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August 28, 2018

Mr. Scott Streiner
Chair and CEO
Canadian Transportation Agency
15 Eddy Street
Ottawa, ON K1A 0N9

Re: Air Transport Association of Canada written submission for Air Passenger Protection Regulations

Dear Mr. Streiner,

On behalf of the Air Transport Association of Canada please accept the input of our membership regarding the Air Passenger Protect Regulations.

ATAC, founded in 1934, serves as Canada's national trade association for commercial aviation and flight training industries as well as aviation industry suppliers. ATAC represents approximately 200 companies dedicated to commercial air transport in Canada.

The airline industry understands that the new air passenger protection regulations will ensure clearer, more consistent passenger rights by establishing minimum standards of treatment, and in some situations minimum levels of compensation that all airlines must provide. ATAC appreciates the opportunity to be part of these extensive consultations.

ATAC identified key principles which must govern rule makers. These include shared responsibility, reasonable compensation, and avoiding a one-size-fits all approach. We focused our attention to the following: Northern operations, communications: recourse options, flight delays and cancellations, denied boarding, tarmac delays, lost or damaged baggage, and the transportation of musical instruments.

ATAC insists that compensation is not meant as a lottery windfall but an indemnification for passenger inconvenience.

We have provided with some detail the concerns from the airline community, that need to be considered in the creation of the CTA mandate to create new regulation supporting Passenger Protect Regulations.

Please do not hesitate to contact me if I can provide any further information. I can be reached at wgouveia@atac.ca or at 613-233-7727 ext. 309

I am hopeful that you will continue to engage with us in the future.

Best regards,

Wayne Gouveia
Senior Vice-President

CC. Marcia Jones, Senior Director Analysis and Regulatory Affairs, Canadian Transportation Agency



Comments to the Canadian Transportation Agency (CTA) on Air Passenger Protection Regulations By the Air Transport Association of Canada

ATAC, founded in 1934, serves as Canada's national trade association for commercial aviation and flight training industries as well as aviation industry suppliers. ATAC's success is founded on the strength of its members who all support a safe, reliable, sustainable, and competitive world-leading Canadian air transport industry. ATAC represents approximately 200 companies dedicated to commercial air transport in Canada ranging from flight training, scheduled and charter, passenger and cargo, air carriers operating regionally, nationally and internationally as well as the industry that supports them.

The airline industry understands that the new air passenger protection regulations will ensure clearer, more consistent passenger rights by establishing minimum standards of treatment and, in some situations, minimum levels of compensation that all airlines must provide. ATAC appreciates the opportunity to be part of these extensive consultations.

The issue of passenger rights gains popularity in Canada every time an unfortunate incident occurs. ATAC supports the Government's intention to ensure that passengers be protected by law. We appreciate that the Government's goal is to help the travelling public navigate through simpler rules and have easier access to support when circumstances result in a complaint.

The Minister is proposing measures addressing compensation standards for passengers. Compensation would apply to delays, denied boarding due to factors within the carrier's control, lost or damaged baggage and will set clear standards allowing for children to be seated with parents, and for the transportation of musical instruments.

The airline industry appreciates the goal of the Minister, of protecting passenger rights. However, in the delivery of reliable travel services airline operators also have a primary goal, the well being and safety of the travelling public along with a good passenger experience. Therefore, imposing higher fees or severe compensation measures will not remedy the occasional operational challenges that airlines deal with. The industry is conscious of unintended consequences of onerous regulations and increased operational costs, depleting the already thin margins. Some potential unintended consequences could be the reduction of scheduled service on certain routes, increased ticket prices and flight cancellations.

Please bear in mind that over 140 million people travelled by air in Canada last year. The number of complaints filed each year at the CTA was well under 2,752 or less than .002% of the total people travelling. The reason we raise this fact is to give you a perspective of the size of the problem. Of course, some complaints remain at the airline level, but even then, the vast majority of travellers enjoy a good passenger experience.

We have consulted our members on this issue to ensure that our comments reflect their collective view of our membership. We recognize the right of air operators to decide on the limitations and reasonableness to be included in airline tariffs as it pertains to passenger protection rules.

We also support the necessity for company specific policies as it relates to the carriage of musical instruments. These policies must be readily available to the traveller at the time of ticket purchase when travelling with musical instruments.

Northern Operations – Carve-out in regulations

We firmly believe that some major principles have to be incorporated in passenger protection regulations. Regulations have to be flexible in particular to the significant difference in markets between northern Canada and southern Canada. Northern travellers and travellers from other remote areas often depend on air travel as the lifeline to their communities. Northern operators often experience delays caused by extreme weather, icing and weather fronts during winter operations that may or may not

exceed a three-hour window for compensation. The objective for these operators is not to cancel the flight as these are essential services. The result is that the northern and remote travellers are more tolerant to weather delays to ensure that they get to and from their communities. New regulations must reflect the nuances of northern operations. Mechanicals can be challenging, as finding replacement aircraft equipped to handle challenging northern runways, i.e. gravel equipped aircraft can lead to further delays resulting in the absence of a substitute aircraft. For example, there are circumstances in Canada's North where the availability of meteorological information on runway conditions may not be always available, also affecting flight schedules.

Important Principles

A key principle of the Bill is that the go no-go decision must remain with the pilot. The threat of severe, even unreasonable, financial repercussions should not be allowed to influence the pilot's decision. Safety is the primary concern for the pilot in command of every flight.

Secondly, the compensation paid out to aggrieved passengers should be in line with the economic realities of air travel in Canada. Unreasonable monetary compensation out of proportion to the magnitude of the carriers' revenues on any given flight could only result in a deterioration of our enviable air transportation system, perhaps even including reduced service on some routes.

For example, Air Passenger Rights in Europe are generous to the point that a passenger could receive compensation for a delayed flight which exceeds the price paid for the round-trip ticket, while the passenger has already completed the first leg of the trip and will most likely complete the return flight with some delays. Such practices can only lead to increased costs to airlines and passengers.

Shared responsibility is another important principle:

An example of circumstances beyond the control of operators is the under-staffing of Air Traffic Control (ATC) resulting in flow control challenges and ground delays which cause flight delays and missed connections. It is important to emphasize the fact, that the passenger is a client of many service providers. First the passenger is our members' client, and the passenger is also a client of the airport through an Airport Infrastructure Fee, and of CATSA through a payment of the Air Travellers Security Charge. Delays can be the result of any of these stakeholders. You can't hold an airline accountable for events beyond its direct control. The Minister has stated "Some of the measures we are looking at include compensation standards for passengers denied boarding due to factors within the carrier's control..."

We need a clear definition of what falls under a carrier's control. While it may be an airline's decision to cancel or delay flights, the reason for doing so may be well beyond that airline's control. Some of the reasons include weather delays, ground delays as a result of de-icing pad congestion, snow clearance, congestion at the airport of destination, air traffic control, all affect an airline's decision. The European guideline on regulation (EC) No 261/2004 (Official Journal of the European Union, Interpretative Guidelines on Regulation (EC) No 261/2004), does make concessions for technical issues associated with the aircraft under two conditions: "first, it is not inherent in the normal exercise of the activity of the air carrier concerned, second, if it is beyond the actual control of that carrier on account of its nature of origin". Once it has been ascertained that the carrier has taken all possible measures to ensure the safety of aircraft and smoothness of operations, the definition for extra ordinary circumstances as in (EC) No 261/2004 needs to be carefully considered in the Canadian context. Such circumstances could only be determined once significant industry consultations have been held. For example. ATC delays and volcanic eruptions are not considered extraordinary circumstances according to references in (EC) No 261/2004.

Also, some delays are safety related. The safety of passengers is the utmost preoccupation of pilots and airlines. Safety related delays should not result in penalties for the airlines. How such delays are managed by the airlines is what this law should address.

An additional principle is that the one-size-fits-all practice that is so prevalent at Transport Canada just cannot apply here. You cannot impose southern compensation standards as applied in Canada's major airports to remote airports and especially to northern airports when air travel is often the only lifeline for the community.

There must be clear definitions: The Minister needs to indicate where the airlines' responsibility ends and other parties involved become liable. An example of this scenario occurs when the airlines get the traveller to the arrival gate but are delayed and cannot allow the passengers to leave the plane, due to circumstances beyond their control. For example, if the aircraft is held up due to snow clearing or absence of ramp attendants to assist in marshalling the aircraft to the parking spot.

Where does the airline responsibility end and other parties become liable?

The following answers represent feedback from ATAC members to some of the CTA questions.

1. Should the new regulations apply, in whole or in part, to the following:

a. All sizes of air carriers

Compensation should be available to all passengers, regardless of the size of the carrier. This compensation, however, has to reflect price paid for the ticket and the revenues generated by that route. The size of airline does matter when re-protecting passengers in a reasonable time. Possible rules must have language that is determined by the circumstances that offer some protection for the airline. Rules for large airlines may not be practical for smaller airlines and need to be considered when creating hard deadlines for re-booking.

b. Foreign and domestic carriers

All carriers flying to Canada should be subjected to Canada's passenger protection regulations.

c. Any other international services resulting from the 5th freedoms

A foreign airline picking up passengers in Canada as a leg of a flight going from a foreign country to another foreign country should be subjected to the same rules as a Canadian carrier unless such flights are for compassionate reasons.

d. Regional services

A key principle here is that all passengers, be they in Economy Class, Business Class or First Class, should be awarded the same compensation.

e. Charters

There needs to be clarity of the CTA term "commercial air services" and the applicability to charters, particularly in the case of domestic and business charters. Ad-hoc charters should be exempt from C-49 regulations because the compensation and communication process is different.

2. Airlines' Obligation to Communicate Clearly

a. What is the key information that air passengers should receive on the airline's terms and conditions of carriage and the recourse available to them?

- The definition of a flight disruption
- Standards of treatment and compensation
- Procedure to obtain information and compensation

b. How should this information be communicated?

On the carrier's website, at the passenger service desks, perhaps through text messages or e-mails. Information on the website is one remedy providing resources to passengers faced with irregularities in their travel plans. In addition, website should inform the traveller in plain language of the airline's tariffs. However, there is some sentiment in the air industry that some posted language may confuse the travelling public and could incite the traveller to seek unfounded

claims. Plain language is necessary however it cannot be at the cost of losing information from the tariff. Method of delivery of the information is also limited by the length of the tariff documents. Possible methods of delivery of communication include making it available on e-tickets and on boarding passes.

c. What criteria should be established to ensure that the language used to communicate passenger rights is simple, clear, and concise?

The information should be in the written form. The communication of the new regulation has to be in clear written language, without acronyms, bilingual, and must include sections of the law identified as obligatory reading. The goal of keeping this communication short, is second only to the clarity of the language. In addition to posting information on the website other options include making it available on e-tickets and on boarding passes. We cannot lose sight of the fact that tariffs are legal documents. One option for an airline website is to have two places, one location with plain language FAQ's and a second place with the legal language of the tariff.

d. Should the regulations give specific direction on the format and length of information document summarizing passenger rights and recourse?

Yes. Specific compensation examples should be available to the passenger. There has to be an effort to take the ambiguity out of the tariff language. The regulator has to take some responsibility in ensuring that the tariff language is complete. The air operators have identified significant challenges in notifying passengers of changes in flight schedules, especially when tickets are purchased through travel agencies and third-party vendors. Where do we draw the line, once the airline has made a reasonable effort to notify the passenger? The answer on notification may be found in using technology such as text messaging to provide the required notification. The question asked is "how can airlines provide the terms and conditions to the consumer", especially if the information is 5-10 pages long? Perhaps an intermediate screen is the solution with the language provided between screens when booking the itinerary and the final print screen.

3. Flight Delays, Cancellation or Denial of Boarding

Section 86.11 of the Canada Transportation Act, S.C., 1996, c.10, as amended Regulations – carrier's obligations towards passengers states: (86.11 (1) (i)) ..."the minimum compensation of treatment of passengers 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". CTA has stated that this is part of the bill and is unavoidable. This makes it imperative that any refund either in the form of a negotiable instrument or voucher or credit, be made part of compensation in this context. We are happy to see that the CTA distinguishes between flight cancellations that are:

- a. Within the airline's control.
- b. Controllable delays that are required for safety have to be exempt. Mechanical delays are presumed to be controllable by some but that is not always the case.
- c. We have to be wary that the CTA does not accept in a wholesale way the European Regulation (EC) No 261/2004 which states that for example: In the case of maintenance "the court takes the view that even where a technical problem which has occurred unexpectedly and is not attributable to poor maintenance and is not detected during routine maintenance, such technical problem does not fall within the definition of "extraordinary circumstances". There seems to be some agreement with the European regulation (EC) No 261/2004 provided in Annex C of the Technical Questions. The UK list of extraordinary circumstances is appropriate but should be noted that it is not an exhaustive list of incidents that the CAA may qualify as extraordinary circumstances. Airlines will also need to demonstrate that they took reasonable measures to mitigate the resulting disruption.
- d. Outside the airline's control.

Comment: Some of our member carriers are concerned how their business practices may be affected by new regulations, in particular when dealing with the Federal Government which requires that cancellation and no-show penalties must be waived as necessary conditions in “Federal Travel Purchase Agreements”.

4. Compensation Levels

Compensation levels, be it for domestic or international travel, should vary if the occurrence results from a business practice, such as overbooking, as compared to occurrences resulting from unintentional reasons. It would be up to the CTA to determine negligence on the part of the carrier.

As we stated in our opening statement, compensation levels, such as that found in Europe and the US, are unrealistic in Canada. In many cases, the size of the airlines in Canada and the revenues generated from those flights are significantly smaller. Compensation should be exactly that, a compensation, and not a lottery ticket, the value of the refund should not exceed the value of the original ticket by multiples. Carriers support the concept that there should be a cap on compensation to ensure that passengers do not abuse the compensation and to help airlines gauge the value of their liability.

Clear language regulations that are easy to understand are preferred by the aviation industry. Prescriptive regulations create challenges. Performance based regulations with measurable outcomes are more workable. Airlines are focused on the fact that there is a need to refine and define the compensation definition on an intermodal basis. A comparison needs to be done with the rail and bus travel from a compensation perspective.

5. Musical Instruments

Musical instruments (86.11 (1) (e) – “requiring the carrier to establish terms and conditions of carriage with regard to the transportation of musical instruments”. For example, a carrier can declare in their tariff that they will not overbook. In the case of musical instruments, why can’t carriers declare in their tariffs that they will not transport musical instruments beyond a certain size and still be compliant with the requirements of 86.11 (1) (e)? An instrument is a non-critical item, so why can’t individual airlines make the decision on whether or not to leave it out of their carriage?

One of the biggest concerns around this issue is the deliberate opportunity for abuse by a certain percentage of the travelling public. This is an opportunity for industry to manage the risk and protect itself from abuse. One possibility is to refuse to carry non-critical items with the greatest liability. There has been a suggestion from northern airlines that a policy be created removing musical instruments from the cabin of the aircraft, reducing the exposure of the liability for instruments. Instruments dedicated to the cargo hold would then have to be packaged for cargo shipment.

6. Lost or Damaged Baggage

Baggage compensation (86.11 (1) (c) – “prescribing the minimum compensation for lost or damaged baggage that the carrier is required to pay”. Having a minimum similar to the US (\$3500 USD minimum (\$4500 CDN)) would be totally unreasonable and costly to the industry. We need to stick with declared values with a determination as to how reasonable a claim is on a case-by-case basis. A minimum compensation could lead to a significant increase in fraudulent claims by passengers. Currently Canadian carrier claims are in the \$1500 range with most claims coming in well under \$1500.

Compensation Options for tarmac delays, lost or damaged baggage – need to be explicit to the consumers:

- travel vouchers valued at more than the cash price
- frequent flyer points
- complimentary tickets
- cash/refund to customers credit cards

The compensation options should be the same for all carriers in Canada. At the end of the day it should be the consumers choice which option he/she chooses. There needs to be more data collection industry wide to be able to quantify these claims from a monetary perspective. No other modes of transportation have compensation for passenger delays (trains, intercity bus, ships). The USA has no compensation regulations for delayed or cancelled flights.

Overarching Principle of compensation. – For Discussion

There is concern in the Canadian context that we follow the European model of 3rd party representatives lobbying on behalf of passengers. This is a practice that we want to steer away from as it can lead to abuse of the system designed to protect the travelling public.

There is a dangerous trend of websites claiming to advocate for compensation on behalf of customers. This is an opportunity for industry to address the issue as to who can legally pursue claims on behalf of passengers.

Ideally the transaction for compensation should be between the airline and the passenger. The CTA needs to consider why the aviation industry has been centred out in the transportation network for compensation by the travelling public. Other modes of transportation such as intercity bus and rail do not have a compensation framework like that imposed on airlines. If there is compensation for the air industry why is it excessive when compared to other modes?

We all value our time, but from a practical sense airline compensation cannot be viewed as a lottery, it has to be reasonable.

European airlines such as Ryan Air have added 2.5 Euros to each ticket and have amassed a compensation fund of \$400 million to meet the (EC) No 261/2004 compensation requirements.

Appendix A

We should examine the document on the Australia Air Passenger Rights from the Library of Parliament Research Publications – Section: [Return to Business, Industry and Trade](#)

Air Passenger Rights in Canada and Other Jurisdictions

<https://lop.parl.ca/Content/LOP/ResearchPublications/2018-09-e.html?cat=business>

Note: Superscript numbers referenced below refer to sections under Air Passenger Rights in Australia in the linked document.

Section 6 - Air Passenger Rights in Australia ³⁸

Australia does not have air passenger rights spelled out in legislation like the U.S. or the EU. According to the Australian consumer advocacy group CHOICE, the country decided not to implement such a regime because of concerns about how it would affect airfares.³⁹

However, Australia's Airline Customer Advocate (ACA) “provides a free and independent service to eligible customers of major Australian airlines by facilitating the resolution of current unresolved complaints about airline services.”⁴⁰ The five participating airlines fund the ACA.⁴¹

To be eligible to file a complaint with the ACA, the complaint must be about a specific incident (e.g., a flight delay or cancellation) and the passenger must have already tried to resolve the complaint directly with the airline.⁴² The complaint must also relate to a problem that has occurred in the last 12 months.⁴³

The ACA will respond to the passenger's complaint within 20 days of the date that they lodged the complaint, although the organization can extend this deadline when it needs to seek more information from the passenger. Airlines must respond to all complaints that the ACA forwards to them.⁴⁴

Nevertheless, the ACA maintains that it “does not have independent power to make decisions that affect the participating airline's response to [a] complaint.”⁴⁵ In other words, the ACA cannot make the airline respond in a particular way.

The ACA's role most resembles the CTA's facilitation process. However, in contrast to the ACA, the CTA also offers an adjudication process, where its decision is final and binding.

Australian airlines are free to set their own policies regarding such matters as denied boarding, flight delays, cancellations and tarmac delays. These policies are typically available through the airlines' customer charters (referred to as tariffs in Canada).

Conclusion

Currently, Canada's air passenger rights regime is most similar to Australia's, as both jurisdictions allow airlines to set their own policies on air passenger rights and require them to publish those policies in their tariffs (or customer charters). Both countries also have dispute resolution processes in place, though the CTA has more enforcement power than its Australian counterpart.

In contrast, the U.S. and the EU both have legislated air passenger rights in cases of denied boarding, flight delays, cancellations and tarmac delays.

Third party resellers that are scrapping legitimate airline websites and reselling tickets are known as third party interveners. In the electronic age it is almost impossible to track down websites such as kiwi.com and gate1travel.com. We have no current mechanism on how to control these hacks. They should be banned.

An example of how different the EU environment is compared to Canada—the book exposure of a 74 seat aircraft at \$300 per seat on a 6 leg round trip would amount to a compensation package of \$133,200 which is well over the profit or operating revenues for that aircraft.

Automating the compensation model is not possible because there has to be some level of an adjudication involved.

The smooth implementation of new CTA requirements will be critical to prevent disruption in the airline industry. A reasonable amount of lead time will be required for carriers to update their tariff.

If we don't address these issues as an industry the result will be economic hardship for the airline companies, loss of services and reduced number of routes that airlines will continue to serve.

It is suggested to overlay the Australian demographics, incomes and wages on top of the Canadian numbers to better compare the two economies.

The direction in which industry proposals are moving are counter intuitive to the Ministers mandate of making more services available to the travelling public.

Recommendations

1. Reasonable Compensation: Compensation has to be in line with the economic realities of the air transport industry in Canada. Even if it is meant as a punitive reward it still has to be reasonable in order to maintain the enviable air transport system that Canadians expect.
2. There needs to be clear language in the regulation that is appropriate to all types of services as the passengers do not distinguish between scheduled, non-scheduled and charter flights. There has to be some sort of regulated communication structure (to the consumer) that provides industry with a standard set of requirements. "Communication" has been identified as the top consumer issue.
3. There must be a carve out for Northern and remote operations in the regulations. The regulations have to be more flexible as air travel is the lifeline to communities and adverse weather conditions frequently affect the length of flights. Northern and remote regions travelers are more tolerant of weather delays as cancelling a flight is a last resort. Therefore, regulations in the south tied to compensation for time delays do not work in the north.
4. Types of Compensation: There needs to be a list approved by the CTA with the types of approved compensation offered by carriers. This list needs to be the same for all carriers in the same type of operation.
5. Third party representatives acting on behalf of the travelling public have to be strictly regulated. The trend with 3rd party legal representation is a move towards more class action lawsuits. However, there is also a need for more education of paralegal representations.
6. Air carriers must have the ability to decide in their tariff whether or not to carry musical instruments and the terms of carriage if they choose to carry.