REPLY SUBMISSIONS ON THE JURISDICTION OF THE CIVIL RESOLUTION TRIBUNAL

The present Applicant asserts **both** *APPR*-related claims and claims pursuant to Article 19 of the *Montreal Convention*.

The Tribunal's jurisdiction to adjudicate claims pursuant to Article 19 of the *Montreal Convention* is not disputed by the Respondent. Consequently, there is no legal basis for dismissing the Application in its entirety.

The Respondent advances five arguments with respect to the Tribunal's jurisdiction to adjudicate *APPR*-related claims.

First, the Respondent conflates standardized compensation owed pursuant to ss. 19 and 20 of the *APPR*, which give rise to a claim in the nature of debt, with obligations under ss. 13, 14, 17, and 18 of the *APPR*, whose breach **may** give rise to claims for damages that are similar in nature to claims under Article 19 of the *Montreal Convention*.

Second, the Respondent erroneously argues that standardized compensation owed pursuant to ss. 19 and 20 of the *APPR* are not a debt, because "debt must be absolute and unconditional."

Third, the Respondent asserts that standardized compensation owed pursuant to ss. 19 and 20 of the *APPR* is in the nature of statutorily-conferred rights, and as such they cannot be enforced by civil action. The Respondent does not explain how its position can be reconciled with the incorporation of the *APPR* into its contract of carriage with passengers.

Fourth the Respondent argues that the Canadian Transportation Agency has **exclusive** jurisdiction, to the exclusion of all other fora, including but not limited to s. 96 courts. The Respondent overlooked the 2023 amendments to the *Canada Transportation Act*, and in any event, identified no express statutory language to support its position on exclusivity of jurisdiction. This argument is an attempt to broaden the issues far beyond the scope of the submissions sought by the Tribunal.

Fifth, the Respondent argues that the *APPR* "does not mandate carriers to refund expenses" incurred as a result of the carrier's failure to honour the obligations set out in ss. 13, 14, 17, and 18 of the *APPR*. The Respondent does not explain how its position can be reconciled with the incorporation of these obligations into its contract of carriage. Indeed, ceding to the Respondent's position would render these contractual obligations illusory.

A. Standardized Compensation vs. Other Obligations Owed under the *APPR*

The legal challenge before the Supreme Court of Canada in *IATA* was confined to the "standardized compensation" provisions of the *APPR*, that is, ss. 19 and 20, which require the

payment of a fixed sum in the event of certain flight delays, cancellations, and denial of boarding.

The Respondent erroneously speaks about "*APPR* compensation" later on, without distinguishing claims for standardized compensation from claims for damages arising from a carrier's failure to fulfill other obligations, such as the obligation to provide information, meals, accommodation, ground transportation, telecommunication, or rebooking in accordance with ss. 13, 14, 17, and 18 of the *APPR*—none of which were challenged or addressed by the Federal Court of Appeal or the Supreme Court of Canada.

In particular, section 14 of the *APPR* sets out minimal standards of treatment of passengers that carriers must adhere to in the event of delays of more than two hours that are within the carrier's control. Specifically, for delays of more than two hours, carriers must provide free of charge food and drink in reasonable quantities and access to a means of communication. If the delay is expected to result in an overnight wait, carriers must also offer hotel or other reasonable accommodation, and transportation thereto and therefrom.

Subsection 2(1) of the *APPR* imposes liability on the carrier for these obligations.

If an airline fails to comply with these obligations, it is in breach of contract. The *APPR* requirements are deemed to form part of the tariff, which regulates the contractual relationship between the parties. As explained by the Supreme Court of Canada, these obligations "become part of the carrier's conditions of carriage": *IATA*, para. 86. In any event, as discussed further below, the Respondent has explicitly incorporated the *APPR* requirements into its tariff.

When an airline breaches its contractual obligations by failing to offer the required food, drink, access to communication, or accommodation, this gives rise to an action for damages for breach of contract. This has been noted by this Tribunal in the past, including in *Prinz v. WestJet Airlines Ltd.*, 2024 BCCRT 980 at paras. 12-15.

A claim arising from a failure to adhere to the minimal standards required by s. 14 of the *APPR* is a claim for damages for breach of contract, and is within this Tribunal's jurisdiction, much like claims under Article 19 of the *Montreal Convention*. This Tribunal has jurisdiction over both claims in respect of breaches of s. 14 of the *APPR* and claims arising under the *Montreal Convention.*

B. "Debt" Must be Ascertainable and Not Unconditional or Absolute

The Respondent conflates the notion of "ascertainable sum" with an absolute or unconditional obligation to pay. The Respondent's position is inconsistent with the case law on payment or return of deposits in real estate transactions, where the sum is ascertainable, but entitlement is neither unconditional nor absolute, because compliance with conditions precedent must be

proven. For example, in *Argo Ventures Inc. v. Choim*, 2019 BCSC 86 at para. 22 it was held that:

> Several courts have held that a claim relating to a deposit is a claim for debt. See *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.,* 1999 BCCA 78 at para. 15, where a claim for an unpaid portion of a deposit was considered a claim in debt. See also *Colby v. Burlaka* (1998), [1999] 1 W.W.R. 193, 1998 CanLII 13462 at para. 10 (S.K.Q.B.), where a claim for return of a deposit or down payment on the sale of land was found to be an action in debt or liquidated demand, **irrespective of whether it was founded in contract, restitution, or equity, because it was a claim for an ascertainable sum**.
>
> [Emphasis added.]

The facts to be ascertained to establish entitlement to standardized compensation under ss. 19 and 20 of the *APPR*, listed in paragraphs 12-18 of the Respondent's submissions, are no different than the conditions precedent for the return of a deposit that must be ascertained.

Standardized compensation under ss. 19 and 20 of the *APPR* can also be distinguished from future rent installments in that claims of standardized compensation are made **after** the flight disruption, and they do not relate to future events. Once the passenger's travel was disrupted and the passenger fulfilled the requirements of s. 19(3), the debt is "perfected" and entitlement to standardized compensation under ss. 19 and 20 of the *APPR* is not contingent on future events.

This conclusion is further supported by this Tribunal finding in *Venhuizen v. Flair Airlines*, Dispute No. SC-2024-006024 that claims for standardized compensation owed under the *APPR* "are reasonably interpreted as debt claims" and as such they fall within the CRT's jurisdiction under s. 118(1)(a) of the *Civil Resolution Tribunal Act*.

C. *APPR*-related Claims are Enforceable by Civil Action

The Respondent argues at paragraphs 22-24 that standardized compensation owed under ss. 19(1)-(2) and 20 of the *APPR* are akin to statutory-conferred rights, and as such they are not enforceable in a civil action. However, the British Columbia Court of Appeal has considered this issue, and set out a rule whereby unless an obligation arises **solely** through statute, an individual will not ordinarily be obligated to proceed only through mechanisms set out in statute.

The issue was discussed by the Court of Appeal in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, and the point coming from that case was clarified in *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 at para. 22. In the latter case, the Court of Appeal clarified that the presumption that relief will only be available through statutory mechanisms applies only if the right arises **solely** from a statute:

> Third, as a general rule, if a right arises solely from statute, a claimant will have to look to the mechanisms provided for, or contemplated, by the statute to vindicate those rights: *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 at para. 73.
>
> [Emphasis is in the original.]

The distinction between obligations that are incorporated in a contract and those that are not is underscored in *Cheetham v. Bank of Montreal*, 2023 BCSC 1319 at para. 67 [***Cheetham***]:

> The important distinction between this case and *Macaraeg*, is that in *Macaraeg* the plaintiff sought to import the statutory obligations from the ESA into the employment **contract, which was admittedly silent** on the question of overtime pay.
>
> [Emphasis added.]

See also *Gauthier v. Air Canada*, 2024 BCSC 231 at paras. 97-102.

As explained in *Cheetham,* the key fact underlying the decision in *Macaraeg* was that the contract at issue was completely silent on the right at issue. The only place to look for the right in *Macaraeg* was the statute, and the statute itself did not deem the right at issue a term or condition to the contract (whether implied or expressed) for non-union contracts. This was noted by Chiasson J.A. in *Macaraeg* at para. 87.

This is manifestly not the case in the context of *APPR* obligations. The contract is far from "silent" on the *APPR* obligations. Rather, these terms and conditions by operation of law become part of the tariff, and in any event, these terms were explicitly included by the Respondent in its tariff. In other words, the obligations set out in the *APPR* **do not solely** arise from statute, but rather they are incorporated explicitly and by operation of law into the contract of carriage. As explained by the Supreme Court of Canada, these obligations, including the obligations with respect to standardized compensation set out in the *APPR,* "become part of the carrier's conditions of carriage": *IATA*, para. 86.

Further, the Respondent has in fact explicitly incorporated *APPR* requirements into its domestic and international tariffs. A customer is entitled to treat terms explicitly included in the tariff as part of the contractual relationship it has with a carrier regardless of whether it would have a statutory right to the same benefit had the carrier not included the term.

Relevant to this case, Air Canada's International Tariff states in Rule 5(C)(1) that:

> **The obligations of the carrier under APPR form part of this tariff and supersede any incompatible or inconsistent term and condition of carriage set out in the tariff to the extent of such inconsistency or incompatibility**, but do not relieve the carrier

from applying terms and conditions of carriage of this tariff that are more favorable to the passenger than the obligations set out in the APPR.

[Emphasis added.]

Furthermore, Air Canada's International Tariff states in Rule 80(B)(3)(a)-(d) that:

(3) In the event of a Schedule Irregularity that is within Air Canada's control:

a) Air Canada will provide alternate travel arrangements as set out in APPR. The alternate travel arrangement is deemed to be satisfactory to the passenger unless the passenger advises otherwise prior to the departure of the new travel arrangement. If the passenger refuses such arrangements because they do not accommodate their travel needs and chooses to no longer travel, the passenger is entitled to an Involuntary Refund in accordance with RULE 100 - REFUNDS and compensation pursuant to APPR if requested within one year of the delay and cancellation;

b) If passenger has been informed of the delay or cancellation less than 12 hours before the initially scheduled departure, and has been delayed more than two hours after the initial scheduled departure time, **Air Canada will provide food and drink in reasonable quantities**, taking into account the length of the wait, the time of day and the location of the passenger;

c) For a Schedule Irregularity lasting overnight, Air Canada will also provide **hotel or other comparable accommodation** for out-of-town passengers that is reasonable in relation to the location of the passenger, as well as **transportation to the hotel or other accommodation** and back to the airport, subject to availability;

d) Compensation
If, due to a delay or cancellation within Air Canada's control, passenger arrives with a delay at arrival of three hours or more, **Air Canada will provide compensation in accordance with APPR**. Only the operating carrier will provide compensation;

[Emphasis added.]

The obligation to provide compensation consistent with the *APPR* is then unquestionably part of the contractual relationship between the parties, and is not an obligation arising solely under statute. It is an obligation that arises through the explicit terms of the contract the Respondent enters into with all its customers. Consequently, customers have the right to enforce their contractual rights, including claims for debt or damages, through any mechanism the legislature has chosen to make available to them, including s. 96 courts or this tribunal.

To summarize, the CRT has jurisdiction over all claims by passengers against airlines arising from breaches of the *APPR*. The legal basis of the CRT's jurisdiction depends on what is being claimed:

- Claims under ss. 19(1)-(2) and 20 of the *APPR* are claims for relief in the nature of debt ("liquidated damages in a contractual agreement": see *AMT Financie Inc. v. Gonabady,* 2010 BCSC 278).

- Claims for breaches of other obligations set out in the *APPR* are claims for contractual damages, where actual loss has to be proven, much like a claim under Article 19 of the *Montreal Convention.*

D. The Canadian Transportation Agency Does not Have Exclusive Jurisdiction

The Respondent argues at paragraph 24 of its response that the Canadian Transportation Agency has exclusive jurisdiction to adjudicate *APPR*-related claims of passengers against airlines. There are several difficulties with this argument.

First, due to the 2023 amendments to the *Canada Transportation Act*, the Canadian Transportation Agency no longer adjudicates passenger claims; instead, complaints of this nature **received** by the Agency are **dealt** with by Complaint Resolution Officers, who are separate and distinct entities from the Agency and whose decisions **are not** orders or decisions of the Agency. The Respondent overlooked bringing ss. 85.06(2) and 85.11 of the *Canada Transportation Act* to this Tribunal's attention:

> **85.06 (2)** An order referred to in subsection (1) **is not** an order or decision of the Agency.
>
> **85.11** The Agency may, at a complaint resolution officer's request, **provide administrative, technical and legal assistance** to the complaint resolution officer.
>
> [Emphasis added.]

Second, and perhaps most importantly, it is settled law that express statutory language is required to confer **exclusive** jurisdiction on a court or a tribunal, to the exclusion of provincial superior courts established pursuant to s. 96 of *The Constitution Act*. In *Ordon Estate v. Grail*, [1998] 3 SCR 437 at para. 46, the Supreme Court of Canada held that:

> [...] it is well established that the complete ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court (rather than simply concurrent jurisdiction with the superior courts) **requires clear and explicit statutory wording** to this effect.

[Emphasis added.]

The British Columbia Court of Appeal reiterated and applied this principle in *Janus v. The Central Park Citizen Society*, 2019 BCCA 173 at para. 24:

> If the Legislature intends to oust the jurisdiction of a superior court to hear claims, it must do so with "clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437 at para. 46; *TeleZone* at paras. 5, 42. There is no such clear and explicit language in the *RTA*: see e.g., *Roumeli Investments Ltd. v. Gish*, 2018 NSCA 27.

In the present case, the *Canada Transportation Act* contains no "clear and explicit statutory wording" to give exclusive jurisdiction over passengers' *APPR*-related claims to the Complaint Resolution Officer nor to any of the other tribunals established in the *Canada Transportation Act*.

The Respondent's position on exclusive jurisdiction is devoid of any merit. Countless reported decisions, not only from the CRT, but also from the Provincial Court of British Columbia, the Nova Scotia Small Claims Court, the Supreme Court of Nova Scotia, and the Federal Court demonstrate that the courts have concurrent jurisdiction over passengers' *APPR*-related claims:

- *Fauvel v. Westjet Airlines Ltd.*, 2024 BCPC 190
- *Richardson et al. v. WestJet Airlines Ltd.*, 2023 NSSM 56
- *Geddes v. Air Canada*, 2022 NSSC 49
- *Lukács v. Air Canada Rouge LP*, 2023 FC 1358 (under appeal on a question other than jurisdiction)

E. Passengers' Expenses Incurred due to the Airline's Failure to Fulfill *APPR* Obligations are Recoverable Damages

The Respondent advances an unorthodox position at paragraphs 25-27 of its response that air carriers are not liable for expenses incurred by passengers for meals, accommodation, ground transportation, and communication when the air carriers fail to meet their legal obligations under s. 14 of the *APPR* to provide same.

The answer to the Respondent's unorthodox position is found in section 2 of the *APPR*, in section 86.11(4) of the *Canada Transportation Act*, and in the contract of carriage between the Respondent and its passengers.

First, subsection 2(1) of the *APPR* provides that:

> **2 (1)** **The carrier operating a flight is liable to passengers** with respect to the **obligations set out in sections 7 to 22 and 24**, or, if they are more

> favourable to those passengers, the obligations on the same matter that are set out in the applicable tariff.
>
> [Emphasis added.]

Second, section 86.11(4) of the *Canada Transportation Act*, provides that the obligations imposed on carriers by the *APPR* "are deemed to form part of the terms and conditions set out in the carrier's tariffs in so far as the carrier's tariffs do not provide more advantageous terms and conditions of carriage than those obligations." As explained by the Supreme Court of Canada, the obligations set out in the *APPR* "become part of the carrier's conditions of carriage": *IATA*, para. 86.

Lastly, as noted earlier, Air Canada's International Tariff expressly incorporates the obligations set out in the *APPR* as contractual obligations in Rules 5(C)(1) and 80(B)(3). Consequently, the carrier's failure to meet these non-monetary obligations—such as the obligation to provide standards of treatment in accordance with s. 14 of the *APPR*—is a breach of contract that triggers liability for damages recoverable by way of civil action in the same way as claims under Article 19 of the *Montreal Convention*.

The Respondent materially misstates the Supreme Court of Canada's decision in *IATA* by erroneously suggesting that "[a]s determined by the SCC, claims for APPR compensation do not qualify as actions for damages, or else they would conflict with the exclusivity of the Montreal Convention: [...]."

The Respondent was a party to the *IATA* appeal, and as such ought to have known that none of the appellants challenged section 14 of the *APPR*, and that the Supreme Court of Canada made no pronouncements with respect to that provision of the *APPR*. The issue in dispute was articulated in *IATA* at para. 21 as follows:

> The principal issue on appeal is whether the provisions of the *Regulations* that mandate **minimum compensation to passengers on international flights in the case of delay, cancellation, denial of boarding and lost or damaged baggage** are *ultra vires* the *CTA*.
>
> [Emphasis added.]

The Respondents also misstate the Supreme Court of Canada's rationale for finding that sections 19 and 20 of the *APPR* co-exist with the *Montreal Convention* and its exclusivity principle. The Supreme Court of Canada's *ratio decidendi* is found in *IATA at para. 97*:

> And even **assuming, without deciding**, that judicial proceedings that seek to vindicate a claim under the *Regulations* amount to an "action" for the purposes of the *Montreal Convention*, the claim would not be for "damages". Where such claims are filed in courts of law, **the claim is not in the nature of one for**

> **damages, because the claim is not tied to any harm suffered by the claimant and does not require any "case-by-case assessment" or relate to "compensation for harm incurred"** (*International Air Transport Association v. Department for Transport*, at para. 43; *Zicherman*, at p. 227). Instead, the claim is for payment of an amount that is already owed as a matter of standardized entitlements provided for under a consumer protection scheme.
>
> [Emphasis added.]

In short, the Supreme Court of Canada found that claims for **standardized** compensation, owed under ss. 19 and 20 of the *APPR*, are not claims for "damages." The high court expressly declined to decide whether judicial proceedings that seek to vindicate such a claim amount to an "action", assuming that point explicitly without deciding it.

Contrary to what is suggested by the Respondent, the *Montreal Convention* **does not** preclude claims for damages for breach of terms and conditions that the air carrier expressly incorporated into its contract of carriage. On the contrary, the Supreme Court of Canada held in *IATA* at para. 34:

> Article 27 expressly permits carriers to contractually waive defences available under the *Montreal Convention*.

Contracts of carriage between air carriers and their passengers govern not only the transportation itself, but also additional services provided by the carrier, such as seating and amenities in a higher class of service (e.g., business class) and seat selections. Passengers pay additional—often very substantial—fees for these additional services. Furthermore, carriers often include in their contracts of carriage additional terms or obligations or service standards that go above and beyond the minimum obligations in the *Montreal Convention*, which is the floor. Contract law and civil law principles dictate that an air carrier is bound by the terms and obligations set out in its contract of carriage. If the air carrier fails to or is unable to deliver the additional services, then the air carrier must repay the passenger the additional fees it had collected for the unperformed additional services, and the *Montreal Convention*'s exclusivity principle is not a defence for such claims. The carrier is liable in breach of contract for the simple and fundamental reason that they failed to perform the service promised in exchange for consideration.

The Respondent essentially argues in paragraph 25 of its response that although the obligation to provide standards of treatment set out in s. 14 of the *APPR* is incorporated in its contract of carriage, it is not liable to passengers if it fails to perform those obligations. Respectfully, the Respondent's position flies in the face of contract law. In the words of Devlin J. in *Firestone Tyre & Rubber Co. v. Vokins & Co*, cited with approval in *Gallen v. Butterley*, 1984 CanLII 752 (BC CA) at para. 76:

> That is not in law a contract at all. It is illusory to say: "We promise to do a thing, but we are not liable if we do not do it." If the matter rested there, there would be nothing in the contract.

The *Montreal Convention's* exclusivity principle does not relieve air carriers from their contractual obligations to passengers, nor does it bar damages for breaches of such obligations. For example, in *RA v. WestJet Airlines Ltd*, 2024 BCCRT 915 at para. 25, which dealt with international travel that is subject to the *Montreal Convention*, the carrier was held to its employee's statement, which this Tribunal concluded to be an agreement to vary the contract of carriage:

> As noted above, parties can agree to vary a contract. WestJet's employee offered to pay the applicants' hotel, travel, and food costs after their flight was diverted. The applicants accepted and relied on WestJet's offer. So, I find that WestJet is bound by its employee's statement and must reimburse the applicants' costs.

The obligations set out section 14 of the *APPR*, which the Respondent has incorporated as terms and conditions of its contract of carriage with passengers, are no different. Failure to fulfill these contractual obligations is a breach of contract. Passengers' expenses incurred as a result of such a breach are damages that are recoverable by way of civil action in the same way as claims under Article 19 of the *Montreal Convention*.

In particular, this Tribunal correctly decided in *Prinz v. WestJet Airlines Ltd.*, 2024 BCCRT 980 at para. 14 that the airline was liable for expenses passengers incurred due to the air carrier's failure to perform its obligations under s. 14 of the *APPR*. The Tribunal's decision in *Prinz* is supported by and consistent with s. 2(1) of the *APPR*, which imposes liability on the operating carrier "with respect to the obligations set out in sections 7 to 22 and 24."