

**SUBMISSION TO THE CANADIAN TRANSPORTATION AGENCY ON PROPOSED CHANGES TO
CLARIFY, SIMPLIFY AND STRENGTHEN THE AIR PASSENGER PROTECTION REGULATIONS**

SUBMITTED BY JOHN GRADEK, AUGUST 8, 2023

I wish to submit the following feedback to the Proposed changes to clarify, simplify and strengthen the Air Passenger Protection Regulations. The following is remitted in my capacity as a observer of the Canadian aviation industry and are to be considered as commentary based on my professional and academic experience.

My general observations about the proposed changes are a mixture of good news and bad news. First the good news. A major concern of mine has been the disruption categories contained in the current regulations that are being used by the industry and the CTA in the categorization of customer-based appeals to the CTA. Unfortunately, I do not have the data that categorizes the appeals to the CTA of claims due solely to disruption categorization, but I would estimate that the vast majority are concerned with airlines' refusal to pay compensation levels stated in the APPRs.

The regulations modified in 2022 attempted to address situation where airlines were using staff shortages as a means exempt them from paying compensation through the "required for safety" regulation. It is interesting to note that since this amendment and clarification were made, airlines are no longer specifying the cause of a delay, but rather simply stating that a disruption occurred due to "safety" reasons. As noted, the use of the "safety" exemption has been misused, inasmuch as the original APPRs had an intent to address "safety" as a mechanical condition that prevented an aircraft from successfully and safely completing its intended itinerary.

The proposed regulations do eliminate the ambiguous and misused nature of the "safety" component, replacing with several other exemptions defined as "exceptional circumstances". More on this later. It is unfortunate that safety has been misused by the industry in exempting compensation, as safety must remain a key determinant to the release of an aircraft for air service and need to be enshrined in these regulations, albeit with the proper operational focus on airworthiness and not on shortcomings in airlines' inability to properly staff a scheduled operation.

The provisions related to passenger rebooking after a 48-hour delay of service appears to be arbitrary. Canadian air travelers have been subjected to instances where even 48 hours can be financially and emotionally straining. I would look to a 24-hour window for same carrier recovery, with recovery on other carriers to be offered at the originating carrier's expense. The offer of refunding the fare for the return itinerary should also hold for this same 24-hour period.

The bad news requires a more detailed review of both exceptional circumstances and airlines' responsibilities for compensation.

The proposed list of exceptional circumstances is “opening a can of worms” when we examine the efforts that have been made by the airline industry from exempting itself for compensation using the “safety” provision. While I admire the effort in these proposed APPRs to refine exceptional circumstances, I believe it is interesting to refer to the definition of “exceptional circumstances” as stated in the European Unions version of passenger rights, EU261/2004:

“Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.”

The approach of the EU has been to keep this definition very general in nature, and to provide guidance to individual countries on their application of this terminology. It is interesting to note that jurisprudence in matters brought before the various courts in the EU since the coming into effect of EU261/2004 that the underlying premise of “exceptional circumstances” has withstood the test of time and has been deemed as sufficiently clear to resolve appeals of airline decisions in awarding compensation. The listing of exceptional circumstances in the proposed APPRs will most likely result in the airline industry becoming more creative in deciding what category to assign for compensation exemption. The longer this list of exceptions, the greater the chance for misuse of these exemptions.

The provisions of the Budget Implementation Act’s amendments to the Canada Transportation Act that claim to shift the burden of proof for a defense of exemption from compensation are, in my opinion, very difficult to implement and allow the airlines more than sufficient leeway in disseminating carrier data related to the cause of a passenger disruption. To make this provision indeed workable, the APPRs would require the submission of operational as well as commercial data from the airline to determine the decision-making process used by the airline to delay one flight versus another. Operational scheduling of aircraft to flight schedules is a complex task, incorporating factors that extend beyond assigning a specific aircraft to a flight. Once again, providing the extended list of exceptional circumstances for which an airline may claim exemption from compensation further complicates the CTA’s appeal process in deciphering complex airline decision-making.

The assistance provision of the proposed APPRs deal with how airlines ought to provide “duty of care” to passengers which have a contracted agreement for air travel. There is a need to have the APPRs be more specific on the “duty of care” provisions, where many Canadian travelers who have been subjected to lengthy delays or outright cancellations have not been provided such provisions. It is recommended that similar compensation provisions as to flight delay compensation be incorporated into the APPRs. This would require detailing the expected level of services to be offered to disrupted passengers by length of delay, and provisions for compensation if the “duty of care” provisions are not met.

One of the major concerns of Canadian travelers experiencing travel disruption has been the lack of timely communication and services from the airline. There is a need to address this delay in customer service within the scope of the APPRs, the specifics of which would need to be detailed. Options would be a requirement for airlines to publicly disclose their service standards for dealing with customer communication by either electronic, voice or written communications, and to report publicly on the ongoing achievement of such service standards. Administrative actions ought to be considered for continued under-achievement of such service standards, with a perspective to demonstrate efforts by the airline to meet such standards.

The concept of “knock-on” effects due to flight disruption is interesting and I congratulate the CTA on this initiative. From an airline operational perspective, it is important to understand that flight schedule recovery from disrupted operations is very much a function of aircraft routing and available recovery aircraft. A blanket exemption to one flight beyond the original delay more than enough for narrow-body, short- and medium-haul routes, but becomes problematic with wide-bodies, longer-haul routes with little to no opportunity to position and use recovery aircraft. Another consideration is Canada’s northern operators whose operations involve multi-stop itineraries under difficult operating conditions. These operators should be exempted from the conditions of “knock-on” effects.

The provisions with the APPR that deal with rebooking and refunds needs to be reviewed as they pertain to smaller airlines. It has become very apparent to me that smaller airlines have been offering flights for services with significant lead times to date of operations. Carriers have been taking advantage of the lack of APPRs outside of the 14-day cancellation window, in which compensation would be offered for cancellation. Canadian air travelers, particularly in smaller Canadian markets, and for which carriers are offering minimum air services, have been subject to cancellations without protection on other carriers or compensation for cancellation. Their only provisions covered under the APPRs is for refunds of fare paid. I believe that this cancellation window should be extended to 60 days, wherein cancellation of a proposed, and sold, air service would require the carrier to rebook the passenger on any carrier offering either direct or connection services permitting the passenger to complete the planned itinerary.

Thank you very much for your offer on commentary to the proposed changes to clarify, simplify and strengthen Air Passenger Protection Regulations, and I look forward to further participation in this revision process as development occur.