



# **Deficiencies of the Proposed Air Passenger Protection Regulations**

by Air Passenger Rights

*Submissions to the Canadian Transportation Agency*

February 2019

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## About *Air Passenger Rights*

*Air Passenger Rights (APR)* is an independent nonprofit network of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation.

*APR* is in a unique position to comment on the regulations to be made under s. 86.11 of the *Canada Transportation Act* on behalf of the public interest:

- **Experience based.** *APR*'s submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independence.** *APR* accepts no government or business funding.
- **No business interest.** *APR* has no business interest in the regulations to be made.

*APR*'s presence on the social media includes the [Air Passenger Rights \(Canada\)](#) Facebook group, with over **9,900 members**, the [Air Passenger Rights](#) Facebook page, and the [@AirPassRightsCA](#) Twitter feed.

*APR* was founded and is coordinated 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 (Founder and Coordinator)

Since 2008, Dr. Lukács has filed **more than two dozen successful complaints**<sup>1</sup> with the Canadian Transportation Agency (the Agency), 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.

Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,<sup>2</sup> in respect of air passenger rights. He successfully challenged the Agency's lack of transparency and the reasonableness of the Agency's decisions.

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>3</sup> the academic community,<sup>4</sup> the judiciary,<sup>5</sup> and the legislature.

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<sup>1</sup> See Appendix A.

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

<sup>3</sup> Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.

<sup>4</sup> [Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL](#), Institute for Air and Space Law, October 2018.

<sup>5</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.

## Executive Summary

Canada has fallen behind the rest of the Western world in terms of consumer protection for air passengers. In 2006, the European Union's *Regulation (EC) 261/2004* came into force. It has since become known as the gold standard of air passenger rights. No similar laws have been passed in Canada. Regrettably, this is not going to change any time soon. Canada will continue to lag behind.

The proposed *Air Passenger Rights Regulations* [Proposed Regulations] undermine the rights of air passengers travelling within, to, and from Canada in some key areas (Figure 1), while largely regifting existing rights in other areas. It is for this reason that **more than 8,000 emails protesting against the shortcomings of the Proposed Regulations** have been sent to the Canadian Transportation Agency.

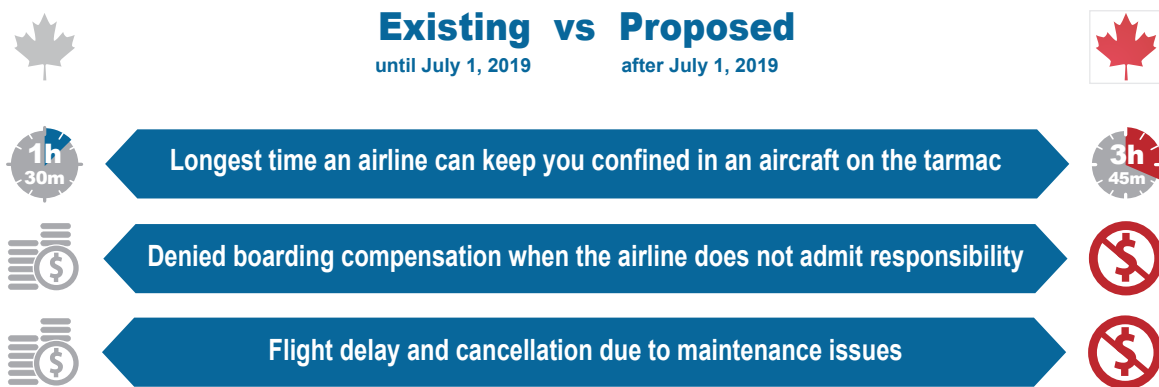


Figure 1. Existing (until July 1, 2019) vs. Proposed (after July 1, 2019)

The Proposed Regulations leave the impression of an instrument written by the airlines to ensure that in most cases, airlines will have to pay no compensation to passengers, while creating the facade of a consumer protection legislation.

*APR* has identified the following key areas where the Proposed Regulations are fundamentally flawed:

1. **Tarmac Delay.** The Proposed Regulations purport to permit airlines to keep passengers confined in an idling aircraft on the tarmac for up to **3 hours and 45 minutes**. *APR* is of the view that these provisions are: (1) inhumane, causing significant suffering and hardship to passengers with disabilities and to families travelling with young children; (2) unlawful, conflicting with the *Canadian Charter of Rights and Freedoms*, and (3) unacceptable.

*APR* believes that no passenger should be kept on the tarmac for more than **90 minutes**, as the Senate recommended in March 2018.

2. **No Entitlement to Denied Boarding Compensation in Most Cases.** The Proposed Regulations define “denied boarding” much more narrowly than the commonly used definition, established in *Regulation (EC) 261/2004* (Figure 2). The proposed definition is so narrow that it deprives passengers from being entitled to compensation in many if not most cases. This challenge is compounded by the requirement that passengers seeking denied boarding compensation establish facts that are within the airlines’ exclusive knowledge, such as the number of passengers who checked in.

*APR* believes that Canada should adopt the commonly used definition of denied boarding established in *Regulation (EC) 261/2004*.



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	✓	✓

Figure 2. Denied Boarding Compensation: EU vs. Proposed Regulations

3. **No Entitlement to Monetary Compensation in Most Cases.** The Proposed Regulations establish lack of compensation as the norm in the case of flight delay, cancellation, and denial of boarding, and payment of compensation as the exception. Passengers who seek monetary compensation will have to establish that the event was “within the carrier’s control” and was not required for safety purposes. In practice, passengers can neither verify nor prove these, because they have no access to the airlines’ crew assignment databases, operation centre databases, and aircraft maintenance log books; therefore, unlike in the European Union, where the burden of proof is on the airlines and not the passengers, in Canada, passengers will receive no monetary compensation in most cases.

*APR* believes that Canada should adopt the principle established in *Regulation (EC) 261/2004* that payment of compensation is the norm, and the airlines must prove any extenuating circumstance.

4. **No Compensation for Passengers Who Do Not Complain within 120 Days.** The Proposed Regulations do not require airlines to proactively compensate passengers for flight delay or cancellation. Instead, passengers are required to complain to the airline and ask for compensation. If they fail to do so within 120 days, they lose their right to compensation.

*APR* is of the view that imposing a 120-day deadline on passengers is unreasonable and serves only the airlines’ private interests.



5. **No Meals or Hotel in Most Cases.** Under the Proposed Regulations, if the airline notifies passengers about a delay or cancellation at least 12 hours in advance, then the airline is **not required** to provide meals or accommodation, even if the delay or cancellation is “within the carrier’s control.” This means that passengers may be left fending for themselves away from their homes, possibly in a foreign country, without any right to assistance from the airline—as long as the airline provided a 12-hour notice.

*APR* is of the view that passengers affected by a flight delay or cancellation within the carrier’s control must **always** be provided with meals and overnight accommodation, regardless of how much advance notice the airline provided.

## Flight Delay and Cancellation

	EU		Canada	
	Meals&hotel provided	Cash compensation	Meals&hotel provided	Cash compensation
Airline proves "extraordinary circumstances"	✓	✗	✗	✗
Airline claims "outside our control"	✓	✓	✗	✗
Airline claims "urgent maintenance"	✓	✓	✓	✗
Airline admits responsibility	✓	✓	✓	✓
Time limit to make a claim	2 – 6 years		120 days	

Figure 3. Flight Delay and Cancellation: EU vs. Proposed Regulations

6. **Shortchanging Passengers Booked on “Small” Carriers.** The Proposed Regulations provide substantially fewer rights and a fraction of the compensation amounts to passengers travelling on “small” carriers, including on airlines operating large aircraft such as Flair or Swoop (wholly owned by WestJet).

*APR* is of the view that this distinction is unlawful, unfair to passengers, and inconsistent with the objective of uniformity stated in Parliament by Transport Minister Marc Garneau.

7. **Important Issues Not Addressed.** The Proposed Regulations fail to address the following issues: (1) right to a refund of the unused portion of a ticket in the case of delay, cancellation, and denial of boarding “outside the carrier’s control;” (2) boarding priorities and the obligation to seek volunteers in the case of denial of boarding “outside the carrier’s control;” and (3) “flight advancement,” that is, when the carrier changes the departure time to a time earlier than it appears on the passenger’s original ticket with the consequence that the passenger misses their flight.

*APR* is of the view that the regulations must address these issues.

## Summary of Recommended Amendments

### Tarmac delay

1. Delete the words “at an airport in Canada” from subsection 9(1) of the Proposed Regulations.
2. Delete subsection 9(2) of the Proposed Regulations.
3. Replace section 9 of the Proposed Regulations with:
  - (1) No person directly or indirectly in control of an aircraft with passengers on board, including but not limited to a carrier or a licensee, shall permit the aircraft to remain on the tarmac for more than 90 minutes.
  - (2) Within 90 minutes of its door being closed, an aircraft with passengers on board must either take off or return to a position that permits passengers to disembark.
  - (3) Within 90 minutes of landing at an airport, an aircraft with passengers on board must either take off or taxi to a position that permits passengers to disembark.
  - (4) A carrier that allows passengers to disembark must, if feasible, give passengers with disabilities and their support person, service animal or emotional support animal, if any, the opportunity to disembark first.
  - (5) This section does not apply if the person invoking this subsection proves that providing an opportunity for passengers to disembark is not possible for reasons that are beyond the carrier’s control, including reasons related to safety and security or to air traffic or customs control.

### Definition of “denied boarding”

4. Replace subsection 1(3) of the Proposed Regulations with:
 

**1(3)** For the purpose of these Regulations, “denied boarding” means a refusal to carry passengers on a flight, if

  - (1) the passenger held a confirmed reservation on the flight concerned, and
  - (2) the passenger presented themselves for check-in as stipulated and at the time indicated in advance in writing (including by electronic means) by the carrier, or if no time indicated, no later than 45 minutes before the published departure time,

except if the carrier proves that there were reasonable grounds to refuse to carry the passenger, such as reasons of health, safety or security, or inadequate travel documentation.

## **Burden of proof**

5. Replace subsection 1(1) with:

**1 (1)** The following definitions apply in Part II of the Act.

**mechanical malfunction** means a mechanical problem that reduces the safety of passengers but does not include:

- (i) a problem that is identified further to scheduled maintenance undertaken in compliance with legal requirements; or
- (ii) a problem that has previously been identified and whose repair has been deferred pursuant to sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(défaillance mécanique)

**required for safety purposes** means legally required in order to reduce risk to passengers but does not include:

- (i) scheduled maintenance in compliance with legal requirements; or
- (ii) repair of a problem that has previously been identified and whose repair has been deferred in accordance with sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(nécessaire par souci de sécurité)

6. Replace subsection 10(1) with:

**10 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier proves to be exclusively due to situations outside the carrier's control, including

7. Replace subsection 11(1) with:

**11 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier fails to prove to be outside the carrier's control, but proves that it is required solely for safety purposes.

8. Replace subsection 12(1) with:

**12 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding unless the carrier proves circumstances referred to in subsection 10(1) or 11(1).



### **Limitation and prescription periods**

9. Replace subsection 19(3) of the Proposed Regulations with a provision mirroring s. 39 of the *Federal Courts Act*: (1) provincial limitation statutes apply to claims arising in a province; and (2) a six-year period applies to claims arising otherwise than in a province.

### **“Large” vs. “small” carriers**

10. Delete subsections 1(2), 17(1)(b), 18(b), 19(1)(b), and 19(5) and delete the words “in the case of a large carrier” in subsections 17(1)(a), 18(a), and 19(1)(a) of the Proposed Regulations.
11. Alternatively, replace “one million” with “one hundred thousand” in subsection 1(2)(a) of the Proposed Regulations, and append immediately after subsection 1(2)(b):
- (c) operates at least one aircraft having a certificated maximum carrying capacity of more than 39 passengers.

### **Right to rebooking on another carrier**

12. Replace the phrase “departs within nine hours” with “scheduled to arrive at the passenger’s destination within four hours” in subparagraph 17(1)(a)(i) of the Proposed Regulations.
13. Replace “paragraph (a)” with “subparagraph (i)” in subparagraph 17(1)(a)(ii) of the Proposed Regulations.

### **Right to meals and hotel**

14. Correct paragraphs 12(2)(b) and 12(3)(b) of the Proposed Regulations to match the intent stated in the Regulatory Impact Analysis Statement, to read:
- ~~if a passenger is informed of the [...] less than 12 hours before the departure time on their original ticket,~~ provide the treatment set out in section 14.
15. Replace paragraphs 11(2)(b) and 11(3)(b) of the Proposed Regulations with:
- provide the treatment set out in section 14.

### **Form of payment**

16. Replace paragraph 21(1)(a) of the Proposed Regulations with:
- compensation in the other form has a monetary value of at least 300% of the minimum monetary value of the compensation that is required under these Regulations;

### **Seating of children**

17. Replace the first sentence of section 22(1) of the Proposed Regulations with:
- In order to seat children who are under 14 years of age in close proximity to a parent, guardian or tutor in accordance with subsection (2), a carrier shall
18. Append the following subparagraph immediately after subparagraph 22(1)(b)(iv):
- (v) if no passenger volunteers to change seats before take-off, involuntarily change the seats of passengers on board before take-off.
19. Replace subsection 22(2) of the Proposed Regulations with:
- 22(2)** The carrier shall assign to a child who is under 14 years of age by offering, at no additional charge,
- (a) in the case of a child who is under 12 years of age, a seat that is adjacent to their parent, guardian or tutor’s seat;
- (b) in the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor’s seat by no more than one row.

### **Clarification of the scope**

20. Replace subsection 2(1) of the Proposed Regulations with:
- All carriers carrying a passenger, including but not limited to the marketing carrier, operating carrier, contracting carrier, and actual carrier, are jointly and severally, or solidarily, liable to the passenger with respect to the obligations set out in these Regulations or, if they are more favourable, the obligations set out in the applicable tariff.

### **Right to a refund of unused portion of ticket**

21. Renumber section 18 as 18(1) of the Proposed Regulations, and append the following provision immediately after it:
- (2)** If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger’s travel needs, the carrier must instead refund the unused portion of the ticket.

### **Boarding priorities**

22. Append the following paragraph to subsection 10(2):
- (d) in the case of a cancellation or a denial of boarding, deny boarding in accordance with section 15.
23. Replace subsection 15(1) of the Proposed Regulations with:
- 15 (1)** ~~If paragraph 11(4)(b) or 12(4)(b) applies in respect of a A carrier,~~ it must not deny boarding unless it has asked if any passenger is willing to give up their seat.

### **Flight advancement**

24. Append the following subsection immediately after subsection 1(3) of the Proposed Regulations:
- 1(4)** For the purposes of these Regulations, a flight whose departure time was brought forward compared to the time appearing on the original ticket, with the consequence that the passenger misses that flight, shall be considered a flight on which the passenger has been denied boarding.

## Lack of Integrity and Institutional Bias in the Regulation-Making

*APR* is deeply concerned that the regulation-making process has been compromised by lack of integrity and institutional bias at the Canadian Transportation Agency in favour of the airline industry and against the travelling public. *APR* is of the view that the issues described below have created a reasonable apprehension of institutional bias, which undermines the integrity and credibility of the present regulation-making process.

*APR* is particularly troubled by what transpires as undue influence of the International Air Transport Association [IATA] on the Agency's regulation and decision making. IATA is the trade association for the world's airlines, representing some 290 airlines,<sup>6</sup> including most commercial airlines flying within, to, and from Canada.

### A. Private consultations with IATA prior to June 2017

According to the affidavit sworn by Ms. Nicola Colville, Area Manager, Canada and Bermuda for IATA, on June 16, 2017:

The Agency has sought IATA's input with regard to the regulations it will draft. IATA is actively participating in the consultation process with Transport Canada and the Agency on this topic.<sup>7</sup>

The private "consultation" between IATA and the Canadian Transportation Agency took place before June **2017**, at which time Bill C-49 had neither been studied nor passed into law by Parliament; yet, the Agency engaged in these **private, confidential** discussions with IATA about the content of the regulations that would be made. Notably, the Canadian public and the consumer advocacy community were excluded from these private discussions.

*APR* is struggling to understand why the Agency communicated with IATA in private about the regulations to be made in private in **2017** (or earlier), given that public consultations about the regulations commenced only a year later, in **2018**.

These circumstances, and the Agency's failure to publicly disclose all of its communications with IATA in relation to the regulations, including the communications referenced in Ms. Colville's affidavit, create the impression that the past and current "public consultation" is a sham, a dog and pony show, serving the sole purpose of lending an air of legitimacy to regulations. *APR* can only conclude that the Agency decided to develop the regulations based on its private communications with IATA.

<sup>6</sup> "About us", IATA's official website (retrieved: August 9, 2018).

<sup>7</sup> [Affidavit of Nicola Colville](#), Affirmed June 16, 2017, filed on behalf of IATA in Supreme Court of Canada File No. 37276, at para. 25.

## **B. Member MacKeigan's marriage to IATA's assistant general counsel**

Member J. Mark MacKeigan, a duly appointed quasi-judicial decision-maker of the Agency, is married to the assistant general counsel of the International Air Transportation Association [IATA].<sup>8</sup>

IATA has been recognized by the Agency as a stakeholder in the current regulation-making process, and has made detailed submissions on the subject.<sup>9</sup>

The failure of Member MacKeigan to recuse himself from all involvement in the regulation-making process creates a reasonable apprehension of bias and institutional bias.

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<sup>8</sup> [Leslie Lugo, Mark MacKeigan](#), July 30, 2017, New York Times.

<sup>9</sup> [IATA's submissions to the Agency](#), dated August 28, 2018.

## 1. Tarmac Delay: 3 Hours and 45 Minutes is Inhumane and Unlawful

*APR* is of the view that provisions of the Proposed Regulations that purport to permit airlines to keep passengers confined to an aircraft idling on the tarmac for up to **3 hours and 45 minutes** are inhumane, unreasonable, and unlawful:

**9 (1)** If a flight is delayed on the tarmac **at an airport in Canada** for more than **three hours** after the aircraft doors have been closed for take-off or the flight has landed, the carrier must provide an opportunity for passengers to disembark.

**(2)** A carrier is not required to provide an opportunity for passengers to disembark in accordance with subsection (1) if take-off is likely in less than **45 minutes** and the carrier is able to provide the treatment referred to in section 8 until take-off.<sup>10</sup>

In addition, *APR* is of the view that the limitation of the scope of subsection 9(1) to “an airport in Canada” is inconsistent with Parliament’s direction.

Unfortunately, paragraph [86.11\(1\)\(f\)](#) of the *Act*, passed by the Trudeau Government, limits the Agency’s powers with respect to the making of regulations to tarmac delays of “**over 3 hours**.” Consequently, the aforementioned objective cannot be achieved by regulations alone, and the Agency must also use its broad adjudicative powers under ss. [67.2\(1\)](#) and [86\(1\)\(h\)](#) of the *Canada Transportation Act* and [s. 113](#) of the *Air Transportation Regulations* to fulfill its consumer protection mandate.

*APR* believes that under the fundamentally flawed framework of Bill C-49,<sup>11</sup> the best the Agency can do in terms of regulations relating to tarmac delays over three hours is imposing a complete prohibition. *APR* proposes the following specific provisions:

(1) No person directly or indirectly in control of an aircraft with passengers on board, including but not limited to a carrier or a licensee, shall permit the aircraft to remain on the tarmac for more than three hours.

(2) Within three hours of its door being closed, an aircraft with passengers on board must either take off or return to a position that permits passengers to disembark.

(3) Within three hours of landing at an airport, an aircraft with passengers on board must either take off or taxi to a position that permits passengers to disembark.

*APR* further submits that, based on the constitutional considerations explained below, the Agency may and should replace “three hours” with “90 minutes.”

<sup>10</sup> Proposed Regulations, ss. 9(1) and 9(2) (emphasis added).

<sup>11</sup> “That is doubling the time airlines can stay on the tarmac, and it can cause severe problems for persons with disabilities,” said Mr. Terrance Green, Transportation Committee Co-Chair, Council of Canadians with Disabilities. [Proceedings of the Standing Senate Committee on Transport and Communications, Issue No. 32 - Evidence - March 20, 2018.](#)



## A. Inconsistency with the parent statute

The Agency is enacting the Proposed Regulations, including the requirement to pay compensation in certain limited cases, based on powers delegated to it by Parliament in subparagraph 86.11(1)(f) of the *Act*:

**86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights **to, from and within Canada**, including connecting flights,

⋮

- (f) respecting the carrier’s obligations in the case of tarmac delays over three hours, including the obligation to provide timely information and assistance to passengers, as well as the minimum standards of treatment of passengers that the carrier is required to meet; [...]<sup>12</sup>

Contrary to Parliament’s express language requiring the making of regulations in relation to flights “to, from and within Canada,” subsection 9(1) of the Proposed Regulations applies only to flights that are “at an airport in Canada.” The Agency thus failed to carry out Parliament’s will.

*APR* submits that the Agency must comply with the express language of Parliament, and is required to enact regulations that govern not only flights located “at an airport in Canada,” but all flights to Canada, even if the tarmac delay takes place outside Canada.

## B. Lack of data supporting the “imminent take-off” provision

Subsection 9(2) purports to allow airlines to keep passengers on the tarmac not only for 3 hours, but up to 3 hours and 45 minutes if “take off is likely.”

The “imminent take-off” argument is a logical fallacy. One could equally make the same argument after 3 hours and 45 minutes, or after 4 hours, or 5 hours. Accepting an argument of this nature without actual data about the statistical distribution of the length of tarmac delays would be tantamount to accepting that airlines can keep passengers on the tarmac indefinitely. This clearly was not Parliament’s intent.

On January 17, 2019, the Agency’s representatives acknowledged that there is no evidence or data capable of supporting the assumption that if a flight did not take off for 3 hours, then there is a reasonable chance that it will be able to take off in the 45-minute window after the 3-hour deadline.

*APR* therefore submits that subsection 9(2) should be deleted.

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<sup>12</sup> *Canada Transportation Act*, s. 86.11 (emphasis added).

### C. Conflict with the *Charter*

Canada is a signatory to the *Tokyo Convention*.<sup>13</sup> Pursuant to Chapter III of the *Tokyo Convention*, the “aircraft commander” represents state authority on board the aircraft “from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation.” Much in the same vein, the *Criminal Code* includes pilots in command in the definition of a “peace officer.”

Thus, when the aircraft is stranded on the tarmac with its doors closed and the passengers unable to disembark, the aircraft’s captain (“pilot in command” or “aircraft commander”) represents state authority on board. As such, their actions are subject to provisions of the *Canadian Charter of Rights and Freedoms* [*Charter*]. The *Charter* provides that:

7. Everyone has the right to life, **liberty** and security of the person and **the right not to be deprived thereof** except in accordance with the principles of fundamental justice.
9. Everyone has the right not to be **arbitrarily detained or imprisoned**.<sup>14</sup>

When passengers board an aircraft, they do so voluntarily for the specific purpose of being transported to their destinations, and consent to being kept on the aircraft for the duration of the flight. The passengers’ consent is inherently tied to the purpose for which it was given, and does not encompass being kept on the tarmac for hours.

As the Quebec Court of Appeal confirmed,<sup>15</sup> once a passenger has expressed their desire to leave, that passenger cannot lawfully be confined to the aircraft. The person in control of the aircraft must conduct themselves in such a matter as to allow and facilitate the passenger disembarking if such an action is possible at all.

When an aircraft is stranded on the tarmac, the passengers are kept on board for a purpose different than the one for which their consent was given. As such, they are entitled to withdraw their consent to being kept on the aircraft, and disembark. Keeping passengers on the aircraft against their will, after they have withdrawn their consent to being kept on the aircraft, is forcible confinement,<sup>16</sup> and is a breach of the passengers’ rights guaranteed by the *Charter*.

APR therefore submits that section 9 of the Proposed Regulations is unlawful and violates the rights guaranteed by the *Charter* in that it purports to permit airlines and pilots in command to keep passengers confined to the aircraft for an extended period of time without their consent.

<sup>13</sup> *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, Tokyo, 14 September 1963, Can. T.S. 1970/5.

<sup>14</sup> *The Constitution Act, 1982*, ss. 7 and 9 (emphasis added).

<sup>15</sup> *R. c. Tremblay*, 1997 CanLII 10526 (QC CA).

<sup>16</sup> *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont. C.A.); leave to appeal ref’d: [1985] 1 S.C.R.

*APR* is of the view that the 90-minute limit on tarmac delays that has been the Canadian standard since 2008 strikes the balance between the right of passengers to withdraw their consent to being kept on the aircraft and the operational realities of an aircraft requiring to taxi from the gate to the de-icing pad and then to the runway.

### **Recommended Amendments**

1. Delete the words “at an airport in Canada” from subsection 9(1) of the Proposed Regulations.
2. Delete subsection 9(2) of the Proposed Regulations.
3. Replace section 9 of the Proposed Regulations with:
  - (1) No person directly or indirectly in control of an aircraft with passengers on board, including but not limited to a carrier or a licensee, shall permit the aircraft to remain on the tarmac for more than 90 minutes.
  - (2) Within 90 minutes of its door being closed, an aircraft with passengers on board must either take off or return to a position that permits passengers to disembark.
  - (3) Within 90 minutes of landing at an airport, an aircraft with passengers on board must either take off or taxi to a position that permits passengers to disembark.
  - (4) A carrier that allows passengers to disembark must, if feasible, give passengers with disabilities and their support person, service animal or emotional support animal, if any, the opportunity to disembark first.
  - (5) This section does not apply if the person invoking this subsection proves that providing an opportunity for passengers to disembark is not possible for reasons that are beyond the carrier’s control, including reasons related to safety and security or to air traffic or customs control.

## 2. Definition of “Denied Boarding”: Deprives Passengers of Compensation

*APR* is concerned that the proposed regulations define “denied boarding” so narrowly that it deprives passengers from being entitled to compensation in many if not most cases:

**1(3)** For the purpose of these Regulations, there is a denial of boarding when a passenger is not permitted to board an aircraft **because** the number of passengers who

- (1) **checked in** by the required time,
- (2) hold a confirmed reservation and valid travel documentation and
- (3) are **present at the boarding gate** in time for boarding

is greater than the number of seats available on the flight.<sup>17</sup>

This definition imposes a burden of proof on passengers that cannot be met, depriving them from compensation in cases where the Agency had previously recognized that compensation was owing. It also unlawfully displaces Parliament’s intended broad meaning of “denied boarding” with the narrow meaning of “denial of boarding as a result of overbooking” in the existing *Air Transportation Regulations*.

### A. Imposition of a burden of proof that cannot be met

The Proposed Regulations require a passenger who seeks denied boarding compensation to prove three facts that are within the airline’s exclusive knowledge:

- (a) the number of passengers who checked in by the required time, held a confirmed reservation and valid travel documents, and were present at the boarding gate in time for boarding;
- (b) the number of seats available on the flight (which depends on the model and configuration of the aircraft); and
- (c) the **reason** that they were denied boarding is **because** the number identified in (a) is greater than the number identified in (b), and no other reason.

Given that passengers have no access to the airlines’ reservation and departure control systems, the Proposed Regulations create conditions for payment of denied boarding compensation that passengers are unable to verify, and in practice cannot prove. “The imposition of a test that can never be met could not be what Parliament intended” when it conferred upon the Agency the powers to make regulations governing denied boarding compensation.<sup>18</sup>

<sup>17</sup> Proposed Regulations, s. 1(3) (emphasis, formatting, and numbering added).

<sup>18</sup> *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para 17.

## B. Comparison with the outcome-based definition in *Regulation (EC) 261/2004*

In sharp contrast, *Regulation (EC) 261/2004* defines denied boarding based on facts that are within the passenger's 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 European regulations, a passenger who is refused transportation has to prove only that they held a “confirmed reservation” and that they “presented themselves for check-in” on time. Both of these are within the knowledge of a passenger and can reasonably be proven.

## C. A step backward compared to the existing jurisprudence

In *Nawrots v. Suwning*, the Agency held that passengers who present themselves for check-in on time but are unable to travel due to the airline's failure to adequately staff its check-in counters are entitled to denied boarding compensation:

[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>19</sup>

Under the narrow definition in the Proposed Regulations, such situations will no longer be recognized as “denied boarding,” because the number of passengers who “are present at the boarding gate in time for boarding” is not greater than the number of seats available on the flight. Passengers caught in such situations will not be eligible for denied boarding compensation, and will be left without any remedy.

In *Janmohamed v. Air Transat*, the Agency coined the notion of *de facto* or constructive denied boarding, and confirmed passengers’ entitlement to compensation in such situations:

[19] The Agency agrees with the applicants that the affected passengers had previously confirmed space on a flight, and then were subsequently denied seats on that flight because of a lack of available seats on the aircraft. According to Air Transat, Flight No. TS246 departed with only one empty seat, and Flight No. TS247 departed with no empty seats. The fact that Air Transat notified the passengers in advance about having moved them to other flights does not relieve Air Transat of the obligation to pay denied boarding compensation. The fact is that there were insufficient seats to accommodate the applicants, despite the fact that they had previously confirmed seats, and that they were involuntarily moved to another flight. **This is a case of *de facto* or constructive denied boarding.**

[20] The Agency appreciates that this situation may be unique, and not a typical case of denied boarding that normally occurs at the gate. However, effectively, the applicants were involuntarily denied boarding on their original flight because Air Transat elected, unilaterally, to give preference to other passengers who had been moved to their flight with the effect that the flight became oversold, resulting in prejudice to the applicants. **Rather than wait for the applicants to arrive at the airport and deny them boarding at that time, they were instead moved, without their consent, to another flight in advance.** The effect is the same. The applicants were not permitted to board their original flight because there was no longer room for them. It was oversold and they were “bumped”.<sup>20</sup>

Under the narrow definition in the Proposed Regulations, *de facto* or constructive denied boarding will no longer be recognized as “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. Consequently, passengers who are *de facto* or constructively denied boarding will not be eligible for denied boarding compensation, and will be left without remedy.

To summarize, the narrow definition of “denied boarding” in the Proposed Regulations will deprive passengers from receiving denied boarding compensation in cases where such compensation would be owed under existing jurisprudence developed by the Agency.

<sup>19</sup> *Nawrots v. Sunwing*, Decision 432-C-A-2013, paras. 84-85 (emphasis added).

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



## D. Invalidity due to inconsistency with the parent statute

Subparagraph 86.11(1)(b)(i) of the *Canada Transportation Act* [Act] requires the Agency to make regulations governing compensation for “denial of boarding”:

**86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

⋮

- (b) respecting the **carrier’s obligations** in the case of flight delay, flight cancellation or denial of boarding, including
  - (i) the minimum standards of treatment of passengers that the carrier is required to meet and the **minimum compensation** the carrier is required to pay for inconvenience when the delay, cancellation or **denial of boarding** is within the carrier’s control,<sup>21</sup>

The legislature is presumed to have knowledge of laws existing at the time of enactment of new legislation. In particular, Parliament is presumed to have been aware of provisions of the *Air Transportation Regulations* [ATR] that require domestic and international carriers to set out in their tariffs:

- (iii) compensation for **denial of boarding as a result of overbooking**,<sup>22</sup>

Thus, Parliament was aware that the term “denial of boarding as a result of overbooking” already existed on the law books, yet it chose not to use such a restrictive, caused-based language, but rather chose to expand the protection offered to air travellers by directing the Agency to make regulations with respect to compensation for “denial of boarding.”

Consequently, the intended meaning of “denial of boarding” in subparagraph 86.11(1)(b)(i) of the Act is different and broader than the meaning of “denial of boarding as a result of overbooking” in the ATR. To put it differently, Parliament’s intent was that the Agency develop regulations governing compensation for all forms of denied boarding, not just for those that are “as a result of overbooking” as the Proposed Regulations do.

The Proposed Regulations are therefore inconsistent with the Act and defeat its purpose by taking away or restricting rights that Parliament intended to confer on the travelling public.

It is trite law that a regulation is invalid and cannot stand if it is inconsistent with its parent statute.<sup>23</sup> Hence, subsection 1(3) of the Proposed Regulations is invalid.

<sup>21</sup> *Canada Transportation Act*, s. 86.11 (emphasis added).

<sup>22</sup> *Air Transportation Regulations*, ss. 107(1)(n)(iii) and 122(c)(iii) (emphasis added).

<sup>23</sup> *Booth v. R.*, 1915 CanLII 596 (SCC), [1915] 21 D.L.R. 558 (S.C.C.); *The Grand Truck Pacific Railway Co. v. The City of Fort William*, 1910 CanLII 51 (SCC), 43 S.C.R. 412; and *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53 at para. 49.

## Recommended Amendments

4. Replace subsection 1(3) of the Proposed Regulations with:

**1(3)** For the purpose of these Regulations, “denied boarding” means a refusal to carry passengers on a flight, if

- (1) the passenger held a confirmed reservation on the flight concerned, and
- (2) the passenger presented themselves for check-in as stipulated and at the time indicated in advance in writing (including by electronic means) by the carrier, or if no time indicated, no later than 45 minutes before the published departure time,

except if the carrier proves that there were reasonable grounds to refuse to carry the passenger, such as reasons of health, safety or security, or inadequate travel documentation.

### 3. Burden of Proof that Passengers Cannot Meet

The Proposed Regulations improperly establish lack of compensation as the norm, and payment of compensation as the exception to the norm:

**12 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that is

- (i) within the carrier's control **and**
- (ii) that is not referred to in subsection 11(1).<sup>24</sup>

Subsection 11(1), referenced in 12(1), states that:

**11 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that is within the carrier's control **but is required for safety purposes**.<sup>25</sup>

The Agency's longstanding position has been that passengers bear the burden of proving facts necessary to establish that the airline failed to comply with its obligations:

When a complaint such as this one is filed with the Agency, **the complainant must, on a balance of probabilities, establish** that the air carrier has failed to apply, or has inconsistently applied, terms and conditions of carriage appearing in the applicable tariff.<sup>26</sup>

This means that passengers seeking to enforce their rights to compensation under section 12 will need to prove, on balance of probabilities, that:

- (i) the delay, cancellation or denial of boarding was indeed within the carrier's control; and
- (ii) **was not** required for safety purposes.

Determining whether an event was "within the carrier's control" requires access to information and data within the carrier's exclusive knowledge and control: crew assignment databases, operations centre databases, and aircraft maintenance log books at the bare minimum.

Given that passengers have no access to any of these, the Proposed Regulations create conditions for payment of compensation that passengers are unable to verify, and in practice cannot prove. "The imposition of a test that can never be met could not be what Parliament intended" when it conferred upon the Agency the powers to make regulations governing compensation for flight delay, cancellation, and denial of boarding.<sup>27</sup>

<sup>24</sup> Proposed Regulations, s. 12(1) (emphasis and roman numbering added).

<sup>25</sup> Proposed Regulations, s. 11(1) (emphasis added).

<sup>26</sup> *Nawrots v. Sunwing*, Decision 432-C-A-2013, para. 38 (emphasis added).

<sup>27</sup> *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para 17.

## A. Inconsistency with the *Montreal Convention* and the *Carriage by Air Act*

The Proposed Regulations are also inconsistent with the principles of the *Carriage by Air Act*, which create a presumption of liability and payment of compensation as the norm. The carrier can exonerate itself from liability and paying compensation only if it establishes an affirmative defence:

### Article 19 - Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay **if it proves** that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.<sup>28</sup>

The principle that the burden of proof to establish extenuating circumstances is on the carrier and not the passenger is the law not only in Canada,<sup>29</sup> but also in the more than 130 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries. Drafters of the *Montreal Convention* recognized that it is the carrier that is in the best position to present evidence on the circumstances of a delay or cancellation and any facts that may relieve it from liability.

APR submits that the Proposed Regulations should incorporate the same principle: it is the carrier, and not the passenger, that must establish that an event was outside the carrier's control and/or was required for safety purposes.

## B. Comparison with *Regulation (EC) 261/2004*

*Regulation (EC) 261/2004* of the European Union is based on the same principle, established by the *Montreal Convention*, that payment of compensation is the norm, while the airline has to establish exceptional circumstances to exonerate itself from the obligation to compensate passengers:

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, **if it can prove** that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

4. **The burden of proof** concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight **shall rest with the operating air carrier**.<sup>30</sup>

<sup>28</sup> *Carriage by Air Act*, Schedule VI (“*Montreal Convention*”), Article 19 (emphasis added).

<sup>29</sup> *Carriage by Air Act*, s. 2(2.1).

<sup>30</sup> *Regulation (EC) 261/2004*, Articles 5(3) and 5(4).

**C. The definitions of “mechanical malfunction” and “required for safety purposes” are vague**

The Proposed Regulations provide that:

**1 (1)** The following definitions apply in Part II of the Act.

**mechanical malfunction** means a mechanical problem that reduces the safety of passengers but does not include a problem that is identified further to scheduled maintenance undertaken in compliance with legal requirements. (défaillance mécanique)

**required for safety purposes** means legally required in order to reduce risk to passengers but does not include scheduled maintenance in compliance with legal requirements. (nécessaire par souci de sécurité)<sup>31</sup>

*APR* submits that these definitions fail to be clear, and overlooks [ss. 605.07-605.10](#) of the *Canadian Aviation Regulations* [*CAR*], governing Minimum Equipment List [*MEL*], and the [Master Minimum Equipment List / Minimum Equipment List Policy and Procedures Manual](#) established by Transport Canada.

It is a common misconception to believe that the inoperability of any component makes an aircraft inoperable. In fact, many aircraft carry passengers with numerous components inoperable. It is the *MEL* that specifies the conditions under which an aircraft can be operated with a particular component inoperable, and the maximum number of days in which the defect must be repaired.

Consequently, while the repair of an inoperable component may “reduce risk to passengers” (as arguably having all components operative is the safest state of an aircraft), such repairs are often not immediately required by law, and can be deferred in accordance with the applicable *MEL* and the *CAR*.

*APR* is concerned that the vague definition of “required for safety purposes” can and will be abused by carriers as a smokescreen by choosing to perform a repair that could be deferred as per *MEL* at times when a flight would have to be delayed or cancelled due to circumstances within the carrier’s control, such as a missing crew member. The carrier will argue that the delay or cancellation was “required for safety purposes,” and will conveniently omit to mention the missing crew member or other relevant circumstances.

*APR* submits that carriers should be encouraged to perform all repairs promptly, and should not be permitted to rely on deferring repairs under *MEL* as a way to avoid paying compensation. *APR* recommends amending the definition of “required for safety purposes” to incorporate the aforementioned information about *MEL*.

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<sup>31</sup> Proposed Regulations, s. 1(1) (emphasis is in the original).

## Recommended Amendment

5. Replace subsection 1(1) with:

**1 (1)** The following definitions apply in Part II of the Act.

**mechanical malfunction** means a mechanical problem that reduces the safety of passengers but does not include:

- (i) a problem that is identified further to scheduled maintenance undertaken in compliance with legal requirements; or
- (ii) a problem that has previously been identified and whose repair has been deferred pursuant to sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(défaillance mécanique)

**required for safety purposes** means legally required in order to reduce risk to passengers but does not include:

- (i) scheduled maintenance in compliance with legal requirements; or
- (ii) repair of a problem that has previously been identified and whose repair has been deferred in accordance with sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(nécessaire par souci de sécurité)

6. Replace subsection 10(1) with:

**10 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier proves to be exclusively due to situations outside the carrier's control, including

7. Replace subsection 11(1) with:

**11 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier fails to prove to be outside the carrier's control, but proves that it is required solely for safety purposes.

8. Replace subsection 12(1) with:

**12 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding unless the carrier proves circumstances referred to in subsection 10(1) or 11(1).



#### 4. 120-Day Limitation Period for Making Claims: Unlawful and Unreasonable

*APR* is concerned that the Proposed Regulations condition the payment of compensation on passengers making a complaint, and unlawfully impose a 120-day statutory limitation period for making a claim:

**19 (3)** To receive the compensation referred to in paragraph (1) or (2), **a passenger must file a request for compensation** with the carrier **within 120 days** after the day on which the flight delay or flight cancellation occurred.<sup>32</sup>

It is submitted that this provision is *ultra vires* of the Agency's regulation-making powers, unconstitutional, and unreasonable.

##### A. Parliament did not confer on the Agency the power to enact limitations

By virtue of the rule of law principle, all exercises of public authority must find their source in law.<sup>33</sup> The Agency, created by its enabling legislation, the *Canada Transportation Act* [*Act*], must exercise only those powers that were assigned to it by Parliament and in the manner intended by Parliament. The Agency is enacting the Proposed Regulations, including the requirement to pay compensation in certain limited cases, based on powers delegated to it by Parliament in subparagraph 86.11(1)(b)(i) of the *Act*:

**86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

⋮

- (b) respecting the **carrier's obligations** in the case of flight delay, flight cancellation or denial of boarding, including
  - (i) the minimum standards of treatment of passengers that the carrier is required to meet and the **minimum compensation the carrier is required to pay for inconvenience** when the delay, cancellation or denial of boarding is within the carrier's control,<sup>34</sup>

The words of the *Act* clearly and unambiguously reflect the legislature's intent that the regulations deal with the "carrier's obligations." The *Act* contains no similar language to authorize the Agency to enact regulations regarding the passengers' obligations. The *Act* confers no power on the Agency to make regulations whose effect is to impose limitations on passenger claims for compensation owed to passengers. Thus, it is submitted that subsection 19(3) of the Proposed Regulations is *ultra vires* of the Agency.

<sup>32</sup> Proposed Regulations, s. 19(3) (emphasis added).

<sup>33</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28.

<sup>34</sup> *Canada Transportation Act*, s. 86.11 (emphasis added).

## B. Enacting statutory limitations is within the exclusive provincial legislative competence

Action for damages for personal injury fall within the exclusive provincial legislative competence in relation to property and civil rights.<sup>35</sup> On the other hand, aeronautics is within the exclusive jurisdiction of the federal Parliament,<sup>36</sup> which allows Parliament to enact laws and delegate legislative powers to the Agency to regulate airlines and impose on airlines obligations as a condition for being permitted to operate within, to, and from Canada.

The “pith and substance” of subsection 19(3) of the Proposed Regulations cannot be legitimately said to relate to aeronautics. The leading feature of this provision is prescription and limitation on claims, and not aeronautics. Its effect relates to tort law (or contract law), which falls squarely within the provincial legislative competence.

Subsection 19(3) severely encroaches on provincial jurisdiction by preventing passengers from making a claim after 120 days, while provincial limitation statutes provide for a longer period. A limitation provision is not “truly necessary” or “essential” to the scheme of the Proposed Regulations,<sup>37</sup> and is severable from the rest of the Proposed Regulations.

It is therefore submitted that it would be unconstitutional for the Agency to enact regulations with respect to prescription and limitation periods such as subsection 19(3) of the Proposed Regulations.

Parliament recognized that, in the absence of an explicit provision in a statute, provincial limitation statutes must be applied in relation to claims arising within a provincial territory, even if the subject matter falls within federal jurisdiction.

**39 (1)** Except as expressly provided by any other Act, **the laws relating to prescription and the limitation of actions in force in a province** between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within **six years** after the cause of action arose.<sup>38</sup>

It is submitted that the same principles should apply to claims that may arise under the Proposed Regulations: Since Parliament did not enact any legislation to expressly provide prescription and limitation periods for claims under the Proposed Regulations, the provincial limitation statutes should apply to actions arising in a province, and the six-year period should apply to claims arising otherwise than in a province.

<sup>35</sup> *The Constitution Act*, 1867, 30 & 31 Vict, c. 3, ss. 92(13) and 92(14).

<sup>36</sup> *Re: Aeronautics*, [1932] A.C. 54.

<sup>37</sup> *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.

<sup>38</sup> *Federal Courts Act*, s. 39 (emphasis added).

### C. Proposed subsection 19(3) is unreasonable

Prescription and limitation provisions deprive claimants from enforcing their rights after the passage of a certain amount of time, while they protect defendants from the risk of having to defend against claims arising from decades-old incidents, where the evidence may no longer be available. As such, establishing limitation periods requires the balancing of competing interests.

It is submitted that proposed section 19(3) serves only the airlines' private interests while ignoring the interests of the travelling public, and is inconsistent with international norms; as such, it is unreasonable.

**First**, 120 days is a small fraction (16.438%) of the two-year limitation period set by the *Carriage by Air Act*:

#### Article 35 - Limitation of actions

1. The right to damages shall be extinguished if an action is not brought within a period of **two years**, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.<sup>39</sup>

The two-year limitation period is the law not only in Canada,<sup>40</sup> but also in the more than 130 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries.

**Second**, imposing a special and substantially shorter limitation period on claims arising under the Proposed Regulations would put Canada significantly behind the European Union, where limitation of claims under *Regulation (EC) 261/2004* is governed by state law,<sup>41</sup> and ranges from 2 years in many civil law states to 6 years in the UK.

**Third**, given that airlines may be sued for delay in the transportation of passengers for up to two years under the *Montreal Convention*, airlines are anyway required to retain evidence for at least two years. Thus, proposed subsection 19(3) deprives passengers of compensation without conferring any benefit on the airlines in terms of abbreviating the retention period for evidence.

### Recommended Amendments

9. Replace subsection 19(3) of the Proposed Regulations with a provision mirroring s. 39 of the *Federal Courts Act*: (1) provincial limitation statutes apply to claims arising in a province; and (2) a six-year period applies to claims arising otherwise than in a province.

<sup>39</sup> *Carriage by Air Act*, Schedule VI (“*Montreal Convention*”), [Article 35](#).

<sup>40</sup> *Carriage by Air Act*, s. 2(2.1).

<sup>41</sup> *Moré v. KLM*, European Court of Justice, Case C-139/11.

## 5. Shortchanging Passengers Booked on “Small” Carriers: Unlawful and Unfair

The Proposed Regulations provide substantially fewer rights and a fraction of the compensation amounts to passengers travelling on “small” carriers:

### large carrier means

- (a) a carrier that transported one million passengers or more during each of the two preceding calendar years; or
- (b) a carrier that is, under a commercial agreement with a carrier referred to in paragraph (a), operating a flight or carrying passengers on behalf of that carrier. (gros transporteur)

**small carrier** means any carrier that is not a large carrier. (petit transporteur)<sup>42</sup>

It follows from the definition that airlines operating “large aircraft” within the meaning of the *Air Transportation Regulations*, such as Flair or Swoop (wholly owned by WestJet), would nevertheless be considered “small” for a number of years.

Passengers travelling on “small” carriers are adversely affected and shortchanged compared to the rest of the travelling public in two respects:

- (a) “small” carriers will be required to pay only a small fraction of the compensation normally owed for flight delays and cancellations;<sup>43</sup> and
- (b) unlike “large carriers,” the “small” carriers will not be required to rebook passengers on flights of competitor airlines.<sup>44</sup>

APR submits that these provisions of the Proposed Regulations are unlawful, unfair to passengers, and unreasonable.

### A. Invalidity due to inconsistency with the parent statute

By virtue of the rule of law principle, all exercises of public authority must find their source in law.<sup>45</sup> The Agency, created by its enabling legislation, the *Canada Transportation Act* [Act], must exercise only those powers that were assigned to it by Parliament and in the manner intended by Parliament. The Agency

<sup>42</sup> Proposed Regulations, s. 1(2) (emphasis is in the original).

<sup>43</sup> Proposed Regulations, s. 19.

<sup>44</sup> Proposed Regulations, ss. 17(1) and 18

<sup>45</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28.

is enacting the Proposed Regulations, including the requirement to pay compensation in certain limited cases, based on powers delegated to it by Parliament in paragraph 86.11(1)(b) of the *Act*:

**86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

⋮

- (b) respecting the **carrier’s obligations** in the case of flight delay, flight cancellation or denial of boarding, including
  - (i) the minimum standards of treatment of passengers that the carrier is required to meet and the minimum **compensation the carrier is required to pay for inconvenience** when the delay, cancellation or denial of boarding is within the carrier’s control,
  - (ii) the minimum standards of treatment of passengers that the carrier is required to meet when the delay, cancellation or denial of boarding is within the carrier’s control, but is required for safety purposes, including in situations of mechanical malfunctions,
  - (iii) the carrier’s obligation to ensure that passengers complete their itinerary when the delay, cancellation or denial of boarding is due to situations outside the carrier’s control, such as natural phenomena and security events,<sup>46</sup>

The legislative objective expressed in subparagraph 86.11(1)(b)(i) of the *Act* is to require carriers to compensate passengers “for inconvenience” caused by flight delay, cancellation, or denial of boarding. There is no causal link between the inconvenience suffered by passengers and the type of carrier they were booked on. A passenger booked on Air Canada suffers the same inconvenience as a passenger booked on Flair or Swoop if they are delayed for 9 hours.

Parliament did not authorize the Agency to distinguish between passengers, and discriminate against those who travel on so-called “small” carriers. Paragraph 86.11 of the *Act* was enacted to create a uniform regime, as the Minister of Transport acknowledged:

I believe that when passengers purchase an airline ticket, they expect and deserve the airline to fulfill its part of the transaction. When that agreement is not fulfilled, passengers deserve clear, transparent, and enforceable standards of treatment and compensation. Under this proposed legislation, Canadians would benefit from a **uniform**, predictable, and reasonable approach.<sup>47</sup>

The distinction between so-called “small” and “large” carriers is introduced in the Proposed Regulations without any statutory mandate to do so, and it violates the stated policy objective of uniformity.

<sup>46</sup> *Canada Transportation Act*, s. 86.11 (emphasis added).

<sup>47</sup> *Hansard*, Volume 148, Number 187, 1st Session, 42nd Parliament (June 5, 2017), p. 12071.

While Parliament provided three categories of events that provide passengers with a different set of rights, Parliament chose not to distinguish between passengers based on the size of the carrier or the number of passengers transported by the carrier on which the passengers are travelling. Thus, the distinction between “small” and “large” carriers introduced in the Proposed Regulations is inconsistent with the objective of its parent statute to create a uniform regime.

It is trite law that a regulation is invalid and cannot stand if it is inconsistent with its parent statute.<sup>48</sup> Hence, the distinction between “small” and “large” carriers in the Proposed Regulations is invalid.

## **B. The definition of a “small” carrier is unreasonable**

Even if one were to accept that Parliament authorized making a distinction between “small” and “large” carriers, it is submitted that the current definition is unreasonable and detached from the reality of airline operations in Canada.

The Proposed Regulations would classify, for example, not only Flair but also Swoop as a “small” carrier even though it is fully owned by WestJet, which is clearly a “large” carrier, and operates the same type and size of aircraft as WestJet does. In so doing, the Proposed Regulations create an uneven playing field and provide a competitive advantage for certain airlines over others. *APR* submits that this could not have been Parliament’s intent, and it is clearly unfair to passengers who pay approximately the same airfare, but would be deprived of the same compensation for the sole reason that their carrier is classified as “small.”

At the same time, it might not be unreasonable to relieve carriers operating only small aircraft from some of the financial burden imposed by the Proposed Regulations. For example, it might not be desirable to hold bush pilots operating a small aircraft with 4 or 8 seats to the same standard as commercial airlines.

It is therefore submitted that the definition of a “small” carrier should be adjusted to be consistent with the economic reality and terminology developed in the *Air Transportation Regulations*.

## **Recommended Amendments**

10. Delete subsections 1(2), 17(1)(b), 18(b), 19(1)(b), and 19(5) and delete the words “in the case of a large carrier” in subsections 17(1)(a), 18(a), and 19(1)(a) of the Proposed Regulations.
11. Alternatively, replace “one million” with “one hundred thousand” in subsection 1(2)(a) of the Proposed Regulations, and append immediately after subsection 1(2)(b):
  - (c) operates at least one aircraft having a certificated maximum carrying capacity of more than 39 passengers.

<sup>48</sup> *Booth v. R.*, 1915 CanLII 596 (SCC), [1915] 21 D.L.R. 558 (S.C.C.); *The Grand Trunk Pacific Railway Co. v. The City of Fort William*, 1910 CanLII 51 (SCC), 43 S.C.R. 412; and *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53 at para. 49.

## 6. Limiting the Right to Rebooking on Another Carrier to Delays Longer than 9 Hours

In 2012, the Agency issued five decisions requiring Air Canada, Air Transat, and WestJet to rebook passengers on flights of other airlines in the event of a flight disruption within the carrier's control.<sup>49</sup> In these five proceedings, the Agency concluded, based on the provisions and principles of the *Montreal Convention*, that carriers have a concomitant obligation to take all reasonable measures to prevent delay to passengers. Such reasonable measures include rebooking passengers on flights of other airlines with whom the carrier has no interline agreement. The five decisions from 2012 did not limit the right of passengers to be rebooked on another carrier to delays of a specific length.

Paragraph 17(1)(a) of the Proposed Regulations require carriers to rebook passengers on flights of another carrier with whom it has no commercial agreement if it is unable to rebook the passenger on its own network on a flight that departs within nine hours of the departure time on the original ticket:

**17 (1)** If paragraph 11(2)(c), (3)(c) or (4)(c) or 12(2)(c), (3)(c) or (4)(c) applies in respect of a carrier, it must provide the following free of charge to ensure that passengers complete their itinerary as soon as possible:

- (a) in the case of a large carrier
  - (i) a confirmed reservation on the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, and that is on any route to the destination on the passenger's original ticket and **departs within nine hours** of the departure time on the original ticket, or
  - (ii) a confirmed reservation on a flight operated by any carrier on any route to the destination on the passenger's original ticket **if the carrier cannot provide a confirmed reservation that complies with** paragraph (a);

While *APR* welcomes the codification in regulations of the existing obligations that were established in 2012, *APR* is concerned by the restrictive language introduced in subparagraph 17(1)(a)(i).

**First**, the relevant time for the purpose of rerouting passengers should be the scheduled **arrival time** of the alternative transportation being offered, and not the scheduled departure time as subparagraph 17(1)(a)(i) currently reads. This distinction has a significant impact on passengers with connecting flights, for example, from Montreal to Frankfurt via Toronto. *APR* believes that the intent of the Proposed Regulations is to mitigate the passenger's delay on arrival at Frankfurt, and not simply to encourage the airline to put the passenger on a flight from Montreal to Toronto while stranding the passenger in Toronto for 24 hours.

<sup>49</sup> *Lukács v. Air Canada*, Decision No. 250-C-A-2012; *Lukács v. Air Canada*, Decision No. 251-C-A-2012; *Lukács v. Air Transat*, Decision No. 248-C-A-2012; *Lukács v. WestJet*, Decision No. 249-C-A-2012; and *Lukács v. WestJet*, Decision No. 252-C-A-2012.

*APR* thus submits that the word “departs” should be replaced with “arrives” or “scheduled to arrive” in subparagraph 17(1)(a)(i) of the Proposed Regulations.

**Second**, on January 17, 2019, the Agency’s representatives acknowledged that there is no evidence or data capable of supporting the choice of **nine hours** as the timeframe to rebook on the carrier’s own network, nor were they able to explain the rationale for choosing this figure.

**Third**, *APR* is of the view that allowing carriers to rebook passengers on their own network instead of another carrier as long as the new flight departs within **nine hours** is unreasonably long, to the point that it would defeat the purpose of the travel for many passengers. In practical terms, this would mean that a passenger booked on an 8 am flight could be rebooked on a 5 pm flight, or a passenger booked on a 9 pm flight could be rebooked on a 6 am flight the next day.

*APR* submits that the requirement to rebook passengers on flights of other carriers should be imposed if the carrier is unable to reroute the passenger on a flight that arrives at the final destination within **four hours** of the original arrival time. This figure represents one half of a normal 8-hour working day, and ensures that passengers can still substantially benefit from the purpose of their travel.

### **Recommended Amendments**

12. Replace the phrase “departs within nine hours” with “scheduled to arrive at the passenger’s destination within four hours” in subparagraph 17(1)(a)(i) of the Proposed Regulations.
13. Replace “paragraph (a)” with “subparagraph (i)” in subparagraph 17(1)(a)(ii) of the Proposed Regulations.



## 7. No Meals or Hotel for Passengers Notified at Least 12 Hours in Advance

Section 14 of the Proposed Regulations creates the impression that carriers are required to provide meals and overnight accommodation for passengers affected by flight delay or cancellation that are within the carrier's control.

This is, however, not the case. Subsection 14(1) of the Proposed Regulations starts with the phrase:

If **paragraph 11(2)(b) or (3)(b) or 12(2)(b) or (3)(b)** applies in respect of a carrier [...]<sup>50</sup>

Each one of paragraphs 11(2)(b), 11(3)(b), 12(2)(b), and 12(3)(b) reads as follows:

if a passenger is **informed** of the [...] **less than 12 hours before the departure time** on their original ticket, provide the treatment set out in section 14;<sup>51</sup>

It follows that passengers who are informed about the delay or cancellation at least 12 hours in advance are **not** entitled to hotel or accommodation under the Proposed Regulations.

*APR* submits that these provisions are inconsistent with the text of the Regulatory Impact Analysis Statement, inconsistent with the principles of the *Montreal Convention*, and are unreasonable.

### A. Inconsistency with the Regulatory Impact Analysis Statement

The regulatory impact analysis states that:

The proposal establishes minimum standards of treatment for all flight delays and cancellations that are either **(1) within the carrier's control**, or **(2) within the carrier's control but required for safety purposes**, where the passenger has been informed of the delay fewer than 12 hours before departure time.<sup>52</sup>

Based on the regulatory impact analysis statement, there was no intent to impose the 12-hour advance notice limitation in the case of delays and cancellations that are within the carrier's control and are not required for safety purposes. The intent was to impose this limitation only with respect to delays and cancellations that are required for safety purposes.

Thus, the texts of paragraphs 12(2)(b) and 12(3)(b) were intended to be different than paragraphs 11(2)(b) and 11(3)(b), but in the Proposed Regulations they are identical due to a copy-paste error.

<sup>50</sup> Proposed Regulations, s. 14(1) (emphasis added).

<sup>51</sup> Proposed Regulations, ss. 11(2)(b), 11(3)(b), 12(2)(b), and 12(3)(b) (emphasis added).

<sup>52</sup> Proposed Regulations, Regulatory Impact Analysis Statement (emphasis added).

## B. Inconsistency with the *Montreal Convention* and the *Carriage by Air Act*

The *Carriage by Air Act* imposes a strict liability on carriers for damages incurred by passengers due to delay in transportation by air:

### Article 19 - Delay

**The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.**<sup>53</sup>

This is the law not only in Canada,<sup>54</sup> but also in the more than 130 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries.

The Canadian Transportation Agency's longstanding and considered view has been that terms and conditions applicable to travel within Canada must conform to the principles of the *Montreal Convention*.<sup>55</sup> *APR* agrees with this view, and believes that provisions of the regulations applicable to travel where the *Montreal Convention* does not apply, such as travel entirely within Canada, should nevertheless be consistent with the legal principles of the *Montreal Convention* to achieve uniformity and clarity.

Sections 11 and 12 prescribe the rights of passengers in the case of delays and cancellations causing delay in transportation by air that are "within the carrier's control," and as such, clearly trigger liability under Article 19 of the *Montreal Convention*.

Yet, the effect of the 12-hour notice restriction in paragraphs 11(2)(b), 11(3)(b), 12(2)(b), and 12(2)(c) of the Proposed Regulations is that the carrier is not required to provide meals and accommodation if it provides sufficient advance notice in situations where the carrier is clearly liable for the passengers' expenses under Article 19 of the *Montreal Convention*.

To put it differently, these provisions of the Proposed Regulations are inconsistent with the principles of the *Montreal Convention*.

*APR* submits that the Agency should not incorporate terms and conditions in the Proposed Regulations that would have been found to be unreasonable by the Agency due to their inconsistency with the principles of the *Montreal Convention*. In particular, the "12-hour advance notice" limitation should be removed from paragraphs 11(2)(b), 11(3)(b), 12(2)(b), and 12(3)(b) of the Proposed Regulations.

<sup>53</sup> *Carriage by Air Act*, Schedule VI ("*Montreal Convention*"), Article 19 (emphasis added).

<sup>54</sup> *Carriage by Air Act*, s. 2(2.1).

<sup>55</sup> See, for example: [Decision No. 181-C-A-2007](#) at para. 36; [Decision No. 483-C-A-2010](#) at para. 32 (leave to appeal to FCA denied: 10-A-42); [Decision No. 251-C-A-2012](#) at para. 19; and [Decision No. 344-C-A-2013](#) at para. 23.

### C. Adverse impact on passengers

The purpose of section 14 of the Proposed Regulations is to offer basic protection (food and shelter) for passengers who find themselves stranded far away from their homes, possibly in a foreign country, for reasons that are within the carrier's control (whether or not due to "safety reasons"). To put it simple, passengers in such situations should not have to go hungry or be forced to sleep at the airport or on the street.

A mere 12-hour notice before the scheduled flight does not afford passengers a reasonable opportunity to book accommodation at an affordable rate; instead, it will force passengers to incur significant expenses for hotels at last-minute rates—if they can at all afford it. Not every passenger can.

Therefore, it is submitted that **all** passengers affected by a flight delay or cancellation within the carrier's control should be provided with meals and overnight accommodation as needed, regardless of whether they were given an advance notice.

### Recommended Amendments

14. Correct paragraphs 12(2)(b) and 12(3)(b) of the Proposed Regulations to match the intent stated in the Regulatory Impact Analysis Statement, to read:

~~if a passenger is informed of the [...] less than 12 hours before the departure time on their original ticket,~~ provide the treatment set out in section 14.
15. Replace paragraphs 11(2)(b) and 11(3)(b) of the Proposed Regulations with:

provide the treatment set out in section 14.

## 8. Form of Payment: A Step Backward

Subsection 21(1) of the Proposed Regulations governs the form of payment:

**21 (1)** If a carrier is required by these Regulations to provide compensation for inconvenience to a passenger, the carrier must offer the amount required in monetary form. However, the compensation may be made in another form if

- (a) compensation in the other form has a greater monetary value than the minimum monetary value of the compensation that is required under these Regulations;
- (b) the passenger has been informed in writing of the monetary value of the other form of compensation;
- (c) the compensation does not expire; and
- (d) the passenger confirms in writing that they have been informed of their right to receive monetary compensation and have chosen the other form of compensation.

*APR* is of the view that subsection 21(1) is a step backward compared to the Agency's existing jurisprudence that prescribes a 1:3 ratio for compensation offered by way of travel vouchers (i.e., at least \$3 of travel vouchers must be tendered for every \$1 of cash compensation owed).

In *Lukács v. Air Canada*, the Agency held:

[49] The Agency agrees with Mr. Lukács' submission that passengers must be afforded ample opportunity to determine whether they wish to choose travel vouchers in lieu of a cash payment as denied boarding compensation, and that this choice should only be made after Air Canada fully informs passengers of the conditions attached to those vouchers. **The Agency finds that, in light of the ratio applicable to cash compensation versus values of travel vouchers for international carriage, the ratio of 1:3 proposed by Mr. Lukács is reasonable.**

[50] In light of the foregoing, the Agency finds that the restrictions that Mr. Lukács proposes be imposed on the issuance of vouchers are reasonable, with the exception of the one-year period proposed by Mr. Lukács for persons to exchange travel vouchers for cash. The Agency is of the opinion that the proposed period is excessive, and finds that a one-month period for an exchange is more reasonable.<sup>56</sup>

Subsequently, in *Lukács v. Porter*, the Agency reaffirmed these findings:

[80] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR because of the absence of provisions that provide for the

<sup>56</sup> *Lukács v. Air Canada*, Decision No. 342-C-A-2013, paras. 49-50 (emphasis added).

following:

- denied boarding compensation must be tendered in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger;
- the passenger must be fully informed of the restrictions that may apply to alternative forms of compensation;
- in the event that a passenger opts for travel vouchers as compensation, the passenger must be able to change their mind within a reasonable amount of time, and exchange their vouchers for cash;
- **if the carrier offers travel vouchers, the restrictions set out in Decision No. 342-C-A-2013 must apply.**<sup>57</sup>

The legislature is presumed to have knowledge of these decisions, and there is no indication that Parliament intended to alter the law they have created. Thus, it is unclear why the Agency chose to claw back the 1:3 ratio that has been the Agency's longstanding considered view.

*APR* submits that rather than unreasonably clawing back the existing rights of passengers, the regulations should simply reflect the Agency's longstanding considered view articulated in the above-noted decisions.

## Recommended Amendments

16. Replace paragraph 21(1)(a) of the Proposed Regulations with:

compensation in the other form has a monetary value of at least 300% of the minimum monetary value of the compensation that is required under these Regulations;

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<sup>57</sup> *Lukács v. Porter*, Decision No. 31-C-A-2014, para. 80.

## 9. Seating of Children

While *APR* strongly supports enshrining in regulations the rights of children to be seated next to an accompanying adult, *APR* is concerned that the Proposed Regulations fail to impose clear and enforceable obligations and constitute a step backward compared to the existing policies of some airlines.

### A. Failure to impose clear and enforceable obligations

*APR* is of the view that section 22 of the Proposed Regulations, concerning the seating of children, suffers from a number of flaws that make it unclear and unenforceable.

**First**, section 22 uses the verb “facilitate,” whose common and ordinary meaning is “to make easier” or “help bring about.” The use of such vague phrases instead of “shall” could, and likely would, be interpreted as stating a desired or recommended outcome rather than imposing a strict legal obligation.<sup>58</sup>

**Second**, there appears to be a conflict between paragraphs 22(1)(a) and 22(1)(b):

**22 (1)** In order to facilitate the seating of a child who is under the age of 14 years in close proximity to a parent, guardian or tutor in accordance with subsection (2), a carrier must

- (a) **assign seats before check-in** at no additional charge to a child under the age of 14 and their parent, guardian or tutor; and
- (b) **if the carrier does not assign seats in accordance with paragraph (a)**, do the following: [...] <sup>59</sup>

If the obligation imposed by paragraph 22(1)(a) is to assign seats before check-in, then it is difficult to understand the purpose of paragraph 22(1)(b) concerning the case where the carrier violated its obligation under paragraph 22(1)(b), and did not assign a seat. If the intent is to impose a legal obligation, then the consequence of failing to comply with paragraph 22(1)(a) must first and foremost be a penalty imposed on the airline.

**Third**, paragraph 22(1)(b) fails to address the situation if no volunteers are found on board:

**22(1)(b)** if the carrier does not assign seats in accordance with paragraph (a), do the following:

- (i) advise passengers before check-in that the carrier will facilitate seat assignment of the child in close proximity to a parent, guardian or tutor at no additional charge at the time of check-in or at the boarding gate,

<sup>58</sup> *Interpretation Act*, s. 11.

<sup>59</sup> Proposed Regulations, s. 22(1) (emphasis added).

- (ii) assign seats at the time of check-in, if possible,
- (iii) if it is not possible to assign seats at the time of check-in, request that other passengers volunteer to change seats at the time of boarding, and
- (iv) if it is not possible to assign seats at the time of check-in and no passenger volunteers to change seats at the time of boarding, request that other passengers volunteer to change seats before take-off.<sup>60</sup>

Paragraph 22(1)(b) is based on the assumption that volunteers will be found before take-off. But if no one volunteers, will a young child be seated apart from their accompanying adult?

*APR* submits that this outcome would be contrary to the purpose for which s. 86.11(1)(d) of the *Canada Transportation Act* was enacted. It is further submitted that if no volunteers are found, airlines must change the seats of passengers to ensure that children are seated next to an accompanying adult.

## **B. A step backward compared to Air Canada's existing rules**

Air Canada's Domestic/International Tariff Rule 10(C)(1) provides:

Note: The Carrier has a supplemental seating policy (and related procedures) for passengers under the **age of 12** travelling with a parent or guardian traveler to ensure that reasonable efforts are made by the Carrier prior to check-in, at time of check-in and by airport and in-flight agents to seat the child **next to their parent or guardian traveler**, free of charge.

⋮

Children **under age 8** must be accompanied by an adult age 16 or older when travelling. The accompanying adult must occupy a seat in the same cabin and be **seated adjacent** to the young child.<sup>61</sup>

Section 22(2) of the Proposed Regulations is a step backward compared to this existing standard:

- 22(2)** The carrier must facilitate the assignment of a seat to a child who is under the age of 14 years by offering, at no additional charge,
- (a) in the case of a child who is **4 years of age or younger**, a seat that is **adjacent** to their parent, guardian or tutor's seat;
  - (b) in the case of a child who is 5 to 11 years of age, a seat that is in the same row as their parent, guardian or tutor's seat, and that is separated from that parent, guardian or tutor's seat by no more than one seat; and

<sup>60</sup> Proposed Regulations, s. 22(1)(b) (emphasis added).

<sup>61</sup> [Air Canada's Domestic Tariff](#), Rule 10(C)(1) (emphasis added).

- (c) in the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row.<sup>62</sup>

*APR* submits that the rules should be simplified by expanding the existing rule of adjacent seating to children under the age of 12.

### **Recommended Amendments**

- 17. Replace the first sentence of section 22(1) of the Proposed Regulations with:
  - In order to seat children who are under 14 years of age in close proximity to a parent, guardian or tutor in accordance with subsection (2), a carrier shall
- 18. Append the following subparagraph immediately after subparagraph 22(1)(b)(iv):
  - (v) if no passenger volunteers to change seats before take-off, involuntarily change the seats of passengers on board before take-off.
- 19. Replace subsection 22(2) of the Proposed Regulations with:
  - 22(2)** The carrier shall assign to a child who is under 14 years of age by offering, at no additional charge,
    - (a) in the case of a child who is under 12 years of age, a seat that is adjacent to their parent, guardian or tutor's seat;
    - (b) in the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row.

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<sup>62</sup> Proposed Regulations, s. 22(2) (emphasis added).



## 10. Scope: Further Clarity is Needed

*APR* warmly welcomes the intent of subsection 2(1) of the Proposed Regulations:

**2 (1)** All carriers **carrying a passenger** are jointly and severally, or solidarily, liable to the passenger with respect to the obligations set out in these Regulations or, if they are more favourable, the obligations set out in the applicable tariff.<sup>63</sup>

At the same time, *APR* is concerned that the phrase “carrying a passenger” may lead to ambiguity and to unnecessary litigation. *APR* submits that additional language would be necessary to ensure that the provision is clear and unambiguous.

### Recommended Amendments

20. Replace subsection 2(1) of the Proposed Regulations with:

All carriers carrying a passenger, including but not limited to the marketing carrier, operating carrier, contracting carrier, and actual carrier, are jointly and severally, or solidarily, liable to the passenger with respect to the obligations set out in these Regulations or, if they are more favourable, the obligations set out in the applicable tariff.

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<sup>63</sup> Proposed Regulations, s. 2(1) (emphasis added).

## 11. Important Issues not Addressed

*APR* is deeply concerned about the omission of a number of important issues from the Proposed Regulations. This state of affairs creates the incorrect impression that airlines are free to do as they please in these areas. *APR* strongly believes this was not Parliament’s intent.

### A. Right to a refund of unused portion of ticket in events “outside the carrier’s control”

Section 18 of the Proposed Regulations, governing the rights of passengers in events that are “outside the carrier’s control,” is silent about the rights of passengers to cancel their travel and receive a refund. This is to be contrasted with subsection 17(2), which provides for such rights in events that are “within the carrier’s control.”

As a result, the Proposed Regulations create the incorrect impression that passengers **cannot** cancel their tickets in the case of events that are “outside the carrier’s control” delaying their travel. *APR* submits that this was not Parliament’s intent in enacting paragraph 86.11(1)(b) of the *Canada Transportation Act* [*Act*]. The legislature is presumed to have knowledge of laws existing at the time of enactment of a new legislation, including the case law. In particular, Parliament is presumed to have been aware of the Agency’s jurisprudence on the right of passengers to cancel their travel and receive a refund regardless of whether the flight delay or cancellation prompting them to do so is within the carrier’s control.

[...] the Agency is of the opinion that Air Transat **has not proven** to the Agency’s satisfaction, **that it is reasonable** to have a time limit in the event of a delay of **36 hours or more**, after which Air Transat would refund the unused ticket or portion thereof.<sup>64</sup>

Ultimately, the Agency substituted Air Transat’s International Tariff Rule 6.3(d) with:

6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.<sup>65</sup>

In *Lukács v. Sunwing*, the Agency reaffirmed passengers’ “fundamental right” to be refunded for the unused portions of their tickets if the carrier cannot transport them within a reasonable amount of time:

[15] In terms of passengers’ right to refunds, in Decision No. 28-A-2004, the Agency recognized the **fundamental right of passengers to be refunded for the unused portions of their tickets** if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.<sup>66</sup>

<sup>64</sup> *Re: Air Transat*, Decision No. 28-A-2004 (emphasis added).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Lukács v. Sunwing*, Decision No. 313-C-A-2013 at para. 15 (emphasis added).

In *Lukács v. Porter*, the Agency reinforced this conclusion:

[33] The Agency finds that as they allow Porter to **refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger’s control**, Existing Tariff Rules 3.4 and 15 are **unreasonable** within the meaning of subsection 111(1) of the ATR. The Agency finds that the Rules fail to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and Porter’s statutory, commercial and operational obligations.<sup>67</sup>

In a subsequent *Lukács v. Porter* case, the Agency held:

[88] The Agency agrees with Mr. Lukács, and finds that it is **unreasonable** for Porter to **refuse to refund the fare** paid by a passenger because of its cancellation of a flight, **even if the cause is an event beyond Porter’s control**.<sup>68</sup>

As these decisions of the Agency demonstrate, passengers do have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers’ control.

There is no indication that Parliament intended to alter the law in this area. Parliament clearly did not intend to force passengers to fly at a time later than stated on their tickets if they no longer desire to do so, nor did Parliament intend to deprive passengers from the option of cancelling their travel and receiving a refund for the unused portion of their tickets.

On January 17, 2019, the Agency’s representatives expressed concern about the lack of delegated legislative authority to make regulations giving effect to the rights that are deeply rooted in the jurisprudence.

*APR* submits that the Agency’s concerns are ill-founded for the following reasons.

**First**, paragraph 86(1)(n) of the *Act* provides that the Agency may make regulations:

(n) generally for carrying out the purposes and provisions of this Part.

Ensuring that the regulations enacted unambiguously state the rights of passengers is clearly consistent with the Agency “carrying out the purposes and provisions” of Part II of the *Act*.

**Second**, pursuant to subparagraph 86.11(b)(1)(iv), the Agency may require carriers to inform passengers about their right to cancel their travel and receive a refund in the event of a delay or cancellation outside the carrier’s control.

<sup>67</sup> *Lukács v. Porter*, Decision No. 31-C-A-2014 at para. 33 (emphasis added).

<sup>68</sup> *Lukács v. Porter*, Decision No. 344-C-A-2013 at para. 88 (emphasis added).

**Third**, paragraph 86.11(1)(g) of the *Act* provides that the Agency shall make regulations:

**86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

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(g) respecting any of the carrier's other obligations that the Minister may issue directions on under subsection (2).<sup>69</sup>

Thus, the Agency may, and in the circumstances of this case, should ask the Minister to issue directions under subsection 86.11(2) of the *Act* for enacting regulations that remove this ambiguity.

### **B. Boarding priorities and the obligation to seek volunteers in events “outside the carrier’s control”**

The Proposed Regulations are silent about the obligation of carriers to seek volunteers and to follow certain boarding priorities in the event of denial of boarding due to circumstances “outside the carrier’s control.” This is to be contrasted with section 15 of the Proposed Regulations, which imposes such obligations in events that are “within the carrier’s control.”

This suggests that under the Proposed Regulations, the carrier may even deny boarding to a passenger who is already on the aircraft if it claims that it is doing so due to circumstances “outside the carrier’s control.”

On January 17, 2019, the Agency’s representatives expressed concern about the lack of delegated legislative authority to enact provisions similar to section 15 for denial of boarding “outside the carrier’s control.”

*APR* respectfully disagrees.

In addition to the Agency’s authority under paragraph 86(1)(n) and 86.11(1)(g) of the *Act*, the Agency may also enact under paragraph 170(1)(c) of the *Act*, regulations to ensure that vulnerable passengers are not left stranded even in circumstances that are “outside the carrier’s control.”

### **C. Flight advancement**

“Flight advancement” occurs when the carrier changes the departure time of its flight to a time **earlier** than it appears on the passenger’s original ticket. Flight advancement has the same effect on passengers as denial of boarding, causing them to miss or be unable to take the flight they had paid for.

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<sup>69</sup> *Canada Transportation Act*, s. 86.11(1)(g).

In *Re: Air Transat*, the Agency held that:

The Agency is of the opinion that, in the event of a flight advancement, the consumer should be offered alternate travel options **immediately**. In addition, the Agency feels it would be beneficial if Air Transat includes a tariff provision that provides for a refund, at the request of the passenger, if such passenger should wish to cancel a reservation for a flight that has been advanced.<sup>70</sup>

The Agency reached the same conclusion in *Lipson v. Air Transat*.<sup>71</sup> In *Lukács v. Air Transat*, it was held that:

[28] With regard to the matter of flight advancements, the Agency is of the opinion that such advancements **may impact as negatively on those passengers as is the case with passengers whose flight is delayed**, and that **affected passengers should be able to avail themselves of the same remedies as those available to passengers whose flight is delayed**. Therefore, the Agency finds that the absence of protection for all passengers affected by flight advancements fails to strike a balance between a passenger's right to be subject to reasonable terms and conditions of carriage and Air Transat's statutory, commercial and operational obligations. As such, Proposed Rule 21(2)(i) would not be considered reasonable within the meaning of subsection 111(1) of the ATR if it were included in the Tariff on file with the Agency.<sup>72</sup>

In spite of these findings of the Agency, the Proposed Regulations are silent about the issue of flight advancement.

On January 17, 2019, the Agency's representatives expressed concern about the lack of delegated legislative authority to enact provisions relating to flight advancement.

*APR* respectfully disagrees.

The effect of flight advancement is the same as denial of boarding or delay: for no fault of their own, the passenger is unable to take the flight for which they had previously paid for, and as a result they are delayed in reaching or unable to reach their destination.

Thus, flight advancement is no more than a sophisticated form of denial of boarding, performed by changing the departure time of the passenger's flight in a manner that the passenger is prevented from being able to present themselves for check-in on time.

*APR* therefore submits that flight advancement should be recognized as a form of denial of boarding and affected passengers should have the same protection and rights accordingly.

<sup>70</sup> *Re: Air Transat*, Decision No. LET-A-112-2003 (emphasis added).

<sup>71</sup> *Lipson v. Air Transat*, Decision No. LET-C-A-59-2003.

<sup>72</sup> *Lukács v. Air Transat*, Decision No. 327-C-A-2013 at para. 28 (emphasis added).

## Recommended Amendments

21. Renumber section 18 as 18(1) of the Proposed Regulations, and append the following provision immediately after it:
  - (2) If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger's travel needs, the carrier must instead refund the unused portion of the ticket.
22. Append the following paragraph to subsection 10(2):
  - (d) in the case of a cancellation or a denial of boarding, deny boarding in accordance with section 15.
23. Replace subsection 15(1) of the Proposed Regulations with:

**15 (1)** ~~If paragraph 11(4)(b) or 12(4)(b) applies in respect of a A carrier, it must not deny boarding unless it has asked if any passenger is willing to give up their seat.~~
24. Append the following subsection immediately after subsection 1(3) of the Proposed Regulations:

**1(4)** For the purposes of these Regulations, a flight whose departure time was brought forward compared to the time appearing on the original ticket, with the consequence that the passenger misses that flight, shall be considered a flight on which the passenger has been denied boarding.

## 12. Enforcement: Turning a Blind Eye to Violations

*APR* is profoundly concerned that the regulations will remain dead letter due to the lack of enforcement by the Canadian Transportation Agency. *APR* is of the view that:

- Airlines should have a positive duty to pay compensation, without a demand from the passenger. Section 19(3) of the Proposed Regulations violates this principle and improperly conditions payment of compensation on the passenger complaining to the airline.
- The Canadian Transportation Agency must adopt a zero tolerance policy with respect to contraventions of the regulations, and direct its enforcement officers to issue an Administrative Monetary Penalty in each and every case that an airline fails to comply with the regulations.
- The Canadian Transportation Agency must cease and desist its unlawful practice of issuing “formal warnings” instead of Administrative Monetary Penalties.

### A. A leading example

In late 2017, numerous CBC reports revealed that WestJet systematically misled passengers whose flights were cancelled. WestJet falsely claimed that the destination airports were closed as a result of hurricane damage. Based on this false claim, WestJet refused to rebook passengers on flights of other airlines that were available to these destinations.<sup>73,74,75</sup> According to the Canadian Transportation Agency’s website:

Results of an investigation initiated on December 19, 2017 by a designated enforcement officer of the Canadian Transportation Agency indicate that WestJet made public statements contrary to and **resulting in a contravention of subsection 18(b)** of the *Air Transportation Regulations*.

Such public statements, to passengers, were made in relation to scheduled flights being cancelled due to apparent airport closures in but not limited to the areas of Santa Clara, Cuba and Turks and Caicos Islands when in fact the airports in question were in an open status.<sup>76</sup>

Although contravention of subsection 18(b) is punishable by an Administrative Monetary Penalty [AMP] of up to \$25,000, no such action was taken against WestJet. Instead of issuing a notice of violation and a penalty, a mere “formal warning” was issued **without any statutory authorization to do so**. Unfortunately, this case is not an isolated incident of the Agency failing to enforce the law against airlines.

<sup>73</sup> [“‘This is bunk’: WestJet apologizes for misleading passengers about why it cancelled flights,”](#) CBC News (Nov. 18, 2017).

<sup>74</sup> [“‘It hurts us’: Air Canada, WestJet under fire for their reasons behind Puerto Rico flight cancellations,”](#) CBC News (Nov. 26, 2017).

<sup>75</sup> [“WestJet once again gives passengers ‘erroneous information’ about why it cancelled flights,”](#) CBC News (Dec. 17, 2017).

<sup>76</sup> [Summary of enforcement action](#), Canadian Transportation Agency’s website (emphasis added).

## B. Specific areas of lack of enforcement

The Canadian Transportation Agency may designate provisions of the *Canada Transportation Act* and regulations made under the *Act* as a provision that may be enforced by way of Administrative Monetary Penalties of up to \$25,000.<sup>77</sup> The Schedule to the *Canadian Transportation Agency Designated Provisions Regulations* lists all such “designated” provisions and the maximum penalty that a designated enforcement officer of the Canadian Transportation Agency may impose for contravention of the provisions.<sup>78</sup>

### Unlawfully issuing “formal warnings” instead of Administrative Monetary Penalties

Since 2013, designated enforcement officers of the Canadian Transportation Agency have issued 232 “formal warnings” instead of notices of violation and Administrative Monetary Penalties **without any statutory authorization to do so**. When the legislature intends to authorize a person to issue warnings, it does so explicitly in the enabling legislation.<sup>79</sup> The *Canada Transportation Act* **does not authorize** designated enforcement officers to issue “formal warnings,” but only to issue notices of violation with Administrative Monetary Penalties.<sup>80</sup>

### Failure to apply the terms and conditions in the tariff (AMP: \$10,000/violation)

[Subsection 110\(4\)](#) of the *Air Transportation Regulations* requires an international licence holder to apply the terms and conditions set out in its tariff. Subsection 110(4) is a “designated provision,” the contravention of which carries an Administrative Monetary Penalty of up to \$10,000. In a large number of cases, no notice of violation nor Administrative Monetary Penalty was issued, notwithstanding the Canadian Transportation Agency’s finding that the airline contravened subsection 110(4).<sup>81</sup>

### Making publicly a false or misleading statement about services (AMP: \$25,000/violation)

[Subsection 18\(b\)](#) of the *Air Transportation Regulations* prohibits carriers from making a false or misleading statement about their services. Subsection 18(b) is a “designated provision,” the contravention of which carries an Administrative Monetary Penalty of up to \$25,000. While airlines were found by the Canadian Transportation Agency to have contravened this provision,<sup>82</sup> nevertheless, there is no record of a notice of violation or an Administrative Monetary Penalty **ever** being issued for such a violation.

<sup>77</sup> *Canada Transportation Act*, s. 177.

<sup>78</sup> *Ibid.*, s. 180.

<sup>79</sup> See, for example, *Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c. 40.

<sup>80</sup> *Canada Transportation Act*, s. 180.

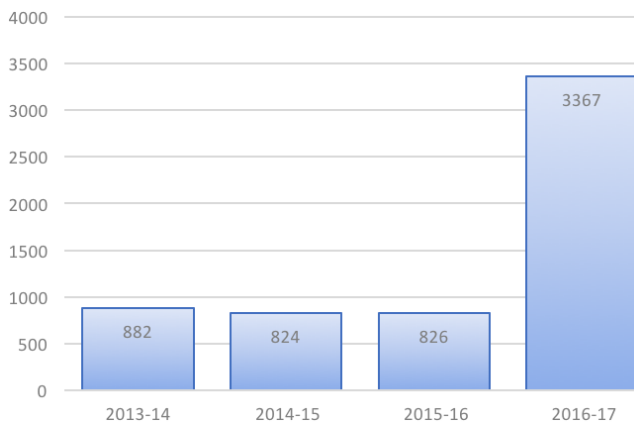
<sup>81</sup> [Decision No. 239-C-A-2013](#) at para. 78; [Decision No. 284-C-A-2013](#) at para. 17; [Decision No. 55-C-A-2014](#) at para. 42; [Decision No. 244-C-A-2014](#) at para. 22; [Decision No. 330-C-A-2015](#) at para. 20; [Decision No. 209-C-A-2015](#) at para. 23; [Decision No. 373-C-A-2016](#) at para. 30; [Decision No. 95-C-A-2016](#) at para. 24; [Decision No. 111-C-A-2016](#) at para. 17; [Decision No. 193-C-A-2016](#) at para. 16; [Decision No. 17-C-A-2017](#) at para. 16; [Decision No. 27-C-A-2017](#) at para. 23; [Decision No. 61-C-A-2017](#) at para. 34; [Decision No. 63-C-A-2017](#) at para. 4; [Decision No. 69-C-A-2017](#) at para. 36; [Decision No. 73-C-A-2017](#) at para. 30; [Decision No. 15-C-A-2018](#) at para. 25; [Decision No. 8-C-A-2018](#) at para. 29; [Decision No. 18-C-A-2018](#) at para. 28; [Decision No. 24-C-A-2018](#) at para. 22; [Decision No. 33-C-A-2018](#) at para. 23; [Decision No. 36-C-A-2018](#) at para. 33; [Decision No. 43-C-A-2018](#) at para. 24; and [Decision No. 44-C-A-2018](#) at para. 34.

<sup>82</sup> See, for example, [Decision No. 335-C-A-2012](#) at para. 12, and [Decision No. 105-C-A-2017](#) at paras. 48-49.

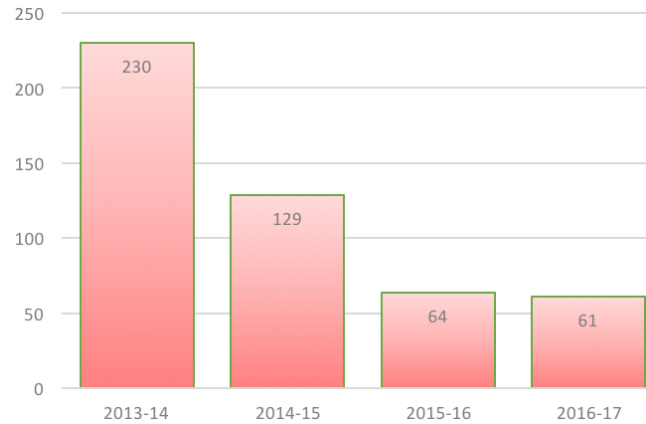


### C. The Canadian Transportation Agency's dismal record

Implementation of the existing consumer-protection laws, regulations, and regulatory decisions has been thwarted by lack of enforcement and financial consequences for airlines that breach the rights of passengers. This anomaly is readily visible in the published statistics of the Agency: since 2013, the number of **complaints** received by the Agency has **quadrupled**, while **enforcement** actions have seen a near **four-fold decrease**.<sup>83</sup>



**Complaints Against Airlines**



**Enforcement Actions by the Agency**

Our understanding is that the number of complaints against airlines in 2017-2018 was even higher, exceeding 5,500. *APR* believes that the substantial decline in the enforcement actions may have contributed to the soaring number of complaints.

<sup>83</sup> [Agency's Statistics 2016-17](#), Canadian Transportation Agency's website (September 3, 2017).

## Appendix

### A. Final Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010  
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010  
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.