

# **Consultation on requested temporary adjustments to the Air Passenger Protection Regulations**

## **A Submission from the Public Interest Advocacy Centre**



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

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## **Introduction**

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 20 years.

PIAC welcomes this opportunity to comment on the Canadian Transportation Agency’s (CTA) consultation on requested temporary adjustments to the Air Passenger Protection Regulations (APPRs).<sup>1</sup> We seek to provide a consumer perspective on the various issues raised by this consultation and hope that our comments will assist the CTA in its inquiry regarding the need and extent of any temporary adjustments to certain APPR provisions.

At the outset, we indicate our strong support for the APPRs, which remain an important regulatory mechanism for advancing air passenger rights. In our view, any adjustments to these regulations should only be allowed under extremely severe and limited circumstances, with a demonstrably clear and imminent need for temporary adjustments. We believe that it is integral to ensure that the protections provided by these regulations are rigorously safeguarded under all circumstances.

## **Scope and Context**

The CTA is seeking input on requests for temporary adjustments to certain obligations under the APPR, as the International Air Transport Association (IATA), the National Airlines Council of Canada (NACC), Air Canada and Sunwing Airlines have asked it to temporarily adjust certain compensation and rebooking requirements in the APPR because of the impacts of COVID-19.<sup>2</sup> The CTA requires comments on the following:

- whether airlines should be required to follow APPR requirements to rebook passengers on other airlines during the pandemic;
- whether airlines should have to pay compensation for inconvenience during the pandemic under more limited circumstances, for example:

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<sup>1</sup> Canadian Transportation Agency, “CTA Holds Public Consultation on Requests for Temporary Adjustments to the Requirements of the Air Passenger Protection Regulations,” (December 11, 2020) online: <<https://otc-cta.gc.ca/eng/content/cta-holds-public-consultation-requests-temporary-adjustments-requirements-air-passenger>>. Also see: Canadian Transportation Agency, “Consultation paper on requested temporary adjustments to the Air Passenger Protection Regulations,” online: <<https://otc-cta.gc.ca/eng/consultation-paper-requested-temporary-adjustments-air-passenger-protection-regulations>>.

<sup>2</sup> Canadian Transportation Agency, “CTA Holds Public Consultation on Requests for Temporary Adjustments to the Requirements of the Air Passenger Protection Regulations,” (December 11, 2020).

- if they told passengers about the disruption less than 3 days in advance (instead of 14 days); and
- if the passenger's delay was 6 or more hours (instead of 3 or more hours);
- whether airlines should be given more time to respond to requests for compensation for inconvenience filed between July 1, 2020 and September 29, 2020; and how long any temporary adjustments to the APPR should be in place, if the CTA decides that any should be made.<sup>3</sup>

The CTA in its Determination No. A-2020-42 ordered temporary exemptions and adjustments for air carriers that resulted in reduced amounts of compensation to be paid for inconvenience and the time when this obligation arises (originally, the requirement is to inform 14 days or more in advance about the delay/cancellation,<sup>4</sup> whereas this order required 72 hours notice).<sup>5</sup> These exemptions were initially approved until April 30, 2020, and later extended to June 30, 2020, by Determination No. A-2020-47.<sup>6</sup> The CTA also decided in Determination No. A-2020-47, to temporarily give air carriers more time (120 days instead of 30 days) to respond to requests for compensation for inconvenience.<sup>7</sup>

Later, the CTA issued Determination No. A-2020-122, in response to airlines' applications, where it denied Air Canada's request for exemption from the requirements of subparagraphs 17(1)(a)(i) and 18(1)(a)(i) of the APPR (broadly, pertaining to rebooking obligations); and denied the request to extend the exemptions that were ordered in Determination No. A-2020-42 and Determination No. A-2020-47 with the exception of the time to respond to requests for compensation.<sup>8</sup> The CTA ordered that all air carriers be exempted from the requirement under subsection 19(4) of the APPR to respond within 30 days to requests for compensation filed between July 1, 2020, and September 29, 2020, on the condition that air carriers respond to these requests by October 28, 2020.<sup>9</sup>

The current consultation deals with airlines and other organizations further requests for temporary APPR exemptions. Air Canada in its application dated September 2, 2020, has asked for the revision of Determination No. 2020-122, and seeks exemption from the requirements of the APPR to offer alternative travel arrangements on all other carriers, not only those with which it has no

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<sup>3</sup> *Ibid.* Also, see: Canadian Transportation Agency, "Consultation paper on requested temporary adjustments to the Air Passenger Protection Regulations."

<sup>4</sup> Air Passenger Protection Regulations, SOR/2019-150, s.12(1) to s.12(3), and s.19(1). See online: <<https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-150/FullText.html>>.

<sup>5</sup> Canadian Transportation Agency, Determination No. A-2020-42 (March 13, 2020), online: <<https://otc-cta.gc.ca/eng/ruling/a-2020-42>>. Also see: Canadian Transportation Agency [news release], "Canadian Transportation Agency issues temporary exemptions to certain Air Passenger Protection Regulations provisions to address the COVID-19 pandemic," (March 13, 2020), online: <<https://otc-cta.gc.ca/eng/content/canadian-transportation-agency-issues-temporary-exemptions-certain-air-passenger-protection>>.

<sup>6</sup> Canadian Transportation Agency, Determination No. A-2020-47 (March 25, 2020), online: <<https://www.otc-cta.gc.ca/eng/ruling/a-2020-47>>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Canadian Transportation Agency, Determination No. A-2020-122 (June 29, 2020), online: <<https://www.otc-cta.gc.ca/eng/ruling/a-2020-122>>.

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

commercial agreement.<sup>10</sup> It also seeks exemption from the requirement to provide compensation to passengers who were informed of a flight delay or cancellation less than 14 days before the original schedule departure, so that this only applies if passengers were informed less than 72 hours before the original departure.<sup>11</sup>

Similarly, Sunwing in its application has requested extending the period of time of Determination 122 from October 28, 2020 to March 31, 2021; exempting all Canadian air carriers from complying with the compensation provisions of the APPR with respect to any compensation claims arising out of schedule flight changes during October 28, 2020 to March 31, 2021; and to exempt all Canadian air carriers to provide alternative travel arrangements on other carriers with which they have no commercial agreement.<sup>12</sup> Likewise, NACC and IATA in their joint submission to the CTA have asked for temporary exemptions from APPR provisions that require carriers to offer alternative travel arrangements that include flights on other carriers and the requirement to provide compensation for a flight delay or a cancellation within carrier's control in case of being informed less than 14 days prior to the original scheduled departure, and that it should only apply in case of informing passengers less than 72 hours in advance.<sup>13</sup>

This hearing takes place in the context of the global pandemic of SARS-CoV-2 ("COVID-19") as declared by the World Health Organization. Air carriers selling services now, therefore, are well aware that they are selling into a pandemic. In PIAC's view, therefore, they should generally bear the risk of extraordinary problems due to conditions created by pandemic response. In addition, in our submission, air carriers are generally the appropriate party to bear risk of loss due to non-compliance with rules or otherwise, as they are the "least cost avoider" – that is, their policies can better avoid or reduce losses to corporate finances, whereas consumers who purchase travel typically cannot absorb full or partial losses of the price of flights or some part thereof without relatively more consequences to household finances. Finally, we underline that the monetary penalties described below, and the obligations to assist customers in completing their itinerary, actually help to insulate travellers from potential illness or even death if they are delayed or stranded – in addition to the usual inconvenience and stress. Although it is through no fault of their own, the reality is that at present and for the near future, airlines are and will be disease vectors. It is not business as usual. It is business during a global pandemic, which must be, we submit, undertaken with the utmost good faith by air carriers and passengers alike.

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<sup>10</sup> Air Canada, RE: Temporary Exemptions from Certain APPR Provisions - Application for Revision of Determination No. 2020-122 (September 2, 2020), online: <[https://otc-cta.gc.ca/sites/default/files/ac\\_appr\\_exemption\\_request.pdf](https://otc-cta.gc.ca/sites/default/files/ac_appr_exemption_request.pdf)>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Sunwing Airlines Applications to the CTA (October 21, 2020), online: <[https://otc-cta.gc.ca/sites/default/files/sunwing\\_request\\_for\\_appr\\_exemption.pdf](https://otc-cta.gc.ca/sites/default/files/sunwing_request_for_appr_exemption.pdf)>.

<sup>13</sup> NACC and IATA, RE: Temporary Exemptions from Certain Air Passenger Protection Regulations Provisions, (September 21, 2020) online: <[https://otc-cta.gc.ca/sites/default/files/nacc\\_iata\\_appr\\_temporary\\_exemptions.pdf](https://otc-cta.gc.ca/sites/default/files/nacc_iata_appr_temporary_exemptions.pdf)>.

## PIAC's Responses

### **Q1. Whether airlines should be required to follow APPR requirements to rebook passengers on other airlines during the pandemic?**

1. The rebooking provisions make the airlines responsible for ensuring that passengers complete their booked trips while coordinating with other airlines as applicable. If this provision is not mandated, airlines would not be responsible for ensuring that passengers complete their journey. This could seriously affect passengers and leave them stranded, potentially in another country and subject to its public health and other police measures, with no clear safeguards. This is particularly dangerous during a pandemic, with countries closing borders to international travel and instituting quarantines and lockdowns. It is important, therefore, to review the gaps that would arise if these rebooking provisions were not in effect.
2. Air Canada in its application to the CTA argued that it should not be forced to make alternative travel arrangements that include flights on any air carrier other than its own, as this requirement risks further disrupting passenger travel, potentially leaving them stranded mid-way through their journey without any real prospect of recovery.<sup>14</sup> Air Canada pleads that this predicament would actually be worse for a passenger.<sup>15</sup>
3. We do not agree. Leaving passengers with no alternative flight can lead to serious distress and hardship. During a pandemic, it actually will be much more difficult for passengers, rather than airlines on passengers' behalf, to coordinate with other airlines and make sure required travel arrangements are made and itineraries completed. Passengers, in addition to the panic of having a flight cancelled and being temporarily stranded, will be hard-pressed during a difficult time, on their own, to find another airline and flights when in a foreign country, in an unfamiliar airport and perhaps not speaking the language, not knowing available airline options and not necessarily having telecommunications. Accordingly, we argue that airlines should remain responsible for ensuring that passengers are rebooked on other carriers as need be, it should be not the other way around.
4. While there might be some challenges in coordinating and rebooking passengers for the air carrier, considering the serious impact that this exemption could have on passengers, we resist the granting this exemption, even temporarily. Even a temporary gap would place an undue burden on air passengers, which in uncertain times cannot be justified by merely pointing to the unpredictability of the different airlines and countries' policies and flying schedules. This is to unfairly externalize the cost of the turbulent air travel market onto passengers.

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<sup>14</sup> Air Canada, RE: Temporary Exemptions from Certain APPR Provisions - Application for Revision of Determination No. 2020-122 (September 2, 2020).

<sup>15</sup> *Ibid.*

5. The CTA noted in its Determination No. A-2020-122 that conditions have evolved and while air carriers' face liquidity challenges and that the weakness and continued fluidity in the air travel market means more rescheduling and consolidation of flights, that the purpose of the temporary measures in Determination No. A-2020-42 and Determination No. A-2020-47 was not to relieve financial pressures on carriers, but rather to give them increased ability to deal with emergent operational imperatives—particularly the need to repatriate Canadians from abroad—in the context of circumstances that changed suddenly, drastically, and repeatedly as the crisis unfolded.<sup>16</sup> We believe that even if the current circumstances continue to be uncertain, they are not as drastic as before with no imminent need to repatriate thousands of Canadians, as was the case in March 2020.
6. The 10 months that have passed since the time when the temporary exemptions were initially put in place is more than enough time for airlines to be able to adapt their schedules and plan in advance – even with other airlines – to make contingency plans to meet their obligations under the APPR. We note that the airlines, including Air Canada and the other applicants to this proceeding appear to have time and can cooperate sufficiently to continue pursuing their action in the Federal Court of Appeal to strike down the APPRs.
7. We also note that the aggregated data provided (see Annex A of this consultation paper) does not indicate the number of passengers left stranded during the reported period of July-September 2020 nor during the initial exemption period (i.e., from March 13 to June 30, 2020). We would encourage the CTA to consider gathering more data to fully assess the impact of this provision and the implications of temporarily exempting airlines from the rebooking requirements. That said, we reiterate that the CTA should note that there is a much higher likelihood of airlines being able to coordinate with other carriers for arranging alternate flights than passengers.
8. PIAC submits that if the airlines are not prepared to take responsibility for completing these trips in coordination with other carriers, in these times, then the question arises as to whether airlines should be allowed to offer and charge for flights where they cannot reasonably ensure completion of service.

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<sup>16</sup> Canadian Transportation Agency, Determination No. A-2020-122 (June 29, 2020), para 14.

**Q2. Whether airlines should have to pay compensation for inconvenience during the pandemic under more limited circumstances, for example: if they told passengers about the disruption less than 3 days in advance (instead of 14 days); and if the passenger's delay was 6 or more hours (instead of 3 or more hours)?**

9. We believe airlines should pay compensation for inconvenience as originally required under the APPR, *i.e.*, if they told passengers about the disruption less than 14 days in advance (an not a mere 3 days in advance) and likewise that the usual compensation obligations should arise with a delay of 3 hours or more. The rationale for earlier temporary exemptions and adjustments to these obligations again was the emergent need to, and urgency for drastic measures due to the unexpected scope of the pandemic and the huge volume of Canadians to get home.<sup>17</sup> After a lapse of several months with no similarly pressing need to repatriate Canadians and with chronic ongoing COVID-19 restrictions, enough time to adapt schedules and operations (including staffing) has passed to enable the airlines to accommodate and adjust their flight schedules.
10. Moreover, allowing airlines to be temporarily exempt or be subject to lenient measures can result in airlines becoming lax in handling their operations and passenger flight schedules, without the pressure of complying with the regulatory requirements. In short, allowing such leniency would present a corporate moral hazard to the carriers. This exemption from compensation for routine failure to meet service expectations also will set a bad precedent and open allow airlines to raise similar applications in the future in many otherwise manageable contexts.
11. We believe the CTA has a strong role to play in protecting and advancing air passenger rights by enforcing the safeguards provided by the APPR, and to be seen to be doing so, and not in prioritizing assistance via regulatory “flexibility” to hope to alleviate airlines’ financial concerns, probably only in a very minor way (especially for the largest carriers such as Air Canada). Air passengers already are disadvantaged in that they have little bargaining power when it comes to dealing with airlines, and these exemptions are only going to exacerbate the prevailing imbalance of rights and obligations between the air passengers and airlines.
12. In addition, airline passengers will rightly, we submit, interpret reduction of compensation for delays as the regulator not being fully committed to the APPRs.
13. Finally, the aggregated data suggests an increased percentage of passengers who booked tickets 3-14 days in advance as a percentage of the total number of transported passengers from July to September 2020 compared to the same ratio for July to September 2019, as well as an increased percentage of passengers who cancelled 3-14 days in advance as a percentage of the passengers who booked at least 14 days in

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<sup>17</sup> Canadian Transportation Agency, Determination No. A-2020-122 (June 29, 2020) at paras 11-13.

advance, for the same period in 2020.<sup>18</sup> First, the data also indicates that in 2019, a significant number of passengers booked (3,651,794) and cancelled 3-14 days in advance (635,943).<sup>19</sup> Second, we submit that it is entirely reasonable consumer behaviour to book closer to travel dates than in 2019 due to the uncertainty of country closures, quarantine requirements and other COVID-19-related restrictions, including pre-flight testing. This does not mean, however, that consumers do not need the maximum notice of cancellations nor that they do not need compensation in these circumstances. Rather, the uncertainty means consumers need even more certainty and notice of flights for planning in a very risky environment. Again, we cite the least cost avoider principle. Consumers can expend serious amounts in intricately planning air travel in the present context and many have fewer resources than in the pre-pandemic economy. Air carriers can avoid the expense of cancellation by not offering flights that are underbooked in the first place and are presently undertaking sophisticated load calculations, which presumably factor in their requirements to compensate customers for late or cancelled flights.

14. The CTA also should consider data regarding Canadian air travel from March to June 2020, and compare those figures to data from July 2020 onwards, to gauge whether and to what extent there has been an increase or decrease in operating flights, flight delays, and cancellations- both by airlines and passengers.
15. Jeremy Bowen, chief executive of Cirium, an aviation consultancy remarked in the *Globe and Mail* report that now airlines schedule flights six to eight weeks in advance, instead of six months or a year ahead, in order to be able to quickly add or remove flights based on seat sales.<sup>20</sup> He further noted that about 40% of airline bookings in the Northern Hemisphere in August and September were made just three days before the flight, noting the challenges in scheduling to fly profitability and that the ways of estimating demand are changing and will continue to do so over the next 2-3 years.<sup>21</sup> PIAC submits that the aggregated data shows that circumstances have altered how the airline industry was been run pre-pandemic and how it is done now. Flights can still leave, and on time.
16. We also briefly comment on the argument raised by Air Canada that the CTA's role is not limited to consumer rights, while referring to the objectives set out in s.5 of the *Canada Transportation Act* (Act).<sup>22</sup> The cited section (s.5) declares the National Transportation Policy as: "[c]ompetitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable

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<sup>18</sup> Canadian Transportation Agency, Consultation paper on requested temporary adjustments to the Air Passenger Protection Regulations, Annex A: Summary of Air Carrier Data (Data aggregated from 5 air carriers).

<sup>19</sup> *Ibid.*

<sup>20</sup> Eric Atkins, "Tight schedules, narrower planes: how the pandemic is reshaping the airline industry," *The Globe and Mail* (3 January 2021), online: <<https://www.theglobeandmail.com/business/article-how-the-covid-19-pandemic-is-reshaping-the-airline-business/>>.

<sup>21</sup> *Ibid.*

<sup>22</sup> Air Canada, RE: Temporary Exemptions from Certain APPR Provisions - Application for Revision of Determination No. 2020-122 (September 2, 2020).

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.”<sup>23</sup> While this policy seeks to balance consumer and air carrier rights, however, we note subs. 5(b) which notes that these objectives are most likely to be achieved when “[r]egulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces...”<sup>24</sup> Clearly market forces, during the pandemic are leading air carriers to seek to avoid the application of pre-existing regulations – as evidenced by this very application. Thus market forces cannot be relied upon to assure timely service on flights that actually take off.

**Q3. Whether airlines should be given more time to respond to requests for compensation for inconvenience filed between July 1, 2020 and September 29, 2020; and how long any temporary adjustments to the APPR should be in place, if the CTA decides that any should be made.**

17. We believe that a normal 30-day deadline for responding to compensation requests under the APPR should apply as none of the reasoning and purported justifications for the earlier exemptions can be said to be pertinent now, after so many months have passed since the inception of this crisis.
18. Notably, the CTA in its Determination No. A-2020-122 granted more time to airlines for responding to passenger requests for compensation as it deemed that air carriers should be able to gradually return to regular APPR timelines, with the 30-day time limit for requests filed on or after July 1, 2020 noted to be undesirable and to accommodate responding to the previous requests.<sup>25</sup> Whereas in its previous Determination No. A-2020-47, the CTA allowed more time to respond to passenger requests for compensation so that air carriers could focus on immediate and urgent operational demands – that included bringing Canadians home.<sup>26</sup> None of these reasons apply now, nor is the requirement to respond to compensation requests a new and unique issue which the airlines need time to prepare for.
19. We do not have sufficient data to comment on how many passenger requests have been responded to by the airlines and within what time frame. We would encourage the CTA to consider these details in assessing the airlines’ conduct in relation to resolving these passenger complaints and concerns.

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<sup>23</sup> *Canada Transportation Act* (S.C. 1996, c. 10), s.5, National Transportation Policy.

<sup>24</sup> *Canada Transportation Act* (S.C. 1996, c. 10), s.5(b).

<sup>25</sup> Canadian Transportation Agency, Determination No. A-2020-122 (June 29, 2020), para 17.

<sup>26</sup> Canadian Transportation Agency, Determination No. A-2020-47 (March 25, 2020), para 4.

20. We conclude by reiterating that the time for responding to passengers' requests for inconvenience should not be extended as granting more adjustments in this regard will further complicate the timelines and create uncertainty and in particular, continue to deprive air passengers of their rights under the APPR.
21. Finally, should the CTA temporarily suspend or adjust any requirements of the APPRs as a result of these applications, which we opposed, PIAC submits that such adjustments or suspensions should last at most four months (120 days), at which time the air carriers should again be required to justify any adjustments or suspensions of the APPRs.

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