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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: Consultation on consolidation of passengers' fundamental right to a refund into the Air Passenger Protection Regulations**

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

**Overview**

1. We welcome the initiative to consolidate passengers' fundamental right to a refund for cancelled flights into the *Air Passenger Protection Regulations [APPR]*. We are of the view that ss. 10(3), 17(7), and 18 of the *APPR* should be amended to reaffirm that:
  - (a) passengers have the same right to a refund for flights that are cancelled or delayed by three (3) hours or longer, regardless of the reasons for the cancellation or delay;
  - (b) refunds must be provided in the original form of payment; and
  - (c) refunds must be paid within seven (7) calendar days.

These amendments would harmonize the *APPR* with regulations in other jurisdictions, and avoid protracted litigation about the classification of the reasons for the cancellation or delay.

2. The vital interest of the Canadian travel industry is that these amendments come into force as soon as possible, because they are needed to restore consumer confidence and goodwill.

3. We reject the attempt of the Canadian Transportation Agency [**Agency**] to rewrite history by claiming that there is a “gap” in the law. Passengers’ fundamental right to a refund for cancelled flights has always been and remains the law in Canada. The present exercise is about *consolidation* of rights into a single statutory instrument.
4. The Agency lacks jurisdiction to make regulations that relate to insolvency or bankruptcy of airlines, or that would otherwise diminish the consumers’ rights under provincial consumer protection legislation.
5. We oppose any new exceptions, or any expansion of the existing exceptions, in the *APPR*. Exceptions diminish the clarity of the *APPR*, and increase the number of disputes and litigation between passengers and airlines, to the prejudice of the lay passengers.

### **Recommended Amendments**

6. Subsection 1(1) of the *APPR* be amended by adding the following definition:

**cancellation** means the non-operation of a flight which was previously planned and on which at least one seat was reserved.

7. Paragraphs 10(3)(b)-(c) of the *APPR* be amended to read:

**10 (3)** When there is delay, cancellation or denial of boarding due to situations outside the carrier’s control, it must

- (b) in the case of a delay of three hours or more, provide alternate travel arrangements or a refund, in the manner set out in section 18, to a passenger who desires such arrangements; and
- (c) in the case of a cancellation or a denial of boarding, provide alternate travel arrangements or a refund, in the manner set out in section 18, to a passenger who desires such arrangements.

8. Subsection 17(7) of the *APPR* be amended to read:

**17 (7)** Refunds under this section must be paid not later than seven days after the refund has been requested, by the method used for the original payment and to the person who purchased the ticket or additional service.

9. Subsections 18(2)-(4) of the *APPR* be replaced with the following amended provisions, mirroring ss. 17(2)-(7) (including the amended s. 17(7)):

**18 (2)** If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger’s travel needs, the carrier must

- (a) in the case where the passenger is no longer at the point of origin that is indicated on the ticket and the travel no longer serves a purpose because of the delay, cancellation or denial of boarding, refund the ticket and provide the passenger with a confirmed reservation that
  - (i) is for a flight to that point of origin, and
  - (ii) accommodates the passenger's travel needs; and
- (b) in any other case, refund the unused portion of the ticket.

**18 (3)** To the extent possible, the alternate travel arrangements must provide services that are comparable to those of the original ticket.

**18 (4)** A carrier must refund the cost of any additional services purchased by a passenger in connection with their original ticket if

- (a) the passenger did not receive those services on the alternate flight; or
- (b) the passenger paid for those services a second time.

**18 (5)** If the alternate travel arrangements provide for a higher class of service than the original ticket, the carrier must not request supplementary payment.

**18 (6)** If the alternate travel arrangements provide for a lower class of service than the original ticket, the carrier must refund the difference in the cost of the applicable portion of the ticket.

**18 (7)** Refunds under this section must be paid not later than seven days after the refund has been requested, by the method used for the original payment and to the person who purchased the ticket or additional service.

## I. The Current State of the Law in Canada

10. It is settled law that passengers whose flights were cancelled by the airline are entitled to a refund of all amounts paid. A “refund” means return of all monies paid in the original form of payment. This principle, coined a “fundamental right,”<sup>1</sup> is deeply rooted in the common law and provincial and federal legislation.
11. The fundamental right to a refund does not apply to passengers whose flight did operate, but who nevertheless chose not to travel (“no show”). A “non-refundable ticket” means that if the passenger is a “no show,” the airline may not have to refund their ticket; however, if it is the airline that cancels a flight, then there are no “no show” passengers, and therefore all tickets must be refunded.

### (a) General Principles

12. A key element of consumer contracts is “consideration”: goods or services received by the consumer in exchange for the money the consumer had paid. If a supplier does not deliver for any reason, the supplier must refund the consumer all monies the consumer had paid.
13. A refund of monies paid is separate and apart from compensation for damages caused by the supplier’s failure to deliver: *force majeure* is a narrow defence to a claim for compensation, but it is not a defence for a claim for a refund of monies paid.
14. A consumer contract that purports to allow a supplier to keep monies received for goods or services that were not delivered is illusory. Provisions purporting to grant such a broad relief from liability reduce the contract to “a mere declaration of intent.”<sup>2</sup>

### (b) Provincial Legislation

15. Most Canadian provinces have codified these principles in their respective consumer protection statutes, which contain **refund provisions**, which guarantee consumers the right to cancel contracts and receive a full refund in the event the supplier does not deliver the goods or services the consumer had paid for.
  - (a) British Columbia, Newfoundland and Labrador, and Quebec have refund provisions for distance sales contracts.<sup>3</sup>

<sup>1</sup> *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013 at para. 15.

<sup>2</sup> *Suisse Atlantique Societe d’Armament v. NV Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361 at 432 (*per* Lord Wilberforce).

<sup>3</sup> *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, ss. 49(1)(d) and 50; *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, ss. 32-33; and *Consumer Protection Act*, CQLR c. P-40.1, ss. 54.9-54.13.

- (b) Ontario has refund provisions for future performance contracts.<sup>4</sup>
  - (c) Alberta, Manitoba, Nova Scotia, and Saskatchewan have refund provisions for goods and services purchased using the Internet.<sup>5</sup>
16. Quebec has an extra layer of protection by requiring monies paid in advance for services to be performed in the future<sup>6</sup> to be held in trust, deeming the supplier to be the trustee.<sup>7</sup>
17. These pieces of provincial legislation not only reaffirm the widely accepted norm that suppliers must refund consumers all monies paid for goods or services not delivered, regardless of the reasons for the non-delivery,<sup>8</sup> but also provide passengers with an additional layer of protection. Indeed, while airlines are federally regulated, they are nevertheless subject to provincial laws of general applicability.<sup>9</sup>

**(c) Federal Legislation**

18. Passengers' fundamental right to a refund had already been established well before the much spoken of *APPR*. The legislative provisions giving effect to this right are found in the *Canada Transportation Act* and the *Air Transportation Regulations*.
19. Every air carrier operating an air service within, to, and from Canada must establish a "tariff,"<sup>10</sup> setting out clearly the airlines' policies with respect to certain enumerated matters, including:

refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,<sup>11</sup>

<sup>4</sup> *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, ss. 26 and 92-96.

<sup>5</sup> *Internet Sales Contract Regulation*, Alta Reg 81/2001, ss. s. 6(2)(b) and 10(1); *Consumer Protection Act*, CCSM c C200, ss. 130(1) and 133(1)(b); *Internet Sales Contract Regulations*, NS Reg 91/2002, ss. 6(c)(ii) and 7 and *Consumer Protection Act*, RSNS 1989, c. 92, s. 21AC(1); and *The Consumer Protection Act*, SS 1996, c C-30.1, ss. 75.61(2)(b) and 75.72(1).

<sup>6</sup> More than two months after the contract is made.

<sup>7</sup> *Consumer Protection Act*, CQLR c P-40.1, s. 256.

<sup>8</sup> The only exception being when the consumer evades delivery.

<sup>9</sup> *Bank of Montreal v. Marcotte*, 2014 SCC 55 at para. 84.

<sup>10</sup> *Canada Transportation Act*, s. 67(1); *Air Transportation Regulations*, SOR/88-58, s. 110(1).

<sup>11</sup> *Air Transportation Regulations*, SOR/88-58, ss. 107(1)(n)(xii) and 122(c)(xii) (emphasis added).

20. The tariff operates as the contract of carriage between the air carrier and passengers. The terms and conditions set out in the tariff are legally binding on the air carrier.<sup>12</sup> The terms and conditions are subject to the statutory requirement that they must be just and reasonable.<sup>13</sup>
21. In 2004, some 15 years before the *APPR*, the Agency already formally recognized that the aforementioned legislative provisions give rise to the right to a refund for passengers whose flights were cancelled by the airline for any reason.<sup>14</sup>
22. In 2013, the Agency reaffirmed this right, and coined it a “fundamental right.”

[15] In terms of passengers’ right to refunds, in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.<sup>15</sup>

23. In a second decision from 2013, the Agency reaffirmed this right again, and held that:

[...] it is unreasonable for [the airline] to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond [the airline’s] control.<sup>16</sup>

24. In a subsequent 2014 decision, the Agency reinforced this conclusion:

[33] The Agency finds that as they allow [the airline] to refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger’s control, Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR. The Agency finds that the Rules fail to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and [the airline’s] statutory, commercial and operational obligations.<sup>17</sup>

25. At the time the *APPR* were drafted, we expressed serious concerns about the *APPR*’s silence on passengers’ existing fundamental right to a refund.<sup>18</sup> Regrettably, the Agency failed to follow our recommendation to consolidate this right into the *APPR*, claiming lack of statutory mandate. (The validity of the Agency’s argument is addressed separately.)

<sup>12</sup> *Canada Transportation Act*, s. 67(3); *Air Transportation Regulations*, SOR/88-58, s. 110(4).

<sup>13</sup> *Canada Transportation Act*, s. 67.2(1); *Air Transportation Regulations*, SOR/88-58, s. 111(1).

<sup>14</sup> *Re: Air Transat*, Decision No. 28-A-2004.

<sup>15</sup> *Lukács v. Sunwing*, Decision No. 313-C-A-2013 at para. 15 (emphasis added).

<sup>16</sup> *Lukács v. Porter*, Decision No. 344-C-A-2013 at para. 88 (emphasis added).

<sup>17</sup> *Lukács v. Porter*, Decision No. 31-C-A-2014 at para. 33 (emphasis added).

<sup>18</sup> *Deficiencies of the Proposed Air Passenger Protection Regulations*, pp. 42-44 (February 2019).

26. We welcome the Agency's initiative to follow our recommendation. We note that had the Agency heeded our advice back in 2019, it would have spared passengers, airlines, and the Agency a considerable amount of litigation.
27. The omission of passengers' fundamental right to a refund from the *APPR* does not negate that right, because the *APPR* is not a complete statutory code. The provisions of the *Canada Transportation Act* and the *Air Transportation Regulations* giving rise to passengers' fundamental right to a refund were not amended or negated by the *Transportation Modernization Act* nor by the *APPR*, and remain in full force.
28. In short, passengers' fundamental right to a refund remains the law and part of the parties' contracts. Consequently, the present consultation concerns the consolidation of passengers' fundamental right to a refund into the *APPR*—not about the creation of new rights.

**(d) Case Law on Cash vs. Vouchers**

29. The Agency's consistent and considered formal opinions have been that the form of payment of amounts owed to passengers must be cash, cheque, credit to the passenger's credit card, or any other form acceptable to passengers.<sup>19</sup>
30. The issue of cash vs. vouchers is not new either. In 2013, it arose in the context of denied boarding compensation. The Agency held that an airline may provide vouchers only if the following five conditions are simultaneously satisfied:<sup>20</sup>
  - (R1) the airline must inform passengers of the amount of cash payment that would be due, and that the passenger may decline travel vouchers, and receive cash or equivalent;
  - (R2) the airline must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
  - (R3) the airline must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of payment;
  - (R4) the amount of the travel voucher must be not less than 300% of the amount of cash payment that would be due (i.e., CAD\$1 in cash being equivalent to CAD\$3 in travel vouchers); and
  - (R5) passengers are entitled to exchange the travel vouchers for cash at the rate of CAD\$1 in cash being equivalent to CAD\$3 in travel vouchers within one (1) month.

<sup>19</sup> *Lukács v. WestJet*, Decision No. 227-C-A-2013 at paras. 35 and 37; see also *Lukács v. WestJet*, Decision LET-C-A-83-2011.

<sup>20</sup> *Lukács v. Air Canada*, Decision No. 342-C-A-2013 at paras. 43 and 47-50.

31. In a subsequent decision, the Agency reaffirmed requirements (R1)-(R5), and held that the absence of these safeguards renders offering vouchers instead of cash unreasonable.

[110] The Agency finds that in the absence of the safeguards set out in Decision No. 342-C-A-2013 associated with the tendering of travel vouchers [...] fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and [the airline's] statutory, commercial and operational obligations.<sup>21</sup>

## **II. Passengers' Fundamental Right to a Refund in Other Jurisdictions**

32. Passengers' fundamental right to a refund for flights cancelled by airlines, regardless of the reasons for the cancellation, is a universal commercial standard that is also widely recognized outside Canada.

### **(a) European Union**

33. In 2021, the European Union's *Regulation (EC) 261/2004* is still the gold standard of passenger protection. It was drafted with clarity and relative simplicity to mitigate the number of disputes and litigation arising from questions relating to interpretation.
34. The key provisions of *Regulation (EC) 261/2004* on passengers' fundamental right to a refund can be summarized as follows:

- *Eligibility*: Flight is cancelled or delayed by more than 5 hours (regardless of reasons).
- *Rights*: Refund and transportation to point of departure.
- *Time Line for Refund*: Within 7 days.
- *Form of Refund*: Cash, electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

35. Article 2(l) provides a clear and concise definition of flight cancellation:

For the purposes of this Regulation:

(l) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.<sup>22</sup>

36. Article 5(1)(a) confers on passengers the rights set out in Article 8 (explained below) in the event of flight cancellation, regardless of the reasons for the cancellation:

<sup>21</sup> *Lukács v. Porter, Decision No. 31-C-A-2014* at para. 110; see also paras. 157-160 and 164-167.

<sup>22</sup> *Regulation (EC) 261/2004*, Article 2(l).

1. In case of cancellation of a flight, the passengers concerned shall:
  - (a) be offered assistance by the operating air carrier in accordance with Article 8; [...]<sup>23</sup>
37. Article 6(1)(iii) confers on passengers the rights set out in Article 8(1)(a) in the event of a flight delay of at least five hours, regardless of the reasons for the delay:
  1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

[...]

passengers shall be offered by the operating air carrier:

[...]

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).<sup>24</sup>
38. Article 8(1)(a) requires the carrier to issue a refund within seven (7) days, in the form prescribed in Article 7(3), and to provide transportation to the point of departure:
  1. Where reference is made to this Article, passengers shall be offered the choice between:
    - (a) - reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
      - a return flight to the first point of departure, at the earliest opportunity;<sup>25</sup>
39. Article 7(3) prescribes the form of the refund:

The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.<sup>26</sup>

<sup>23</sup> *Regulation (EC) 261/2004*, Article 5(1)(a).

<sup>24</sup> *Regulation (EC) 261/2004*, Article 6(1)(iii).

<sup>25</sup> *Regulation (EC) 261/2004*, Article 8(1)(a) (emphasis added).

<sup>26</sup> *Regulation (EC) 261/2004*, Article 7(3) (emphasis added).

**(b) Turkey**

40. In 2012, Turkey adopted its Regulation on Air Passenger Rights (SHY-Passenger),<sup>27</sup> which mirrors the European Union's *Regulation 261/2004*.

	<b>SHY-Passenger</b>	<b>Regulation 261/2004</b>
Definition	Article 2(g)	Article 2(l)
Cancellation	Article 6(1)(a)	Article 5(1)(a)
Long Delay	Article 7(1)(3)	Article 6(1)(iii)
Time Line and Form	Article 9(1)(a)	Articles 8(1)(a) and 7(3)

**(c) Israel**

41. In 2012, Israel passed the *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions)*, 5772-2012 [ASL].<sup>28</sup>
42. The key provisions of the ASL on passengers' fundamental right to a refund can be summarized as follows:
- *Eligibility*: Flight is cancelled or delayed by more than 8 hours (regardless of reasons).
  - *Rights*: Reimbursement of consideration (including fees, levies, taxes and other obligatory payments) or replacement ticket, at the passenger's choice.
  - *Time Line for Reimbursement*: Within 21 days.
  - *Form of Reimbursement*: Original form of payment.

**(d) United States**

43. The United States Department of Transportation's longstanding position has been that airlines must promptly refund tickets when the airline cancels the passenger's flight or makes a significant change in the schedule and the passenger chooses not to accept the alternative offered by the carrier:

With respect to providing prompt refunds, we conclude that the obligation to provide such refunds applies not only to refunding the basic price of a ticket but also to refunding optional fees charged to a passenger for services that the passenger is unable to use due to an oversale situation or a flight cancellation. For example, if a passenger pays for premium economy seating, but his

<sup>27</sup> SHY-Passenger in English.

<sup>28</sup> *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions)*, 5772-2012 in English.

flight is canceled or oversold and that seating is not available on the flight that he/she has agreed to be re-routed on, then the carrier must promptly refund the passenger the fee paid for the premium seating. In adopting this requirement, the Department believes it is unfair for a carrier to refuse to provide a refund to a passenger of fees paid for services not provided through no fault of the passenger.

We continue to believe that there are circumstances in which passengers would be due a refund, including a refund of non-refundable tickets and optional fees associated with those tickets due to a significant flight delay.  
[...]

We reject [...] assertions that carriers are not required to refund a passenger's fare when a flight is cancelled if the carrier can accommodate the passenger with other transportation options after the cancellation. We find it to be manifestly unfair for a carrier to fail to provide the transportation contracted for and then to refuse to provide a refund if the passenger finds the offered rerouting unacceptable (e.g., greatly delayed or otherwise inconvenient) and he or she no longer wishes to travel.

Since at least the time of an Industry Letter of July 15, 1996 [...] the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.<sup>29</sup>

44. On April 3, 2020, the United States Department of Transportation issued an Enforcement Notice reminding airlines of their obligation to refund passengers for cancelled flights, and reaffirmed the aforementioned principles.<sup>30</sup>
45. On May 12, 2020, the United States Department of Transportation issued an FAQ, which stated, among other things, that:

Airlines and ticket agents can offer consumers alternatives to a refund, such as credits or vouchers, so long as the option of a refund is also offered and clearly disclosed if the passenger is entitled to a refund. Further, any restrictions that apply to the credits and vouchers, such as the period in which credits must be used or any fees charged for using the credit, must be clearly disclosed to consumers. If an airline, by representation or omission, engages in conduct that is likely to mislead consumers about their right to a refund, or the value

<sup>29</sup> [Enhancing Airline Passenger Protections](#), 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011) (emphasis added).

<sup>30</sup> [Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel](#), US DOT (April 3, 2020).

of a voucher or credit that is offered, the Aviation Enforcement Office would deem such conduct to be a deceptive practice.

[...]

Airlines and ticket agents are required to make refunds promptly. For airlines, prompt is defined as being within 7 business days if a passenger paid by credit card, and within 20 days if a passenger paid by cash or check.<sup>31</sup>

46. The United States Department of Transportation cited 14 CFR §259.5(b)(5) in support of its interpretation of “prompt”:

Where ticket refunds are due, providing prompt refunds, as required by 14 CFR 374.3 and 12 CFR part 226 for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases, including refunding fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation;<sup>32</sup>

### **III. Canada Should Harmonize its Regulations with the International Standards**

47. Canada should not reinvent the wheel, but harmonize the *APPR* with other jurisdictions, much the same way as Turkey has done.
48. As demonstrated in the foregoing survey, passengers’ fundamental right to a refund for flights cancelled by the airline or flights that experience a long delay, regardless of the reasons for the cancellation or delay, is a universally accepted commercial standard.
49. It is also a commonly accepted principle that refunds must be made in cash or equivalent and/or the original form of payment. Vouchers may be provided only with the passenger’s signed written agreement.
50. In terms of time lines, seven days seems to be the standard both in the European Union and in the United States for credit card payments, although the United States permits 20 days for cash or cheque payments.
51. There is no indication that the European Union’s seven day limit causes any hardship to airlines, including Canadian airlines, that operate flights departing from the European Union. We therefore believe that Canada should adopt the **7-day standard for refunds**.

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<sup>31</sup> [Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel](#), US DOT (May 12, 2020) (emphasis added).

<sup>32</sup> [14 CFR §259.5\(b\)\(5\)](#).

52. In terms of what constitutes a “long delay” to entitle a passenger to a refund, ss. 11(3)(c) and 12(2)(c) of the *APPR* have fixed the threshold at **three hours**. We believe that the same three-hour time threshold should be used for delays outside the carrier’s control, for the following reasons:
- (a) Having a uniform time threshold for all reasons of flight delay allows ascertainment of the right to a refund without having to determine the cause of the delay, and thus it reduces disputes and litigation between passengers and airlines.
  - (b) The EU, Israel, and Turkey use a uniform threshold for determining what constitutes a “long delay” entitling the passenger to a refund.<sup>33</sup> In these jurisdictions, the threshold does not depend on the reason for the delay—likely for the reasons stated in item (a).
  - (c) No passenger should be required to take a flight that has been delayed for an amount of time that defeats the purpose of the passenger’s travel. For example, for a passenger booked to arrive at their destination on Christmas Eve, travelling the next day may defeat the purpose of their travel.
  - (d) A delay that exceeds three hours is significant in our fast paced world. It means arriving at the destination on the afternoon instead of the morning, or in the evening instead of the afternoon. As such, it is capable of defeating the passenger’s purpose of travel.

#### **IV. Coming Into Force: As Soon as Possible**

53. The amendments proposed herein are necessary for the recovery of the Canadian travel industry. Consequently, it is in the vital interest of the industry that the amendments come into force as soon as possible. While the airlines may argue for deferring the coming into force of the amendments, acceding to such requests would have profound economic consequences for Canada, and would significantly delay the Canadian travel industry’s recovery.
54. Consumer confidence and goodwill is the lifeblood for every airline and the travel industry as a whole, which depends on consumers paying in advance for services to be rendered at a later date.
55. Consumers will pay for services in advance only if they have confidence that they will receive the services they had paid for, or, if the services are not provided, a full refund of their hard-earned money. In the absence of such assurances, consumers will vote with their wallets: travel less, or whenever possible, take their business to airlines based in jurisdictions that do offer such guarantees, such as the US or the EU.

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<sup>33</sup> Israel treats long delays as a form of flight cancellation.

56. Over the past year, Canadian airlines and their travel industry partners have squandered their most precious assets: consumer confidence and goodwill. The Government of Canada's actions and omissions, and in particular those of the Agency, have compounded the loss by eroding consumers' confidence in the government's willingness to protect private property and consumer rights.
57. This loss of confidence will slow the entire sector's recovery. To mitigate the long-term economic harm, it is therefore imperative to enact measures that guarantee that money the public pays in advance to airlines would never be misappropriated again. The proposed amendments to the *APPR* would operate as a stop-gap measure to restore or at least prevent further erosion of consumer confidence and goodwill.
58. The proposed amendments therefore should come into force as soon as permitted by the *Statutory Instruments Act*.

## V. The Consultation Paper is Misleading: There is no “Gap”

59. As explained in great detail in Section I, passengers' fundamental right to a refund for cancelled flights has been the law in Canada for several decades, and remains the law in Canada today.
60. The Consultation Paper contains malicious, false, and fraudulent statements that deliberately mislead the public about the state of the law in Canada:

The COVID-19 pandemic – and the global collapse of air travel that resulted in mass flight cancellations – have highlighted a gap in Canada's air passenger protection framework: the absence of a requirement for airlines to refund tickets when flights are cancelled, or where there is a lengthy delay, for reasons outside their control and it is not possible for the airline to complete the passenger's itinerary within a reasonable time.<sup>34</sup>

61. There is no gap in the laws of Canada nor in the obligations of airlines in terms of refunding passengers for flights cancelled by the airlines, regardless of the reasons for the cancellation. These well-established obligations flow from provisions of the *Canada Transportation Act* and the *Air Transportation Regulations*, and were previously recognized by the Agency in multiple decisions.
62. The only gaps are in the Agency's enforcement of passengers' rights and in the consolidation of the aforementioned obligations into a single statutory instrument, such as the *APPR*.
63. In 2018-2019, the Agency had the power to consolidate the fundamental right to a refund into the *APPR*. It is the **will** to do so that the Agency lacked.

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<sup>34</sup> [Consultation paper: Development of new airline refund requirements](#).

64. At the time the *APPR* were drafted, we expressed serious concerns about the *APPR*'s silence on passengers' fundamental right to a refund. We cautioned that airlines may attempt to rely on this silence as a purported basis for violating passengers' fundamental right to a refund.<sup>35</sup> Regrettably, the Agency failed to follow our recommendation to consolidate this right into the *APPR*, claiming lack of statutory mandate, which is yet another assertion that is devoid of any merit.
65. Sections 67(2), 86(1)(m), and 86(1)(h) of the *Canada Transportation Act* provided the Agency with broad regulation-making authority with respect to the content of airlines' domestic and international tariffs. Indeed, ss. 107(1)(n)(xii) and 122(c)(xii) of the *Air Transportation Regulations*<sup>36</sup> were enacted pursuant to that authority.
66. The very same regulation-making powers could have easily been used to fully consolidate passengers' fundamental right to a refund into the *APPR*.

## **VI. The Agency Must Respect its Jurisdictional Limits**

67. 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*.<sup>37</sup>
68. The Agency says that the amendments to the *APPR* would be made pursuant to a ministerial direction, which reads, in part, as follows:

- 1** The Canadian Transportation Agency must make a regulation respecting a carrier's obligations towards passengers in the case of flight cancellations due to situations outside of the carrier's control that prevent it from ensuring that passengers complete their itinerary within a reasonable time.
- 2** The regulation made by the Canadian Transportation Agency must provide for refunds to passengers for flight cancellations due to situations outside of a carrier's control, including the situations listed in subsection 10(1) of the *Air Passenger Protection Regulations*, that prevent it from ensuring that passengers complete their itinerary within a reasonable time.<sup>38</sup>

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<sup>35</sup> [Deficiencies of the Proposed Air Passenger Protection Regulations](#), pp. 42-44 (February 2019).

<sup>36</sup> [Air Transportation Regulations](#), SOR/88-58, ss. 107(1)(n)(xii) and 122(c)(xii).

<sup>37</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 27-30.

<sup>38</sup> [Direction Respecting Flight Cancellations for Situations Outside of a Carrier's Control](#), SOR/2020-283.

69. The Agency lacks jurisdiction to make regulations about airline insolvency and bankruptcy, which are subject matters that Parliament expressly assigned to provincial superior courts.<sup>39</sup>
  - (a) If an airline is unable to meet its obligation to refund passengers for services not rendered, then the airline is an “insolvent person” within the meaning of the *Bankruptcy and Insolvency Act*,<sup>40</sup> and the matter must be heard and determined by the appropriate provincial superior court.
  - (b) Providing refunds for services not rendered is a basic property right, and it is an obligation that may even survive bankruptcy or restructuring.<sup>41</sup>
  - (c) The ministerial direction does not authorize the Agency to consider “an airline’s financial viability” in connection with the regulations to be made with respect to refunds. On the contrary, the direction states, unconditionally, that the regulation to be made “must provide for refunds.”
  - (d) Consequently, the Agency lacks jurisdiction to make regulations that consider “an airline’s financial viability” in connection with meeting its obligation to refund passengers, and the Agency lacks jurisdiction to adjudicate matters that relate to “an airline’s financial viability” in this context.
70. The Agency also lacks jurisdiction to make regulations that diminish consumers’ rights under provincial consumer protection laws.
  - (a) While airlines are federally regulated, they are nevertheless subject to provincial laws of general applicability.<sup>42</sup> In particular, airlines must comply with provincial laws requiring the refund of monies paid in advance for services ultimately not rendered.
  - (b) The Agency has no jurisdiction to override provincial consumer protection laws.
  - (c) Consequently, the Agency must make regulations that conform to the principle of “co-operative, flexible federalism,”<sup>43</sup> and allow simultaneous compliance.

<sup>39</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, [s. 183](#); and *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36, [s. 9](#).

<sup>40</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, [s. 2](#).

<sup>41</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, [s. 178\(1\)\(d\)-\(e\)](#); and *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36, [s. 19\(2\)\(c\)-\(d\)](#).

<sup>42</sup> *Bank of Montreal v. Marcotte*, 2014 SCC 55 at para. 84.

<sup>43</sup> *Quebec (A.G.) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 45.

## VII. No New Exceptions Should be Added

71. Adding exceptions to the *APPR* raises considerable legal and practical difficulties.
72. A refund is not the same as compensation for inconvenience. A refund is merely the return of moneys paid for services not received. As such, passengers' fundamental right to a refund is a basic property right. Consequently, any exception to this right would raise serious concerns of consistency with s. 1(a) of the *Canadian Bill of Rights* and, in the absence of explicit legislative authority, may be *ultra vires* the Agency.
73. One of the greatest strengths of the European Union's regulatory regime is its relative simplicity, including the absence of exceptions. This allows a tribunal or a court to determine passengers' entitlement to a refund without the need to obtain and weigh complex evidence about the circumstances of a cancellation or delay.
74. The *APPR* is already hopelessly overcomplicated and vague, as demonstrated by the large number of complaints relating to the "classification" of delays and cancellations (within or outside the airline's control, etc.). The sheer number of these complaints demonstrates that the number of exceptions and their vagueness create a barrier to enforcement.
75. One of the greatest practical challenges with the exceptions already enumerated under s. 10(1) of the *APPR* is that they fail to explicitly distinguish the events based on the time the enumerated events come to the airline's attention. This invites disputes and litigation.
76. For example, the grounding of the 737 MAX was clearly outside the airlines' control in March 2019; however, some airlines kept selling tickets on the 737 MAX in October 2019, many months after their grounding. When those flights, sold in October 2019, were ultimately cancelled, the airline argued that the cancellation was due to the grounding of the 737 MAX, and as such was covered by s. 10(1)(k) of the *APPR*. This demonstrates the kind of disputes and litigation that exceptions invite.
77. We are therefore of the view that no further exceptions should be added to the *APPR*. In the alternative, if further exceptions were added to s. 10(1), then the provision itself should be amended to clarify that the exceptions apply only if the event was not foreseeable and could not have reasonably been known to the airline at the time of selling the ticket or the time of booking the passenger on the affected flight, whichever is later.
78. In particular, airlines should not be able to rely on the pandemic and the restrictions that have been in place and were known to all for months, and before a ticket was sold, as "situations outside the carrier's control." Permitting the airlines to do so would render ss. 11–12 of the *APPR* devoid of any meaning, and would be contrary to Parliament's intent in enacting s. 86.11 of the *Canada Transportation Act*.

Sincerely yours,

Dr. Gábor Lukács  
President