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VIA EMAIL: *Consultations-aeriennes.Air-Consultations@otc-cta.gc.ca*
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec K1A 0N9

Dear Madam or Sir:

Re: Public Consultation on Requests for Temporary Adjustments to the Air Passenger Protection Regulations

Please accept the following submissions in relation to the above-noted matter.

Overview

1. The Canadian Transportation Agency [**Agency**] is conducting a consultation on a matter outside its statutory jurisdiction.
 - (a) The Agency has no jurisdiction to grant an industry-wide exemption by way of an order. The sought industry-wide exemption may be granted only by way of regulation, and requires the approval of the Governor-in-Council.¹
 - (b) The Agency has no jurisdiction to grant a *retroactive* exemption. The Agency is limited to making orders that come into force effective immediately or at a future time.² In particular, Air Canada's request for an exemption until December 31, 2020 is moot.
2. The IATA and NACC lack standing to seek exemptions on behalf of airlines.
3. Decision No. LET-A-67-2020 gives rise to a reasonable apprehension of bias. The Agency's request for data is an attempt to make out the case for the airlines, while suppressing data about the number of passengers whose flights were cancelled by the airlines.

¹ *Canada Transportation Act*, ss. 86(1) and 36(1).

² *Canada Transportation Act*, s. 28(1).

4. The “consultation” is procedurally unfair to consumers and consumer advocacy groups, who are deprived of the opportunity to direct questions and seek productions from the airlines.
5. The data provided by the airlines and summarized in Annex “A” to the consultation paper is arithmetically impossible, unreliable, and does not account for the number of passengers whose flights were cancelled by the airlines.
6. Granting the exemptions sought would be unfair to and harm the travelling public.

I. The Agency’s Limited Jurisdiction to Grant Exemptions

7. The Agency, being a creation of statute, may exercise only those powers that were assigned to it by Parliament in the Agency’s enabling statute, the *Canada Transportation Act* [*Act*]. Furthermore, the Agency must exercise those powers assigned to it in the manner prescribed by the *Act*.³
8. The *Act* confers two distinct types of powers on the Agency to grant exemptions from any requirements of Part II of the *Act*:
 - (a) regulatory powers, to make regulations exempting a person from requirements of Part II of the *Act*; and
 - (b) quasi-judicial powers, to make an order exempting a person from requirements of Part II of the *Act*.

Each of these distinct powers serves a different purpose, and is subject to a different set of requirements prescribed by the *Act* and the *Statutory Instruments Act*. Nevertheless, they share the common feature that neither regulations nor orders may be retroactive.

Regulatory Exemptions

9. Subsection 86(1) of the *Act* provides that:

86 (1) The Agency may make regulations

[...]

(l) excluding a person from any of the requirements of this Part;⁴

10. These are regulatory powers that the Agency may exercise in furtherance of a broader policy, and without having to examine the unique circumstances of the person being exempted.

³ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 27-30.

⁴ *Canada Transportation Act*, s. 86(1).

11. The Agency may grant a regulatory exemption under s. 86(1) of the *Act* only with the Governor-in-Council's approval:

36 (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.⁵

12. In addition, every regulatory exemption under s. 86(1) of the *Act* is subject to the provisions of the *Statutory Instruments Act* [SIA], and in particular, s. 9(1) of the *SIA*:

9 (1) No regulation shall come into force on a day earlier than the day on which it is registered unless

- (a) it expressly states that it comes into force on a day earlier than that day and is registered within seven days after it is made, or
- (b) it is a regulation of a class that, pursuant to paragraph 20(b), is exempted from the application of subsection 5(1),

in which case it **shall come into force**, except as otherwise authorized or provided by or under the Act pursuant to which it is made, **on the day on which it is made** or on such later day as may be stated in the regulation.⁶

In short, in the absence of explicit statutory authorization, the earliest day on which a regulation may come into force is “the day on which it is made.”

Quasi-Judicial Exemptions

13. Subsection 80(1) of the *Act* provides that:

80 (1) The Agency may, by order, on such terms and conditions as it deems appropriate, exempt a person from the application of any of the provisions of this Part or of a regulation or order made under this Part where the Agency is of the opinion that

- (a) the person has substantially complied with the provision;
- (b) an action taken by the person is as effective as actual compliance with the provision; or
- (c) compliance with the provision by the person is unnecessary, undesirable or impractical.⁷

⁵ *Canada Transportation Act*, s. 36(1).

⁶ *Statutory Instruments Act*, s. 9(1) (emphasis added).

⁷ *Canada Transportation Act*, s. 80(1) (emphasis added).

14. These are quasi-judicial powers that the Agency may exercise only on a case-by-case basis, upon being satisfied about the unique circumstances of “the person” being exempted.
15. In addition, every exemption order under s. 80(1) of the *Act* is subject to the requirements of s. 28(1) of the *Act*:

28 (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

- (a) at a future time,
- (b) on the happening of any contingency, event or condition specified in the order, or
- (c) on the performance, to the satisfaction of the Agency or a person named by it, of any terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.⁸

Notably, the *Act* does not permit the Agency to make retroactive orders that come into force earlier than the day on which the orders were made.

(a) The Agency Lacks Jurisdiction to Grant an Industry-Wide Exemption Under S. 80(1)

16. The present consultation is conducted based on the erroneous premise that the Agency can make “temporary adjustments under section 80 of the *Canada Transportation Act*” to the *Air Passenger Protection Regulations* [*APPR*].⁹ With all due respect, the Agency cannot.
17. Subsection 80(1) of the *Act* does not authorize the Agency to make “adjustments” to existing regulations, that is, altering regulations across the entire industry. The essential nature of what the Agency seeks to accomplish is a legislative function, which the Agency may perform only by regulation-making, as prescribed by ss. 86(1) and 36(1) of the *Act*.
18. First, if the Agency could grant broad, industry-wide exemptions under s. 80(1) of the *Act*, then s. 86(1) of the *Act* would be redundant. Since, as a matter of statutory interpretation, Parliament does not speak in vain, the scope of the Agency’s exemption granting powers under s. 80(1) must be construed as different than those under s. 86(1).

⁸ *Canada Transportation Act*, s. 28 (emphasis added).

⁹ [Consultation paper on requested temporary adjustments to the Air Passenger Protection Regulations](#), Agency’s website.

19. Second, and perhaps more importantly, s. 80(1) of the *Act* contemplates case-by-case exemptions, not industry-wide ones. This is reflected in the requirement that the Agency examine the unique circumstances of “the person” (the airline) that is being granted the exemption.
20. It is impossible to examine the unique circumstances of each airline that perform air service within, to, and from Canada in a single proceeding, where most airlines are not even parties, and submitted no data at all. Indeed, by way of example, there are significant differences between the following classes of airlines:
 - (a) airlines that operate in Northern Canada;
 - (b) airlines that operate primarily within Canada;
 - (c) European airlines that are also subject to the requirements of *Regulation (EC) 261/2004* with respect to all flights to and from Canada;
 - (d) Canadian airlines that operate flights to and from the European Union, and as such their flights departing from the EU are subject to the requirements of *Regulation (EC) 261/2004*; and
 - (e) airlines that operate flights to and from the United States, and thus are subject to the US Department of Transportation’s regulatory requirements.
21. In short, while the Agency may adjudicate Air Canada’s and Sunwing Airlines’ requests for an exemption under s. 80(1) of the *Act*, the Agency lacks the jurisdiction to embark on an inquiry for an industry-wide exemption under that provision.
22. If the Agency wishes to proceed with an industry-wide “adjustment” to the *APPR*, the Agency must enact regulations under s. 86(1) and obtain the Governor-in-Council’s approval for same, as required by s. 36(1). The latter also ensures clarity of the responsibility and accountability for the decision for the “adjustment.”

(b) The Agency Lacks Jurisdiction to Grant a Retroactive Exemption

23. The Agency has no jurisdiction to grant an exemption from the *APPR* with a retroactive effect, that is, effective on a date that is earlier than the date of the order or regulation granting the exemption.
24. The Agency’s powers with respect to the coming into force of its orders are limited to deferring the entry into force to a future time.¹⁰ Similarly, the Agency cannot make regulations with a retroactive effect, because the *Act* contains no such explicit authorization.¹¹

¹⁰ *Canada Transportation Act*, s. 28(1).

¹¹ *Statutory Instruments Act*, s. 9(1).

25. In the absence of explicit statutory language, an administrative body lacks authority to make orders with a retroactive effect. The power to amend or vary orders does not clothe an administrative body with the power to make orders with a retroactive effect. Absent explicit legislative language authorizing *retroactive* amendments, the power to amend or vary must be interpreted on a going-forward basis: the amended order becomes effective on the date the amendment was made, and does not affect prior events or rights.¹²
26. In the case of the Agency, the *Act* confers on the Agency limited powers to review, rescind, or vary its own decisions¹³ as an exception to the *functus officio* principle. These powers, however, do not clothe the Agency with authority to vary a past order with a *retroactive effect*. The effect of the variance can be only as of the date the decision to vary is made or a later date.
27. It follows that the Agency lacks jurisdiction to grant exemptions from obligations set out in the *APPR* that would affect passengers' vested rights that have accrued prior to the issuance of the Agency's order.
28. In practical terms, this means that the Agency lacks jurisdiction to exempt airlines from any obligation under the *APPR* that arises from events that pre-date the Agency's order's date or that would apply to contracts of carriage that have been entered into by passengers prior to the issuance of the Agency's order.
29. For example, an exemption order issued on February 15, 2021 can apply only to itineraries purchased on or after February 15, 2021 and only with respect to events that occurred on or after February 15, 2021.
30. Therefore, the Agency lacks jurisdiction to retroactively extend to December 31, 2020 the exemption that had already expired on June 30, 2020. Hence, Air Canada's request is moot.

II. IATA and NACC Lack Standing to Seek Exemptions on Behalf of Airlines

31. IATA and NACC are not regulated entities under the *Act*. The *APPR* neither confers rights nor imposes obligations on IATA or NACC. As such, NACC's and IATA's request for exemption from provisions of the *APPR* is not properly before the Agency.
32. NACC and IATA may seek an exemption only on behalf of those airlines that have explicitly authorized them to do so, and which have agreed to be legally bound by NACC's and IATA's actions. In the absence of such authorization, NACC and IATA have no standing to seek exemptions on behalf of the airline industry in general. Airlines can seek exemptions on their own—as the applications by Air Canada and Sunwing Airlines demonstrate.

¹² *Dorel Industries Inc. v. Canada (Border Services Agency)*, 2014 FC 175 at paras. 25-27.

¹³ *Canada Transportation Act* s. 32.

33. It is apparent on the face of the record that IATA and NACC do not represent *all* their members in this matter, because Air Canada and Sunwing Airlines have (correctly) chosen to make their own applications for exemptions. Consequently, IATA and NACC do not represent Air Canada and Sunwing.
34. The Agency therefore must inquire which airlines NACC and IATA purport to represent, and whether these airlines have agreed to be legally bound by NACC's and IATA's actions.
35. If IATA and NACC are unable to produce authorizations to act on behalf of specific airlines, then their joint application should be dismissed for lack of standing, without prejudice to their right to make stakeholder submissions about Air Canada's and Sunwing's applications.
36. An additional reason to dismiss NACC's and IATA's joint request as presented is that it deprives the Agency of carrying out its statutory mandate under s. 80(1) of the *Act* to examine, on a case-by-case basis, the unique circumstances of each airline that would be subject to the sought exemption. This difficulty is demonstrated by the Agency having received only aggregate data of several airlines,¹⁴ but no airline-by-airline data from each individual airline that seeks an exemption.
37. For greater clarity, s. 80(1) of the *Act* requires the Agency to examine the circumstances of "the person" who would be granted the exemption. Consequently, data submitted by airline A cannot be the basis for granting an exemption to airline B under s. 80(1) of the *Act*. Therefore, the Agency may exercise its exemption granting powers under s. 80(1) of the *Act* only with respect to airlines that have submitted data specific to their own operations and unique circumstances.
38. In short, as it stands, there are only two exemption applications properly before the Agency: by Air Canada and by Sunwing Airlines.

III. Reasonable Apprehension of Bias

39. On October 22, 2020, in Decision No. LET-A-67-2020, the Agency requested Air Canada, IATA, and NACC to provide certain supplementary data.
40. It is submitted that the act of requesting such supplementary data, the framing of the questions by the Agency, and the Agency's failure to enforce its previous decision give rise to a reasonable apprehension of bias.

¹⁴ The authenticity of the data is disputed.

The Act of Requesting Supplementary Data

41. The Agency has been dealing with the exemption requests pursuant to s. 80(1) of the *Act*, which requires the Agency to consider, on a case-by-case basis, the unique circumstances of the person that would be subject to the exemption.
42. The applicants bear the onus of tendering sufficient evidence to persuade the Agency that the requisite elements of s. 80(1) of the *Act* are met.
43. It is apparent on the face of Decision No. LET-A-67-2020 that the Agency was of the view that the exemptions applications that were before it contained insufficient information to support granting exemptions under s. 80(1) of the *Act*.
44. Instead of dismissing the applications as lacking adequate evidentiary support, the Agency invited the applicants to submit supplementary data to bolster their case. By so doing, the Agency has abandoned its role as an impartial decision-maker, and has assumed the role of an advocate or advisor assisting the applicants to make out their case.
45. The Agency's conduct cannot be excused by considerations of access to justice. The applicants seeking the exemptions are large corporations and/or associations that have ample access to legal advice and representation; they are not the proverbial self-represented litigant to whom the Agency might owe some duty of providing assistance or guidance.
46. The Agency's actions and level of involvement in the furtherance of the applicants' case therefore gives rise to a reasonable apprehension of bias.

Framing of the Questions – Tunnel Vision

47. The request for supplementary data is based on the premise advanced by the airlines that flights were cancelled as a result of cancellations by the passengers.
48. The Agency did not even contemplate that an alternative explanation may exist, namely, that predominantly it was the airlines who cancelled flights first, and only then did the passengers choose to seek a refund instead of alternative travel arrangements, as contemplated by ss. 17(2) and 17(7) of the *APPR*.
49. The Agency did not seek supplementary data to test such an alternative explanation. In particular, the Agency failed to seek supplementary data about the number of passengers who held a booking on the flights that were cancelled, nor did the Agency inquire about how many of these passengers elected to travel on alternative transportation and how many sought a refund (i.e., exercised their rights under ss. 17(2) and 17(7) of the *APPR*).
50. In short, the nature of the supplementary data requested by the Agency demonstrates that the Agency has gone on a mission to gather data that could support the airlines' arguments

rather than an objective inquiry with an open mind to consider the possibility that there may be another explanation for the large scale flight cancellations.

The Agency's Failure to Enforce Decision No. LET-A-67-2020 or Disclose Data to the Public

51. In Decision No. LET-A-67-2020, the Agency requested Air Canada, IATA, and the NACC to provide supplementary data about the number of flights that were cancelled “due to low load factor.” The Agency also asked how many of these cancellations were caused by passenger ticket cancellations made between 3 and 14 days before the flight.
52. The consultation paper¹⁵ contains no information of this nature. Annex “A” provides the number of flights that were cancelled and the number of passengers who, allegedly, cancelled their tickets between 3 and 14 days before the flight, but it is silent about any alleged causal relationship. There is no reference to “due to low load factor” in Annex “A.”
53. It is unclear whether the absence of this information from the consultation paper is due to the Agency’s failure to enforce its own Decision No. LET-A-67-2020 or due to the Agency’s failure to disclose this information to the public. Whichever the explanation is, the current state of affairs, where information that the Agency acknowledged to be relevant is being withheld from the public, leaves a reasonable observer with the impression that the sole purpose of the present “consultation” is to create an air of legitimacy to what has already been decided—thereby giving rise to a reasonable apprehension of bias.

IV. Denial of Procedural Fairness

54. The present proceedings carry the hallmarks of a quasi-judicial function:
 - (a) The relief sought, namely, exemptions from provisions of the *APPR*, affect the rights and obligations of persons. The Agency’s decision will affect the rights of passengers vis-à-vis airlines and the obligations of airlines vis-à-vis passengers.
 - (b) An adversarial relationship is present between the airlines seeking to reduce their obligations to passengers, and passengers who would oppose such a request and whose rights would be negatively affected by the relief sought.
 - (c) The Agency considers the matter under s. 80(1) of the *Act*, which requires the Agency to apply substantive rules to individual cases, by examining the individual circumstances of each airline, rather than to implement social or economic policy in a broad sense (which would be the case under s. 86(1) of the *Act*).

¹⁵ [Consultation paper on requested temporary adjustments to the Air Passenger Protection Regulations](#), Agency’s website.

55. The Agency's action to portray the present proceeding as a purely regulatory matter and a "consultation" that is not subject to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* is disingenuous and procedurally unfair to consumers and consumer advocacy groups, because it deprives them of the ability to direct questions and seek productions from the airlines. In particular, the Agency's conduct deprives consumers and consumer advocacy groups of the opportunity to test the authenticity and accuracy of the data provided by the airlines.
56. This troubling state of affairs is to be contrasted with the Agency's decision in *Lukács v. Air Canada*, LET-C-A-154-2012, where the Agency ordered Air Canada to disclose to the undersigned Air Canada's raw ticket sales data used to justify Air Canada's claims about aggregate data. In that decision, the Agency acknowledged that

[...] it is within Mr. Lukács' right to "test whether Air Canada's calculations are correct".

In the present case, however, the Agency has provided no means for consumers or consumer advocacy groups to engage in a similar legitimate exercise to test the data that was supplied by the applicants.

57. In short, the Agency appears to intend to make decisions on the basis of the applicants' say-so, without any opportunity for those with an adverse interest to test the evidence. It is submitted that this state of affairs amounts to denial of procedural fairness.
58. The Agency is hereby requested to provide consumers and consumer advocacy groups, including the undersigned, with a reasonable opportunity to test the claims of aggregate data submitted by the airlines.

V. The Data Submitted by the Applicants is Arithmetically Impossible and Unreliable

59. The data in Annex "A" to the consultation paper¹⁶ is arithmetically impossible and unreliable. According to Agency staff,¹⁷ the data was provided by the applicants (airlines).
60. First, for the months of July, August, and September 2020, the sum of the number of passengers who allegedly "booked 3-14 days in advance" and "booked at least 14 days in advance" exceeds by thousands the total number of passengers transported. We have been unable to obtain any explanation for this discrepancy.

¹⁶ [Consultation paper on requested temporary adjustments to the Air Passenger Protection Regulations](#), Agency's website.

¹⁷ Email of Ms. Marcia Jones, Chief Strategy Officer, dated December 21, 2020.

61. The discrepancy between the alleged number of passengers and the alleged number of bookings in Annex “A” for the months July, August, and September 2020 is as follows:

$$\begin{aligned} 833,119 - (319,342 + 554,116) &= -40,339 && \text{(July 2020)} \\ 1,083,058 - (349,744 + 766,810) &= -33,496 && \text{(August 2020)} \\ 906,093 - (299,929 + 614,896) &= -8,732. && \text{(September 2020)} \end{aligned}$$

These discrepancies render the data unreliable and unsuitable to serve as the basis for any decision.

62. Second, the reference to percentages, such as “Passengers who cancelled 3-14 days in advance as a % of the passengers who booked at least 14 days in advance,” is questionable as “passengers who cancelled 3-14 days in advance” is not a subset of “passengers who booked at least 14 days in advance.”
63. Third, Annex “A” indicates that 80.502% of the flights scheduled in July-September 2020 were cancelled (189,156 out of 234,971), and 72.616% of these cancellations (137,358 out of 189,156) were “systemic” in the sense that flights with the same flight number were cancelled multiple times. Nevertheless, Annex “A” is silent about the fate of the passengers who held confirmed bookings on the 189,156 flights that were cancelled in this period. For example, if 50 passengers held confirmed bookings on each cancelled flight on average, then

$$189156 \times 50 = 9,457,800 \text{ passengers}$$

were affected in total. This is substantially higher than the figure of 4,979,951 for the number of passengers who allegedly “cancelled their tickets.” This begs a number of questions:

- (a) In each of the months July, August, and September 2020, how many passengers held confirm bookings on the flights that were cancelled by the airlines?
- (b) Among the passengers who held confirmed bookings on flights that were cancelled by the airlines in each of the months July, August, and September 2020,
- i. how many were transported on alternative travel arrangements; and
 - ii. how many opted to exercise their rights to a refund under ss. 17(2) and 17(7) of the *APPR*?
64. There is a fundamental flaw in the data supplied by the applicants in that it fails to distinguish ticket cancellations that were preceded by flight cancellations, and fails to distinguish between passengers who both booked and cancelled within the 3-14 day period and those who only booked or only cancelled in that time frame. As a result, the data purports to compare apples with oranges.

65. In order to assess whether ticket cancellations are driving the flight cancellations (as the applicants allege) or flight cancellations drive ticket cancellations, the applicants should be required to provide complete datasets (in a CSV file, for example) with rows corresponding to individual flight segments flown by individual passengers (with personal information removed),¹⁸ and columns consisting of:
- (1) flight number;
 - (2) flight date;
 - (3) date the flight was cancelled (if any);
 - (4) ticket number;
 - (5) date the ticket was booked;
 - (6) date the ticket was cancelled (if any); and
 - (7) date the ticket was refunded to the original form of payment (if any).

The undersigned will be pleased to assist the Agency with the analysis of data containing this information.

VI. Granting the Exemptions Sought would be Unfair to and Harm the Travelling Public

66. On June 29, 2020, the Agency correctly denied Air Canada's and Sunwing Airlines' applications for extending the exemptions from ss. 17(1)(a)(i) and 18(1)(a)(i) that the Agency had previously granted. The Agency found that:

Sunwing and Air Canada have not provided evidence that they are facing the same sorts of operational imperatives and the sudden, drastic changes that characterized the initial stages of the pandemic, and they have not shown why, after more than 3 months, it is not possible to adapt operations to new realities such as health and safety precautions.¹⁹

67. The applicants are now seeking exemptions from two kinds of obligations:
- (a) the obligation to reprotect passengers whose flights were cancelled on flights of other air carriers (ss. 17(1) and 18(1) of the *APPR*); and
 - (b) the obligation to compensate passengers whose flight is cancelled and who are notified about the cancellation at least 72 hours in advance of the flight.

The applicants also seem to conflate cancellations during COVID-19 with cancellations due to COVID-19.

¹⁸ If flight 1234 had 20 passengers with confirmed bookings, then there should be 20 separate rows, one row per passenger.

¹⁹ [Determination No. A-2020-122](#), para. 15 (emphasis added).

68. As the Agency correctly held on June 29, 2020, there is no evidence to suggest that it is not possible for airlines to adapt operations to new realities—including to drastic decline in demand.

Bait-and-Switch

69. The premise of the *APPR* is that passengers are entitled to the flight for which they paid. Air transportation is time-sensitive, and delay may have serious consequences for passengers, especially during times when responsible passengers avoid non-essential travel.
70. For example, for a passenger travelling to attend a medical appointment (such as a cancer follow up or other similar serious medical issue), the difference between a morning and an afternoon flight may well mean the difference between making or missing their appointment.
71. Airlines have a “concomitant obligation” to mitigate and address the damage which has or may be suffered by a passenger as a result of delay.²⁰ Sections 17(1) and 18(1) of the *APPR*, which require airlines to rebook passengers whose flights were cancelled on flights of other airlines, embody this principle. With close to a year into the pandemic, there is no reason to relieve airlines from these obligations.
72. The genesis of the airlines’ woes is their failure to adapt their inventory (i.e., the flights on which seats are offered for purchase) to the new realities of the pandemic. It is a matter of common sense and public knowledge that demand has dramatically declined. Yet, it appears from Annex “A”²¹ that airlines decreased the number of flights scheduled only by 6.258% (234,971 in July-September 2020 compared to 250,656 in July-September 2019).
73. Given the decline in demand, it is no wonder that 80.502% of the flights scheduled in July-September 2020 had to be cancelled—the demand was simply not present, and this was predictable and foreseeable. The airlines sold these tickets as part of an irresponsible, and arguably unlawful, “bait-and-switch” practice of attempting to drum up demand contrary to federal guidelines,²² selling tickets on flights they do not genuinely intend to operate, and then cancelling them later without any consequences, while keeping passengers’ money on the purported basis that the tickets are “non-refundable.”²³
74. Granting the exemptions sought would enable and encourage airlines to continue these irresponsible and arguably unlawful practices, and to enrich themselves at the public’s expense.

²⁰ *Lukács v. Air Canada*, [Decision No. 250-C-A-2012](#) at para. 25.

²¹ To the extent that it can be considered reliable at all.

²² [“Air Canada hires influencers to promote vacation travel even as federal guidelines urge people to stay home”](#) (Globe and Mail, January 5, 2021).

²³ [Airlines’ ‘bait-and-switch’ strategy lures customers to flights that never take off](#) (Canadian Press, November 6, 2020).

Passengers' Vested Rights and Reliance on Determination No. A-2020-122

75. As noted earlier, the Agency lacks jurisdiction to grant an exemption retroactively; however, even if it had such powers (which is explicitly denied), it would be unfair to the travelling public to do so.
76. Determination No. A-2020-122 of the Agency, denying Air Canada's and Sunwing Airlines' application to extend the exemptions beyond June 2020, was published on the Agency's website, and was widely available to the public. Passengers who purchased tickets after June 29, 2020 accrued vested rights under the *APPR* and relied on the Agency's Determination as an assurance that ss. 17(1)(a)(i) and 18(1)(a)(i) of the *APPR* would apply to their travel.
77. An exemption from ss. 17(1)(a) and 18(1)(a) of the *APPR* would fundamentally change the terms and conditions of the contract of carriage and the airlines' obligations to passengers. It would therefore be unfair to impose a detrimental after-the-fact change on passengers who have already entered into contracts.
78. In short, it is submitted that apart from the strict jurisdictional issue, common sense and fairness to the travelling public also dictates that any exemption that the Agency might grant must be on a going-forward basis, applicable only to tickets sold **after** the Agency's decision is rendered.

The Agency Cannot Exempt Airlines from Obligations under the Montreal Convention

79. Sections 17(1) and 18(1) of the *APPR* articulate airlines' "concomitant obligation" under the *Montreal Convention* to mitigate and address the damage which has or may be suffered by a passenger as a result of delay.²⁴
80. The Agency must be mindful that it has no jurisdiction to grant exemptions from provisions of the *Montreal Convention*, which are incorporated as Schedule VI to the *Carriage by Air Act*. Consequently, in practical terms, the Agency's ability to exempt airlines from ss. 17(1) and 18(1) of the *APPR* may be confined to flights that are not subject to the *Montreal Convention*.
81. In these circumstances, exempting airlines from ss. 17(1) and 18(1) of the *APPR* would create unnecessary confusion and additional controversy between passengers and airlines—with airlines relying on the exemption granted to them, and passengers citing the *Montreal Convention*.

²⁴ *Lukács v. Air Canada*, [Decision No. 250-C-A-2012](#) at para. 25.

VII. Conclusion

Based on the foregoing, it is submitted that the Agency lacks jurisdiction to grant an industry-wide or *retroactive* exemption, and that granting any exemption of the nature sought would be unfair to and harmful for the travelling public.

The airlines must adjust their inventory (scheduled flights) to the new realities of the pandemic, and schedule only flights that they are highly likely to operate. Doing so would also be consistent with federal guidelines and policy objectives of discouraging non-essential travel.

Sincerely yours,

Dr. Gábor Lukács
President