup> *Deficiencies of the Proposed Air Passenger Protection Regulations*, pp. 42-44 (February 2019).

On March 25, 2020, the CTA published its “Statement on Vouchers” that told the public, against the weight of the authorities cited above, that airlines do not have to refund cancelled flights, but may provide an I-owe-you (future travel voucher) instead. The CTA advanced propositions that appeared to conflate a “refund” with “compensation for inconvenience.” The CTA later conceded that the “Statement on Vouchers” was not legally binding and did not alter passengers’ rights to a refund,<sup>29</sup> but only after the Federal Court of Appeal directed the CTA to explain itself.<sup>30</sup> Yet, the CTA continued for some time to display an amended version of the “Statement on Vouchers” that partly backtracked on the original statement.<sup>31</sup>

The Government of Canada continued its messaging in late 2020 by stating that the pandemic highlighted a “gap” in the *APPR*,<sup>32</sup> and by the Transport Minister directing the CTA to enact further regulations to close this purported gap.<sup>33</sup> These were viewed by passenger advocates and many passengers as face-saving measures to excuse the government’s failure to enforce passengers’ fundamental right to a refund.

There was no gap in the laws of Canada nor in the obligations of airlines in terms of refunding passengers for flights cancelled by the airlines, irrespective of the reasons for the cancellation. These well-established obligations flow from provisions of the *Canada Transportation Act* and the *Air Transportation Regulations*, and were previously recognized by the CTA in multiple decisions.

In September 2022, the *APPR* was amended to address refunds in the event of flight delays and cancellations that are classified as being “outside the carrier’s control.” The 2022 *APPR* requires airlines to offer passengers the choice between a refund in the original form of payment and alternate transportation only if no alternate transportation is available within 48 hours.

The 2022 *APPR* offered no protection to passengers whose flight is cancelled due to reasons outside the carrier’s control, but for whom travelling 6 or 12 or 24 hours later defeats the purpose of their travel. Instead, it creates even more confusion. While passengers may be able to enforce their right to a refund in small claims courts, airlines will undoubtedly argue that the *APPR*’s amendments permit the airline to keep passengers’ money if they are able to offer alternate transportation departing within 48 hours.

The 2022 *APPR* continues to overlook the time-sensitive nature of air travel and the common time constraints present in the lives of virtually every person in a contemporary Western society, leaving Canada’s treatment of passengers’ fundamental right to a refund an outlier.

We therefore warmly recommend the proposal to consolidate passengers’ fundamental right to a refund into the *APPR* and harmonize Canada with the standards of the European Union, the United States, and other jurisdictions. Implementing the proposal will simplify the *APPR*, and is likely to reduce the number of disputes between airlines and their passengers.

<sup>29</sup> “FAQs: Statement on Vouchers”, Canadian Transportation Agency’s website (archived on Apr. 22, 2020).

<sup>30</sup> Order of the Federal Court of Appeal (Locke, J.A.), dated April 16, 2020 in File No. A-102-20.

<sup>31</sup> “Statement on Vouchers”, Canadian Transportation Agency’s website (archived on Nov. 16, 2020).

<sup>32</sup> Consultation paper: Development of new airline refund requirements, CTA’s website.

<sup>33</sup> *Direction Respecting Flight Cancellations for Situations Outside of a Carrier’s Control*, SOR/2020-283.



### 3. Exceptional Circumstances

In 2017, concerns were raised that the air passenger protection framework created by the *Transportation Modernization Act* would “double the amount of compensation that passengers are not going to receive.”<sup>34</sup> That concern has proven to be an underestimate, with a backlog of over 52,000 complaints at the Canadian Transportation Agency in July 2023.<sup>35</sup>

The current *APPR* has been rightly criticized for establishing unnecessarily complex and vague criteria for eligibility to lump sum compensation that are disproportionate to the amounts at stake and contribute to the CTA’s soaring backlog of passenger complaints.<sup>36</sup> These criteria shortchange passengers, contain many loopholes that foster disputes and litigation by airlines, and fail to provide meaningful protection comparable to the European Union’s gold standard.<sup>37</sup>

We warmly welcome the proposal to reduce the existing three categories of flight disruptions (outside the carrier’s control, required for safety purposes, and within the carrier’s control and not required for safety purposes) to two (ordinary and exceptional circumstances). We passionately support the initiatives toward harmonizing the *APPR* with the European Union’s passenger protection regime. We are concerned, however, that these laudable initiatives may be thwarted by insufficient clarity or excessively broad language in the regulatory text that leaves room for (mis)interpretation and may therefore contribute to further increase in the number of complaints.

We recommend amending the *APPR* as follows to harmonize Canada with the European Union’s compensation standards and to reduce disputes between airlines and passengers:

**R-5.** Define “exceptional circumstances,” which relieve the carrier from paying passengers lump sum compensation for inconvenience caused by flight disruptions, as follows:

***exceptional circumstances*** means circumstances that were not inherent to normal operations, were beyond the carrier’s control, could not have been avoided even if the carrier had taken all reasonable measures, and were not attributable, in whole or in part, directly or indirectly, to any of the following:

- (a) unavailability or shortage of flight crew or cabin crew or staff at the carrier or any third party with whom the carrier has a contractual relationship;
- (b) aircraft maintenance or safety issues, other than those caused by acts of sabotage or terrorism or a hidden manufacturing defect of the aircraft comprising the carrier’s fleet identified by the manufacturer or a competent authority that affects flight safety;

<sup>34</sup> Standing Committee on Transport, Infrastructure and Communities, [Evidence \(Sep. 14, 2017\)](#) at 1905 (emphasis added).

<sup>35</sup> “Regulator lays out proposed changes to passenger rights charter”, CTV New (Jul. 11, 2023).

<sup>36</sup> [From the Ground Up: Revamping Canada’s Air Passenger Protection Regime](#), p. 2 (December 2022).

<sup>37</sup> [Regulation \(EC\) 261/2004](#).

- (c) labour disruptions at the airline or any third party with whom the carrier has a contractual relationship;
- (d) any situation that was known or should have been known to the carrier at the time the ticket was sold to the passenger; or
- (e) acts or omissions of the carrier, its agents or servants, or any third party with whom the carrier has a contractual relationship.

### A. The Effect of the Current *APPR*

The current *APPR*'s shortcomings, including the barriers to access to justice that it creates, have been aptly identified by the Nova Scotia Small Claims Court:

2. When consumer protection is the intended outcome of a regulatory regime, it should be assumed the regime will be in plain language, easy to understand and supports a simple claims process. The *APPR*, which was intended to accomplish enhanced passenger rights, accomplishes none of these. The language is complex and legalistic; one needs detailed or specific knowledge to invoke the claims system; and the process to seek compensation, once invoked, does not lend itself to quick resolution. This case illustrates that complexity, as lengthy pre-hearing processes involved the issuance of subpoenas to obtain detailed records from the Defendant about aircraft fleet information, maintenance records and other matters to support the Claim.
3. Few individuals would undertake such efforts to seek a few hundred dollars in compensation. Even if they wanted to, fewer could undertake such a claim. Close to 1000 pages of paper were exchanged, in a \$400 claim.<sup>38</sup>

The CTA's recent decisions also demonstrate the challenge that the current *APPR*'s scheme has created in adjudication of consumer complaints between airlines and passengers, and in enforcement.

In *Lareau v. WestJet*, the carrier argued that no compensation was owed to passengers who experienced a 21-hour delay, because the passengers' flight was cancelled due to crew member unavailability, and that this cancellation was required for safety purposes.<sup>39</sup> The CTA held that crew unavailability did not meet the definition of "required for safety purposes" within the meaning of the *APPR*;<sup>40</sup> however, because of the *APPR*'s vague language, WestJet was granted leave to appeal the CTA's decision to the Federal Court of Appeal and the appeal is awaiting hearing.<sup>41</sup>

<sup>38</sup> *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3 (emphasis added); aff'd: 2022 NSSC 49.

<sup>39</sup> *Lareau v. WestJet*, CTA Decision No. 89-C-A-2022 at paras. 1-2.

<sup>40</sup> *Ibid* at paras. 9-12.

<sup>41</sup> *WestJet v. Lareau*, Federal Court of Appeal File No. A-267-22.



In *Crawford v. Air Canada*, the carrier argued that no compensation was owed to passengers who were delayed by more than 15 hours, because the passengers' flight was cancelled for circumstances outside its control, as the first officer assigned to the flight was unable to complete the refresher training required by the *Canadian Aviation Regulations* before the operation of the flight.<sup>42</sup> The CTA highlighted carriers' responsibility for staffing issues, such as hiring, dispatching and training, and held that crew unavailability in the circumstances of the case was within the carrier's control.<sup>43</sup> The Federal Court of Appeal denied Air Canada's motion for leave to appeal.<sup>44</sup>

In *WestJet v. Yanyk*, the carrier argued that no compensation was owed to passengers who were delayed by more than 9 hours, because the passengers' flight was cancelled due to the flight crew exceeding their duty time limit as a result of a combination of adverse weather impacting a previous flight (i.e., knock-on effect) and an unexpected maintenance issue. The CTA cited *Lareau v. WestJet* with approval, and highlighted the importance of the carrier tendering evidence to support its position. Ultimately, the CTA held that the flight cancellation in question was within the carrier's control and not required for safety purposes.<sup>45</sup>

In *Anslow v. Sunwing*, the carrier argued that no compensation was owed to passengers who were delayed by more than 6 hours, because the passengers' flight was cancelled due to the freezing and rupture of the aircraft's lavatory pipes, and that the cancellation was required for safety reasons. The freezing of the pipes occurred because an aircraft heater had been turned off while the aircraft was parked in Regina. The CTA held that given the winter conditions at the time of the event, it was reasonably foreseeable that the pipes would freeze if proper maintenance protocols were not followed while the aircraft was parked. The CTA concluded that the cancellation was within the carrier's control and not required for safety reasons.<sup>46</sup>

These cases highlight the substantial confusion and unnecessary litigation that the current *APPR* has caused. Most if not all of these could have been avoided had Canada adopted the European Union's eligibility criteria for lump sum compensation owed to passengers affected by flight disruptions.

## **B. Extraordinary Circumstances Under the European Union's Regime**

*Regulation (EC) 261/2004* requires the carrier to pay standardized compensation for denial of boarding irrespective of the cause, and establishes payment of compensation as the norm in the event of flight delay and flight cancellation. Under the EU's regime, the airline can avoid paying compensation only in exceptional cases where the airline proves that the flight delay or cancellation was caused by "extraordinary circumstances,"<sup>47</sup> a narrow concept reserved for events such as volcanic eruptions, and which excludes situations that are inherent to the normal exercise of the airline's activity.

<sup>42</sup> *Crawford v. Air Canada*, [CTA Decision No. 107-C-A-2022](#) at paras 1 and 10.

<sup>43</sup> *Ibid* at paras. 14-17.

<sup>44</sup> *Air Canada v. Crawford*, [Federal Court of Appeal File No. 22-A-18](#).

<sup>45</sup> *WestJet v. Yanyk*, [CTA Decision No. 122-C-A-2022](#) at paras. 1, 7-9, and 11-22.

<sup>46</sup> *Anslow v. Sunwing*, [CTA Decision No. 20-C-A-2023](#) at paras. 1, 6, and 10-11.

<sup>47</sup> *Regulation (EC) 261/2004*, Article 5(3).

### Unexpected Aircraft Maintenance

Aircraft maintenance and/or safety issues **are not** considered to be “extraordinary circumstances” **unless** they are caused by acts of sabotage or terrorism or “where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety.”<sup>48</sup> Unexpected technical problems that are not attributable to poor maintenance and are not detected during routine maintenance checks **are not** “extraordinary circumstances” either.<sup>49</sup>

### Unexpected Illness or Death of Essential Crew Member

Unexpected absences due to illness or death of a crew member whose presence is essential to the operation of a flight are part of the normal exercise of the airline’s activity and **are not** “extraordinary circumstances” even if the illness or death occurred shortly before the flight’s departure.<sup>50</sup>

### Strikes

A legal strike to assert the demands of a carrier’s employees that is followed by a group of employees essential for operating a flight **is not** an “extraordinary circumstance.”<sup>51</sup> Recently, the England and Wales Court of Appeal upheld and applied this principle in *Civil Aviation Authority v. Ryanair*.<sup>52</sup> Similarly, a solidarity strike in support of employees of the carrier’s parent company, which is followed by employees essential for operating a flight, **is not** an “extraordinary circumstance.”<sup>53</sup> Even a wild cat strike in the form of a coordinated action of employees calling in sick in response to the carrier’s actions harming employees’ interests **is not** an “extraordinary circumstance.”<sup>54</sup>

### Airport Operations

The collision of an airport’s set of mobile boarding stairs with an aircraft **is not** an “extraordinary circumstance,” because “mobile stairs or gangways are indispensable to air passenger transport, enabling passengers to enter or leave the aircraft, and, accordingly, air carriers are regularly faced with situations arising from their use.”<sup>55</sup>

We recommend amending the *APPR* to incorporate the aforementioned principles from the EU.

<sup>48</sup> *Wallentin-Hermann v. Alitalia*, European Court of Justice, [Case C-549/07](#) at para. 26.

<sup>49</sup> *Van der Lans v. Koninklijke Luchtvaart Maatschappij MV*, [Case C-257/14](#) at para. 49.

<sup>50</sup> *TAP Portugal v. flightright GmbH*, [Case C-156/22](#) at para. 26; see also: *Lipton & Anor v. BA City Flyer Ltd*, [\[2021\] EWCA Civ 454](#) at paras 50-51; and *M. c. Air India*, Cour de cassation, [Pourvoi no. 19-12.294](#).

<sup>51</sup> *AirHelp v. SAS*, [Case C-28/20](#) at para. 51.

<sup>52</sup> *CAA v. Ryanair*, [\[2022\] EWCA Civ 76](#) at para. 43.

<sup>53</sup> *CS v. Eurowings GmbH*, [Case C-613/20](#) at para. 34.

<sup>54</sup> *Krüseemann v. TUIfly GmbH*, [Case C-195/17](#) at para. 48.

<sup>55</sup> *Siewert v. Condor Flugdienst GmbH*, [Case C-394-14](#) at para 19.

### C. Potential Loopholes and How to Avoid Them

We are concerned that including a list of potential exceptional circumstances in the revised *APPR*, as listed in the Consultation Paper, may create confusion and preserve existing loopholes or create new ones.

- *“Hidden manufacturing defects that come to light and affect flight safety.”* If these words are not qualified by “the aircraft comprising the carrier’s fleet,” then airlines might argue that any unexpected maintenance issue with a single aircraft is an “exceptional circumstance”—thereby perpetuating the *APPR*’s existing “required for safety reasons” loophole. The proposed qualification serves an important purpose to clarify that the hidden manufacturing defect has to affect a considerable part of the carrier’s fleet, not just a single aircraft.
- *“Labour disruptions at the airline or by essential air service providers like airport managers, air navigation personnel, or ground handlers.”* Classifying labour disruptions at the airline or at the airline’s ground handling agents as “exceptional circumstances” is inconsistent with the principle, recognized by the CTA in *WestJet v. Yanyk*, that staffing issues are the carrier’s responsibility, and the principle that the carrier is responsible for the actions and omissions of its subcontractors with whom it has a contractual relationship. We believe that Canada should follow the European Union’s standards with respect to a carrier’s responsibility for flight disruptions caused by labour disputes with its own employees or the employees of its subcontractors, especially in light of Canadian passengers’ recent experience with the averted strike at WestJet.<sup>56</sup>
- *“Weather or other atmospheric conditions, or natural disasters, that make it impossible to safely operate the flight.”* The proposed language is unfortunately overbroad and could be abused by airlines to deny passengers compensation in situations where the weather does permit safe operation of the flight, but the range of the aircraft assigned to the flight is reduced due to the weather conditions.<sup>57</sup> Since it is the airline’s responsibility to assign an adequate aircraft to operate its flights, such situations should not be recognized as “exceptional circumstances.”
- *“Airport operational issues for which the airline is not responsible.”* The proposed language may create confusion with respect to airport operation issues that are announced in advance, but a carrier overlooks or chooses to ignore them. For example, an airport may have a runway renovation that affects its capacity and may delay flights; however, renovations are normally announced many months in advance, and so the carrier should have been aware of the upcoming constraints and should have adjusted its operations accordingly.

In order to avoid unnecessary disputes and litigation, it would be preferable to only give a definition of “exceptional circumstances” without including any examples in the *APPR*.

<sup>56</sup> [“WestJet cancels 111 flights and counting ahead of Friday pilot strike deadline”, CBC News \(May 18, 2023\).](#)

<sup>57</sup> [“The ‘Mexican game’: How Air Transat misled passengers and aviation officials”, CBC News \(May 31, 2017\).](#)

## 4. Right to Assistance

The most common and immediate loss incurred by a passenger who is denied boarding or whose flight is delayed or cancelled is out-of-pocket expenses for meals, communication, overnight accommodation, and transportation to the accommodation. It is a common feature of passenger protection regimes (such as the regimes of the European Union, Israel, and Turkey) to require airlines to offer passengers affected by flight disruptions “assistance” by providing passengers with the aforementioned services free of charge.

Regrettably, the *APPR* currently provides passengers with a right to assistance only if two conditions are simultaneously met: (1) the flight disruption was within the airline’s control; **and** (2) the airline did not notify the passenger about the disruption at least **12 hours** before the flight’s scheduled departure (ss. 11(3)(b), 11(4)(b), 12(2)(b), and 12(3)(b)).

We warmly welcome the proposal to abolish the first condition, and expand the right to assistance to all flight disruptions, irrespective of the cause. This proposal, however, does not go far enough as it appears to retain the second condition, which creates undue hardship for passengers and is at odds with the standards established in other jurisdictions.

We recommend the following amendment to the *APPR* to harmonize Canada with the European Union’s assistance standards and to reduce disputes between airlines and passengers:

**R-6.** Create a single rule about right to assistance that is applicable uniformly to all flight disruptions, irrespective of the cause and any advance notice.

### A. Right to Assistance in Other Jurisdictions

The right to assistance is a universal commercial standard that is widely recognized outside Canada.

**European Union.** The key provisions of *Regulation (EC) 261/2004* on right to assistance are as follows:<sup>58</sup>

- *Eligibility:* Denial of boarding, flight cancellation, or flight delay of over 2 hours (depending on flight’s distance, but irrespective of disruption’s reasons).
- *Rights:*
  - meals and refreshments in a reasonable relation to the waiting time;
  - hotel accommodation (if a stay of one or more nights or a stay additional to that intended by the passenger becomes necessary);
  - transport between the airport and place of accommodation (hotel or other); and
  - two telephone calls, telex or fax messages, or e-mails.
- *Exceptions:* None.

<sup>58</sup> *Regulation (EC) 261/2004*, Articles 4(3), 5(1)(b), 6(1)(i)-(ii), and 9.

*Israel.* In 2012, Israel passed the *ASL*,<sup>59</sup> whose key provisions on right to assistance are as follows:

- *Eligibility:* Denial of boarding, flight cancellation, or flight delay of over 2 hours (irrespective of disruption’s reasons).
- *Rights:*
  - meals and refreshments in a reasonable relation to the waiting time;
  - hotel accommodation (if a stay of one or more nights or a stay additional to that intended by the passenger becomes necessary);
  - transport between the airport and place of accommodation (hotel or other); and
  - two telephone calls, telex or fax messages, or e-mails.
- *Exceptions:* No eligibility to overnight accommodation if a flight is delayed (but not cancelled) due to a strike or a “protected” work-to-rule job action.

*Turkey.* In 2012, Turkey adopted its Regulation on Air Passenger Rights (SHY-Passenger), which mirrors the European Union’s *Regulation 261/2004*.<sup>60</sup>

## **B. The Current State of the *APPR* Generates Disputes and is Unfair**

Currently, a passenger’s right to assistance under the *APPR* depends on how the reasons for the flight disruption are categorized. If the disruption is due to circumstances within the carrier’s control, the passenger is owed assistance; however, if it is outside the carrier’s control, the airline owes no assistance to the passenger. As a result, a carrier’s liability for a passenger’s meal (\$25-\$50) and overnight accommodation (\$150-\$300) expenses depends on complex and evidence-intensive determinations about the reasons for the flight disruption—turning it into a battleground between airlines and passengers even when the amounts at stake are minimal. The high cost to society of adjudicating such disputes compared to the amounts at stake favours a universal right to assistance, irrespective of the reasons for the flight disruption.

An additional made-in-Canada loophole is that if the airline notifies the passenger at least 12 hours in advance about a flight disruption, then no assistance is owed under the current *APPR*. This loophole, which is inconsistent with Article 19 of the *Montreal Convention* applicable to most international itineraries, enables airlines to engage in a bait-and-switch practice of selling tickets on flights with convenient-looking schedules (e.g., non-stop or reasonably short connections) and then cancelling those flights a few weeks before their scheduled departure while offering an unfavourable alternate transportation requiring an overnight stay. Under the current *APPR*, airlines that engage in such anti-competitive practices are not held responsible for the out-of-pocket losses that they cause to passengers.

Adopting the European Union’s assistance standards will reduce disputes between airlines and passengers, and will also foster fair competition.

<sup>59</sup> *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions)*, 5772-2012 in [English](#); complete legislative history is [available in Hebrew](#).

<sup>60</sup> [SHY-Passenger in English](#), Articles 5(3), 6(1)(b), 7(1)(1)-(2), and 10.

## 5. Small vs. Large Carriers

The substantial differences between the obligations of so-called “small carriers” and “large carriers” to passengers under the current *APPR* is probably the single issue that has attracted opposition and rebuke from passengers<sup>61</sup> and some carriers<sup>62</sup> alike.

An airline is “large” for the purposes of the *APPR* if it has transported a worldwide total of two million passengers or more during each of the two preceding calendar years (*APPR*, s. 1(2)). This definition enabled airlines such as Air Transat, Flair, Lynx, and Sunwing to claim to be “small” for the purposes of the *APPR* even though they operate large aircraft much like Air Canada and WestJet.

Under the current *APPR*, a “small carrier” is liable to pay a significantly lower lump sum compensation than a “large carrier” to passengers whose flight is delayed or cancelled (*APPR*, ss. 19(1)(b) and 19(2)(b)). In addition, the *APPR* requires only “large carriers” to rebook passengers whose flights are delayed or cancelled for reasons with the carrier’s control on competitors’ flights (*APPR*, ss. 17(1)(a)(ii)-(iii) and 18(1.1)(a)); the *APPR* imposes no similar obligations on “small carriers” whose flights are delayed or cancelled for reasons with the carrier’s control (*APPR*, ss. 17(1)(b) and 18(1.1)(b)).

We warmly welcome the proposal to lessen the gap between the obligations of “small” and “large” carriers; however, the proposal does not go far enough. We believe that the distinction should be eliminated altogether; or alternatively, the delineation should be based on the size of the aircrafts in the fleet, rather than the number of passengers transported annually. We recommend the following amendments to the *APPR*:

**R-7.** Expand the obligations of “large carriers” to apply to “small carriers.” Alternatively, replace the definition of “large carrier” in s. 1(2) of the *APPR* with:

**large carrier** means a carrier that operates at least one large aircraft or one medium aircraft within the meaning of the *Air Transportation Regulations*.

### A. Simplifying the Regime: Cutting the Number of Rules by Half

The made-in-Canada distinction between the obligations of “small carriers” and “large carriers” doubles the regulatory scheme’s complexity and the number of rules with which a passenger must be familiar.

Under the current *APPR*, there are three kinds of disruptions (delay, cancellation, and denied boarding), three categories of disruptions (outside the carrier’s control, required for safety purposes, and within the carrier’s control and not required for safety purposes), and two types of carriers (small carrier and large carrier). This means a total of  $3 \times 3 \times 2 = 18$  different scenarios.

<sup>61</sup> [Deficiencies of the Proposed Air Passenger Protection Regulations](#), pp. 28-30 (February 2019).

<sup>62</sup> Standing Committee on Transport, Infrastructure and Communities, [Evidence](#) (Nov. 28, 2022) at 1735.



Even when the existing three categories will be reduced to two (ordinary and exceptional circumstances), it will leave passengers with a total of  $3 \times 2 \times 2 = 12$  different scenarios under the *APPR*, which is still too unwieldy for most passengers to remember and work with.

Eliminating the distinction between “small carrier” and “large carrier”, or alternatively, defining “small carrier” sufficiently narrowly to exclude airlines like Air Transat, Flair, Lynx, and Sunwing, would cut the number of different scenarios under the *APPR* that most passengers will encounter by half, to  $3 \times 2 = 6$ . Doing so would have the additional benefit of levelling the playing field among airlines that operate substantially similar aircraft on substantially similar if not identical routes—an objective that the CTA previously endorsed in the context of protection of air passengers affected by flight disruptions.<sup>63</sup>

## **B. Harmonizing the *APPR* with the *Montreal Convention***

The *Montreal Convention* is an international treaty governing the rights of passengers travelling on most international itineraries to and from Canada. The *Montreal Convention* is incorporated as Schedule VI to the federal *Carriage by Air Act*, and has the force of law in Canada by virtue of s. 2(2.1) of that Act.

The *Montreal Convention* imposes on carriers the concomitant obligation to take all reasonable measures to prevent delay in the transportation of passengers.<sup>64</sup> The reasonable measures necessary for meeting that concomitant obligation include rebooking passengers whose travel is disrupted for reasons within the carrier’s control on flights of other airlines with whom the carrier has no interline agreement.<sup>65</sup>

The current *APPR* creates the impression that a “small carrier” does not have to rebook passengers whose international travel is disrupted on competitors’ flights (*APPR*, s. 17(1)(b)). This impression is incorrect and confusing.<sup>66</sup> The *Montreal Convention* applies with equal force to both “small” and “large” carriers operating flights as part of an international itinerary. Consequently, “small carriers” are subject to the same concomitant obligation as “large carriers” when they operate a flight to or from Canada. The *APPR* cannot override the *Carriage by Air Act* that incorporates the *Montreal Convention*.<sup>67</sup>

Eliminating the distinction between “small carrier” and “large carrier”, or alternatively, defining “small carrier” in a manner that excludes carriers that operate flights to and from Canada, would foster harmony between the *APPR* and the *Montreal Convention*.

<sup>63</sup> Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights, Canadian Transportation Agency (original issued on Jul. 3, 2013).

<sup>64</sup> *Lukacs v. United Airlines Inc.*, 2009 MBQB 29 at paras. 49-50.

<sup>65</sup> *Lukács v. Air Canada*, CTA Decision No. 250-C-A-2012 at paras. 25 and 90-91; see also: *Lukács v. Air Canada*, CTA Decision No. 251-C-A-2012; *Lukács v. Air Transat*, CTA Decision No. 248-C-A-2012; *Lukács v. WestJet*, CTA Decision No. 249-C-A-2012; and *Lukács v. WestJet*, CTA Decision No. 252-C-A-2012.

<sup>66</sup> “Hundreds of Canadians stranded for days in Mexico after Sunwing cancellations”, CBC News (Dec. 26, 2022); and “After Sunwing halts Saskatchewan service, some stranded passengers may return via Edmonton”, Global News (Dec. 30, 2022).

<sup>67</sup> *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211 at para. 93.

## 6. Knock-On Effect

The current *APPR* allows an airline to relieve itself of compensation and assistance requirements in the event that a flight disruption is caused by the disruption of a *previous* flight that was outside the carrier's control or required for safety reasons (*APPR*, ss. 10(2) and 11(2)). This kind of situation has often been referred to as the “knock-on effect.” Regrettably, the *APPR*'s current knock-on effect provisions are not confined to disruptions to flights operated by the same aircraft or crew, nor do they limit the number of flights with respect to which an airline may claim the knock-on effect in a row. In practical terms, this means that an airline could claim that a flight cancelled on Friday was due to the knock-on effect of a flight disruption on the previous Monday.

We warmly welcome the proposal to impose reasonable restrictions on the use of the knock-on effect; however, the proposal does not go far enough in that it might be preferable to abolish the knock-on effect provisions altogether to simplify the regulatory scheme. Alternatively, the restrictions should be made clearer to avoid further abuse by the airlines. We recommend the following amendments to the *APPR*:

- R-8.** Eliminate the knock-on effect provisions altogether. Alternatively, restrict the exception to the obligation to pay passengers lump sum compensation for inconvenience to:
- (a) the flight that actually experiences the exceptional circumstance; and
  - (b) the next flight scheduled to use the same aircraft, provided that the next flight was scheduled to depart within three (3) hours of the previous flight's scheduled arrival time.

Permitting airlines to relieve themselves from obligations on the basis of a knock-on effect perpetuates major loopholes of the existing *APPR*: dependence on information that is in the airline's exclusive control and complex evidence-intensive adjudication that may be disproportionate to the amounts at stake.

Verification of a knock-on effect exception requires access to the airline's aircraft assignment and scheduling system, which is not public. This difference sets the knock-on effect apart from a narrow list of exceptional circumstances that may reasonably easily and quickly be verified by passengers and decision makers using publicly available information.

We are concerned that if the knock-on effect exceptions are not abolished in their entirety, then they would be abused in much the same way as airlines currently abuse the “safety-reasons” loophole for refusing to compensate passengers.

If some form of knock-on effect exceptions are retained, then they should be constrained, by clear legislative language, to the very next flight that was scheduled to use the same aircraft (not crew). To ensure that “next flight” is interpreted as intended, we recommend limiting the scope of the exception to the next flight that is scheduled to depart within a short time of the previous flight's scheduled arrival time.



## 7. Uniform Procedures for the Payment of Lump Sum Compensation

The current *APPR* unnecessarily provides for two completely different procedures: one for the payment of denied boarding compensation and the other for the payment of lump sum compensation for inconvenience for flight delay and cancellation.

Denied boarding compensation is payable automatically as soon as it is operationally feasible and no later than 48 hours of the time of the denial of boarding, without the passenger having to make a claim (*APPR*, s. 20(2)). In sharp contrast, compensation for flight delay and cancellation is payable only if the passenger files a request for compensation with the airline within one year of the flight disruption they experienced (*APPR*, s. 19(3)), and the airline then has 30 days to pay the compensation or to provide the passenger with an explanation for refusing to pay compensation (*APPR*, s. 19(4)). Oddly, the *APPR* imposes no requirements on the airline to provide the passenger with an explanation for the airline's refusal to pay denied boarding compensation.

This state of affairs substantially and unnecessarily complicates the regulatory scheme, and unfairly puts the onus on passengers whose flight was delayed or cancelled to seek compensation.

We recommend amending the *APPR* by harmonizing the procedures for the payment of compensation owed in relation to flight disruptions, and creating a single uniform procedure that is applicable to all compensations owed for flight disruptions (flight delay, flight cancellation, and denied boarding):

- R-9.** Expand the scope of the *APPR*'s existing procedures for the payment of denied boarding compensation, set out in ss. 20(2)-(5) of the *APPR*, to apply to the payment of compensation for flight delay and cancellation and to replace the procedures set out in ss. 19(3)-(4).
- R-10.** Relax the 48-hour deadline in s. 20(2) of the *APPR* to a 7-day deadline.
- R-11.** Expand the obligation to provide detailed reasons for not paying lump sum compensation, set out in s. 19(4) of the *APPR*, to apply to the carrier's refusal to pay denied boarding compensation.

The rationale for relaxing the 48-hour deadline for remitting payment to 7 days is twofold. First, an airline may need a few days to ascertain whether the flight delay or cancellation was caused by exceptional circumstances that may relieve the airline from the obligation to pay. Thanks to the narrow definition of "exceptional circumstances," a 7-day period provides ample time to do so. Second, a 7-day deadline would also harmonize with the internationally accepted commercial standards for providing a refund.

The recommended amendments would assist passengers to put flight disruption behind them within days, instead of the current reality of lingering agony of many months and possibly years.

## 8. Lack of Transparency in Adjudication

The *Budget Implementation Act, 2023, No. 1* amended the *Canada Transportation Act [Act]* by replacing the CTA's passenger complaint adjudication process with a new mediation-arbitration process.

- Mediation must start within 30 days of the filing of a complaint (*Act*, s. 85.05(1)).
- If no agreement is reached in mediation within 60 days, then the **same** complaint resolution officer who conducted the mediation must adjudicate the complaint and make a legally binding order on the basis of the information that was provided by the passenger and the carrier (*Act*, s. 85.06(1)).
- The complaint resolution officer must take into account any prior decision with respect to the classification of the same flight's disruption (*Act*, s. 85.08).
- The information on the basis of which the complaint resolution officer issued a legally binding decision must be kept confidential unless the parties agree otherwise (*Act*, s. 85.09(1)).

We would be remiss not to voice our concerns about this new process that mixes the roles of a mediator and a decision maker, and also encroaches on the constitutionally protected open court principle.

The century-old open court principle provides that legal proceedings are presumptively open to the public. Citizens and the media have the right to access court proceedings and the same evidence that the court relied on. The open court principle is a hallmark of a democratic society which permits the public to discuss and put forward opinions and criticisms of legal practices and proceedings. The open court principle is inextricably tied to freedom of expression and the press guaranteed by section 2(b) of the *Charter*.<sup>68</sup>

Curtailed public access to legal proceedings can only be justified when there is the need to protect social values of superordinate importance, such as if disclosure would subvert the ends of justice or unduly impair its proper administration, or to protect a vulnerable party from revictimization.<sup>69</sup> Generic privacy concerns, which do not rise to the level of posing a threat to a person's dignity or physical safety, are insufficient to displace the presumption of openness in legal proceedings.<sup>70</sup>

The open court principle was held to apply to tribunals engaged in adjudication of disputes between parties in an adversarial setting in the context of immigration, labour relations, automobile injuries, whistleblower protection, and human rights.<sup>71</sup> Ontario's *Freedom of Information and Protection of Privacy Act* was found

<sup>68</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 at paras. 21-23; and *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 31-34.

<sup>69</sup> *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras. 4-5; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at paras. 14 and 27; *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 30.

<sup>70</sup> *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 85.

<sup>71</sup> *Southam Inc. v. Canada (MEI)*, [1987] 3 FC 329; *Tipple v. Deputy Head (DPWGS)*, 2009 PSLRB 110; *Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106 at para. 104; *El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT) at paras. 59-60; *Woodgate v. RCMP*, 2022 CHRT 27 at para. 12.

to infringe on s. 2(b) of the *Charter* and declared to have no force or effect to the extent it prevented public disclosure of adjudicative records of tribunals that adjudicate disputes in an adversarial setting.<sup>72</sup>

The CTA, being an administrative tribunal, is required to follow the open court principle. Documents filed with the CTA in the course of adjudication of consumer disputes between passengers and airlines, such as submissions and evidence, are placed on the public record, unless the CTA makes a confidentiality order on the basis of the same strict legal test used by the courts. In 2015, the Federal Court of Appeal held that it was “impermissible” for the CTA to refuse to provide such documents to members of the public in the absence of a confidentiality order, on the mere basis of generic privacy concerns.<sup>73</sup>

The newly introduced section 85.09 of the *Act* makes all information provided by passengers and the airlines for adjudication confidential unless the party providing the information agrees otherwise. This creates a presumption of secrecy and covertness for the new process of adjudication of consumer disputes between passengers and airlines, contrary to s. 2(b) of the *Charter*.

The practical effect of s. 85.09 is a Star Chamber-like process, where the public and the media have no access to the evidence used by the decision maker to determine whether the airline owes compensation to the passenger, and even the reasons for the decision will remain secret. Instead, only bald bottom-line conclusions are published (*Act*, s. 85.14), and those bald bottom-line conclusions will be used in adjudicating subsequent complaints relating to the same flights filed by other passengers (*Act*, s. 85.08). This, in turn, shields from public scrutiny both the decision maker’s conduct in adjudicating disputes and the airlines’ treatment of passengers. As Professor Paul Daly so aptly summarized:

This is a breach of the open justice principle, with the effect that proceedings before the Agency will be conducted in secret. Perhaps the rationale here is that the complaints resolution officers (82.01(1)) engage in mediation (85.01) which is best conducted in private. But the confidentiality clause sweeps beyond the mediation stage to encompass the entirety of air passenger proceedings before the Agency, including those that are quasi-judicial in nature. It is difficult to see how this clause would survive constitutional challenge based on the open justice principle grounded in s. 2(b) of the *Charter of Rights and Freedoms*.

[...]

Taken together, these provisions would create mechanisms for binding mediation and adjudication that would operate largely in secret. Decision-making would be done in the shadows, on the basis of past decisions and guidelines that have only seen the light of day to the extent the Agency chooses.<sup>74</sup>

<sup>72</sup> *Toronto Star v. AG Ontario*, 2018 ONSC 2586.

<sup>73</sup> *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para. 80.

<sup>74</sup> Daly, Paul. *Judicial Oversight and Open Justice in Administrative Proceedings*, Administrative Law Matters (May 18, 2023).