

November 4, 2024

**Joint Representations of Porter Airlines Inc. and Porter Airlines (Canada) Limited
concerning the Air Travel Complaints Fee Proposal by the Canadian Transportation
Agency**

Porter Airlines Inc. and Porter Airlines (Canada) Limited (collectively, **Porter**) provide these representations in response to the publication by the Canadian Transportation Agency (the **Agency**) of its Air Travel Complaints Fee Proposal (the **Fee Proposal** or the **Proposal**) and its related invitation for feedback from the public and industry stakeholders.

In Porter's respectful submission, the Fee Proposal is all but certain to act contrary to the stated goal of its enabling legislation "to clarify, simplify and strengthen the Canadian air passenger protection regime". Rather, as currently proposed, the Fee Proposal would incentivize a further explosion in passenger complaints (including especially in tactical baseless claims), and will result in a substantial increase to the Agency's and airlines' costs of processing complaints while further reducing the proportion of complaints settled or resolved on their merits. In the result, the Fee Proposal can be expected to increase costs and administrative burden of the passenger protection regime without any resulting benefit in efficiency or in the just resolution of complaints.

Ultimately, the Fee Proposal further entrenches the Agency's complaint resolution as deeply inconsistent with other judicial and quasi-judicial processes for resolving claims. Most dispute resolution regimes, including courts and other government tribunals, are structurally designed to encourage settlement and resolution of claims with a view to their merits. By contrast, the Fee Proposal will worsen the inequities in the current regime, whereby airlines already only have 14 calendar days to respond to each of a high volume of complaints involving complex operational matters with relatively little certainty and consistency of outcome. In this environment, carriers are already forced to settle some unmeritorious complaints simply because of the cost and uncertainty of filing a response, which may or not be understood or accepted by one of the many Complaint Resolution Officers. The Fee Proposal may be expected to result in a further explosion in complaints for airlines and the Agency to process, including unmeritorious tactical complaints from claimants who are aware that the carrier will have to pay an exorbitant fee even to be proven right.

Porter is aware of no other industry, and indeed no other mode of travel, which is subject to a burdensome compensation regime such as the Agency's, and its incremental yet substantial revisions to its process – often aimed at ameliorating problems the Agency failed to foresee (despite warnings from industry stakeholders) – appear to have no basis in the principles of efficient complaint resolution or procedural fairness. The Fee Proposal aggravates this situation further, by pushing the costs of the increasingly complex and unpredictable regime exclusively on its industry's service providers regardless of their conduct and compliance, rather than implementing a structure that uses cost burdens to encourage reasonable settlements and resolution, and to discourage frivolous or bad faith claims.

It is worthy of note that, as reported by the Agency, Porter has a substantially lower rate of passenger complaints than any of its Canadian competitors, reflecting our commitment to customer satisfaction and the efforts and resources we devote to resolution of customer concerns via direct engagement with our passengers. Nonetheless, Porter, like other carriers

and the Agency itself, has had to bear far greater costs to administer complaints under the *Air Passenger Protection Regulations (APPR)* than predicted by the Agency when the APPR first came into effect. While Porter is actively working to bring more competitive options to air travellers, the existing APPR structure is already diverting resources that could contribute to investments in new products and services. The Fee Proposal only exacerbates Canada's position as being among the world's most costly air travel jurisdictions for third-party taxes and fees. This detracts from the country's ability to foster airline competition, attract investment in the industry, and produce broader economic growth. While each government agency and service provider may consider their taxes and fees independently, the cumulative effect is such that airlines cannot offer service at the levels they desire and passengers face more costly purchases when they are able to fly. The Agency's updates to the complaint resolution process in September 2023 had the effect of shifting even greater burdens on the carriers and introducing even more uncertainty to proceedings, further discouraging the resolution of complaints on their actual merits.

With respect, Porter submits that the Fee Proposal reflects a similar failure of foresight, and that it is plain and obvious that the proposed scheme will incentivize more complaints regardless of their merit and further increase the cost burden to both airlines and the Agency, all to the detriment of the traveling public.

Background – The Air Passenger Protection Regulations and September 2023 Changes to the Agency's Complaints Process

The APPR came into force in December 2019, following a consultation process similar to the one herein. The salient feature of the APPR is its compensation regime, which requires air carriers to provide compensation and other remedies to passengers in the event of flight disruptions (cancellations or delays), depending on whether those disruptions arose from reasons within the carrier's control, outside the carrier's control, or within the carrier's control but "required for safety purposes".

While the Agency and air carriers who submitted feedback correctly foresaw that the APPR would cause a substantial increase in passenger complaints to the Agency, the Agency vastly underestimated the burden and costs of administering this deluge of claims. Despite the carriers' warnings that the new regime would prove costly (and likely result in higher fares as a result), the Agency remarkably determined in its Regulatory Impact Analysis that the new regime would not result in any incremental increase in carriers' regulatory compliance costs (while carriers generally warned of new and burdensome compliance costs), and estimated the Agency's own annualized costs of administering the complaints process at about \$1,400,000, or less than 5% of its actual annual costs as reflected in the current Fee Proposal.

Contrary to the Agency's over-optimistic predictions, both it and carriers have had to devote substantial resources - including the addition of new human resources - to administering the new, vague, high-volume regime, and to bear the enormous related administrative costs. Moreover, there was little guidance to passengers and carriers on how the APPR's vague categories of disruptions might be delineated by the Agency members deciding cases, causing a lack of predictability that undermined settlement efforts.

As predicted by carriers, the Agency became overwhelmed with new passenger complaints once the APPR took effect, and carriers were required to devote substantial resources to

responding to these new complaints with little certainty or guidance as to how the new scheme would be interpreted and applied.

In September 2023, in order to address the large and growing complaint backlog it had failed to foresee, and to establish a “more efficient” process, the Agency made additional changes to the complaints administration process “to deliver faster outcomes to air passengers”. As noted in the Fee Proposal, the three key features of this revamped process were to: (a) reassign responsibility for adjudicating complaints from Agency members to a new class of “Complaint Resolution Officers” who were not appointed by the Governor in Council; (b) create basic eligibility criteria for complaints to proceed through the process; and (c) impose new, short timelines for the process, including that carriers were now provided with only 14 days to prepare and file all of their pleadings, records, and evidence responding to a complaint. As well, the new process vastly reduced the mediation services previously offered by the Agency to help facilitate cooperative resolution of complaints between passengers and carriers. To Porter’s knowledge, the Agency did not conduct any Regulatory Impact Analysis in relation to its substantial and onerous process revisions in September 2023, despite the enormous new burdens these changes placed on carriers.

The Agency’s 2023 process changes further discouraged and suppressed the settlement and resolution of complaints on their merits, including because:

- a) The determination of complaints by a large pool of Complaint Resolution Officers (CROs) rather than Agency members has resulted in much less predictability as to how the APPR will be applied to different operational circumstances and what sorts of evidence will be accepted or rejected. In fact, Porter has encountered situations where two different CROs issued conflicting decisions on different passenger complaints about the exact same flight, despite both cases being based on the same events and identical evidence and argument from Porter. Consistency and predictability of outcome are primary drivers of settlement of complaints, and their absence is an obstacle to the carrier and passenger reaching a mutually agreeable resolution and avoiding the costly adjudication process.
- b) Carriers are faced with a large volume of complaints – many of which involve complex operational facts underlying the cause for a particular flight disruption – and have a mere 14 days to file complete pleadings and evidence which will clearly demonstrate to a CRO of indeterminate experience and familiarity with such matters as to the reason for the delay. As indicated immediately above, carriers must go to this effort based on little predictability as to outcome. It is understandable, then, that carriers will often pay out a complaint they feel they have valid defences to, given the higher cost and uncertainty involved in devoting resources to preparing the complete pleading, argument, and evidence it must file in merely 14 days for each individual complaint.
- c) There is no effective incentive to the passenger to consider a compromise amount, especially since the “mediation” process under the new regime is simply to give the parties an allotment of time to discuss the matter they have taken contrary positions on without the facilitation of the Agency or any other disinterested third party.

While Porter acknowledges that the September 2023 process changes are not the subject of this consultation per se, it is important to note and consider the ways in which the implementation and evolution of the APPR complaint resolution process have strayed ever further from any principled approach aimed at resolving complaints on their merits and in a manner and at a cost proportionate to their scope.

As indicated above, Porter is proud to have a low claim rate due to our commitment to direct passenger engagement, but has nonetheless borne substantial and material costs to comply

with the APPR complaint resolution regime – and especially under the new burdens after the September 2023 updates. The Fee Proposal will exacerbate this burden, amplifying the costs without yielding proportionate – or indeed any – material benefits to passengers.

The Fee Proposal

The Fee Proposal seeks to compel airlines to pay to the Agency \$790 for every complaint decided by the Agency (the **Fee**), regardless of whether the airline is found to owe any remedy to the passenger or to have acted improperly in any manner whatsoever. As proposed, the Fee would apply not only to passenger complaints filed after the Fee comes into effect, but also to complaints which are currently in the Agency’s substantial complaint backlog and awaiting determination.

A. The Fee Proposal will incentivize tactical claims and force settlements by carriers irrespective of claims’ actual merits

First, Porter submits that the proposed fee is disproportionate and exorbitant, greatly exceeding the average fare collected by Porter from its passengers, and in most cases exceeding even the compensation amounts claimed by the passenger. The result is that carriers would have every incentive to pay out any claims for less than the proposed \$790 fee amount, whether those claims were well founded or not. This fee structure essentially punishes carriers for exercising their right to contest meritless claims, creating a “pay to defend” scenario that undermines due process. In circumstances where the claims process already imposes a burdensome administrative responsibility on carriers to prepare complex responses in a very short time, compounded by the uncertainty of outcomes decided by CROs, the proposed fee would act as a threshold under which airlines would simply absorb the costs of claims regardless of merit. Moreover, the further growth of ‘claims farms/harvesters’ would be a near certainty in circumstances where it will cost the airline nearly \$800 to be proven that it does not owe its passenger compensation in an amount less than that. Imagine the following scenario under the new Fee Proposal regime:

A large nor’easter blizzard halts flights into and out of a Canadian airport in winter, forcing all airlines to cancel all flights into and out of a certain airport for hours – a circumstance clearly considered “outside the carrier’s control” under the APPR. Savvy passengers would be aware that – as long as they tried claiming compensation directly from the airline first – they could submit an “eligible” complaint to the Agency with the knowledge that it would cost the airline \$790 (plus the costs of preparing its response) to obtain a determination that no compensation was owed to the passenger due to the ‘uncontrollable’ weather event. A demand to the airline of, say, \$500, would merit settlement by the airline despite the fact that it clearly had no control over the flight disruption. Add claims farmers to the equation, who may successfully solicit passengers at airports, social media, etc., and the circumstance amounts to an enormous windfall of payments by the carrier despite the delays being outside of its control – whether by early settlement payments in anticipation of having to pay the \$790 fee to be vindicated in each passenger complaint, or by settling these unmeritorious complaints to avoid the cost of a determination that the carrier acted properly.

This dynamic could rapidly spiral, resulting in carriers facing mounting costs, regardless of the validity of the claims against them. Porter respectfully submits that scenarios such as the above

one clearly illustrate the perverse incentives and certainty of huge costs to carriers that will result from the Fee Proposal - which costs, it must be assumed, will ultimately be reflected in higher travel costs to the public.

Remarkably, the Fee Proposal provides for a punitive cost burden to carriers with no regard whatsoever to whether the carrier has done anything worthy of 'punishment', and offers rich rewards to those willing to manipulate the fee structure to compel payouts from carriers who have not caused any flight disruptions. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*,¹ the Supreme Court of Canada discussed cost awards in public interest cases, emphasizing that cost regimes should promote fair resolution and discourage frivolous or baseless claims. However, the Fee Proposal is a blanket fee, which disregards the merit of individual complaints and could lead to an influx of tactical claims, with passengers exploiting the system for easy settlement, rather than seeking legitimate resolutions. Such a fee structure contradicts the principles of fairness and efficiency that should guide the Agency's resolution process.

Worthy of note is that the passenger (or claim farmers) have every incentive to submit meritless claims, and no risk of any fee or other costs for bad faith claims aimed at forcing a settlement payment from the carrier that has done no wrong. Accordingly, it is almost certain that the Fee Proposal would cause a further explosion in complaints, driving up the Agency's costs, and further straining Agency resources and impeding efficient resolution, which the Proposal is ostensibly aimed at ameliorating.

B. The Fee Proposal is proposed to apply retroactively, contrary to principles of procedural fairness

The Fee Proposal will, as proposed, not only apply prospectively, but will apply to claims currently in the Agency's backlog. This retroactivity, as proposed, is fundamentally contrary to the principles of procedural fairness entrenched in Canadian law which, Porter submits, ought to apply to a governmental tribunal such as the Agency. The retroactive imposition of financial obligations deprives the affected parties – here, the carriers – of any opportunity to anticipate, adapt, or mitigate the impact of the Fee, contravening the doctrine that parties should not be subject to new burdens for actions or events that occurred prior to the introduction of the backward-looking rules. In *Baker v. Canada (Minister of Citizenship and Immigration)*², the Supreme Court of Canada underscored that procedural fairness requires that affected parties be afforded clarity, predictability, and the opportunity to respond to rules before they take effect. Imposing fees retroactively on carriers who bear no responsibility for the Agency's backlog (and who, in fact, frequently predicted and warned of it in their submissions on the original APPR), violates the principles of procedural fairness embedded in Canadian law. Any fee structure must, at law, be applied prospectively from the date of its coming into force, or it will undermine the legal certainty of which procedural fairness requires the protection.

¹ [2003] 3 S.C.R. 371.

² [1999] S.C.R. 817.

Conclusion

Even absent any passenger compensation regime like the APPR, air carriers already have strong incentives to operate their schedules on time and in their entirety, for countless operational, financial, and customer relations purposes. There is, however, nonetheless an argument to be made that regulatory schemes that ostensibly impose costs on carriers for 'controllable' flight disruptions might incentivize carriers to minimize such 'controllable' disruptions. However, when such a regime becomes so burdensome, costly, and uncertain, any such incentives are deeply undermined.

The \$790 proposed fee is disconnected to airline economics and the average value of passenger claims. It should also be made clear as part of this submission that consideration for waiving the fee for airlines when the Agency rules in their favour should not be a secondary position. The proposed amount itself is burdensome and still leaves multiple scenarios described above whereby the system can be manipulated or lead to unjust settlements.

The current claims resolution process following the changes of September 2023 added enormous additional cost and procedural demands to carriers, all accompanied by a decline in predictability and certainty owing to the 'democratization' of the complaint decision process from Agency members to a large pool of CROs. This structure already diverges from other tribunals whose processes are proportional (in relation to the amounts claimed) and whose costs regimes are aimed at producing meritorious resolutions and settlements. The addition of a fee which significantly exceeds most fares and claimed amounts regardless of outcome is certain to fail in any of its stated goals of "simplifying, clarifying, or strengthening" the Canadian air passenger protection regime. Rather, it will further diminish the importance of merit in determining or settling complaints, further erode any attention to the importance of proportionality in resolving claims, and further entrench the carriers' and Agency's administrative costs, attracting a rush of complaints that seek to leverage the punitive cost on carriers rather than to secure compensation owing to passengers.

Instead of implementing a burdensome fee structure that compounds the procedural inequities in the existing complaint resolution process, the Agency should focus on incentivizing direct resolution between airlines and passengers, including by reviving its former mediation services which produced mutually agreeable resolutions in the vast majority of cases. Shifting emphasis from automatic Agency intervention to cooperative dispute resolution would reduce administrative burdens, lower costs, and reserve Agency resources for complex cases that genuinely require adjudication.

The Agency's objective of cost recovery (currently stated at a 60% rate) leaves the possibility of open ended fee escalations, with a starting point that is already untenable. The system itself requires a clear-headed reconsideration before attempting to add costs for airlines within a system that they did not create or control.