Submissions to the Canadian Transportation Agency

by Air Passenger Rights

Analysis of the Proposed Amendments to Canada's Air Passenger Protection Regulations

March 2025

Halifax, NS • AirPassengerRights.ca

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Executive Summary

The proposed amendments to Canada's *Air Passenger Protection Regulations* [***APPR***] were meant to implement the recommendations of the House of Commons Standing Committee on Transport, Infrastructure and Communities[1] to **close** major loopholes in the *APPR*, and to give effect to section 465 of the *Budget Implementation Act, 2023, No. 1*.

Unfortunately, the proposed amendments fall far short of both, and instead they perpetuate the *status quo* in two of the existing *APPR*'s most significant loopholes.

First, Proposed Section 18 defines "exceptional circumstances"—which relieve the carrier from paying standardized compensation to passengers for their inconvenience—in a manner that deems the majority of flight disruptions to be due to "exceptional circumstances." The Regulatory Impact Analysis Statement candidly acknowledges that **more than one-half** (53%) of flight delays and **more than two-thirds** (69%) of flight cancellations would fall in this category. In our view, such an expansive definition of "exceptional circumstances" would be absurd and defeat Parliament's intent.

Second, the Regulatory Impact Analysis Statement candidly acknowledges that the definition of "denial of boarding" in the existing *APPR* limits the intended scope of the definition of denial of boarding, and that this means that "a passenger that should have been entitled to compensation in relation to denial of boarding may not receive such." Proposed Subsection 1(3), which defines "denial of boarding," largely perpetuates this loophole.

We urge the Canadian Transportation Agency and the Government of Canada to promptly close these loopholes and better align Canada's *APPR* with the European Union's gold standard.

We would be remiss in our duty if we did not acknowledge some of the positive qualities of the Proposed Amendments. *First*, we commend the authors of the Regulatory Impact Analysis Statement for the inclusion of quantitative data on the impact of the proposed definition of "exceptional circumstances" and for acknowledging the existing *APPR*'s shortcomings in defining "denial of boarding." This information is invaluable in fully appreciating the flaws in the proposal. *Second*, we warmly welcome the unified language for alternate transportation arrangements in Proposed Subsection 13(1), although we propose some clarifications to Proposed Subsections 13(2) and 13(3). *Third*, we endorse Proposed Paragraph 14, which would finally consolidate passengers' fundamental right to a refund into the *APPR*. *Fourth*, we welcome the Proposed Section 22, which contains clearer and better language about the seating of children. *Lastly*, we endorse increasing the maximum Administrative Monetary Penalties (AMP) for violations of the *APPR* to $250,000 per violation, with the reservation that we look forward to seeing AMPs in such amounts issued on a regular basis to air carriers.

[1] "Strengthening Air Passenger Rights in Canada," Report of the Standing Committee on Transport, Infrastructure and Communities (Apr. 2023).

Summary of Recommendations

R-1. Delete Proposed Subparagraph 18(a)(i)(G).

R-2. Revise Proposed Subparagraph 18(a)(i)(L) to read:

> **(L)** a labour dispute involving ~~the carrier or~~ an essential service provider such as an airport managing body~~,~~ or air navigation service provider, but excluding the carrier and its subcontractors such as but not limited to ~~or~~ ground handling service provider, or

R-3. Replace the definition of "denial of boarding" in Proposed Subsection 1(3) with:

> ***denial of boarding*** means the refusal to carry a passenger on a flight on which they hold a confirmed reservation — or on which they held a confirmed reservation before their itinerary was amended by the carrier without their consent — for a reason other than a failure by the passenger to:
>
> (a) present valid travel documentation;
> (b) present themselves at the airport at the required time for check-in; or
> (c) comply with health, safety or security requirements;
>
> ***confirmed reservation*** means when the passenger has been issued a ticket or other document that indicates that the carrier has accepted and registered the reservation.

R-4. In Proposed Section 18, delete the words "or 16" and make the following consequential revisions:

(1) in Proposed Subsection 16(1), delete the words "Subject to section 18"; and

(2) delete Proposed Subsection 16(6).

R-5. Delete Proposed Subparagraph 12(4).

R-6. In Proposed Paragraph 12(2)(a), delete the words "unless they were informed of the delay or cancellation at least 12 hours before the departure time that is indicated for that flight on their ticket."

R-7. In Proposed Subsection 2.2(2), replace "15 days" with "7 days."

R-8. Delete Proposed Paragraph 18(a)(ii) in its entirety, or alternatively, in Proposed Subparagraph 18(a)(ii)(C):

(a) delete the words "in the case of a large carrier"; and

(b) replace the words "24 hours" with "9 hours."

R-9. Expand the obligations of "large carriers" to apply to "small carriers." Alternatively, replace the definition of "large carrier" in s. 1(2) of the *APPR* with:

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

R-10. Insert the following provision immediately after Proposed Section 2.1:

> **2.2** A carrier may not rely on a document in support of a defence to a claim referred to in section 85.01 of the Act unless that document has been disclosed to the claimant in accordance with section 2.1 and subsections 15(4) and 16(6).

R-11. Revise Proposed Subsection 2(1) to read:

> The carrier operating a flight is liable to passengers with respect to the obligations set out in these Regulations. If a carrier's obligations in respect of a given matter as set out in the applicable tariff are more favourable to a passenger than its obligations in respect of the same matter as set out in these Regulations, the carrier is liable with respect to the obligations set out in the tariff.

R-12. Revise Proposed Subparagraphs 13(2)(b)(i), 13(2)(c)(i), 13(3)(b)(i), and 13(3)(c)(i) to read:

> is operated by any carrier, including but not limited to competitors with whom the carrier has no agreement,

R-13. Revise Proposed Subsection 13(9) to read:

> A passenger may decline any alternate travel arrangements that meet the requirements of this section that have been provided to them if they do not allow the passenger to complete their itinerary within a reasonable time or otherwise do not meet their travel needs, in which case the carrier may cancel the reservation.

R-14. In Proposed Subparagraphs 18(1)(i)(B) and 18(1)(i)(C), replace the phrase "incompatible with the safe operation of the flight" with "make the safe operation of the flight impossible."

About *Air Passenger Rights*

Air Passenger Rights [**APR**] is Canada's independent federal nonprofit organization of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation. APR has a track record of successfully predicting shortcomings and loopholes in legislation relating to air passenger rights.

- In 2017, APR appeared before the House of Commons Standing Committee on Transport, Infrastructure and Communities [**TRAN**] and submitted a brief, cautioning that the *Transportation Modernization Act* (Bill C-49) was inadequate.

- In 2018, APR appeared before the Standing Senate Committee on Transport and Communications and submitted a brief, cautioning again that the *Transportation Modernization Act* was inadequate.

- In 2019, APR published a 52-page report entitled "Deficiencies of the Proposed Air Passenger Protection Regulations" about how airlines would exploit the *Air Passenger Protection Regulations*'s shortcomings and loopholes.

- In 2020, APR appeared before the TRAN and in 2021 submitted a brief entitled "Withheld Passenger Refunds: A Failure by Design" on the refunding of flights cancelled by airlines.

- In November 2022, APR appeared before the TRAN and in December 2022, mere days before the 2022 holiday season air travel meltdown, APR submitted a 29-page brief entitled "From the Ground Up: Revamping Canada's Air Passenger Protection Regime" setting out detailed recommendations for legislative amendments, including higher administrative monetary penalties for airlines that violate passengers' rights.

- In 2023, following the 2022 holiday season air travel meltdown, APR appeared before the TRAN again as part of the study of the *Air Passenger Protection Regulations*.

- In 2025, APR obtained an injunction prohibiting Canada's second-largest airline from misleading passengers about their entitlement to reimbursement for meals and accommodation in the event of certain flight disruptions: *APR v. WestJet Airlines Ltd.*, 2025 BCSC 155.

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

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

APR's presence on social media includes the Air Passenger Rights (Canada) Facebook group with over 245,000 members, and the @AirPassRightsCA X/Twitter feed with over 21,200 followers.

APR was founded and is led by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

Gábor Lukács, PhD (President)

Dr. Lukács holds a PhD in mathematics from York University (2003), and taught financial mathematics at Dalhousie University.

Since 2008, Dr. Lukács has filed more than two dozen successful complaints with the Canadian Transportation Agency [**CTA**], challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers. In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking. In November 2023, the Public Interest Advocacy Centre (PIAC) awarded Dr. Lukács the Harry Gow Award for Transportation and Competition to Connect Communities.

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,[2] the academic community,[3] and the judiciary.[4] Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,[5] in respect of air passenger rights. He successfully challenged the CTA's lack of transparency and the reasonableness of the Agency's decisions. In 2020, the Federal Court of Appeal allowed Dr. Lukács to intervene in the airlines' challenge to the *Air Passenger Protection Regulations*, noting that he "would defend the interests of airline passengers in a way that the parties cannot."[6] In 2024, the Supreme Court of Canada allowed Dr. Lukacs to intervene and present written and oral arguments in the airlines' challenge to the *Air Passenger Protection Regulations*, in which the high court most decisively sided with consumers.[7]

In 2025, Dr. Lukács was awarded the King Charles III Coronation Medal for his service to the community, to Nova Scotia, and to Canada.

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

3 Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018; and Second Annual Business Ethics Conference: Ethics in the Aviation Industry, McGill University, November 2024.

4 *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.

5 *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

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

7 *International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30.

1. Exceptional Circumstances

Proposed Section 18 that defines "exceptional circumstances"—which relieve the carrier from paying standardized compensation to passengers for their inconvenience—perpetuates the *status quo* and the existing *APPR*'s loopholes, including the dreaded "required for safety reasons" loophole.

The existing *APPR* categorizes flight delay, cancellation, and denial of boarding into three categories that mirror subparagraphs 86.11(1)(a)(i)-(iii) of the *Canada Transportation Act* [***Act***], albeit in reverse order:

(i) due to situations outside the carrier's control (s. 10);
(ii) within the carrier's control but required for safety purposes (s. 11); and
(iii) within the carrier's control but not required for safety purposes (s. 12).

The airline must pay standardized monetary compensation to passengers only if the disruption falls in the *residual* category of "within the carrier's control but not required for safety purposes." This classification makes denial of compensation the norm—and payment of compensation the exception.

Section 465 of the *Budget Implementation Act, 2023, No. 1* [***BIA***] amended subsection 86.11(1) of the *Act* by making air carrier's obligation to pay standardized monetary compensation to passengers for inconvenience caused by flight disruptions the general rule, and authorizing the Agency to prescribe exceptions to this general obligation. Proposed Section 18 is purportedly made under this authority.

Proposed Section 18, however, defines "exceptional circumstances" to mean the situations that are currently encompassed in the categories of "outside the carrier's control" (s. 10) and "within the carrier's control but required for safety purposes" (s. 11). In so doing, it accomplishes little more than rebranding the *status quo* and attempting to pass it off as a substantial improvement or streamlining of the *APPR*.

In our view, Proposed Section 18 suffers from three critical flaws:

A. the proposed definition of "exceptional circumstances" encompasses the majority of flight disruptions;

B. the inclusion of the current "within the carrier's control but required for safety reasons" category in the newly-minted "exceptional circumstances" inadvertently limits affected passengers' right to assistance; and

C. the definition of "exceptional circumstances" is inconsistent with the EU's regime.

In what follows, we first expand on these critical shortcomings, and then recommend alternative language to remedy them.

A. Absurd: The Proposed Definition of "Exceptional Circumstances" Encompasses the Majority of Flight Disruptions

Proposed Section 18 deems the majority of flight disruptions to be due to "exceptional circumstances." The Regulatory Impact Analysis Statement candidly acknowledges that **more than one-half** (53%) of flight delays and **more than two-thirds** (69%) of flight cancellations would be deemed to be due to exceptional circumstances within the meaning of Proposed Section 18.

Such an expansive definition of "exceptional circumstances" would be absurd and defeat Parliament's intent expressed in section 465 of the *BIA*, which was introduced in response to the House of Commons Standing Committee on Transport, Infrastructure and Communities' recommendation:

> **Recommendation 2 - Categorization of Delays and Cancellations**
>
> That the Government of Canada review the process by which flight delays or cancellations may be categorized as within an air carrier's control but required for safety purposes, and that it consider harmonizing the *Canada Transportation Act* and the *Air Passenger Protection Regulations* with European regulatory schemes in this regard.[8]

The Minister of Transport told the Standing Senate Committee on Transport and Communications during the study of Division 23 of the *Budget Implementation Act, 2023, No. 1*, which includes section 465, that:

> For example, air carriers would be required to pay mandatory compensation to travellers for all disruptions, no matter the cause – except for a very limited number of cases, which will be defined in regulations. This means there will be no more loopholes where airlines can claim that a disruption is caused by something else outside of their control or for a security reason, when it's not.[9]

Similarly, a Transport Canada senior official told the House of Commons Standing Committee on Finance during the study of Division 23 of the *Budget Implementation Act, 2023, No. 1* that:

> Currently in the regulations, there are different categories. There are three categories of incident, two of which allow the air carriers to not provide compensation in instances where there are significant delays or cancellations. Those would be where the carrier interprets that an incident is not within its control or where the carrier interprets that an incident is due to safety.
>
> Those categories will disappear, and instead there will be more onus on the carriers themselves to provide compensation in all incidents, except for those incidents that are deemed to be exceptional. A specific list will be articulated in the regulations themselves.[10]

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[8] "Strengthening Air Passenger Rights in Canada," Report of the Standing Committee on Transport, Infrastructure and Communities (Apr. 2023).

[9] *Evidence*, Standing Senate Committee on Transport and Communications (May 17, 2023; emphasis added).

[10] *Evidence*, Standing Committee on Finance (May 2, 2023; emphasis added).

The Minister of Transport's and Transport Canada's senior official's words both clearly and consistently indicate the legislative intent that the list of exceptions to the obligation to pay standardized compensation to passengers include only "a very limited number of cases" and only those that are "exceptional."

Designating the majority of flight disruptions as being due to "exceptional circumstances," as Proposed Section 18 does, is therefore inconsistent with and defeats Parliament's intent in amending the *Canada Transportation Act* and enacting section 465 of the *BIA*.

B. Limiting the Right to Assistance in Flight Disruptions Required for Safety Reasons

The combined effect of Proposed Subparagraph 18(a)(i)(G) and Proposed Subsection 12(4) is that the right of passengers whose flight is disrupted for what is currently known as reasons "within the carrier's control but required for safety reasons" (s. 11) to assistance (meals, accommodation, etc.) is limited to a 72-hour period. As demonstrated by the example below, this would be a step back compared to the right to assistance under the existing *APPR*.

Example. Gina lives in Vancouver. Gina visited for business a small town that is served by one daily flight by a single airline. She was scheduled to fly back to Vancouver on Monday, but her flight was cancelled for unexpected maintenance issues that were discovered with the aircraft before departure. Since the missing part for the aircraft has to be delivered by ground transportation, the airline is unable to transport Gina to Vancouver before Friday.

Under the existing APPR, Gina's flight disruption falls within the category of "within the carrier's control but required for safety reasons" (s. 11), and as such the airline owes Gina, for the entire four days of her being stranded, "food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger" and "access to a means of communication" under s. 14(1) and " hotel or other comparable accommodation that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport" under s. 14(2).

Under the proposed amendments, pursuant to Proposed Subparagraph 18(a)(i)(G), Gina's flight disruption was caused by "exceptional circumstances." Proposed Subsections 12(1)-(3) require the airline to provide Gina with meals, accommodation, access to means of communication, overnight accommodation, and ground transportation. **However**, because Gina's situation is captured by Proposed Section 18, her entitlement to assistance is limited to a 72-hour period from the time her flight was cancelled, pursuant to Proposed Subsection 12(4), which reads as follows:

> **12 (4)** Despite subsection (3), if the delay, cancellation or denial of boarding that gives rise to the carrier's obligations under subsection (1) is the result of a circumstance referred to in section 18, those obligations cease to apply 72 hours after the flight is delayed or cancelled or the denial of boarding occurs. [Emphasis added.]

As a result, under the proposed amendments, the airline's obligation to Gina will cease to apply on Thursday, and Gina will have to pay for her meals and accommodation from Thursday to Friday from her own pocket—an outcome that is worse than it would be under the existing *APPR*.

We believe this to be a drafting error and/or oversight, which ought to be corrected.

C. Inconsistencies with the European Union's Regime

Empirical research has shown that the European Union's passenger protection regime has reduced the likelihood and duration of flight delays under that regime, finding an economically important and statistically significant effect of the European Union's regulation covering compensation and services on both departure and arrival delay, as well as on-time performance.[11]

In the current economic climate, where we face a developing economic war with the United States, it would be in Canada's vital interest to strengthen economic relations with the European Union, including in the area of air transportation. Harmonization of Canada's air passenger protection regime with the European Union's gold standard would be an important first step toward that goal, and would offer considerable economic benefits to Canadians.

Regulation (EC) 261/2004 requires the carrier to pay standardized compensation for denial of boarding irrespective of the cause, and establishes payment of compensation as the norm in the event of flight delay and flight cancellation. Under the EU's regime, the airline can avoid paying compensation only in exceptional cases where the airline proves that the flight delay or cancellation was caused by "extraordinary circumstances,"[12] a narrow concept reserved for events such as volcanic eruptions, and which excludes situations that are inherent to the normal exercise of the airline's activity.

Unexpected Technical Defect or Problem with the Aircraft

Aircraft maintenance and/or safety issues **are not** considered to be "extraordinary circumstances" **unless** they are caused by acts of sabotage or terrorism or "where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety."[13] Unexpected technical problems that are not attributable to poor maintenance and are not detected during routine maintenance checks **are not** "extraordinary circumstances" either.[14]

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[11] Hinnerk Gnutzmann and Piotr Śpiewanowki, "Can Regulation Improve Service Quality? Evidence from European Air Passenger Rights," European University Institute Working Paper, RSCAS 2018/44 (2018).

[12] *Regulation (EC) 261/2004*, Article 5(3).

[13] *Wallentin-Hermann v. Alitalia*, European Court of Justice, Case C-549/07 at para. 26.

[14] *Van der Lans v. Koninklijke Luchtvaart Maatschappij MV*, Case C-257/14 at para. 49.

In sharp contrast with the European Union's regime, Proposed Subparagraph 18(a)(i)(G) designates "an unforeseeable technical defect in, or other unforeseeable technical problem with, the aircraft" as an "exceptional circumstance."

Strikes

A legal strike to assert the demands of a carrier's employees that is followed by a group of employees essential for operating a flight **is not** an "extraordinary circumstance."[15] Recently, the England and Wales Court of Appeal upheld and applied this principle in *Civil Aviation Authority v. Ryanair*.[16] Similarly, a solidarity strike in support of employees of the carrier's parent company, which is followed by employees essential for operating a flight, **is not** an "extraordinary circumstance."[17] Even a wild cat strike in the form of a coordinated action of employees calling in sick in response to the carrier's actions harming employees' interests **is not** an "extraordinary circumstance."[18]

In sharp contrast with the European Union's regime, Proposed Subparagraph 18(a)(i)(L) designates "a labour dispute involving the carrier or an essential service provider such as an airport managing body, air navigation service provider or ground handling service provider" as an "exceptional circumstance." This definition is overbroad in that it conflates the labour relations of the airline and its subcontractors, over which the airline has direct or indirect control, with the labour relations of genuinely independent entities, such as NAV Canada.

Recommendations

We recommend remedying the aforementioned shortcomings and better aligning Canada's regime with the European Union's gold standard of air passenger protection as follows:

R-1. Delete Proposed Subparagraph 18(a)(i)(G).

R-2. Revise Proposed Subparagraph 18(a)(i)(L) to read:

> **(L)** a labour dispute involving ~~the carrier or~~ an essential service provider such as an airport managing body~~,~~ or air navigation service provider, but excluding the carrier and its subcontractors such as but not limited to ~~or~~ ground handling service provider, or

[15] *AirHelp v. SAS*, Case C-28/20 at para. 51.
[16] *CAA v. Ryanair*, [2022] EWCA Civ 76 at para. 43.
[17] *CS v. Eurowings GmbH*, Case C-613/20 at para. 34.
[18] *Krüsemann v. TUIfly GmbH*, Case C-195/17 at para. 48.

2. Denial of Boarding

The Regulatory Impact Analysis Statement candidly acknowledges that the definition of "denial of boarding" in the existing *APPR* limits the intended scope of the definition of denial of boarding, and that this means that "a passenger that should have been entitled to compensation in relation to denial of boarding may not receive such." We could not agree more. Indeed, this is one of the major loopholes that we identified in February 2019,[19] and that we have been urging the Government of Canada to close ever since.

Regrettably, Proposed Subsection 1(3), which defines "denial of boarding," largely perpetuates this loophole:

> **1(3)** For the purpose of these Regulations, there is a denial of boarding when, no earlier than 24 hours before the scheduled departure time of a flight, a carrier cancels a passenger's confirmed reservation for the flight, or otherwise does not permit a passenger who holds a confirmed reservation to occupy a seat on the flight, because the number of confirmed reservations for the flight exceeds the number of seats that may be occupied.
>
> [Emphasis added.]

In our view, Proposed Subsection 1(3) is flawed in that it establishes eligibility to compensation on the basis of information in the airline's exclusive control, and it perpetuates the state of affairs that passengers who "should have been entitled to compensation in relation to denial of boarding may not receive such." Canada should harmonize its definition of "denial of boarding" with the one used in the European Union, which does not suffer from the Canadian existing and proposed definitions' shortcomings.

A. Criteria Based on Information in the Airline's Exclusive Control

Proposed Subsection 1(3) requires a passenger seeking denied boarding compensation to establish that:

(1) the airline cancelled the passenger's confirmed reservation for the flight "no earlier than 24 hours before the scheduled departure time" of the flight; and

(2) the reason that the passenger's confirmed reservation was cancelled is that "the number of confirmed reservations for the flight exceeds the number of seats that may be occupied."

Given that passengers have no access to the airlines' reservation and departure control systems, the Proposed Subsection 1(3) creates 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

[19] "Deficiencies of the Proposed Air Passenger Protection Regulations," by Air Passenger Rights (Feb. 2019), Part 2.

governing denied boarding compensation.[20]

In addition, the 24-hour limitation in the definition of "denial of boarding" is arbitrary, and fails to protect passengers' right to be transported on the flight that they purchased—if that flight operates at all. Instead, the 24-hour limitation may allow airlines to evade the obligation to pay denied boarding compensation by unilaterally cancelling in advance passengers' confirmed reservations on flights for which passengers paid good money, and unilaterally moving these passengers to different flights that they did not choose or that they deliberately sought to avoid.

B. Real-Life Examples of Passengers Denied Compensation Under Proposed s. 1(3)

In this section, we present real-life examples, where common sense dictates that the passenger should be receiving denied boarding compensation, yet the passenger's situation does not meet the unreasonably narrow definition of Proposed Subsection 1(3).

i. Failure to Check In Passengers Due to Absence of Personnel

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.[21]

Under Proposed Subsection 1(3), however, such situations would not be recognized as "denial of boarding," because the reason for the cancellation of the passenger's confirmed reservation is not that "the number of confirmed reservations for the flight exceeds the number of seats that may be occupied," but rather the airline's failure to properly staff its check-in counters.

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[20] *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para 17.

[21] *Nawrots v. Sunwing*, Decision 432-C-A-2013, paras. 84-85 (emphasis added).

ii. *De Facto* Denial of Boarding

In *Janmohamed v. Air Transat*, the Agency coined the notion of *de facto* or constructive denied boarding in a situation where the airline unilaterally moves a passenger to a different flight in advance, because the flight is oversold. The Agency 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".[22]

While the passengers' confirmed reservation on their original flights was cancelled due to an overbooking, they nevertheless do not meet the narrow definition of "denial of boarding" under Proposed Subsection 1(3), because the passengers were notified several days before their travel that the airline moved them to other flights.[23] This example underscores the arbitrary nature of the 24-hour limitation in Proposed Subsection 1(3).

iii. Airline Mistakenly Believes that the Passenger Would Miss Their Connection

Zoe Fauvel and Steffan Chmuryk were travelling from London, UK to Comox, BC with connecting flights in Toronto, ON, and Calgary, AB. When their flight from Toronto to Calgary was slightly delayed, the airline's computer system anticipated that Zoe and Steffan would miss their connection, and automatically cancelled their bookings on the Calgary-Comox flight that day and rebooked them on a flight leaving the next day. The anticipation that Zoe and Steffan would miss their connection turned out to be incorrect, and they arrived in Calgary in time to make their connection; however, they were not allowed to board their original Calgary-Comox flight.[24]

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[22] *Janmohamed v. Air Transat*, Decision No. 95-C-A-2016, paras. 19-20 (emphasis added).
[23] *Ibid.*, para. 8.
[24] *Fauvel v. Westjet Airlines Ltd.*, at paras. 1-5.

While Zoe and Steffan were clearly "denied boarding" in the common and ordinary sense of that phrase, and should have been compensated accordingly, they do not meet the narrow definition of "denial of boarding" under Proposed Subsection 1(3), because they were not denied boarding "because the number of confirmed reservations for the flight exceeds the number of seats that may be occupied." This example demonstrates how Proposed Subsection 1(3) perpetuates the *status quo* and an existing loophole of the *APPR*.[25]

iv. Airline's Mistake About Document Requirements

Mia and Joel Mackoff held confirmed bookings on an Air Canada flight to Vancouver. When the Mackoffs presented themselves for check-in, they were refused boarding, because the airline's agent mistakenly believed that they did not meet some travel requirements. As a matter of fact, they were both eligible to travel. Air Canada refused to pay the Mackoffs denied boarding compensation under the *APPR*, because overbooking was not the reason for their denial of boarding.[26]

While the Mackoffs were clearly "denied boarding" in the common and ordinary sense of that phrase, and should have been compensated accordingly, they do not meet the narrow definition of "denial of boarding" under Proposed Subsection 1(3), because they were not denied boarding "because the number of confirmed reservations for the flight exceeds the number of seats that may be occupied." This example, like the previous one, demonstrates that Proposed Subsection 1(3) perpetuates the *status quo* and an existing loophole of the *APPR*.[27]

C. The European Union's Regime Provides a Full Answer to These Concerns

In sharp contrast with Proposed Subsection 1(3), *Regulation (EC) 261/2004* defines "denied boarding" as an outcome, based on simple facts that are within the passenger's knowledge, irrespective of causes that are within the airline's exclusive knowledge:

> **2(j)** "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;
>
> **3(2)** Paragraph 1 shall apply on the condition that passengers:
>
> (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,
>
> — as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised

[25] *Ibid.*, at paras. 14-15.
[26] *Mackoff v. Air Canada*, 2022 BCCRT 1121 at paras. 2 and 12-19.
[27] *Ibid* at paras. 26-29.

> 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 Union's regime, a passenger who is refused transportation does not have to prove that the flight was overbooked, but only has to prove that they held a "confirmed reservation" and that they "presented themselves for check-in" on time or that they "have been transferred" by the airline to a different flight. Both of these are within the knowledge of a passenger and can reasonably be proven. Notably, the European Union's regime does not allow the carrier to avoid paying denied boarding compensation even in the case of extraordinary circumstances. Indeed, if a flight can take off at all, then not transporting a passenger who is eligible to travel on that flight is inexcusable.

The European Union's simple and logical definition of "denial of boarding" clearly encompasses: (i) failure to check in a passenger due to absence of personnel; (ii) *de facto* denial of boarding; and (iv) the airline's mistake about document requirements.

Eligibility to denied boarding compensation in the event of the airline's mistaken belief that the passenger would miss their connecting flight resulting in the cancellation of the passenger's booking on their flight was confirmed by the European Court of Justice:

> [...] the concept of "denied boarding" includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.[28]

There is no logical reason for Canadian passengers with these common experiences of not being able to travel on the flight for which they paid good money to have lesser protection than their European counterparts enjoy.

In addition, as noted earlier, harmonization of Canada's air passenger protection regime with the European Union's gold standard would be an important first step toward the goal of strengthening Canada's economic relations with the European Union, and would offer considerable economic benefits to Canadians.

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[28] *Cachafeiro v. Iberia*, European Court of Justice, Case C-321/11, para. 36.

Recommendations

We recommend remedying the aforementioned shortcomings and better aligning Canada's regime with the European Union's gold standard of air passenger protection as follows:

R-3. Replace the definition of "denial of boarding" in Proposed Subsection 1(3) with:

> ***denial of boarding*** means the refusal to carry a passenger on a flight on which they hold a confirmed reservation — or on which they held a confirmed reservation before their itinerary was amended by the carrier without their consent — for a reason other than a failure by the passenger to:
>
> (a) present valid travel documentation;
> (b) present themselves at the airport at the required time for check-in; or
> (c) comply with health, safety or security requirements;
>
> ***confirmed reservation*** means when the passenger has been issued a ticket or other document that indicates that the carrier has accepted and registered the reservation.

R-4. In Proposed Section 18, delete the words "or 16" and make the following consequential revisions:

(1) in Proposed Subsection 16(1), delete the words "Subject to section 18"; and

(2) delete Proposed Subsection 16(6).

3. Right to Assistance

We warmly welcome the shift toward a single set of rules for assistance (meals, telecommunication, accommodation, and ground transportation) to passengers whose flight is disrupted, which would apply regardless of the reasons for the flight disruption.

Proposed Section 12, however, falls short of achieving this objective in two ways. *First*, Proposed Subsection 12(4) limits passengers' right to assistance to 72 hours for flight disruptions that are deemed to be due to "exceptional circumstances." *Second*, Proposed Paragraph 12(2)(a) removes passengers' right to assistance if the airline notified them about their flight disruption at least 12 hours before the departure time showing on their tickets.

A. Assistance Should Not Be Limited to 72 Hours in "Exceptional Circumstances"

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

Proposed Subsection 12(4) limits passengers' right to assistance in the event of flight disruptions caused by "exceptional circumstances" to a 72-hour period from after the disruption, and leaves passengers out-of-pocket for all expenses incurred after that 72-hour period:

> **12 (4)** Despite subsection (3), if the delay, cancellation or denial of boarding that gives rise to the carrier's obligations under subsection (1) is the result of a circumstance referred to in section 18, those obligations cease to apply 72 hours after the flight is delayed or cancelled or the denial of boarding occurs. [Emphasis added.]

Proposed Subsection 12(4) has a number of undesirable—and likely unintended—consequences. *First*, as the example of Gina on page 8 shows, Proposed Subsection 12(4) **reduces** the right to assistance of passengers whose flight is disrupted due to what is currently called "within the carrier's control but required for safety reasons." Indeed, under Proposed Subparagraph 18(a)(i)(G), such flight disruptions would be deemed to be due to "exceptional circumstances," thus triggering the 72-hour limitation in Proposed Subsection 12(4). For comparison, section 14 of the existing *APPR* would impose no such temporal limitation on Gina's right to assistance in these circumstances.

Second, Proposed Subsection 12(4) creates uncertainty about passengers' right to assistance, because the reasons for a flight disruption cannot always be ascertained in the first 72 hours, and may require more thorough investigation even by the airline.

Third, a right to assistance that requires determination of the reasons and classification of the flight disruption is likely to generate unnecessary disputes and litigation over what is typically modest amounts. The high cost to society of adjudicating such disputes compared to the amounts at stake favours a universal right to assistance, irrespective of the reasons for the flight disruption.

Fourth, requiring air carriers to provide assistance—without temporal limitation—to passengers affected by a flight disruption due to extraordinary circumstances creates a financial incentive for the carrier to transport the passengers as expeditiously as possible, which is one of the underlying objectives of the *APPR*.

Lastly, the vast majority if not all of exceptional circumstances listed in Proposed Section 18 are, practically speaking, uninsurable by passengers; however, given the large volume of passengers and the rarity of exceptional circumstances causing passengers to need meals and accommodation in excess of 72 hours, airlines are in a far better position to cost-effectively insure themselves for risks related to providing assistance to passengers beyond the 72-hour period.

We therefore recommend removing Proposed Subsection 12(4).

B. Assistance Should Not Depend on Lack of 12-Hour Notice

The made-in-Canada loophole set out in Proposed Paragraph 12(2)(a), that no assistance is owed to the passenger if the airline notifies the passenger at least 12 hours in advance about a flight disruption, significantly limits the utility of the right to assistance, and has been abused by airlines.

Bait-and-Switch Sale of Tickets

We noticed an increase in the number of complaints in our Facebook group about bait-and-switch sale of tickets, where the airline would first sell the passenger a non-stop flight for an itinerary, and then cancel those flights a few weeks before the scheduled departure, while offering an unfavorable alternate transportation requiring an overnight stay. Notably, such conduct not only harms passengers directly, but also indirectly by being anti-competitive and depriving other carriers of business on the basis of the false pretense that the convenient flights sold would actually be operating.

Passengers caught in these situations no longer have the practical ability to cancel their booking for a full refund, because airfares have already gone up (due to the approaching travel date), and the amount refunded to them would not cover the costs of a more reasonable alternate transportation (if available). We believe that carriers that engage in such anti-competitive practices that put passengers in such situations ought to be providing assistance (meals, accommodation, and ground transportation) to affected passengers irrespective of how much advance notice was provided. Proposed Paragraph 12(2)(a) unreasonably excludes passengers in these situations from the right to assistance, and leaves them with considerable unexpected out-of-pocket expenses for meals and accommodation caused by the airline's purely commercial decision to cancel the passenger's flight.

Inconsistency with the *Montreal Convention*

Proposed Paragraph 12(2)(a) is inconsistent with Article 19 of the *Montreal Convention* applicable to most international itineraries, which imposes liability on the air carrier for damage occasioned by delay of passengers (including meals, accommodation, and ground transportation), irrespective of any advance notice provided to the passenger.

C. Right to Assistance in Other Jurisdictions

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

European Union. The key provisions of *Regulation (EC) 26 1/2004* on right to assistance are as follows:[29]

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

Israel. In 2012, Israel passed the *ASL*,[30] whose key provisions on right to assistance are as follows:

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

Turkey. In 2012, Turkey adopted its Regulation on Air Passenger Rights (SHY-Passenger), which mirrors the European Union's *Regulation 261/2004*.[31]

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[29] *Regulation (EC) 261/2004*, Articles 4(3), 5(1)(b), 6(1)(i)-(ii), and 9.

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

[31] SHY-Passenger in English, Articles 5(3), 6(1)(b), 7(1)(1)-(2), and 10.

Recommendations

We recommend remedying the aforementioned shortcomings and better aligning Canada's regime with the European Union's gold standard of air passenger protection as well as with other jurisdictions, as follows:

R-5. Delete Proposed Subparagraph 12(4).

R-6. In Proposed Paragraph 12(2)(a), delete the words "unless they were informed of the delay or cancellation at least 12 hours before the departure time that is indicated for that flight on their ticket."

4. Right to a Refund

We most warmly welcome the proposal to consolidate passengers' fundamental right to a refund into the *APPR*, and we endorse Proposed Section 14.

For close to twenty years, it has been settled law in Canada that passengers whose flights were cancelled by the airline for any reason are entitled to a refund of all amounts paid for unused services. This common sense principle, recognized as a "fundamental right,"[32] is deeply rooted in the common law and provincial and federal legislation, and has been expressly recognized by the House of Commons Transport Committee.[33] Proposed Section 14 is therefore a long overdue amendment.

At the same time, we have misgivings about Proposed Paragraph 2.2(2) allowing airlines 15 days to refund passengers instead of the 7-day standard that has been adopted not only in the European Union[34] but also in the United States.[35]

All airlines that operate to or from the European Union or the United States already have to comply with the obligation to issue refunds within 7 days insofar as passengers travelling to and from these jurisdictions are concerned. None of these airlines presented any evidence to show that they have faced any difficulty or hardship in complying with these well-established rules that, in one form or another, have been in place for about two decades.

The industry stakeholders' objection to Canada harmonizing its refund deadline rule with the one that has been in place for about two decades in two of the largest jurisdictions in the Western world sounds hollow and speculative, and is unsupported by evidence.

Recommendation

We recommend that Canada harmonize its refund deadline rule with the European Union's and the United States' longstanding rules as follows:

R-7. In Proposed Subsection 2.2(2), replace "15 days" with "7 days."

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[32] *Lukács v. Sunwing Airlines*, CTA Decision No. 313-C-A-2013 at para. 15.

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

[34] *Regulation (EC) 261/2004*, Articles 4(3), 5(1)(a), 6(1)(iii), 8(1)(a), and 7(3).

[35] 14 CFR Part 399.80(l).

5. Knock-On Effect

Proposed Paragraph 18(a)(ii), deeming certain flight disruptions that are directly attributable to the delay or cancellation of an earlier flight ("knock-on effect"), is only a marginal improvement over subsections 10(2) and 11(2) of the existing *APPR*.

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

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

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

Even if some form of knock-on effect exception were to be retained, we are particularly concerned about Proposed Subparagraph 18(a)(ii)(C), for two reasons.

First, the words "in the case of a large carrier" suggest that the 24-hour sundown period applies only to large carriers, and small carriers may rely on the knock-on effect indefinitely as an excuse for refusing to pay passengers standardized compensation.

Second, a 24-hour sundown period appears to be excessive in light of existing case law that even 10 hours should be sufficient to arrange for an alternate aircraft.[36]

Recommendation

To remedy the aforementioned shortcomings, we recommend the following revisions:

R-8. Delete Proposed Paragraph 18(a)(ii) in its entirety, or alternatively, in Proposed Subparagraph 18(a)(ii)(C):

(a) delete the words "in the case of a large carrier"; and

(b) replace the words "24 hours" with "9 hours."

[36] *Lai v. Air Canada*, 2023 BCCRT 772 at para. 24.

6. Small vs. Large Carriers

The substantial differences between the obligations of so-called "small carriers" and "large carriers" to passengers under the existing *APPR* is probably the single issue that has attracted opposition and rebuke from passengers[37] and some carriers[38] alike.

An airline is "large" for the purposes of the *APPR* if it has transported a worldwide total of two million passengers or more during each of the two preceding calendar years (*APPR*, s. 1(2)). Up until 2025, this definition enabled airlines such as Air Transat, Flair, Lynx, and Sunwing to claim to be "small" for the purposes of the *APPR* even though they operate large aircraft much like Air Canada and WestJet.

While Proposed Subsection 13(3) is a welcome step toward lessening the gap between the obligations of "small" and "large" carriers to passengers and harmonizing the *APPR* with the *Montreal Convention*, it does not go far enough.

Under the proposed amendments, there would be three kinds of disruptions (delay, cancellation, and denied boarding), two categories of disruptions (ordinary and exceptional circumstances), and two types of carriers (small and large). This means a total of $3 \times 2 \times 2 = 12$ different scenarios. Eliminating the distinction between "small" and "large" carriers would be a much needed, long overdue,[39] and substantial simplification of the consumer protection scheme to a total of $3 \times 2 = 6$ different scenarios instead of 12 that a passenger may experience.

We believe that the distinction between "small" and "large" carrier should be eliminated altogether; or alternatively, the delineation should be based on the size of the aircrafts in the fleet, rather than the number of passengers transported annually. We also accept that a bush pilot or an airline operating a small aircraft in the North should not be subject to the same requirements as an airline operating a large aircraft between Toronto and Edmonton.

Recommendation

R-9. Expand the obligations of "large carriers" to apply to "small carriers." Alternatively, replace the definition of "large carrier" in s. 1(2) of the *APPR* with:

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

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[37] Deficiencies of the Proposed Air Passenger Protection Regulations, pp. 28-30 (February 2019).
[38] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1735.
[39] *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3); aff'd: 2022 NSSC 49.

7. Carriers' Obligation to Provide Documents

We warmly welcome Proposed Section 2.1 and Proposed Subsections 15(4) and 16(6) that read as follows:

> **2.1** A carrier that denies – in whole or in part – a claim referred to in section 85.01 of the Act must, when communicating that denial to the claimant, provide
>
> (a) a clear and detailed explanation of the reasons for the denial that sets out the terms and conditions of carriage, fare and fare rule that are relevant to the denial; and
>
> (b) a copy of or electronic access to the applicable tariff.
>
> **15 (4)** If the carrier determines that compensation is not payable due to the existence of a circumstance referred to in section 18, the explanation referred to in section 2.1 must be accompanied by any documents, reports or other evidence that establish the existence of that circumstance. [Emphasis added.]
>
> **16 (6)** If the carrier determines that compensation is not payable because of the existence of a circumstance referred to in section 18, the carrier must provide to the passenger, within 48 hours after the denial of boarding, a clear and detailed explanation as to why compensation is not payable that is accompanied by any documents, reports or other evidence that establish the existence of that circumstance. [Emphasis added.]

These provisions, **if strictly enforced**, would bring significant transparency to the airlines' reasons for refusing any claim, would equip passengers with necessary information to meaningfully assess whether the airline has complied with its legal obligations, and could significantly reduce the number of disputes between passengers and airlines.

We are concerned, however, about the lack of a simple and effective mechanism to enforce these provisions and to automatically sanction air carriers that fail to comply with them. To put it differently, there appears to be no clear and prescribed consequence if an air carrier fails to provide full disclosure of the evidentiary basis for its denial of a claim.

We therefore recommend augmenting these much-needed provisions with sanctions analogous to Rule 232(1) of the *Federal Courts Rules*:

R-10. Insert the following provision immediately after Proposed Section 2.1:

> **2.2** A carrier may not rely on a document in support of a defence to a claim referred to in section 85.01 of the Act unless that document has been disclosed to the claimant in accordance with section 2.1 and subsections 15(4) and 16(6).

8. Unclear Language

A. Proposed Subsection 2(1)

Subsection 2(1) of the **existing** *APPR* contains a helpful and clear imposition of liability on the operating carrier:

> **2 (1)** The carrier operating a flight is liable to passengers with respect to the obligations set out in sections 7 to 22 and 24, or, if they are more favourable to those passengers, the obligations on the same matter that are set out in the applicable tariff.
>
> [Emphasis added.]

We are concerned that Proposed Subsection 2(1) may be unclear and create confusion:

> **2 (1)** If a carrier's obligations in respect of a given matter as set out in the applicable tariff are more favourable to a passenger than its obligations in respect of the same matter as set out in these Regulations, the carrier is liable with respect to the obligations set out in the tariff.

First, the removal of the phrase "carrier operating a flight" creates ambiguity as to which carrier is actually required to perform the obligations set out in the regulations, and is likely to result in carriers pointing fingers to each other given that Proposed Subsection 2(2) does not clearly impose liability on the operating or the marketing carrier in the vast majority of cases.

Second, the relocation of the phrase "is liable" toward the end of the sentence in Proposed Subsection 2(1) may be misunderstood as intended to impose liability on the carrier only in the event that the obligations set out "in the applicable tariff are more favourable to the passenger" than the obligations on the same matter in the *APPR*. This was clearly not Parliament's intent in enacting s. 86.11(4).

We recommend clarifying the true intent of Proposed Subsection 2(1) as follows.

R-11. Revise Proposed Subsection 2(1) to read:

> The carrier operating a flight is liable to passengers with respect to the obligations set out in these Regulations. If a carrier's obligations in respect of a given matter as set out in the applicable tariff are more favourable to a passenger than its obligations in respect of the same matter as set out in these Regulations, the carrier is liable with respect to the obligations set out in the tariff.

B. Proposed Subsections 13(2) and 13(3): Meaning of "Any Carrier"

Proposed Subsections 13(2) and 13(3), governing the carrier's obligation to offer alternative transportation to passengers affected by flight disruptions, use the phrase "any carrier" on multiple occasions.

The Regulatory Impact Analysis Statement for the original 2019 *APPR* and the 2022 revision of the *APPR* leave no doubt that "any carrier" is to be contrasted with "by the carrier or a carrier with which it has a commercial agreement" and that "any carrier" was intended to include competitors with whom the carrier has no any agreement at all.

In practice, however, airlines often thumb their noses at the law and refuse to comply with the legal obligation to rebook passengers on competitors.[40]

We recommend clarifying the meaning of the phrase "any carrier" throughout Proposed Subsections 13(2) and 13(3) as follows.

R-12. Revise Proposed Subparagraphs 13(2)(b)(i), 13(2)(c)(i), 13(3)(b)(i), and 13(3)(c)(i) to read:

> is operated by any carrier, <u>including but not limited to competitors with whom the carrier has no agreement</u>,

C. Proposed Subsection 13(9): Meaning of "Alternate Travel Arrangements"

We are concerned that Proposed Subsection 13(9) introduces ambiguity as to when the carrier may cancel a passenger's reservation:

> **13 (9)** A passenger may decline any alternate travel arrangements that have been provided to them if they do not allow the passenger to complete their itinerary within a reasonable time or otherwise do not meet their travel needs, in which case the carrier may cancel the reservation.

While we understand the *intent* of the phrase "alternate travel arrangements" to be arrangements in accordance with Proposed Subsections 13(2) or 13(3), as the case may be, the proposed wording could leave one with the impression that the carrier could cancel the passenger's reservation even if the carrier offers alternate transportation that does not meet the requirements of Proposed Subsections 13(2) or 13(3) (e.g., a flight two weeks later or earlier than originally scheduled).

It would clearly defeat the purpose and intent of Proposed Section 13 if a carrier could evade the obligations set out therein by offering non-compliant alternate transportation arrangements, and then cancelling the passenger's reservation when the passenger rightly protests.

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[40] "'It's just not right': Passengers call out WestJet for breaching rebooking rules," Canadian Press (Jan. 25, 2024).

We recommend clarifying the meaning of "alternate travel arrangements" in Proposed Subsection 13(9) as follows.

R-13. Revise Proposed Subsection 13(9) to read:

> A passenger may decline any alternate travel arrangements that meet the requirements of this section that have been provided to them if they do not allow the passenger to complete their itinerary within a reasonable time or otherwise do not meet their travel needs, in which case the carrier may cancel the reservation.

D. Proposed Subparagraphs 18(1)(i)(B) and 18(1)(i)(C)

We are concerned by the introduction of the vague phrase "incompatible with the safe operation of the flight" in Proposed Subparagraphs 18(1)(i)(B) and 18(1)(i)(C). We believe that the phrase "make the safe operation of the aircraft impossible," used in s. 10(1)(c) of the existing *APPR*, is more precise and less likely to generate disputes and litigation.

We recommend retaining the original wording and clarifying the intent of these provisions as follows.

R-14. In Proposed Subparagraphs 18(1)(i)(B) and 18(1)(i)(C), replace the phrase "incompatible with the safe operation of the flight" with "make the safe operation of the flight impossible."