

Public Submission to the Canadian Transportation Agency

Regarding the CTA's Proposal for Fee Charging for Complaint Processing

To: The Canadian Transportation Agency

Date: October 18, 2024

Introduction

We express our concerns about the proposed complaint processing fees by the Canadian Transportation Agency (CTA) and outline why this proposal, as currently stated, is untenable from business and legal perspectives.

Interpretive Notes

The *Budget Implementation Act 2023*, effective June 22, 2023, mandates the CTA to streamline complaint resolution and enhance transparency. Division twenty-three of the *Budget Implementation Act, 2023* indicates that the CTA may, after consulting with the Minister, make rules with respect to the fees and charges to be paid in relation to the administration or enforcement of any provision of the *Canada Transportation Act* or its regulations.

Streamlining the complaint resolution process and enhancing transparency is mandatory. The legislative language related to fees and charges is permissive, and not mandatory.

Under section 34(1) the fees or charges that “could be required” under this section constitute a debt to the Crown and the charges “may be recovered” in a court of competent authority. There is no clear mandate that the fees must be invested back into the CTA's dispute resolution process, and there is no clear legislative direction for traceability of the fees. However, the CTA may be permitted to use the funds in the fiscal year they are received or in the following fiscal year to support its complaint-handling activities allowing the CTA both a revenue recovery mechanism and flexibility in spending to ensure operational efficiency.

As a result of this legislation, the CTA indicates it must establish fees or charges; although, the statutory language relied upon by the CTA is permissive and not mandatory. The CTA proposes a \$790 CAD fee for ‘eligible closed complaints’ without defining the term or providing an independent financial audit for the verification.

Business Impediment

Inequitable Financial Burden on Canadian Aviation Businesses

Introducing fees, taxes or charges (hereinafter “**charges**”) for complaint processing, regardless of carrier size or service to remote and vulnerable communities, contradicts Canadian aviation principles. Further, the proposed charge imposes a significant financial burden on businesses, particularly Class 3 or Class 4 Transportation Service Providers (“TSP”), as defined by the CTA. These businesses often operate on tighter budgets and will not have the resources to successfully absorb additional costs either directly or indirectly, through increased passenger fees.

For all air TSPs, irrespective of size, any claim processing charge imposed on these Canadian carriers by the CTA will pass on to passengers through higher ticketing prices. Such a process makes aviation even more expensive and inaccessible to those in Canada relying upon aviation as a mobility service, including at-risk families flying their loved ones for healthcare, remote locations not well served by other modes of transportation, students, and Indigenous communities.

An example is a small airline operating in rural or remote areas that receives 20 complaints in one year that are resolved. At \$790 per complaint, the airline would incur \$15,800 in additional fees annually, which could represent a significant operational cost. To cover that cost the airline may raise ticket prices by \$10 to \$15 per flight. While this may seem minimal to some, for lower-income individuals and families, especially those relying on air travel in remote regions, even small increases can significantly impact travel affordability. Vulnerable groups such as low-income individuals, families with children, and elderly passengers, often have limited transportation options. If these small airlines are forced to increase ticket prices, many in these populations may forgo travel altogether, making essential trips (for work, healthcare, or family matters) less feasible.

Additionally, and notably, because the CTA’s proposed charges relate to the uncertain nature of dispute resolution, the charges lead to an unknown and potentially disproportional increased operational expense by air carriers who will need to self-insure against the possibility of regulator mismanagement. The CTA’s charge proposal will destabilize

business planning and, and it will hinder every Canadian air carrier's ability to provide quality services to customers.

Deterrent to Appropriate Adjudication of Complaints

The proposed charges will not deter legitimate complaints. The proposed charges will not deter illegitimate complaints. In other words, under the current regime individual consumers are not at any direct disadvantage when submitting legitimate claims to the CTA. The imbalanced proposal does not change that but does put all air carriers at a financial disadvantage.

The proposal is ripe for abuse by groups, including foreign agencies, to encourage the filing of unnecessary or vexatious reports, akin to a securities short squeeze. The CTA's proposal will therefore impact the sensitive and delicate foreign diplomacy, which is a necessity in daily global aviation business operations. The CTA's proposed charges, when utilized by exploiters or litigious groups or individuals, irrespective of their domicile, could significantly devalue private companies and operators during times of either sales or mergers. All Canadian companies and individuals will be impacted negatively, with those in the most vulnerable positions impacted the most. The CTA's proposal, if accepted, may have significant economic implications for the Canadian economy, given the importance of aviation to it.

The CTA's proposal may lead to an increased caseload before the Tribunal and subsequent administrative appeals. The additional case load will lead to further unresolved issues that may adversely affect service quality and customer satisfaction, therefore undermining consumer and industry trust currently placed in CTA oversight.

Negative Impact on Market Competition

The fee structure creates an uneven playing field in the industry. Larger, well-funded corporations with larger fleet sizes may be able to absorb these costs through ticket price increases more easily than smaller competitors. This disparity will stifle competition, leading to a less dynamic and innovative transportation sector.

The Competition Bureau ought to be on notice of the CTA's proposal on charge structure, and it ought to weigh in on this proposal through its market study of competition in domestic air passenger service.

Negative Legal Implications

Access to Justice Interfered

The principle of access to justice is a cornerstone of the Canadian legal system. It is important to ensure that any charge or tax for complaint processing aligns with this principle.

Dispute resolution is, at best, uncertain. It is essential that Canadian individuals and businesses are treated equitably in defending or pursuing complaints whether at a tribunal, quasi-judicial tribunal, or judicial court. There are no known overriding considerations of justice that would compel the CTA to suggest a unilateral charge on their dispute resolution services.

All Canadian businesses, whether in aviation or otherwise, should have the right to respond to complaints and/or seek redress without the fear of automatic financial penalties.

Unclear Regulatory Framework Adherence Given Technology Advancements

Unilateral charges for dispute resolution may not align with the CTA's regulatory framework and legislative intent. It is essential to ensure that any charge introduced is consistent with the legislative intent and statutory provisions that guide the CTA's operations. Referencing the permissive provisions related to Charges as they are contained within the *Budget Implementation Act 2023, No. 1* alone is woefully insufficient justification. A thorough review of the legal basis for the reason the CTA contemplates this charge as mandatory has not yet occurred to determine the proposal's legitimacy.

Depending on the nature of the dispute and underlying facts, a blanket charge in certain circumstances will be entirely unreasonable for the level of services provided by the CTA. There are certain, but few, complaints that are challenging and significantly time-consuming that require human intervention. Whereas most air travel consumer protection complaints, particularly with the assistance of technology and AI, are appropriately resolvable within a matter of minutes at low to no cost. A straightforward example of an easily resolvable dispute includes a passenger traveling on a domestic flight who faces a delay in their checked baggage by 48 hours. This may result in the passenger incurring minor costs to buy essential items such as toiletries and clothing while waiting for their luggage. Such a potential dispute between the passenger and airline is straightforward because the Air Passenger Protection Regulations (“**APPR**”) are clear and the evidence amounting to

receipts for expenses and flight/baggage delay is easy to verify and administer with assistance of technology. Other straight forward examples include disputes over seat selection fees, flight delay compensations, or a refund request for a service that was not delivered.

A practical illustration of how quickly a passenger complaint can be resolved, without significant fees, is on a refund request for a service that was not delivered. A passenger may pay an additional fee for in-flight Wi-Fi on a flight but is unable to connect throughout the journey due to technical issues. The airline does not automatically issue a refund, and instead of utilizing the CTA the passenger files a complaint through the airline's customer service portal. The airline's AI system can review the flight logs to verify that the Wi-Fi service was unavailable during the passenger's flight utilizing data from the onboard systems and the complaint details. AI will then check the passenger's payment records to confirm that the service was purchased. Once service unavailability and payment are verified, AI can automatically generate a resolution either issuing an immediate refund or send the case for minimal human intervention at the CTA if further details are needed. AI would notify the passenger of the refund and close the case. Only, if necessary, would the system escalate the complex issues to human agents at the CTA.

Appropriate, safe and secure use of technology in aviation can quickly verify data such as flight records and transaction logs allowing for fast resolution and ensuring that similar cases are handled in the same manner reducing inconsistencies. This process can be applied to large volumes of complaints efficiently, thus minimizing delays in customer service response times. It is unclear how such a process would cost \$790 CAD.

Levying a common charge for the CTA's service for all disputes, irrespective of their nature, will enrich the tribunal unjustly, across the board, at the expense of all airlines. A blanket fee for all complaints, whether those resolvable through an individual, or artificial intelligence analysis of the facts, laws, and tariff wording, is patently unfair. Allowing the practice, as proposed by the CTA, sets a dangerous precedent for other regulated industries focused on consumer protection.

The CTA's proposal references no consultation with any other consumer protection regime in aviation or otherwise. There is a need to consider the precedent set by other regulatory bodies in Canada. Many agencies do not charge fees for complaint processing, recognizing the importance of accessible and fair dispute resolution mechanisms, as well as the access to justice cornerstone in Canada. The CTA should align its practices with these established norms in other industries to ensure fairness and consistency.

The International Civil Aviation Organization ("**ICAO**") Core Principles on Consumer Protection guides that government authorities, including the CTA, should strike an appropriate balance between protection of consumers and industry competitiveness. ICAO

suggests that Canada's consumer protection regime should reflect the principle of proportionality and allow for the consideration of the impact of massive disruptions.

The CTA's proposal on complaint resolution charges fails to address how the proposal aligns with ICAO's Core Principles on Consumer Protection.

The CTA's proposal also fails to detail how additional proposed charges, which constitute a debt to the Crown, would improve on the efficient complaint handling procedures that Canadian consumers should be able to rely upon.

Precedent and Fairness Are Absent

All Canadians, whether individuals or corporations, in considering whether to launch, defend or acquiesce to a dispute must be in a position that allows fair consideration of the nature of the dispute, the appropriate adjudicative body, and cost of the dispute resolution process. This principal is traceable to the English *Supreme Court of Judicature Act, 1873*, and a principal adopted across all provincial judicature legislation across Canada. Discretion respecting costs of and incidental to a dispute resolution proceeding or a step in a proceeding, is a foundation of Canadian Justice. A blanket charge ignores this principle of justice, precedent and fairness.

The CTA's proposal of the dispute resolution charge could benefit from additional transparency, including:

- (a) consideration for market interest rates or other relevant factors;
- (b) consideration to the circumstances of the consumer complaint;
- (c) consideration that an air carrier may have made an advance payment to the consumer;
- (d) consideration about the circumstances of advance disclosure by the complainant or the air carrier;
- (e) consideration about the size of the air carrier, or types of operations or locations to where they are flying to and from;
- (f) consideration to the level of complexity of the complaint or proceeding;

- (g) consideration about the importance of the complaint and issue before the CTA;
- (h) consideration to the amount claimed and the amount potentially recoverable;
- (i) consideration to the conduct of any party that tended to shorten or to unnecessarily lengthen the duration of the dispute resolution process;
- (j) provision of a definition about what constitutes an “eligible closed complaint”, and how the charge relates to complaints that are appealed through the tribunal or court system.
- (k) consideration about the apportionment of fault;
- (l) consideration of written offers to resolve or written offer to contribute from either the air carrier or consumer
- (m) consideration about the involvement of a code-share partner;
- (n) consideration about a consumer or air carrier’s improper denial of or refusal to admit anything early in the dispute resolution process;
- (o) consideration whether any step in the proceeding was improper, vexatious, or unnecessary;
- (p) consideration whether any step leading to the dispute occurred through negligence, mistake, or excessive caution by either party;
- (q) consideration whether the consumer or air carrier commenced separate or multiple proceedings for claims;
- (r) provision of the independent financial audit supporting the assessment leading to the \$790 CAD figure adopted as accurate by the CTA;

- (s) provision of clear methodology on how the CTA will re-invest additional government or P3 funds in technology, staff training and digital infrastructure upgrades for more expediency, efficacy, or accuracy in dispute resolution; and,
- (t) communication of a consideration, provision or plan for how the CTA will address the current backlog of complaints through traditional or artificial-intelligence and/or technology means.

Additionally, in no way has the CTA's tied the proposal to how such charges would promote or incentivize further negotiation and settlement between the air carrier and the consumer, how such a charge aligns with the intent of the Convention for the Unification of Certain Rules for International Carriage by Air (*Montreal Convention (1999)*) for international flights, or how this charge proposal will make aviation more accessible and inclusive for all Canadians.

For example, the *Montreal Convention (1999)* is focused on individualized damages for specific harm to passengers, including baggage loss and delays. While passenger compensation is essential, it should align with the internationally accepted principles of liability under the *Montreal Convention (1999)*. The CTA's proposal of broad and automatic unilateral charge does not indicate how the APPR will be modified so that compensation for delays, cancellations or denied boarding is more closely tied to actual harm as outlined under Articles 17 to 19 of the *Montreal Convention (1999)* or other international frameworks such as European Regulation 261/2004 to ensure that obligations mirror practices in other jurisdictions that follow *Montreal Convention (1999)*. Without doing so, the CTA increases the risk of creating conflicting legal standards and lessens Canada's regulatory position (and financial position) within the global aviation framework.

A joint review panel consisting of CTA members, IATA, ICAO and international aviation legal experts to periodically review how the APPR and CTA enforcement mechanisms co-exist to ensure alignment with the *Montreal Convention (1999)* and European Regulation 261/2004 is recommended for ongoing compliance and a reduction in regulatory friction.

Any administrative monetary penalties or charges imposed by the CTA should be recalibrated to reflect the actual financial burden imposed on airlines, to ensure proportionality in fines that may drive ticket prices up, ultimately harming vulnerable passengers.

Conclusion Requires Proposal Reconsideration

Considering the above points, we urge the CTA to reconsider the implementation of unilateral non-mandatory charges for complaint processing and to provide transparency into its dispute resolution process given the development of assistive technology. The financial and legal implications of the proposal are substantial and will negatively impact aviation businesses, the competitive market, and the principles of access to justice and regulatory fairness.

There are alternatives to unilateral charges imposed on airlines. We request that the CTA engage in further consultations with stakeholders to explore alternative solutions, such as private-public partnerships, that address the CTAs financial modeling needs without compromising the rights and interests of businesses, accessible air travel for Canadians, and consumer protection. We request that the CTA consider the adoption of technology to quickly resolve passenger complaints at no to low cost, create a joint review panel consisting of CTA members, IATA, ICAO and international aviation legal experts to periodically review the APPR framework, and recalibrate any administrative monetary penalties or charges to reflect the actual financial burden imposed on airlines.

Thank you for your attention to this matter. We look forward to your favorable consideration of our submissions.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Edmondson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Eric Edmondson
CEO, Pivot Airlines