

Comments on proposed regulations published in Canada Gazette, Part I, Volume 158, Number 51: Regulations Amending the Air Passenger Protection Regulations

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General Comment

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Joint Representations of Porter Airlines Inc. and Porter Airlines (Canada) Limited concerning the Air Travel Complaints Fee Proposal by the Canadian Transportation Agency

Porter Airlines Inc. and Porter Airlines (Canada) Limited (collectively, Porter) provide these representations in response to the publication by the Canadian Transportation Agency (the Agency) of its proposed amendments to the Agency's Air Passenger Protections Regulations (APPR) as published in the Canada Gazette, Part I, Volume 158, Number 51 on December 21, 2024 (the Proposal).

Introductory Comments

Any assessment of the Proposal requires consideration of the Proposal's stated objectives and those of the APPR generally, including both the extent to which (a) the Proposal is likely to achieve (or even hinder) those stated objectives, and (b) whether key policy objectives have been improperly omitted from the Agency's consideration and stated objectives.

The Proposal states that the objectives of the proposed amendments are to:

provide a clear, comprehensive and consistent set of rights for passengers;

seat children under the age of 14 next to their parent, guardian or tutor at no extra cost;

better align refund requirements with those in the United States and the European Union;

ensure the APPR are easier to understand, to implement and to enforce; and

ensure the APPR continue to balance the need to reflect operational realities of air carriers (including small carriers serving remote and northern communities) with the legislative goal of providing clear, comprehensive and consistent passenger rights.

As discussed below, Porter views many elements of the proposed amendments as conducive to achieving the Proposal's stated objectives – subject to certain refinements as proposed herein – while some elements appear certain to impose inefficient cost and administrative burdens without sufficient (if any) corresponding net benefit. Moreover, it is unclear whether any consideration has been given to the stated objectives of Canada's National Transportation Policy as prescribed in the Canada Transportation Act (the APPR's enabling statute), including the primacy of maintaining a “competitive, economic and efficient” transportation system that “enable[s] competitiveness and economic growth in both urban and rural areas throughout Canada.

In Porter's respectful submission, certain of the Proposal's stated objectives may be considered desirable, not in and of themselves, but rather only to the extent that they contribute to – or at the very least do not impede – the objective of the National Transportation Policy to develop and maintain an efficient transportation system that enables competitiveness and economic growth throughout Canada. For example, the objectives of clarity and consistency are laudable on their face, but even the most clear and consistent regulations, if they hamper efficiency and competitiveness across the air travel industry, cannot be said to be consistent with the National Transportation Policy nor the Agency's mandate in enabling and supporting it. Likewise, the stated objective of aligning practices with the U.S. and Europe should be considered desirable only to the extent aligning elements of the APPR with these foreign frameworks may be expected to yield results consistent with the National Transportation Policy's overriding purpose.

A salient feature of the original (and existing) APPR framework was to provide for a range of carrier obligations to passengers based on whether a flight disruption arose from reasons ‘within’ or ‘outside of’ the carrier's control – with cash compensation for inconvenience and the highest standards of care applying for so-called “controllable” disruptions. The Proposal seeks to add clarity by creating a closed list of “exceptional circumstances” (comparable to the existing APPR's ‘outside the carrier's control’ category), but excludes certain common circumstances outside the carrier's control, and further imposes responsibility for the highest standards of treatment (hotel, food, etc.) on carriers regardless of whether the disruptions are within the carrier's control. In

other words, airlines would be compelled to bear potentially enormous costs in cases of, for example, airport understaffing, runway closures, weather events, or other ‘uncontrollable’ circumstances.

While Porter agrees that the APPR regime would benefit from clarification as to which circumstances trigger which carrier obligations, the Proposal departs from this framework in arbitrary and onerous ways without providing any principled rationale nor any suggestion as to how this achieves or advances any objective of the National Transportation Policy. Porter submits, on the contrary, that substantially and arbitrarily increasing the cost burden on carriers – and thus on their passengers through inevitable higher fares – undermines the National Transportation Policy objective of creating an efficient and competitive air travel system. Any regime that imposes heavy and potentially crippling costs on carriers, irrespective of the carrier’s actions, omissions, or contingency plans for delays, cannot, in Porter’s submission, be considered principled or consistent with the National Transportation Policy.

A number of the other revisions in the Proposal likewise appear to be aimed at broadening the cost and operational burdens on air carriers without any link to an objective which advances the National Transportation Policy goals, and in many cases which far exceed the burdens and remedies imposed by other jurisdictions from which the Agency has said it seeks to “learn lessons” and apply best practices. Moreover, in most cases, the Agency appears to have vastly understated – if not disregarded outright – the technological and administrative resources that will be required to implement and roll out new practices the Proposal would demand of carriers.

Notably, the Agency had likewise previously underestimated the incremental costs to carriers, as well as to the Agency, of implementing and administering the original APPR – including that it estimated its own costs at less than 1/20th of its actual APPR administration costs, as described in its recent APPR Cost Recovery Fee proposal. The failure by the Agency to account for operational realities, including realistic costs to air carriers, undermines its stated objective to balance operational realities with the goal of providing for passenger rights.

Porter believes the Proposal reflects a useful starting point in applying the lessons learned from the implementation and administration of the APPR since its inception.

But, for the reasons that follow, Porter submits that certain proposed changes ought not to be adopted as proposed – including especially arbitrary changes which have no

principled basis in linking carrier obligations to carrier culpability, nor any consistency with the overriding goal of creating an efficient and competitive air travel system.

Competitiveness and Efficiency of Canadian Transportation

As stated, Porter submits that the objectives of the Proposal must be considered together with the overriding objective of the National Transportation Policy in the APPR's enabling legislation, to achieve an economic and efficient transportation system that enables competitiveness and economic growth across Canada. The Canadian air travel system is indisputably a major contributor to Canada's economic prosperity and growth, with a recent IATA study finding that air transport, including its contributions to tourism, contributes USD \$82 billion (CAD ~\$120 billion) to Canada's GDP, and over 800,000 jobs.

Yet, no other mode of transportation in Canada – whether rail, bus, or public transit – has been subjected to a passenger rights regime, much less one in which carriers must bear such administrative and financial costs. As such, the APPR regime puts air carriers at a substantial disadvantage compared to competitive modes of transport administered by the Canada Transportation Act and the National Transportation Policy enshrined therein.

Moreover, the APPR regime contributes to making Canada's air travel system costly and less competitive with other jurisdictions. Most notably, the Proposal provides for huge new costs to carriers – such as compensation payment obligations for some common 'uncontrollable' disruptions and wide-ranging passenger accommodation (food, hotel, transport) obligations for all disruptions, regardless of cause. These collectively exceed the burdens imposed on carriers by any other regulatory regime in the world, and will discourage foreign carriers from serving Canadian destinations, reducing connectivity of Canadian communities to each other and points abroad. Meanwhile, Australia has recently declined to adopt any similar passenger rights regime. The United States has no such similar framework and is likely to reassess existing requirements under the current administration. Even the European Union is reviewing its passenger rights regime with a view to mitigating its costly impact on airlines.

Further, at a time of substantial uncertainty concerning the stability and reliability of Canada's trade relationship with its primary trade partner the U.S., a substantial increase in costs and obligations such as reflected in the Proposal would hinder the efficient flow of people and labour by air travel by undermining its efficiency and competitiveness, contrary to the National Transportation Policy. The implications of

Canada-U.S. trade tariffs are another economic burden that will disproportionately affect Canadian carriers and their ability to provide a range of strong, sustainable transportation options.

Again, Porter cautions reliance on the future cost calculations reflected in the Agency's Regulatory Impact Statement Analysis, which have proven in prior APPR designs to have been incomplete and over-optimistic, and to vastly understate the actual costs to carriers and to the Agency.

Porter states that any revisions to the air travel framework must be carefully considered, including as to the timing in light of Canada's situation in the competitive international air travel industry and the reliability of the methods and analyses relied upon by the Agency.

From Categories of 'Control' to a List of Exceptional Circumstances

The original (and current) framework of the APPR provided for 'tiered' carrier obligations based, broadly speaking, on the extent to which a flight disruption arose from reasons within a carrier's control. An analog to this principle may be observed in the Montreal Convention governing passenger remedies in international travel – which exempts air carriers from liability when they could not have prevented the passenger's loss. While the initial and existing APPR regimes are not without their faults and flaws, they are at least founded in an ostensibly principled framework. In theory, then, an airline would face greater obligations to passengers (up to and including cash payments for inconvenience) where flight disruptions arose from reasons within their control, and more modest obligations where the disruptions were not within the airline's control. In practice, however, the interpretation and application of these 'categories' proved difficult and often highly subjective, prompting an overwhelming flood of passenger complaints to airlines and to the Agency – the cost of which dwarfed the Agency's predictions on how much the APPR would cost the government and airlines to administer, and which produced inconsistent and unpredictable outcomes. Indeed, when the Agency delegated the determination of APPR complaints and claims to its Complaint Resolution Officers, even those CROs produced inconsistent decisions on whether this or that disruption was 'controllable' or 'uncontrollable'. And, in fact, some CROs reviewing different passenger complaints from the very same flight with the very same documentary record have made opposite determinations on whether the airline was responsible.

Given the uncertainty and costliness of these determinations, Porter recognizes that a list of exceptional circumstances” may provide more certainty in categorizing flight disruption events which should attract a more modest tier of passenger remedies.

However, the Proposal also seeks to pre-emptively undermine this predictability by adding that, even if an exceptional circumstance has occurred, the carrier must still prove that “the flight disruption could not have been avoided even if all reasonable measures had been taken by the air carrier”. That is, even in a circumstance where, for example, an airport is closed due to severe weather, the airline must still prove that there was nothing it could have done to operate its flight on schedule. Leaving aside that the Agency is asking the carrier to prove a counterfactual (“could not have been avoided ...”), the subjectivity of this additional requirement effectively eliminates the primary advantage offered by reference to a list of circumstances instead of a subjective test, and also introduces unnecessary steps which will only exacerbate the administrative and cost burdens the “exceptional circumstances” list ostensibly seeks to streamline.

Further, the Agency has omitted certain frequently recurring ‘uncontrollable’ disruption reasons from its proposed list of exceptional circumstances, including, most notably, disruptions caused by (a) airport-caused delays or cancellations, which arise frequently and for a wide range of reasons airlines have no control over (e.g. ground delays, insufficient gate availability, limited air traffic control or other essential non-airline staffing), or (b) major outages of essential platforms and services not maintained by the airline. To make airlines bear higher costs and obligations to passengers due to insufficiency of airport performance and infrastructure is arbitrary and inconsistent with the basic framework of the APPR. As well, Canadian airport infrastructure is underfunded or lacking in many cases. It would be extremely unjust for a federal government that collects air travel fees into its general revenues without equally reinvesting them in airport infrastructure to foist the consequences of resulting service disruptions onto airlines which are only seeking to complete their schedules in a timely manner. There is no stated objective, principled rationale, nor objective of the National Transportation Policy which justifies forcing carriers to bear these costs when they have no control over whether and how frequently they might arise.

Proposing to make airlines responsible for matters such as airport/air traffic understaffing is also inconsistent with the inclusion of any and all airline staffing issues as matters for which airlines must provide the highest tier of remedies, including cash payments for inconvenience. Again, absent any stated rationale or link to the objectives

of the National Transportation Policy, it is difficult to discern why the Agency has proposed to make airlines absorb huge financial liabilities for their own inability to staff their operations, regardless of market scarcity or other external conditions, while also making airlines responsible when airports or government authorities have been unable to sufficiently staff airport and air traffic support operations essential to timely airline operations.

Similarly, the APPR's highest tier of carrier obligations ought not to be triggered where disruptions result from system failures or outages maintained and supplied by third parties, such as the CrowdStrike outage which crippled the operations of banks, ATMs, airlines and a wide array of other essential infrastructure, none of which was required to bear customer compensation and costs burdens except impacted airlines flying to and from Canada. While the theoretical justification offered by the Agency in the past has been that a carrier's service providers are 'within its control', the reality is that no providers of such essential infrastructure and services are prepared to bear the risk or cost of such service failures. To the extent that such assurances and acceptance of liability for such outages are not available to carriers in the market, it cannot reasonably be said that, in the event of such a failure, the carrier has failed to take any action to prevent it. As such, the imposition of this burden on the carrier is arbitrary and unprincipled, and inconsistent with the objectives of the APPR and the Canada Transportation Act.

Finally, while Porter appreciates the benefit of certainty and predictability in enabling the more efficient disposition of passenger claims by airlines and the Agency, it must also be recognized that an entirely closed list of 'exceptional circumstances' may lead to unjust outcomes to the extent that a new circumstance unforeseen by the Agency arises which is outside the control of carriers and for which they should not have to bear the highest tier of remedies to passengers. Just as the COVID-19 pandemic highlighted a gap in passenger refund rights, so may an unprecedented occurrence call for the Agency to deem such a circumstance exceptional for the purpose of determining airline obligations. As such, the list of exceptional circumstances should be expanded to include other acts of god or force majeure, perhaps subject to the Agency determining that any particular circumstance is properly added/included to the list.

Proposed Requirement for Airlines to Accommodate Passengers for 72 Hours –
Regardless of Carrier Responsibility

The Proposal notably and surprisingly calls for the introduction of a new requirement that air carriers provide standards of treatment (food, hotel, transport) to all passengers for up to 72 hours, irrespective of the cause of their flight disruption. This requirement seems starkly inconsistent with any stated objective of the APPR or the Proposal, the existing framework of the APPR correlating airline obligations to culpability for flight disruptions, and the National Transportation Policy. Moreover, it has no analog in any passenger rights regime anywhere in the world and amounts to a free insurance policy for every traveller - notwithstanding that these costs will ultimately be borne by passengers through higher fares.

Delays and cancellations are an unavoidable part of air travel, occurring commonly due to factors completely outside of an airline's control. Requiring carriers to provide standards of treatment even during exceptional circumstances would have a crippling financial impact on airlines, and especially routes to remote areas that are more frequently subject to extreme weather events and already have limited service. Even this very winter, major Canadian metropolitan areas saw multi-day disruptions of their operations within the same week due to severe weather systems and the closure of two runways at the country's largest airport because of an aircraft incident. Under the proposed new regime, each carrier may have been required to bear the cost of hotel, food, and ground transportation costs for thousands of passengers for days. This shift of financial responsibility onto airlines – and ultimately the passengers who fund those airlines' operations – would be unprecedented in any passenger protection regime, and with a few such occurrences could render services to and from remote areas and/or those subject to weather events completely unviable at a single stroke. Moreover, it would compound the existing costly requirements that airlines rebook passengers, often on other airlines, by purchasing expensive 'last-minute' fares, even where a delay or cancellation was outside the control of the disrupted airline. The Agency offers no principled rationale - based on the National Transportation Policy or otherwise - for arbitrarily making the airline, in effect, the insurer of passengers affected by uncontrollable circumstances that are already disruptive and costly to airlines.

The impact would be especially harmful in the context of Canadian air travel specifically, given the proclivities toward recurring winter weather events, summer thunderstorms, wildfires, and other events. These all impact airlines' operations and may become even more frequent occurrences based on observable climate trends – all of which substantially and arbitrarily contravenes the Agency's mandate to support the National Transportation Policy's objective of an efficient and economical travel system that serves urban and rural communities across Canada. There is simply no principled basis

to introduce this massive burden on airlines, which can do nothing to avoid the costs, except to cut service to areas which may be at high risk. This ultimately harms the carriers and the travelling public.

Must More Stringent Rebooking Requirements – Regardless of Carrier Responsibility

The Proposal likewise seeks to introduce far more stringent rebooking obligations on carriers. While large carriers currently have 48 hours to rebook passengers if the disruption is outside the carrier's control, the Proposal would require that all passengers be rebooked within 9 hours. This is again irrespective of whether the disruption arises from an exceptional circumstance outside the airline's control, failing which the carrier must rebook on the next available seat on any airline including from nearby airports. Since, like many reserved services, airline seats become more expensive close-in to the time of departure, this requirement will harm smaller airlines with less developed networks to the benefit of larger airlines receiving revenue windfalls from their competitors who do not have as many rebooking options. Furthermore, the tight and stringent requirements may be expected to place many passengers on itineraries they do not want, including with undesired connections or travel to an alternative airport, given the large scale rebookings that will be required (again, even when the airline is not at fault), and the timing in which they may be completed. As well, airlines – especially more recent entrants – will have to develop and/or on-board new technology platforms and services to support its attempts at meeting these requirements, at high cost and with long implementation horizons.

In addition, the 9-hour window is so short that it is all but certain airlines will be unable to find any departures to rebook passengers on, ensuring that despite airlines' best efforts they may frequently breach this requirement. Routes with less than daily service or situations where evening flight cancellations require overnight stays are just two examples of this.

New Administrative Burdens in Responding to Passenger Claims

The Proposal also purports to require airlines to provide responses to passengers who claim and are denied APPR compensation within 30 days, including detailed evidence and documentation explaining the denial. Again, this is unprecedented in any jurisdiction from which the Agency may seek to "learn lessons".

This new proposed requirement utterly fails to account for the operational realities the Agency states that it seeks to balance. Airline operations are extremely complex,

including the allocation of aircraft, crew, and other resources in the face of multiple cascading factors across interwoven networks. Airlines' processes are designed to enable the timely completion of operations, not to generate records which explain multi-layered causative operational factors in a manner that is comprehensible to passengers without manual interventions by Porter team members to do so. Even if it were achievable to ensure that such documentation could be generated as part of airlines' ongoing operations, this would require enormous IT investment and development.

It is worth noting, as well, that even the Agency's own experts – Complaint Resolution Officers who are responsible for interpreting evidence of APPR decisions by airlines – do not consistently understand or interpret such operational documents. Indeed, airlines have repeatedly received opposite decisions from CROs evaluating claims from different passengers on the same flight, evaluating the exact same airline documents. It is deeply impractical to suggest that airlines might somehow be able to reach a standard for explaining complex processes which are often impenetrable even to purported experts, and to generate such documentation and explanations in an extremely short time period for every passenger claiming APPR relief.

Already the airlines have been subjected to wildly disproportionate burdens of proof and evidence to respond to a high volume of APPR complaints administered by the Agency. The inconsistency of results by the Agency's own officers illustrates the futility of seeking to simplify and reduce such complex processes, especially within limited time periods.

It is Porter's submission that even the existing APPR complaint administration regime requiring airlines to submit all documents and evidence within 20 days of being alerted to a claim often results in unjust outcomes and certainly imposes costly burdens disproportionate to the typical contested amounts in APPR complaints. To expand this framework would require substantial redesign of many processes across airport operations at great cost, and which is not reflected in the Agency's analysis. Moreover, the furnishing of such documents to every passenger seems very likely to increase the likelihood of a passenger interpreting the documents differently (as the Agency CROs sometimes do), prompting a further increase in formal complaints the Agency and aggravating the current backlog and uncertainty of that process.

Communications Requirements

The proposed communications requirements also fail to reflect “operational realities” in several respects.

First, the requirement to promptly communicate to passengers what remedies are available to them is inconsistent with the reality – previously acknowledged by the Agency – that determinations as to causes for disruptions do not occur “in real time” and often require analysis and processing of complex operational factors. This may include information from other airlines, and determinations may apply differently to passengers in view of their individual itineraries.

In addition, the Proposal appears to suggest that airlines would be responsible for communicating with each passenger, when the fact is that airlines often do not have access to each passenger’s contact details - particularly in the case of bookings by third-party travel agencies, which do not typically share this information - and communication with the ‘primary’ booking party is sufficient and reflective of operational realities.

Seating of Children Under 14

This requirement appears to be a ‘solution in search of a problem’, as Porter believes all large Canadian carriers already meet this requirement. And indeed, Porter updated its own policies and procedures to meet this standard years ago, in consultation and cooperation with the Agency, when the Agency undertook an initiative to review such policies (along with other matters such as carriage of musical instruments). That those consultations resulted in the adoption by Canadian carriers of policies that meet the requirements of the APPR demonstrates that alternative regulation and enforcement approaches may yield productive results without necessitating sweeping regulatory proposals accompanied by a ‘one shot’ opportunity to make submissions rather than engage in discussions.

However, the new requirement that such seating arrangements be confirmed quickly after booking rather than 24 hours before departure is inconsistent with seating practices and would require the design of new processes and accompanying IT infrastructure for little to no apparent gain or benefit for airlines or passengers.

Summary of Recommendations:

The proposed revisions should be halted, so that a diligent consideration of their impact may be considered with input from and a robust dialogue with all stakeholders, rather than the limited consultation process now underway.

For each proposed change, the Agency should be required to provide either a principled rationale or explain how the proposed change advances the objectives of the National Transportation Policy as set forth in the Canada Transportation Act.

Disruptions caused by airports, governments and their agencies, or other third-party providers of essential services/platforms should be added as additional “exceptional circumstances,” as well as a provision for the Agency to deem future unprecedented events as exceptional to avoid ‘gaps’ in the APPR’s application as occurred with COVID (which did not trigger refund rights in many cases).

Where an exceptional circumstance exists, the additional requirement for the airline to prove that it could not have avoided the disruption or resulting loss should be discarded.

The broadly imposed standards of care and rebooking requirements, which are proposed to apply irrespective of whether an exceptional circumstance has occurred, should be discarded in respect of such ‘uncontrollable’ disruptions, and a 48-hour accommodation period should be applied rather than 72 hours.

The proposed new rebooking requirements should be discarded, or alternatively they should apply only for disruptions that are not caused by an ‘uncontrollable’ exceptional circumstance, and the 9-hour requirement should be extended to maintain the current 48-hour threshold. Additionally, the rebooking requirements should reflect that they are subject in all cases to availability of such rebookings.

The proposed requirement for carriers to provide supporting “evidence” and documentation to passengers whose compensation claims are denied should be discarded.

The communication requirements to passengers should not require airlines to give prompt determinations as to eligibility for compensation.

The communication requirements should be considered to be satisfied if delivered to the “lead” passenger on a booking. This may include a third party, such as a travel agency.

The timing of confirming seating of children with adults should be left unaltered.

Whatever the final revisions, the Agency should consult with carriers in good faith to determine practicable implementation timelines, having special regard to IT developments that will be required to accommodate these new requirements, which as

proposed are far-reaching and would require substantial redevelopment of processes and systems.