

# **Canadian Transportation Agency - Consultation: Air travel complaints fee proposal**

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**Submission of the Public Interest Advocacy Centre**



**PUBLIC INTEREST ADVOCACY CENTRE  
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC**

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## Introduction

1. The Public Interest Advocacy Centre (“PIAC”) is a national non-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and in particular, vulnerable consumer interests concerning the provision of important public services. PIAC has been active in the field of air passenger protection and policy for over 40 years.
2. PIAC supports the principle of recovering fees from airlines for processing eligible air travel complaints, even if it is on a temporary basis, only a portion of these fees. We understand that the proposed fees are temporary that will be replaced with broader cost recovery schemes to cover all applicable costs.<sup>1</sup> This costs recovery process is a legislative requirement as set out in the amended *Canada Transportation Act* (the Act),<sup>2</sup> and a common practice used by ombuds services in other industries in Canada as well.
3. The underlying aim of this fee recovery regime should be to protect *and* promote air passenger rights, and deter airlines from non-compliance.
4. In what follows, we comment on the proposed fees, using the experience of other ombuds services’ cost recovery regimes.

## Cost recovery will promote better airline behaviour

5. PIAC wholly supports the proposal to recover fees from airlines for processing eligible air travel complaints. We comment below on the more nuanced issues regarding the quantum of costs to recover, how it should apply and to whom. The underlying aim of this regime should be to protect and promote air passenger rights and deter airlines from non-compliance, and requiring the carriers to cover the costs of the regime should have that effect.
6. The amendments to the *Canada Transportation Act* (Act) clearly provide that the agency shall establish fees or charges for the purposes of recovering all or a portion of the costs that it determines to be related to dealing with these complaints.<sup>3</sup>

### Fees and charges

**85.16 (1)** The Agency shall establish fees or charges for the purpose of recovering all or a portion of the costs that the Agency determines to be related to the process of dealing with

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<sup>1</sup> Canadian Transportation Agency (CTA), Consultation: Air travel complaints fee proposal, online: <<https://otc-cta.gc.ca/eng/publication/consultation-air-travel-complaints-fee-proposal>>.

<sup>2</sup> *Canada Transportation Act* (S.C. 1996, c. 10), s. 85.16 (1), as amended by the *Budget Implementation Act, 2023* (BIA), also see here: Canadian Transportation Agency (CTA), Consultation: Air travel complaints fee proposal.

<sup>3</sup> *Canada Transportation Act* (S.C. 1996, c. 10), s. 85.16 (1).

complaints — other than complaints disposed of under subsection 85.04(2) — under sections 85.05 to 85.12.<sup>4</sup>

7. Cost-recovery is a common feature of other regulatory complaints mechanisms. Notably, the Commission for Complaints for Telecom-television Services (CCTS)<sup>5</sup> and the Ombudsman for Banking Services and Investments (OBSI)<sup>6</sup> are two ombuds services in Canada in the federal sphere that recover fees. Respectively, from the participating service providers and banks, federally regulated financial institutions and other such firms. We briefly discuss the scope and structure of these regimes below to draw some parallels.
8. What is important to note, however, is that these other regimes are not directly applied by a sectoral regulator like the CTA under statute but rather as a negotiated structure in a quasi-contractual, quasi-self-regulatory system, with a regulatory backstop.
9. This means that the CTA system being set up is somewhat unique and less flexible than these others and provides for no direct input, other than these consultations, from either the industry or passengers. It should therefore be carefully and periodically reviewed with input from all stakeholders.
10. The cost recovery process should contribute towards improved service for air passengers, increase compliance with the Air Passenger Protection Regulations (APPRs) and all applicable passenger rights, as well as eventually reduce the number of complaints. Indeed, if this regime works as desired, it could significantly reduce the high complaints backlog at the CTA by encouraging airlines as far as feasible to resolve issues quickly, in order to minimize the fees they would owe to the CTA. This would certainly vary from one airline to another and may also vary depending on the circumstances leading to passenger complaints. If airlines have to pay for the complaints that they generate, airlines will put more effort on working with passengers to resolve concerns in a timely manner to avoid the formal CTA process.

### **Lessons from other ombuds' cost recovery approaches**

11. Costs recovery regimes have been effectively implemented by other regulatory agencies. Indeed it is entirely typical for such systems to charge the industry (but not customers) a fee to resolve complaints. Any suggestion by the airlines that such fees are unprecedented or unjustified should be rejected as incorrect. The dispute resolution-like model implemented by the CTA for the APPRs simply aligns its funding with that of the other cost recovery systems in the federally-regulated communications and banking sectors.

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<sup>4</sup> *Canada Transportation Act* (S.C. 1996, c. 10), s. 85.16 (1).

<sup>5</sup> Commission for Complaints for Telecom-Television Services (CCTS), Structure and funding, online: <<https://www.ccts-cprst.ca/about-ccts/governance/structure-and-funding/>>.

<sup>6</sup> Ombudsman for Banking Services and Investments (OBSI), "How We're Funded," online: <<https://www.obsi.ca/en/for-consumers/how-were-funded/>>.

12. In telecommunications and television, the Commission for Complaints for Telecom-television Services (CCTS), an independent ombuds service that handles telecom and paid television service complaints, which is entirely funded by its participating communications service providers.<sup>7</sup> Earlier, its funding model was 100% revenue-based but has changed now to be increasingly complaint-based, as provided for in the Broadcasting and Telecom Regulatory Policy CRTC 2016-102, where each participant pays a fee for each complaint accepted by the CCTS.<sup>8</sup> Notably, this fee includes a series of escalating fee levels, which are designed to provide an incentive for early resolution of complaints, and to compensate the CCTS for the additional resources required to deal with complaints as they proceed through the CCTS complaints process.<sup>9</sup>
13. Additionally, participating service providers with annual revenues greater than \$10 million also pay an annual fee to the CCTS, proportionate to each such participant's share of total eligible Canadian telecommunications revenues, while participants with less than \$10 million of annual revenues currently pay an annual fee of \$100.<sup>10</sup> Thus, unlike the proposed cost recovery mechanism by the CTA, there is an additional annual fee that is paid by the participants to the CCTS based on their total revenues.
14. In banking, the OBSI recovers all of its budgeted operating expenses from its participating firms, with the allocation of budget on each sector (banking and investments) based on its proportionate use of OBSI's service.<sup>11</sup> This is determined by the total number and complexity of the cases opened for each sector<sup>12</sup> in the previously completed year.<sup>13</sup> Once the budget has been allocated to each sector, fees for each firm within that sector are determined.<sup>14</sup> More specifically, for bank fees, banks and other federally regulated financial institutions are divided into institutions based on each firm's size and complaint volumes, with 25% of fees for each assessed on their asset size as compared to other institutions and 75% of fees based on complaint volumes for each institution in the preceding three-year period relative to other banks.<sup>15</sup>

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<sup>7</sup> Commission for Complaints for Telecom-Television Services (CCTS), Structure and funding (webpage).

<sup>8</sup> Broadcasting and Telecom Regulatory Policy CRTC 2016-102 at para 154

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> OBSI, "Firm Bulletin: 2024 Fees for Participating Firms," (October 12, 2023) online:

<<https://www.obsi.ca/en/news/posts/firm-bulletin-2024-fees-for-participating-firms/>>.

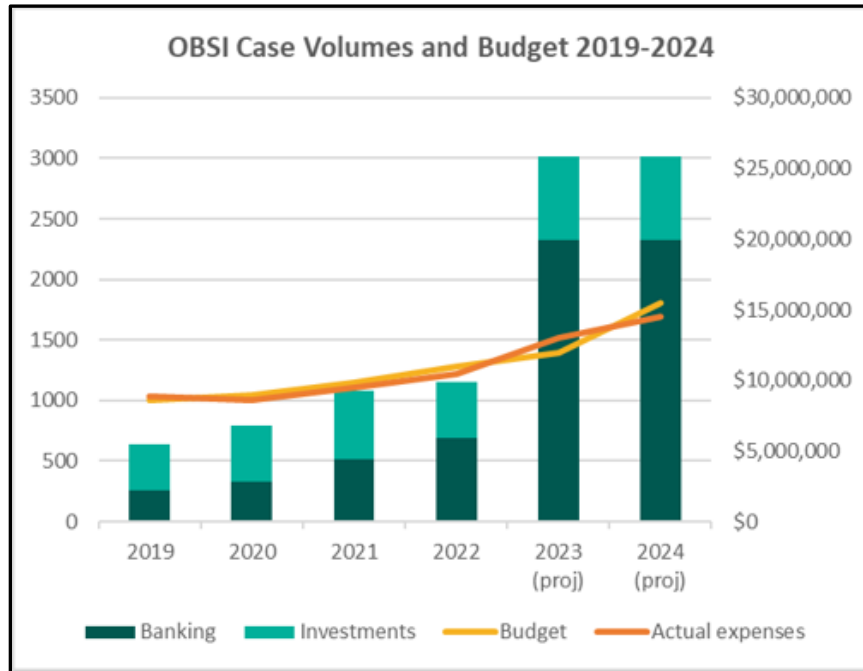
<sup>12</sup> See: "For fee purposes, OBSI has five industry sectors:

1. Banks and other federally regulated financial institutions (FRFIs);
2. Investment firms that are members of Canadian Investment Regulatory Organization (CIRO), which include investment dealers and mutual fund dealers;
3. Investment firms that are not members of CIRO, which include portfolio managers (PMs), exempt market dealers (EMDs), Restricted Portfolio Managers, Restricted Dealers and Investment Fund Managers (IFMs);
4. Scholarship plan dealers (SPDs); and
5. Provincial credit unions." Source: Ombudsman for Banking Services and Investments, "Fee Payment Structure," online: <<https://www.obsi.ca/en/for-firms/fee-payment-structure/>>.

<sup>13</sup> OBSI, "Firm Bulletin: 2024 Fees for Participating Firms," (October 12, 2023).

<sup>14</sup> *Ibid.*

<sup>15</sup> OBSI, "Fee Payment Structure," online: <<https://www.obsi.ca/en/for-firms/fee-payment-structure/>>.



Source: OBSI, [“Firm Bulletin: 2024 Fees for Participating Firms,”](#) (last accessed in October 2024)

- The above two cost recovery mechanisms involve the number of complaints in varying forms, with the revenue of different firms also affecting the overall amount paid by each firm.

### The proposed CTA cost recovery mechanism is appropriate

- The CTA consultation paper does not propose any fees to be charged in relation to the assets owned or revenues earned by the airlines, nor passengers carried, nor is the recommended fee of \$790 per complaint indicated to vary based on the size of the airline.
- PIAC submits that this is the correct approach. The legislation requires, as underlined above, that any fee or charge imposed must be “related to dealing with these complaints”. In our view, neither the size of airline, nor its revenues, nor competitive position in the marketplace are related to individual complaints. A delay on Air North inconveniences a passenger as does a flight delay on Porter or Air Transat or Air Canada.
- While Parliament could have directed the CTA to base complaint fees on such factors as different size, passenger volumes or the revenues of airlines that would be required to pay the cost recovery fees for the complaints against them, at least in part, it did not. The fee is to be related to dealing with complaints and therefore appears tied to complaints not operations or the marketplace.

19. However, in PIAC's view it is permissible, and indeed *preferable*, that the CTA consider a lower fee be charged at an earlier and less formal stage of the complaints process. Such a reduced fee is related to the stage and concomitant effort and complexity of resolving the complaint itself and the use of resources are less for the CTA at earlier stages, so such differential fees based on the stage of the complaint should be permissible.
20. The CTA can do this by setting a fee for resolution at the mediation stage under section 85.05 that is considerably less than for a resolution at the end of the decision process under section 85.06.
21. The CTA should cost out a resolution at the mediation stage and investigation stage and incentivize carriers to settle claims at the earliest stage. For example, it is our understanding that the CCTS charges companies only about 40% per early stage resolution compared to a decision after full investigation. We suggest a similar charge of only \$200 or so for resolutions at the CTA mediation stage, while charging more (perhaps up to the recommended \$790) for resolution after a final decision.
22. The CTA also states that airlines will be required to pay for all pending complaints. At least, this is the interpretation the CTA has of the discretion granted to it under the legislation. As a result, the CTA in the discussion paper states:

All airlines will be billed once the charge comes into force and only for eligible complaints (processed and closed) where a start notice is issued after the coming into force date. This includes complaints received prior to September 30, 2023.
23. It appears that a "start notice" must be issued before the CTA considers that a complaint is received and subject to the new fee, which CTA confidently asserts can include complaints in the backlog (now of around 80,000 complaints) including those received prior to 30 September 2023, provided this 'start notice' is issued after the coming into force of the regulations at issue in this consultation.
24. PIAC cautions the CTA to not be so sure it can impose a fee for these backlogged cases. Our experience with telecommunications rate setting litigation leads us to predict that the airlines will argue that such fees are retroactively being applied and the legislation is not clearly enough stated to legally justify such a retroactive or even a retrospective charge.
25. The CTA also should consider that this unexpected liability for prior complaints might result in disproportionate impact on carriers with smaller revenues as compared to Air Canada and WestJet, depending on each carrier's complaints backlog. Large airlines like Air Canada and Westjet will also, however, face a considerable new liability.
26. Given this new requirement, which cannot be avoided as it is embodied in legislation, the CTA's proposal can strike an appropriate balance of fees as long as the overarching goal of a functional and effective APPR resolution process for consumers is met.

27. Therefore, in the section below, PIAC makes recommendations regarding the amount to be charged and the method of charging for each complaint, that is designed firstly to encourage rapid resolution of complaints and secondly fair compensation for consumers, all while thirdly providing for ways to reduce the overall financial burden of the new regime on airlines.

### **The actual cost per complaint are appropriate to the circumstances**

28. In terms of the costs for processing these complaints at the CTA, we note from the details provided that the total costs of processing 22,615 complaints per year on an estimate costs \$29,777,523, and 60% of that is \$ 17,866,514, which the CTA seeks to recover. This figure when divided by 22,615 leads to the proposed recovery fee of \$790 per eligible closed complaint. Based on these observations, we submit the following comments.

#### Quantum of Costs

29. The cost per complaint, even at 60% of actual related costs, is high. PIAC attributes this to the use of properly remunerated government labour with a realistic workflow to produce a full investigation and documentation that can lead to a fair and defensible decision.

30. However, while the CCTS and OBSI do not publish their costs per complaint resolved, our understanding is that it is less than that proposed by the CTA, even at 60%. Part of this is likely due to the different labour rates, however, the average may also be lower due to early resolution discounts. Unfortunately, these statistics are not publicly available.

#### Criteria for Costs Recovery

31. As noted above, it is PIAC's view that only matters related to the complaints themselves, and not to other matters such as size and market position of airlines, are supported by the wording of the legislation.

32. Also as noted above, the CTA can and should study the possibility of a graduated scale of costs depending on when and how the complaint is resolved, in order to incent airlines to move to resolution of the complaints more quickly. Leaving the present proposal, namely that only the completed complaints are charged to airlines, may incent airlines to delay, not to move quickly, to deal with CTA complaint resolution officers.

## The need to take a consumer-centric approach to cost-recovery

### Consumer Implications

33. Our main concern from a consumer perspective is the passing of these additional costs to air passengers, leading to higher airfares and/or other ancillary fees. Canada is already considered to have relatively high airfares,<sup>16</sup> and with this proposal to recover some complaint processing fees, there is a risk of increased airfares. If air passengers are indirectly paying for these expenses, even if it is just a portion of these expenses, then the underlying goal of promoting and protecting their interests gets undermined. Airfares should not go up, the complaints processing fees should be covered by the airlines as a cost of doing business.
34. To some extent, the imposition of these complaint resolution fees will shift the costs of complaints adjudication from the general tax revenue base, paid by all Canadians, to the airlines and therefore, it is very likely that airlines will pass on some or all of these costs to airline passengers in the form of ticket price increases.
35. PIAC suggests that the CTA should work with the Minister of Transport and Transport Canada to monitor airfares after this regime goes into effect. This is to determine whether there has been any impact and/or changes due to this costs recovery regime, and if necessary, consider what policies and measures are required to address and/or mitigate any price hikes.
36. To begin with PIAC is concerned that the CTA be alive to the possibility that airlines will seek to break out this cost of adjudication of complaints as a line item on ticket order websites and invoices. Such a stunt would harm consumers and mislead many into thinking that the fees were government-mandated taxes on air travel. We anticipate that if such steps were taken as defensive mechanisms, that airlines would be tempted to characterize these fees as a direct government charge that they were simply 'passing on'.
37. This is misleading, as airlines can choose whether or not to increase fares or not to cover any such costs. Nonetheless, we do recognize the sudden shift to airlines of the expense of this cost-recovery system, which, as noted, was previously indirectly and fully supported by public tax revenues.

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<sup>16</sup> Faiza Amin and Meredith Bond, "Lack of budget airlines, government fees keeping Canadian airfares high," *CityNews Toronto*, (23 January 2023), online: <<https://toronto.citynews.ca/2023/01/23/budget-airlines-government-restrictions-airfares-high/>>.

Also see: Nick Murray, "Competition Bureau studying Canadian airlines amid 'relatively high' airfares," *CBC News* (31 July 2024), online: <<https://www.cbc.ca/news/politics/competition-bureau-canadian-airlines-1.7281133>>.

### Impact on smaller air carriers

38. In our view, the risk of a disproportionate impact on smaller air carriers is only due to the requirement to apply the new fees to all backlogged complaints. If such a sudden new liability is more than can be afforded by these airlines (although we doubt such liability is in any way near the type of costs to force financial difficulty) then this recovery fee could hurt competition and consumer choice in this industry. Considering this, the CTA might want to work with smaller carriers on a transition plan that is workable, fair, does not hurt competition and innovation, while ensuring that they bear fiscal responsibility and accountability as other carriers.
39. Having said that, we understand from s.85.16 (2) of the amended Act that airlines will only have to pay for complaints against them, they are not responsible for covering costs for complaints against other air carriers. This is fair and should be well-reflected and clearly provided for in the finalized fee structure and details issued by the CTA for this regime.

#### **Carrier's liability**

(2) The carriers that are the subject of complaints — other than complaints disposed of under subsection 85.04(2) — are liable for the payment of the fees or charges.<sup>17</sup>

40. Parliament, in s.85.16 (2) of the amended Act has stated that airlines will only have to pay for complaints against them, and that they are not responsible for covering costs for complaints against other air carriers, no matter their size or market position. This is fair, in the sense that it incents each carrier to comply with the APPRs and to settle complaints directly with customers before they avail themselves of the APPRs, and generally to run their airline to a standard where such complaints are not generated in crippling numbers (that is, operate on time and without excessive cancellations and overbooking).

### **PIAC's Recommendations**

41. Based on the above, our recommendations are as follows:

- ❖ PIAC supports the proposal to recover fees from airlines for processing eligible air travel complaints, which is a legislative requirement. However, in our view it would be reasonable that the CTA consider a lower fee be charged at an earlier and less formal stage of the complaints process. The CTA can do this by setting a fee for resolution at the mediation stage under section 85.05 that is considerably less than for a resolution at the end of the decision process under section 85.06. This could also incentivize carriers to settle claims at the earliest stage.
- ❖ Given that the CTA's proposed complaints cost recovery regime is different than other regimes applied by ombuds services and less flexible with no provision of

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<sup>17</sup> *Canada Transportation Act* (S.C. 1996, c. 10), s. 85.16 (2).

direct input, other than these consultations, the CTA should carefully consider different perspectives when designing this recovery system and review it regularly. Its review process must give a chance to the public and all interested stakeholders to share their comments, consistent with ss.85.16(3) of the Act.

- ❖ PIAC suggests that the CTA should work with the Minister of Transport and Transport Canada to monitor airfares after this regime goes into effect. This is to determine whether there has been any impact and/or changes due to this regime, and if necessary, consider what measures are required to address and/or mitigate any price hikes.
- ❖ Considering the risk of a disproportionate impact on smaller air carriers due to the requirement to apply the new fees to all backlogged complaints, we submit that the CTA might want to work with smaller carriers on a transition plan that is workable, fair, does not hurt competition and innovation, while ensuring that they also bear fiscal responsibility and accountability as other carriers.

## Final Remarks

42. In closing, PIAC notes that this proposed fee imposition is harder on the airlines due to the CTA's massive complaints backlog, with still 78,000<sup>18</sup> unresolved complaints. We strongly suggest that the CTA initiate a separate consultation process that specifically deals with addressing and removing this backlog. Were there a plan to deal with it, it would provide at least some certainty to companies and improve APPR outcomes for consumers.

\*\*\*End of Document\*\*\*

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<sup>18</sup> Eric Atkins, "Canadian airlines will be billed \$790 per customer complaint resolved, transportation agency proposes," *The Globe and Mail* (Published September 18, 2024, updated September 19, 2024), online: <<https://www.theglobeandmail.com/business/article-airlines-will-be-billed-790-per-customer-complaint-resolved-in/>>