



November 4, 2024

Mrs. France Pégeot
Chair and CEO
Canadian Transportation Agency
Ottawa, Ontario K1A 0N9

Re: Consultation on Cost Recovery Fee

Dear Mrs. Pégeot,

These comments are provided by the Air Transport Association of Canada (“ATAC”) in response to the Canadian Transportation Agency’s consultation notice seeking comments on the Agency’s proposal to impose a \$790 cost recovery fee on air carriers for all passenger complaints resolved by the Agency under sections 85.05 to 85.12 of the *Canada Transportation Act*.¹

ATAC’s 175 members have been proudly representing Canada’s commercial aviation industry for 90 years. Our members offer air services in every region of Canada, not only contributing substantially to this country’s connectivity, but offering a desperately needed lifeline to many northern and remote regions often delivering essential air services to Canadians.

Summary

In principle ATAC opposes the very notion of a fee structure based on cost recovery of a service so essential to the Canadian population. No other mode of transportation bears such an onerous fee structure in the adjudication of user claims.

ATAC is concerned about both the sum of the proposed fee (\$790 per complaint) and the Agency’s intention to impose the fee upon air carriers irrespective of the merits of the complaint.

The proposed fee will impose additional costs on air carriers that will ultimately be borne by passengers by way of higher fares. It will create additional barriers to entry for new air carriers and potentially limit routes served by existing carriers, thereby reducing competition in Canada’s air transport industry. It will also impose a significant barrier to air carriers’ ability to access impartial dispute resolution.

ATAC recommends two variations to the Agency’s proposed fee. The first is eliminating or waiving the fee where the Agency determines a complaint in favour of an air carrier. The second is a reduction in the fee to minimize the negative impact it will have on competition and air transport fares.

¹ Canadian Transportation Agency, “Consultation: Air travel complaints fee proposal”, available at: <https://otc-cta.gc.ca/eng/publication/consultation-air-travel-complaints-fee-proposal>.

ATAC's position on the Agency's fee proposal

ATAC serves as Canada's national trade association for the commercial aviation and flight training industries, as well as aviation industry product and service suppliers. Our membership is comprised of companies engaged in commercial aviation all across the country.

The *Canada Transportation Act* includes a National Transportation Policy declaration. It reads:

It is declared that *a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada.*²

The proposed fee will undermine the competition and economic efficiency objectives of the declaration. Imposing the fee per complaint, regardless of a complaint's merits or outcome, will inflict a substantial cost on air carriers. Air carrier margins are low and the financial cost of incurring a \$790 fee per passenger complaint is not insignificant. To cover the cost, air carriers will have to increase fare prices at a time when Canadians are already facing rising costs in their daily lives.

The proposed fee also has the potential to dissuade new market entrants from offering air services in Canada and to discourage the expansion of new routes, or the abandonment of current routes, by existing air carriers. New market entrants and existing air carriers will need to weigh the costs associated with the proposed fee when evaluating the business case to continue servicing existing routes or to add new routes especially in the north and remote regions. The lack of critical funding for infrastructure in the North and Remote airports exacerbates the problem and will add additional financial burden, especially to medium and smaller operators challenged with difficult and harsh operating environments. The abandonment of existing routes, or the decision to not add a new route because of the additional cost and risk associated with the proposed fee, would undermine the competition and economic efficiency objectives of the National Policy Declaration in the Act. The current APPR regulations and proposed fees overlook the unique nature of essential operations especially in northern and remote locations in Canada.

The proposed fee also undermines the rule of law and air carriers' access to fair and impartial dispute settlement. The Agency's 2023-2024 statistics report on its website does not provide statistics on passenger disputes per issue. However, in the Agency's 2022-2023 published statistics, "flight disruptions" accounted for 74% of all passenger complaints.³ It is understood that most of these involved requests for compensation under section 19 of the *Air Passenger Protection Regulations* ("APPR").

ATAC's members include both large carriers and small carriers for purposes of the APPR. A small carrier's APPR compensation liability for a delay or cancellation within their control is \$125 for a delay of 3 to 6 hours, \$250 for a delay of 6 to 9 hours and \$500 for a delay of 9 hours or more. A large carrier's APPR compensation liability for a delay or cancellation within their control that is

² *Canada Transportation Act*, S.C. 1996, c. 10, s. 5.

³ Canadian Transportation Agency, "Statistics 2022-2023", available at [3](#).

between 3 and 6 hours is \$400, rising to \$700 for a delay of 6 to 9 hours. Liability for a delay of 9 hours or more is \$1,000. No compensation is owed for delays and cancellations outside the carrier's control or required for safety purposes.

Imposing a fee of \$790 per complaint, regardless of its merits, creates an economic incentive for air carriers to pay compensation to passengers with baseless or illegitimate claims for APPR compensation (e.g. for a delay or cancellation arising exclusively from a weather delay) or other compensation, rather than have the complaint resolved in the air carrier's favour. While the air carrier may be confident that the Agency will dismiss the complaint, the \$790 cost will, in many cases, exceed the compensation demands of a passenger. This is particularly the case for small carriers whose APPR liability per passenger for delays and cancellations within their control is a fraction of the proposed \$790 fee.

The existence of the \$790 fee may also incentivize the filing of complaints by passengers who are in some way discontent with their travel experience, regardless of whether it is a proper complaint, as a means of 'punishing' the air carrier.

Access to civil justice has been judicially recognized as a precondition to Canada's vibrant economy, because access to justice allows contracting parties to enforce their agreements.⁴ The Agency's fee proposal—in particular the value of the fee compared to APPR compensation combined with the intention to impose the fee on air carriers regardless of the merits of a complaint—creates an unreasonable barrier to access to justice and undermines the rule of law. The economic incentive created by the fee proposal will coerce air carriers to not only avoid the impartial adjudication of passenger complaints by the Agency, but to pay sums to passengers that are not owed so as to avoid the impartial adjudication of disputes by the Agency. Moreover, it would allow persons to operate in a way that is contrary to law, whereby they demand compensation not owed without fear of consequences, using the threat of the Agency's proposed fee. Consequently, the fee undermines the rule of law and air carriers' right to access to justice. Courts, including the Supreme Court of Canada, have struck down court fees and arbitration clauses that impose fees that prevent access to a mechanism to adjudicate disputes.⁵ The Agency's proposed fee is analogous to the fees in these other cases. If the proposed fee is imposed, there is a real risk that Courts may intervene and strike down fee.

The consultation notice states the Agency has an estimated capacity to resolve 22,615 complaints.⁶ At the end of the Agency's 2024 fiscal year it had a backlog of over 70,000 complaints.⁷ The Agency received in excess of 40,000 complaints in each of its 2023 and 2024 fiscal years.⁸ If current trends continue, the Agency will continue to see a significant year-on-year increase in its complaints backlog.

⁴ *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para 112 (per Brown J).

⁵ *Uber Technologies Inc. v. Heller*, 2020 SCC 16; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59.

⁶ Canadian Transportation Agency, "Consultation: Air travel complaints fee proposal", available at: <https://otc-cta.gc.ca/eng/publication/consultation-air-travel-complaints-fee-proposal>.

⁷ Canadian Transportation Agency, "Statistics 2023-2024", available at <https://otc-cta.gc.ca/eng/statistics-2023-2024>.

⁸ Canadian Transportation Agency, "Statistics 2023-2024", available at <https://otc-cta.gc.ca/eng/statistics-2023-2024>.

When the \$790 fee is viewed within context of the above comments, the Agency's dispute resolution capacity, and the Agency's complaint backlog, there is concern that one of the unstated purposes of setting the fee at \$790 is to encourage air carriers to settle disputes and to reduce passenger complaints to the Agency.

The Act is clear that the Agency may only impose fees for the purpose of cost recovery.⁹ The Agency may not impose fees for any other purpose, including encouraging the resolution of complaints or incentivizing air carriers to settle complaints. Imposing the fee for an improper purpose undermines its legitimacy and raises the risk it will be found unlawful.

Recommendations

Partial cost recovery fees have been determined to be necessary by Parliament and are authorized by the Act. The above concerns about access to justice and the rule of law can be addressed by eliminating or waiving the fee where a complaint is found in favour of an air carrier. This would remove the economic incentive for air carriers to avoid dispute settlement by the Agency and pay sums to passengers with baseless claims where the air carrier would be meritorious.

The concerns about competition, new entrants to the market and the cost of air transportation can also be addressed by eliminating or waiving the fee where an air carrier is meritorious in a dispute. Further, the impact of the fee on competition can be minimized by reducing the fee. ATAC believes a fee aligned with other jurisdictions and tribunals would be reasonable as it would align with filing fees in other dispute settlement venues, such as small claims courts and administrative dispute settlement bodies. CTA must change direction on this proposal and improve its own internal mechanism to process complaints while considering other options if airlines and consumers are to benefit.

CTA estimates that the fee would cost airlines \$17.9 million which is grossly underestimated and will surely challenge the economic viability of many operators as the backlog of complaints continues to grow past 70K. This punitive proposal is representative of the disconnect between the agency and the realities of Canada's economy and aviation sector and will have dire unintended consequences.

Sincerely,



John McKenna
President & CEO

⁹ *Canada Transportation Act*, s. 85.16(1).