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March 12, 2021

VIA EMAIL: ***secretariat@otc-cta.gc.ca***

Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec K1A 0N9

Dear Madam or Sir:

Re: Position Statement (Rule 23)
Case No. 20-01590

Please accept the following position statement pursuant to Rule 23 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*.

I. The Inquiry Officer's Report Should Not Be Adopted

1. The Inquiry Officer may have made a commendable effort to gather documents, records, and statements; however, the Inquiry Officer's Report is fundamentally deficient in that it fails to include as exhibits or appendices the very documents, records, and written statements that were collected, which are relevant to the inquiry. The Officer failed to carry out his mandate.

2. On February 13, 2020, the Agency appointed an Inquiry Officer pursuant to s. 38(1) of the *Canada Transportation Act* [***Act***]. The Agency's direction was that

> The Inquiry Officer's mandate will be to:
>
> - obtain any documents, records and information relevant to the inquiry;
> - conduct interviews and take written statements from individuals and organizations directly involved in the complaints; and
> - submit a summary report to the Agency by March 26, 2020.
>
> [Emphasis added.]

3. Understandably, the report could not be completed on time due to the COVID-19 pandemic.

4. According to the Inquiry Officer's Report, dated September 30, 2020:

> For each of the 182 flights, the Inquiry Officer, assisted by Agency staff, reviewed passenger complaints, conducted interviews with the respondent air carriers, and collected relevant documentation, with the purpose of establishing the facts associated with those flights and determining whether any particular trends or issues should be flagged to the Agency.
>
> In order to conduct the inquiry more efficiently, an exception was made for 63 Air Canada flights for which there were only one complaint, as these were considered unlikely to raise new issues that were not raised by the other 504 complaints (see "Air Canada Single Complaint Flight List" in Appendix B of this report).
>
> Although basic information was collected on each of these 63 flights, they were not subject to a detailed review with Air Canada representatives, nor to the provision of additional supporting documentation.
>
> With the exception of these 63 Air Canada flights, the flights covered by the inquiry are listed in the Summary Table (see Appendix A of this report).
>
> [...]
>
> The Summary Table and the text below constitute the substance of the Inquiry Officer's report.

[Emphasis added.]

5. In short, the Inquiry Officer's Report has only two appendices, one being a Summary Table, and the other being the "Air Canada Single Complaint Flight List". Neither of these appendices include any of the "relevant documentation" that was collected. Instead, the Summary Table is a mere summary of the Inquiry Officer's own views based on the undisclosed documents and the undisclosed interviews and written statements.

6. It follows that it is not possible to meaningfully comment on the validity of the Inquiry Officer's Report's conclusions.

7. The Inquiry Officer's failure to adduce to the Report the documents, records, and written statements obtained is unusual and inconsistent with the past practice, for example, in the Air Transat Tarmac Delay Inquiry (Case No. 17-03788), where documents and written statements appear to have been publicly available.

8. This state of affair not only creates substantial procedural unfairness to the individual passengers whose rights are being determined in this proceeding, but as explained below, also raises serious concerns about the Agency's compliance with the open court principle enshrined in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

9. We accept that the Agency may rely on the Inquiry Officer's Report as an aid to articulate issues and as a preparatory tool for an oral hearing where evidence would be heard "in open court" (i.e., in a manner available to the public).

10. In the absence of the documents, records, and written statements obtained by the Inquiry Officer, however, the Report should not be admitted for the truth of its content. Doing so would be tantamount to circumventing the open court principle by "outsourcing" the Agency's fact-finding mandate.

11. It is therefore submitted that:

    (a) the Agency should decline to adopt the Inquiry Officer's Report and decline to admit it as evidence for the truth of content; or

    (b) the Agency should direct that all documents, records, and written statements obtained by the Inquiry Officer be placed on public record, and furthermore provide a reasonable time for the filing of additional submissions and position statements based on these documents.

II. The Proper Role of the Agency in Adjudicating Complaints

12. On November 5, 2020, in Decision No. LET-C-A-72-2020, the Agency opened pleadings about what it described as "general questions of interpretation."

13. We accept that the complaints before the Agency in this proceeding raise questions of statutory interpretation in terms of how provisions of the *Air Passenger Protection Regulations* [***APPR***] may apply to the specific facts of each complaint. In addressing these questions, the Agency must exercise caution to not stray into amending the *APPR* under the guise of decision-making.

14. The question before the Agency is what the **correct** interpretation of the *APPR* **is**, and not what the *APPR* "should" say as a matter of good policy. This is a question of law that the Agency must answer **correctly** based on the well-established principles of statutory interpretation, and not based on any policy or wish of either the industry or consumers.[1]

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[1] As a result of *Vavilov* and the statutory right of appeal from questions of law under s. 41 of the *Act*, the Agency's interpretation of the *APPR* may be reviewed by the Federal Court of Appeal on the **correctness** standard: *Canada (MCI) v. Vavilov*, 2019 SCC 65 at paras. 36-37.

15. Should the Agency find that the correct interpretation of the *APPR* is at odds with some policy considerations, then the appropriate remedy is to **amend** the *APPR* through the proper legislative process prescribed by the *Statutory Instruments Act* and s. 36 of the *Act*.

III. Interpreting Consumer Protection Legislation: *Seidel*

16. The *APPR* was promulgated pursuant to s. 86.11 of the *Act*, whose stated purpose is consumer protection.

17. In *Seidel v. TELUS Communications Inc.*, the majority of the Supreme Court of Canada established the following principle for interpreting consumer protection legislation:

> As to statutory purpose, the *BPCPA* is all about consumer protection. As such, its terms should be interpreted generously in favour of consumers [...][2]

18. In a 2019 decision, this principle was applied by the Federal Court to interpret the *Competition Act* in *Lin v. Airbnb, Inc.*, 2019 FC 1563 at para. 57, and to certify a class action. More recently, the same principle was applied by the Quebec Court of Appeal in *Benamor c. Air Canada*, 2020 QCCA 1597 at para. 57 in reversing the lower court's judgment, and authorizing a class action against Air Canada on the basis of the Quebec *Consumer Protection Act*.

(1) How much detail regarding the reason for a flight disruption should be provided by carriers to passengers pursuant to paragraph 13(1)(a) of the APPR, including in situations that evolve, resulting in multiple reasons for delay over time?

19. Paragraph 13(1)(a) of the *APPR* must be read in its full context and in accordance with its purpose:

> **13 (1)** A carrier must provide the following information to the passengers who are affected by a cancellation, delay or a denial of boarding:
>
> (a) the reason for the delay, cancellation or denial of boarding;
>
> (b) the compensation to which the passenger may be entitled for the inconvenience;
>
> (c) the standard of treatment for passengers, if any; and
>
> (d) the recourse available against the carrier, including their recourse to the Agency.

[2] *Seidel v. TELUS Communications Inc.* 2011 SCC 15 at para 37.

20. The obligation to communicate the reasons for the flight disruption must be read in conjunction with the right to be informed about the compensation, standard of treatment, and available recourse. These rights collectively ensure that the passenger may make informed decisions about, for example, whether to incur additional expenses and seek reimbursement later from the carrier, or whether they can insist on being rebooked on flights of another carrier under s. 17 of the *APPR*.

21. It follows that the information provided under paragraph 13(1)(a) of the *APPR* must be sufficiently comprehensive to allow passengers to independently assess their entitlement to compensation and standard of treatment.

22. Section 13 of the *APPR* does contemplate evolving situations:

> **(2)** In the case of a delay, the carrier must communicate status updates to passengers every 30 minutes until a new departure time for the flight is set or alternate travel arrangements have been made for the affected passenger.
>
> **(3)** The carrier must communicate to passengers any new information as soon as feasible.

23. Consequently, in situations that evolve and may involve multiple reasons for delay over time, the carrier must communicate each reason, and clearly identify the length of delay that each reason has caused.

(2) If a carrier refuses to pay compensation on the basis that a flight disruption was required for safety or was outside its control, how much detail regarding the reason for the flight disruption should be included in the explanation given to the passenger pursuant to subsection 19(4) of the APPR? Should carriers have to explain multiple reasons for a delay when more than one exists?

24. Section 19 deals with compensation for flight delays and cancellations. Subsection 19(4) of the *APPR* provides that:

> **19 (4)** The carrier must, within 30 days after the day on which it receives the request, provide the compensation or an explanation as to why compensation is not payable.

25. The obligation under s. 19(4) must be read in conjunction with s. 13. Their purpose is to allow passengers to independently verify the validity of the carrier's reasons for refusing to pay compensation, and to allow the passenger to make an informed decision about whether to resort to any legal recourse against the carrier.

26. Therefore, under s. 19(4) of the *APPR*, the passenger must be provided with sufficient details (facts) that allow the passenger to assess their prospects should they take further actions to enforce their rights under the *APPR*.

27. In particular, if there are multiple reasons for a delay, then the carrier must provide all reasons and identify, to the extent possible, the length of delay that each reason has caused.

(3) What criteria should be applied to determine the appropriate categorization of a flight disruption with multiple reasons for delay?

28. The categorization of a flight disruption caused by multiple reasons should be decided using the well-established "but for" test for liability, by assessing what would have happened had none of the events within the airline's control occurred.

29. Recently, the British Columbia Civil Resolutions Tribunal applied this test to determine categorization under the *APPR*:

> 45. I find FIN645 was delayed by 40 minutes due to circumstances beyond Air Canada's control, namely deicing FIN645 for the outbound flight to Sao Paulo. Based on section 10(2), I accept that AC309's scheduled departure time was delayed to 18:50, also due to circumstances beyond Air Canada's control.
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> 46. However, I do not accept that AC309's additional 33 minute delay to 19:30 was also beyond Air Canada's control. Air Canada's reasons for the second delay were vague. On January 13, it stated the delay was "due to additional preparation time", and then on January 20 it stated the delay was "due to scheduling issues". It now says the delay was due to the crew's flight to Montreal arriving late due to mechanical failure. Air Canada did not explain what the mechanical failure was and so I find it has not proved the delay was beyond its control, or within its control but due to safety purposes. In the absence of any evidence to the contrary, <u>I find the second delay was within Air Canada's control</u>.
>
> 47. According to Air Canada's January 20 email, AC8311 to Comox was also delayed due to de-icing, although it did not state the delay's length. I find more likely than not, that <u>if AC309 had not been delayed by the crew and had departed at 18:50, the McNabbs would have arrived in Vancouver in time to board AC8311</u>.
>
> 48. Since Air Canada is responsible for the McNabbs missing AC8311, and AC309 was a connecting flight that was part of their itinerary on their tickets, I find rule 80 of the Tariff applies. According to rule 80(2), the APPR provisions for delays applies to the missed connection. I find the McNabbs' flight

> to Comox was delayed by over 9 hours due to AC309's delay, and so the McNabbs are entitled to receive compensation of $1,000 each under section 19(1)(a) of the APPR.[3]
>
> [Emphasis added.]

(4) What criteria should be applied to determine the appropriate categorization of a flight disruption caused by a crew shortage? When, if ever, would a crew shortage be considered a safety-related reason for a flight disruption, rather than a matter within the carrier's control?

30. A carrier has full control over its staffing, and it is the carrier's responsibility to ensure that adequate crew is available to operate the flights that the carrier has been contracted to operate. This responsibility includes also arranging for adequate backup crew.

31. Crew shortage was not intended by Parliament to be considered an event "required for safety purposes." That phrase was introduced to deal with flight disruptions related to mechanical failures. Indeed, subparagraph 86.(1)(b) of the *Act* provides that:

> **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
>
> (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,
>
> [Emphasis added.]

32. The same legislative intent, focusing on aircraft maintenance, is reflected in subsection 1(1) of the *APPR*:

> **required for safety purposes** means required by law in order to reduce risk to passenger safety and includes required by safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a safety management system as defined in subsection 101.01(1) of the *Canadian Aviation Regulations* but does not include scheduled maintenance in compliance with legal requirements.

[3] *McNabb v. Air Canada*, 2021 BCCRT 100 at paras. 45-48.

33. The *APPR* recognizes only one exception to the principle that staffing is the carrier's responsibility. Paragraph 10(1)(j) provides that:

> **10 (1)** This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier's control, including but not limited to the following:
>
> (j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider;

34. While paragraph 10(1)(j) is not exclusive, it is indicative of the legislative intent that recognizes the carrier's full control and responsibility for their own staffing decisions.

(5) What criteria should be applied to determine the appropriate categorization of a flight disruption caused by a computer issue or network outage?

35. Each carrier is responsible for the maintenance of its computer equipment and network, including those of its subcontractors.

36. Computer issues and network outages are not extraordinary events, but rather events that occur regularly. As such, carriers have to be prepared to deal with them, including having redundant and backup systems and communication channels that may be resorted to when the primary systems or channels are unavailable.

37. In assessing such events, the question to be considered is whether the carrier has taken all reasonable measures to prevent or mitigate the disruption. This can often be evidenced by whether other carriers are also affected by the same issue. An issue that affects only one or two carriers but not the others is likely to be caused by their own choices with respect to IT. On the other hand, if all carriers at a given airport are affected by a network or power outage, then the question remains what measures the carrier has taken to respond to the disrupting event, and what kind of backup systems were available and were deployed to mitigate the disruption's effect.

> Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier reacts to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?[4]

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[4] *Lukács v. Porter*, Decision No. 16-C-A-2013 at para. 105; see also *Lukács v. United*, Decision No. 467-C-A-2012 at para 42.

(6) *How should flight disruptions be categorized when a passenger experiences flight disruptions on multiple flights on their way to their ticketed destination? Should events affecting replacement flights affect the categorization of a flight disruption? For example, should the flight disruption be categorized based on the reason for the initial flight disruption or the reason for the longest delay?*

38. The flight disruption must be categorized using the aforementioned "but for" test, by assessing what would have happened had none of the events within the airline's control occurred. See *McNabb*, *supra*.

(7) *What should or should not be considered to be "further to scheduled maintenance" as defined in subsection 1(1) of the APPR? Should a new issue identified during the repair of another issue be considered to be found further to scheduled maintenance? Do post-flight maintenance or pre-flight maintenance checks constitute scheduled maintenance?*

39. The purpose of the "required for safety purposes" exceptions under the *APPR* is to relieve airlines from the obligation to pay compensation in the context of unexpected maintenance events that require immediate grounding of an aircraft, in situations where arranging for a replacement aircraft is genuinely impossible (see also s. 11(2)). These provisions are not meant to enable carriers to use maintenance as a *carte blanche* to cancel flights and not pay compensation to passengers.

40. If an aircraft is grounded for unexpected maintenance issues, the carrier has to reorganize its affairs in a manner that takes into account that the aircraft is and remains out of service until such time as the aircraft is certified to fly again.

41. In practical terms, an unscheduled maintenance issue can directly affect only a single flight operated by the given aircraft. The subsequent flights are only affected by the "knock-on" effect, where the airline's defence to liability for compensation is the "all reasonable measures" defence:

> **11 (2)** A delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation that is within that carrier's control but is required for safety purposes, is considered to also be within that carrier's control but required for safety purposes if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation.

42. Consequently, whether new issues are identified during the repair of another issue is not relevant to determining the carrier's liability for the delay or cancellation of the subsequent flights. What matters is whether the carrier takes "all reasonable measures to mitigate the impact of the earlier flight delay or cancellation."

43. Lastly, post-flight and pre-flight maintenance checks are "scheduled" in that their timing is known relative to the flight's time, and they are "maintenance in compliance with legal requirements" to the extent that is required by the *Canadian Aviation Regulations* or any other legislation.

(8) In situations where a flight disruption is the result of a knock-on effect from a previous flight disruption, what factors should the Agency consider when considering whether the carrier took all reasonable measures to mitigate the impact of the initial disruption as required by subsections 10(2) and 11(2) of the APPR?

44. The phrase "took all reasonable measures" in the context of air law originates from Article 19 of the *Montreal Convention*, which is Schedule VI to the *Carriage by Air Act*. The jurisprudence on the *Montreal Convention* places the burden of proof on the carrier to demonstrate that it took all reasonable measures to mitigate the impact of a disruption.

45. Since the *Carriage by Air Act* is a legislation in the same subject matter as the *APPR*, the phrase "took all reasonable measures" in the *APPR* should be given the same meaning as in the *Carriage by Air Act*, and the burden of proof should similarly be placed on the carrier.

46. Courts have considered the following factors to determine whether the airline has met its burden of proof to demonstrate that it took "all reasonable measures":

   (a) aircraft maintenance regime, including but not limited to whether the mechanical failure could have been avoided;

   (b) availability of replacement aircraft at other hubs; and

   (c) whether the number of replacement aircraft was reasonable.[5]

47. These factors, however, are not a closed list, and a circumstance-focused, case-by-case approach is necessary to assess whether the carrier has discharged its burden of proof.

Sincerely yours,

Dr. Gábor Lukács
President

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[5] *Lukacs v. United Airlines Inc., et al.*, 2009 MBQB 29 at para. 48; leave to appeal ref'd: 2009 MBCA 111.