



November 4, 2024

VIA EMAIL

Canadian Transportation Agency
60 Laval Street, Unit 01
Gatineau, QC J8X 3G9

Attention: Ms. France Pégeot
Chair and CEO

Dear Ms. Pegeot:

RE: WestJet Response to Consultation on Proposal for Air Travel Complaints Fee

AIR TRAVEL COMPLAINTS FEE PROPOSAL

On September 18, 2024, the Canadian Transportation Agency (the “Agency”) published a consultation regarding an Air Travel Complaints Fee Proposal (the “Fee Proposal”). WestJet has carefully considered the Fee Proposal, both on its own and as a component of the administration of the *Air Passenger Protection Regulations* (“APPR”), and has identified serious concerns that must be addressed by the Agency prior to proceeding with any such proposal. In summary:

- The Fee Proposal discloses that the costs of administering the APPR are more than 20 times the Agency’s original estimate. These runaway costs raise serious concerns, including whether the costs to Canadians of the APPR exceed the benefits. The Fee Proposal jeopardizes the objectives that the APPR (and regulation generally) is intended to achieve.
- This material increase in spending by the Agency on administering the APPR is driven by ongoing inefficiencies, and the Agency is failing to meet the level of service that Canadians expect. In its Fee Proposal, the Agency forecasts that it will continue to process fewer complaints every year than it receives. As a result, the Agency’s backlog of complaints has grown to more than 78,000 and is on track to exceed 90,000 by next summer; by then, Canadians will be waiting for four years or longer to have their complaints resolved.
- The additional costs from the Fee Proposal will raise Canadian airlines’ costs of operating, which will: (i) disproportionately put at risk routes that do not generate significant profits, which tend to be routes that serve regional and remote airports (i.e., because re-accommodation is more challenging due to the lack of frequency), and (ii) likely be passed through to Canadians in the form of higher fares, which will disproportionately impact lower income Canadians. A proposal that foreseeably reduces regional connectivity and reduces affordability for Canadians cannot be implemented.
- If enacted as drafted, aspects of the Fee Proposal are likely to be overturned on judicial review.

- By imposing a high fee on airlines alone and irrespective of the outcome, the Fee Proposal is likely to exacerbate the Agency’s backlog of cases awaiting adjudication and will likely fuel a new industry of claims resolution companies, which occurred in the European Union after the establishment of Regulation 261/2004.¹ Additional concerns about the mass filing of complaints and the creation of a claims industry are further articulated in the submission by the National Airlines Council of Canada (“NACC”).

The Fee Proposal’s serious flaws are the result of, and entwined with, the systemic problems in the administration of the APPR. To serve the interests of Canadian travellers, as a first step, it is necessary for the Agency to resolve the problems in how it manages the APPR complaints resolution process. Only when the process is reasonably effective, predictable and efficient can a fee for administering these matters be properly formulated.

I. Compliance with the Cabinet Directive on Regulation

There are important questions about the impact the Fee Proposal would have on the APPR’s compliance with the Cabinet Directive on Regulation (“**Directive**”).² As described below, the Agency’s own cost-benefit analysis, combined with data from the Fee Proposal about the costs of administering the APPR, result in a conclusion that the APPR makes Canadians worse off.

a. The APPR’s Runaway Costs, and Concerns About the APPR’s Ongoing Benefits to Canadians

The Directive requires that government agencies, when creating new regulations, prepare and publish a Regulatory Impact Analysis Statement (“**RIAS**”). The RIAS is intended to ensure regulations meet “the Government of Canada’s expectations and requirements in the development, management, and review of federal regulations.” Among other things, the Directive requires that a cost-benefit analysis of new regulations be included in a RIAS, so that “decision-makers can determine the best course of action.”³

At the time of the APPR’s publication and implementation in 2019, the Agency also prepared and published its APPR Regulatory Impact Analysis Statement (“**APPR RIAS**”).⁴ The APPR RIAS contains a cost-benefit analysis for the purposes of “estimate[ing] the incremental net benefit to society of the APPR.”⁵ Among other things, the APPR RIAS estimated that “the present value of the incremental costs to the Government of administering the APPR is \$9.7 million [over 10 years], with an annualized cost of \$1.4 million.” The analysis concluded that the APPR would represent a “net benefit” to Canada, with a net “annualized average” benefit of \$12.4 million for Canadian society. The Agency’s Fee Proposal discloses that the actual costs of administering the APPR to the Government of Canada have grown to be approximately \$29.8 million per year. In other words, the

¹ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004, establishing common rules on competition and assistance to passengers in the event of denied board and of cancellation or long delay of flights.

² Treasury Board of Canada Secretariat, Cabinet Directive on Regulation, last updated July 5, 2024, available online: <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cabinet-directive-regulation.html>.

³ Directive, section 5.2.1.

⁴ Canadian Transportation Agency, *Air Passenger Protection Regulations – Regulatory Impact Analysis Statement*, Canada Gazette, Part II, Volume 153, Number 11, May 22, 2019, available online: <https://gazette.gc.ca/rp-pr/p2/2019/2019-05-29/html/sor-dors150-eng.html>.

⁵ APPR RIAS, section 12.

actual annual costs of administering the APPR RIAs are more than 20 times the originally projected annualized cost. As shown in Table 1, below, if the actual annual costs to the Government of Canada were incorporated into the APPR RIAs’s cost-benefit analysis, then the APPR would not offer any “net benefit” for Canada – instead, it would impose a net negative cost on Canadian society of approximately \$16 million per year. In other words, the total cost of the APPR program for Canadians exceeds the benefit they receive back. To add to these concerns, the APPR complaint program is failing to deliver the service it is intended to provide, as the massive backlog of complaints continues to grow.

Table 1 – Cost-Benefit Analysis of APPR – Average Annualized Cost

Category	APPR RIAs / Table 4 Data	APPR RIAs (Adjusted with Actual Costs to Government of Canada)
Benefit to Canadians	\$231.1 million	\$231.1 million
Cost to Air Carriers	\$217.3 million	\$217.3 million
Cost to Government of Canada	\$1.4 million	\$29.8 million
Net Benefit	\$12.4 million	(\$16 million)

The Directive provides that the guiding principles of federal regulatory policy include that regulations are to advance the public interest and support good government, and regulatory decision-making should be evidence based.⁶ The Directive also provides for the periodic review and assessment of regulation, to evaluate its effectiveness in contributing to the desired policy objectives.⁷

Given: (i) the runaway costs of administering the APPR, which are 20 times the amount originally estimated at the time of the APPR’s creation, and (ii) the potential effects these runaway costs are having for the APPR’s effects on Canadian society more generally, WestJet submits that the Agency must conduct a full review of its internal efficiencies in operating the APPR complaint resolution process prior to considering any cost-recovery mechanism (or any comparable proposal to impose fees pursuant to section 85.16 of the *Canada Transportation Act*).

b. The Fee Proposal’s Effect on a Fair and Competitive Economy

The Agency’s annual statistics record each airline’s number of APPR complaints per 100 flights operated. These statistics show that APPR complaints are related to the number of flights an airline operates, and as a result an airline’s cost of resolving APPR complaints – whether through early settlement (where the airline pays the consumer in all circumstances) or through a Complaint Resolution Officer (including the proposed \$790 mandatory fee to be charged to airlines) – is a marginal cost. Thus, the Fee Proposal directly increases the marginal cost for airlines operating in Canada.

⁶ Directive, section 3.0.

⁷ Directive, section 7.0.

Higher marginal costs – which are brought about by the Fee Proposal – create significant risks to (i) routes with low profit margins (which are disproportionately found on routes that service regional and remote airports, because there are fewer options to re-accommodate travelers), and (ii) smaller regional airlines and new entrants. Consider, for example, a flight to a remote airport that only operates three times per week on a Boeing 737. If just one of these flights is canceled for reasons outside of the airline's control and passengers file complaints with the Agency, the fees imposed on the airline alone could cost the airline as much as \$137,000 (even though no compensation is due to passengers). This amount will far exceed the shallow annual profit from these routes and will potentially lead to service cancellations altogether. Consider, by further example, if the same flight that was operated on time and without disruption; if as few as three passengers file unmeritorious claims with the Agency, even though no compensation is due to those passengers, the fees alone would offset the profits an airline would typically earn from such a flight.

In addition, because all airlines operating in Canada will experience the increase in costs associated with the Fee Proposal at the same time, the Agency should anticipate that airlines will pass through the increased cost of the Fee Proposal to consumers in the form of higher airfares. Higher airfares have a disproportionate impact on lower income Canadians.

The Directive requires that regulations “support a fair and competitive economy.”⁸ WestJet submits that the Agency should carefully consider the fairness of imposing runaway costs of administering the APPR on Canadian airlines, and the impact on affordability and competition of imposing those fees on Canadian airlines (including with respect to service to regional or remote airports and higher airfares for Canadians). In addition, if the Agency prepares an updated cost-benefit analysis of the APPR (as discussed above), that analysis should incorporate the costs of anticipated service cuts and higher airfares. A Fee Proposal that foreseeably reduces regional connectivity and reduces affordability for Canadians, and does not result in a net benefit, cannot be implemented.

c. Openness and Transparency

By passing section 459 of the *Budget Implementation Act, 2023*, Parliament determined that air carriers that are the subject of complaints under the APPR are to be liable for the fees and charges imposed for recovering all or a portion of the costs that the Agency determines to be related to the process of dealing with complaints.

We have carefully examined Hansard and transcripts of the Finance Committee regarding *Budget Implementation Act, 2023*. We cannot identify any debate, testimony, submission or other evidence to indicate that Parliamentarians were advised of the actual costs of administering the APPR (and which were likely to be imposed on air carriers as a result).

When determining the portion of costs of the APPR that will be recovered from air carriers, WestJet submits that the Agency should have regard to (i) the Agency’s last public disclosure or other communications with Parliament prior to the passage of the *Budget Implementation Act, 2023* about the cost of administering the APPR, and (ii) the Directive’s requirements that regulation be open and transparent.⁹ If the last public disclosure or communication with Parliament regarding such costs is

⁸ Directive, section 3.0.

⁹ Directive, section 3.0. See also Treasury Board of Canada Secretariat, Policy on regulatory Transparency and

the \$1.4 million annualized figure contained in the APPR RIAs, then the Agency should carefully consider if it would be open and transparent to now seek recovery from air carriers of the \$17.9 million under the Fee Proposal (being 60% of the cost of administering the APPR).

II. Legal Concerns

The Fee Proposal raises significant legal concerns, which should be addressed and resolved before the Fee Proposal is finalized. Otherwise, aspects of the Fee Proposal are likely to be overturned on judicial review.

a. Presumptions Against Retroactivity and Retrospectivity

The Fee Proposal is to operate both retroactively and retrospectively. That is, air carriers would be charged \$790 for all APPR complaints where (i) a start notice was issued after September 30, 2023 and the complaint was resolved prior to the coming into force of the Fee Proposal (i.e., retroactive fees) and (ii) a start notice was issued after September 30, 2023 and was not resolved before the coming into force of the Fee Proposal (i.e., retrospective fees for ongoing cases).

The Supreme Court of Canada has held that there is a presumption against the retroactive and retrospective application of rules, because the rule of law requires that people be able to order their affairs in light of an established legal order.¹⁰ This presumption can only be rebutted in limited circumstances, including where legislation expressly provides that it is retroactive or retrospective.

There is nothing in the *Budget Implementation Act, 2023* that provides (expressly or by implication) that air carriers will be retroactively or retrospectively liable for any fees or charges associated with the administration of complaints under the APPR.

b. Aspects of the Fee Proposal Are Unreasonable

Under the Fee Proposal, air carriers would be required to pay \$790 for all complaints that are subject to a start notice, no matter the result. In other words – win, lose or draw for the air carrier – the air carrier must pay in all circumstances. This structure creates perverse incentives that are in conflict with the interests of justice.

On the air carrier side, air carriers will have strong incentives to settle obviously unmeritorious APPR complaints if they are for less than \$790, because settlement avoids the cost of preparing a response, the costs incurred in defending the complaint, and the difference between \$790 and the value of the complaint.¹¹ On the consumer side, as described in more detail below, the Fee Proposal also creates incentives for unmeritorious complaints.

Accountability, last updated April 20, 2021, available online:
<https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/policy-regulatory-transparency-accountability.html>.

¹⁰ See, for example, *R. v. Albashir*, 2021 3 SCR 531, at paras. 35 and 36 (retroactivity) and *R. v. Dineley*, 2012 SCC 58, at para. 40 (retrospectivity).

¹¹ The APPR envisages many complaints for less than or around \$790 (e.g., for a large carrier, delays of less than nine hours are subject to minimum compensation of \$400 or \$700 (depending on whether the delay is for more or less than six hours)). There are also likely strong incentives to settle unmeritorious complaints in excess of \$790.

The Agency should give careful consideration to whether Canadian law permits the imposition of fees on air carriers where they successfully assert their legal rights. Such a structure may be contrary to the interests of justice and therefore unreasonable as a matter of law.

III. The Fee Proposal’s Impact on the Number of Unmeritorious Claims and the Agency’s Backlog

The Fee Proposal creates troublesome incentives – for both airlines and consumers – that are likely to exacerbate the Agency’s backlog of cases awaiting adjudication.

a. The Fee Proposal Incentivizes Unmeritorious Complaints, and Participation by Third Party Claims Resolution Companies

If the Fee Proposal requires that air carriers pay a fee even if they are successful in defending a complaint, the Fee Proposal will incent airlines to settle unmeritorious complaints and that fact will become publicly known. This will create incentives for claims resolution companies (which will seek to purchase large numbers of complaints)¹² to incent passengers to file an increased number of unmeritorious complaints because: (i) there is no downside risk to making such a filing (i.e., low barriers to filing a complaint and no cost); and (ii) there is a significant positive expected value to filing a complaint (i.e., because the airline is likely to settle regardless of the merits). There is nothing that airlines can do to limit their exposure to such unmeritorious claims.

Claims resolution companies are already emerging in Canada, and this \$790 fee from the Agency will create a whole new market for them: by incenting travelers to agree to let them file unjustified complaints on their behalf, they will push airlines into paying unjustified compensation simply to avoid the \$790 administrative fee. This will drive up the volume of complaints and increase the Agency’s backlog even further, and the incremental costs for airlines will ultimately be passed on through higher ticket prices, making essential air travel even less affordable in Canada.

If the Agency prepares an updated cost-benefit analysis of the APPR (as discussed in Section I.a, above), that analysis should incorporate (i) the increased incentives for claims resolution companies to procure unmeritorious complaints created by the Fee Proposal and (ii) the effect of claims resolution companies participating in the APPR process (i.e., professional litigants that are unwilling to withdraw unmeritorious complaints because the expected value of each complaint is positive).

b. The Fee Proposal’s Negative Impact on APPR’s Backlog

As illustrated in Table 2, below, the Agency’s backlog of complaints has grown every year, and last year the Agency received more than 43,000 complaints. In March 2023, the Government of Canada allocated \$75.9 million to “help strengthen passenger rights by giving the Agency additional resources to carry out its mandate and reduce the backlog of existing complaints.”¹³ Despite this investment, the backlog now is reported to exceed 78,000 complaints.

¹² The participation of claims resolution companies that purchase complaints against airlines from large numbers of consumers is already occurring in other jurisdictions. See, for example, Holman Fenwick Willan LLP client update, *Regulation (EC) 261/2004 litigation: claim agencies in the crosshairs of the European Commission*, April 2017, available online: <https://www.hfw.com/insights/Claim-agencies-in-the-crosshairs-of-the-European-Commission-April-2017/>.

¹³ See: <https://www.canada.ca/en/transport-canada/news/2023/03/minister-of-transport-announces-additional-funding-for-the-canadian-transportation-agency-to-help-clear-the-backlog-of-air-passenger-complaints.html>.

The Fee Proposal estimates that the Agency will only be able to resolve approximately 22,000 complaints per year, which is less than one-third of the existing backlog, and less than 52% of the complaints received last year. Setting aside the question of whether the APPR has an overall net negative effect for Canadians, the promise that APPR offered to Canadian consumers will never be realized if the Agency’s backlog of cases grows every year. The likelihood of the backlog growing increases if the Fee Proposal creates incentives for additional unmeritorious complaints. The Agency’s updated cost-benefit analysis should incorporate the effect of delayed resolution of complaints filed with the Agency.

Table 2 – Agency APPR Complaints Received and Resolved – Last 3 Years and 3 Year Forward Estimate

Year (as defined in Agency Annual Reports)	Complaints Received	Complaints Process / Resolution Rate	Backlog	Estimate of Months Until Resolution
2021-2022 Actual	12,158	13,409	13,409	12 months
2022-2023 Actual	42,068	11,158	44,319	48 months
2023-2024 Actual	43,549	16,759	71,109	51 months
2024-2025 Estimate	43,549	22,615	87,688	47 months
2025-2026 Estimate	43,549	22,615	104,267	55 months
2026-2027 Estimate	43,549	22,615	120,846	64 months

Notes: Backlog in future years is calculated as the year prior’s backlog, plus 90% of new complaints received (in other words, we have assumed that 10% are not eligible at Stage 4, and to be conservative), minus the resolution rate. Estimate of months until resolution in two future years is calculated as Column D divided by Column C, multiplied by 12.

IV. Conclusion

For the reasons noted above, WestJet has significant concerns with the Fee Proposal, both on its own and as a component of the administration of the APPR.

The proposed \$790 fee is completely disproportionate, as it exceeds many of the levels of compensation provided for under the APPR system. Charging such an outsized fee for complaints regardless of their legitimacy undermines the purpose of the entire system. Even more concerning is the proposed retroactive and retrospective application of this fee, which effectively amounts to an additional tax on air travel of up to \$60 million.¹⁴

The proposed fee is too high because it is the result of, and entwined with, the systemic problems in the administration of the APPR. As a first step, it is necessary for the Agency to resolve the problems in how it manages the APPR complaints resolution process. Only when the process is reasonably effective, predictable and efficient can a fee for administering these matters be properly formulated.

¹⁴ This is the approximate amount of fees owing to the Agency for (i) all cases resolved after September 1, 2023 but prior to the coming into force of the Fee Proposal and (ii) all cases filed with the Agency prior to the coming into force of the Fee Proposal.

If imposed, the Fee Proposal will only serve to exacerbate the issues associated with administering the APPR.

WestJet is committed to continuous improvement of its processing of APPR complaints. For those continuous improvements to be effective, WestJet depends upon the Agency to ensure its processes improve as well. Shared improvements will be the solution to resolving the backlog of complaints before the Agency, and the delivery of world-leading services to Canadian travelers. WestJet remains ready to work with the Agency to improve the APPR system for Canadian travelers.

Yours truly,

WESTJET

A handwritten signature in black ink, appearing to read 'Andrew Gibbons', with a stylized, cursive script.

Andrew Gibbons
Vice President – External Affairs