REPLY SUBMISSIONS ON THE JURISDICTION OF THE CIVIL RESOLUTION TRIBUNAL

On November 8, 2024, Tribunal Member Kristin Gardner issued a decision in *Venhuizen v. Flair Airlines*, Dispute No. SC-2024-006024, finding 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* [***CRTA***].

Surprisingly, the Respondent's submissions neither acknowledge nor address Tribunal Member Gardner's findings of law in *Venhuizen v. Flair Airlines*.

Instead, the Respondent advances four arguments.

First, the Respondent attempts to sow confusion about the standardized compensation provisions of the *APPR* (ss. 19 and 20) that give rise to a claim in the nature of debt and obligations whose breach **may** give rise to claims for damages (e.g., ss. 13, 14, 17, and 18) that are similar in nature to claims under Article 19 of the *Montreal Convention*.

Second, the Respondent argues that **all** compensation owed under the *APPR* is in the nature of statutorily-conferred rights that are not provided by contract and are of the nature contemplated in *Macaraeg*, 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.

Third, 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.

Lastly, the Respondent argues that this Tribunal should decline to adjudicate this matter, because the Canadian Transportation Agency provides a "more appropriate" process for dispute resolution of *APPR*-related claims. The Respondent's submissions are unsupported by any evidence, and cannot be adjudicated without voluminous evidence relating to whether the process proposed by the Respondent is "more appropriate." The Respondent also overlooks the fundamental principle that a claimant's choice of forum for litigation should be respected absent a compelling reason to the contrary.

The last two arguments are an attempt to broaden the issues far beyond the scope of the submissions sought by the Tribunal.

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

The Respondent correctly acknowledged at paragraph 18 of its response that 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.

However, the Respondent erroneously speaks about "*APPR* claims" 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.

For example, 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. As the Respondent conceded at paragraph 14 of its submissions, the *APPR* requirements are deemed to form part of the tariff, which regulates the contractual relationship between the parties.

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.*

The Respondent's reliance on CRT cases that dealt with s. 13 of the *APPR* is misplaced, and these cases do not stand for the proposition for which they are offered. The CRT correctly determined in these cases that its role in these disputes is to offer **restitution** to a passenger who suffered damages, and not to punish the airline for violations of s. 13 if no damages were suffered.

Breach of s. 13 of the *APPR* (failure to provide information) is less likely to result in damages, and it would appear that the passengers in those cases failed to clearly articulate what their damages were. In the absence of a clearly articulated claim of damages, the CRT cannot award damages for the mere breach of s. 13, in much the same way that a judge cannot award damages in a civil claim against a driver who failed to stop at a stop sign if no accident occurred. The only remedy for failing to obey a stop sign in the absence of an accident is a fine (ticket). Similarly, the only remedy for a breach of s. 13 of the *APPR* in the absence of damages suffered by the passenger is an Administrative Monetary Penalty. None of these detract from the CRT's jurisdiction to adjudicate disputes where a breach of s. 13 does cause damages.

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

The Respondent argues at paragraphs 52-55 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. The Respondent cites *Macaraeg v. E Care Contact Centers Ltd*, 2008 BCCA 182 [***Macaraeg***] in support of its position.

The Respondent has overlooked *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 at para. 22, where the Court of Appeal clarified that *Macaraeg* 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 in 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. That it has done so is not controversial between the parties; the Respondent states in paragraph 36 of its response that "the APPR's terms are incorporated into WestJet's tariffs."

The Respondent strangely makes an argument that suggests that it does not matter that it incorporated the terms of the *APPR* into its tariff because "[i]f the APPR were not included in a tariff, the statutory obligations set forth in the APPR would apply nonetheless."

That may be so, but the fact is that the Respondent did incorporate the *APPR* terms into its 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. The Respondent's suggestion that explicit contractual terms should not be treated as contractual terms is nonsensical.

Relevant to this case, the WestJet International Tariff states in Rule 100(J)(5) that:

> The Carrier will provide compensation in the following amounts to Passengers who are delayed due to delay or cancellation and when that delay is within the control of the Carrier and when the Passenger was informed 14 days or less about the delay. Regardless of the fare paid, Passengers are entitled to a monetary compensation as follows:
> (a) No compensation if the delay is less than three hours;
> (b) $400, if the delay is three hours or more but less than six hours;
> (c) $700, if the delay is more than six hours but less than nine hours; and
> (d) $1000, if the delay is more than nine hours.

The obligation to provide compensation consistent with the *APPR* is then unquestionably part of the contractual relationship between the parties. The Respondent cannot rely on *Macaraeg* as this 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.

To conclude on *Macaraeg,* in that case, Chiasson J.A. noted that it was an error to find terms of the *Employment Standard Act* incorporated into the contract regardless of the intentions of the parties (para. 100). In the present case, however, the terms of the *APPR* are both expressly

incorporated into the terms of the contract, and are required by law to be so incorporated. As was the case in *Lewis v. WestJet, Macaraeg* offers no assistance to the Respondent.

Since claims under ss. 19(1)-(2) and 20 of the *APPR* are for an ascertainable sum, they are claims for relief in the nature of debt in much the same way as a claim relating to the return of a deposit in a real estate transaction: *Argo Ventures Inc. v. Choim*, 2019 BCSC 86 at para. 22.

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.*

C. The Canadian Transportation Agency Does not Have Exclusive Jurisdiction

The Respondent says 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.]

In particular, the lengthy quote from the Federal Court of Appeal's 2022 reasons at paragraph 60 of the Respondent's submissions is outdated.

Second, the Respondent correctly acknowledges that violations of the *APPR* and other licensing requirements in the *Canada Transportation Act* are also punishable by way of Administrative Monetary Penalties issued by Designated Enforcement Officers under Part VI, in much the same way as parking in the wrong place or speeding may be sanctioned by a ticket. However, the Respondent fails to explain that the role of Designated Enforcement Officers is similar to municipal officers issuing parking or speeding tickets: they issue the notice of violation, but they do not adjudicate civil disputes.

Designated Enforcement Officers have no authority to order an airline to pay passengers compensation, in the same way that an officer issuing a parking ticket cannot order a driver to compensate a property owner for unlawfully parking on their property. Furthermore, the Federal Court of Appeal confirmed that Designated Enforcement Officers are separate and distinct tribunals from the Agency: *Lukács v. Canadian Transportation Agency*, File No. A-431-17, Order dated May 30, 2018 (*per* Stratas, J.A.).

Lastly, 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)

D. The Complaint Resolution Officer Process is not "More Appropriate"

The Respondent argues that the Tribunal should decline to resolve this dispute pursuant to s. 11(1)(a)(i) of the *CRTA* on the basis of the Respondent's say-so that the Agency and the *Canada Transportation Act* "provide for the more appropriate dispute resolution process" (paragraphs 63-72 of the Respondent's submissions).

i. The Objection is Belated and not Properly Before the Tribunal

As a preliminary matter, the Respondent's objection to the Tribunal's jurisdiction on the basis of s. 11(1)(a)(i) of the *CRTA* is belated and not properly before the Tribunal at this late stage of the proceeding.

The Respondent correctly acknowledged at paragraph 2 of its responding submissions that parties to this dispute have already provided written final submissions. The Respondent did not object to the CRT's jurisdiction at its first opportunity, nor did it object to the CRT's jurisdiction throughout the dispute process. On the contrary, the Respondent accepted the CRT's jurisdiction, and made submissions on the merits of the case without raising any concern or objection on the basis of s. 11(1)(a)(i) of the *CRTA*.

The Tribunal Member's October 30, 2024 invitation to address narrow and specific questions of statutory interpretation relating to the *CRTA* **was not** an invitation for the parties to reopen their cases and raise issues that they could and should have raised in their final written submissions before the Tribunal Member was assigned.

It is submitted that the Respondent's submissions relating to s. 11(1)(a)(i) of the *CRTA* fall outside the scope of the permissible submissions that the Tribunal invited on October 30, 2024, and should be disregarded as an abuse of process.

ii. The Respondent's s. 11(1)(a)(i) Argument Requires Evidence

The Respondent advances bald assertions, unsupported by any evidence, that the Agency and the *Canada Transportation Act* "provide for the more appropriate dispute resolution process."

The Respondent then goes on to allege, without any evidence, that the dispute resolution process provided under the *Canada Transportation Act* is substantially faster than adjudication by the CRT (see, in particular, paragraph 67 of the Respondent's response).

While the *Canada Transportation Act* prescribes fast processing times, there is no evidence before the Tribunal that these processing times are being respected in any way. In fact, they are not. Given that the Tribunal sought **submissions** from the parties on October 30, 2024, the Applicant is precluded from adducing evidence at this stage. It would be procedurally unfair to the Applicant if the Tribunal agreed to rule on this issue on the basis of the Respondent's say-so and without any evidence.

As explained below in greater detail, in the unlikely event that the Tribunal agrees to entertain this issue at all despite the Applicant's objection, the Tribunal ought to take judicial notice of the multitude of concerns, including years of waiting time, tens of thousands of complaints in backlog, concerns of regulatory capture, and reports of intimidation and unconstitutional silencing of passengers at the Canadian Transportation Agency.

iii. The Complaint Resolution Officer's Process is not "More Appropriate"

In the unlikely event that the Tribunal agrees to entertain the s. 11(1)(a)(i) issue at all, it is submitted that the Tribunal either ought to take judicial notice of the facts listed in this subsection or alternatively should provide the Applicant with a reasonable opportunity to tender evidence on these points.

1. The Complaint Resolution Officer's Process suffers from a multi-year backlog. According to the Canadian Transportation Agency's Annual Report 2023-2024, "the backlog of complaints continued to grow in 2023-2024 reaching **71,109** by the end of the period." The report, which has also been tabled with Parliament, is available in multiple formats online:

    - PDF: https://otc-cta.gc.ca/sites/default/files/publications/annual_report_2023_2024.pdf
    - HTML: https://otc-cta.gc.ca/eng/publication/annual-report-2023-2024

    The statistics table of the backlog, retrieved from the CTA's website (https://otc-cta.gc.ca/eng/statistics-2023-2024#complaints_year_end), is reproduced below:

Consumer protection for air travellers

New complaints and backlog of complaints at year end

	2023-2024	2022-2023	2021-2022	2020-2021	2019-2020
Complaints received	43,549	42,068	12,158	13,275	19,392
Backlog at year end	71,109	44,319	13,409	16,515	13,467

Note: These statistics only include complaints that were submitted to the Agency – they do not reflect the total number of air travel complaints against air carriers. Many travellers resolve their complaints directly with the carrier.

According to a news report published in the Globe and Mail on November 24, 2024 (https://www.theglobeandmail.com/investing/personal-finance/article-new-us-airline-legislation-might-be-good-news-for-canadian-passengers/), the current backlog is **80,500** complaints.

2. The wait time for air travel complaints filed with the Canadian Transportation Agency is "more than 18 months" just to have the complaint initially reviewed. The Canadian Transportation Agency's Case Status Tool page (https://portail-portal.otc-cta.gc.ca/en/case-status-enquiries) states that:

> **Air travel complaints:** We continue to receive a **high number of new cases**. The wait time for an **air travel complaint** to be reviewed can be more than 18 months. We assure you that the wait time will not affect the outcome of your case review. [Bold is in the original, underlining and red colour were added.]

3. The Canadian Transportation Agency's impartiality has been called into question in the unanimous report of the House of Commons Standing Committee on Transport, Infrastructure and Communities:

Recommendation 21 — Prevent Regulatory Capture at the Canadian Transportation Agency

That the Canadian Transportation Agency be required to explain what measures it takes to prevent regulatory capture.

The Parliamentary report, tabled with the House of Commons, is available on the House of Commons' website in multiple formats:

- HTML: https://www.ourcommons.ca/documentviewer/en/43-2/TRAN/report-3/page-24
- PDF: https://www.ourcommons.ca/Content/Committee/432/TRAN/Reports/RP11431526/tranrp03/tranrp03-e.pdf#page=16

4. There are serious concerns about the constitutionality of the Complaint Resolution Officer's process in light of the confidentiality imposed by s. 85.09(1) of the *Canada Transportation Act* not only on the mediation phase but also on the final and legally binding decision that is issued at the end of the process and the documents that are used for issuing such decisions. According to Professor Paul Daly, one of Canada's distinguished administrative law and constitutional law scholars at the University of Ottawa:

   > This is a breach of the open justice principle, with the effect that proceedings before the Agency will be conducted in secret. Perhaps the rationale here is that the complaints resolution officers (82.01(1)) engage in mediation (85.01) which is best conducted in private. But the confidentiality clause sweeps beyond the mediation stage to encompass the entirety of air passenger proceedings before the Agency, including those that are quasi-judicial in nature. It is difficult to see how this clause would survive constitutional challenge based on the open justice principle grounded in s. 2(b) of the *Charter of Rights and Freedoms*.

   Professor Daly's complete article, entitled "Judicial Oversight and Open Justice in Administrative Proceedings," is available online: https://www.administrativelawmatters.com/blog/2023/05/18/judicial-oversight-and-open-justice-in-administrative-proceedings/

5. According to recent media reports, passengers who chose the Complaint Resolution Officer's process and then exercised their *Charter*-protected freedom of expression to discuss the outcome of their complaints faced pressure by Canadian Transportation officials to remove their social media posts:

   > Tim Rodger also knows what it feels like to have his social media monitored after the Canadian Transportation Authority (CTA) took exception to a post he made on that same Air Passenger Rights Facebook page.
   >
   > After a trip to Belize last December, Rodger's bag came off an Ottawa luggage carousel badly damaged. When WestJet wouldn't pay full replacement costs, he filed a complaint with the CTA and won.
   >
   > He posted the regulator's decision to the Facebook group, and got a phone call from the CTA shortly after, telling him the decision was confidential. Rodger took the post down, but says he doesn't think the confidentiality makes sense.
   >
   > If previous decisions had been made public, he says, "I maybe could have resolved this sooner if I'd found case law showing the exact same thing."

The media reports and interviews with affected passengers are available online:

- https://www.cbc.ca/news/canada/british-columbia/bc-couple-westjet-compensation-fight-1.7389792
- https://www.cbc.ca/player/play/video/9.6573501
- https://www.cbc.ca/listen/live-radio/1-63-the-current/clip/16112405-air-passengers-told-post-complaints-online

In short, the Complaint Resolution Officer's process is extremely slow, it is secretive, and its impartiality is questionable. Passengers have to wait more than 18 months to even have their complaint initially reviewed, and then passengers are robbed of their *Charter*-protected freedom of expression to discuss the outcome of their complaints. Such a process cannot reasonably be said to be "more appropriate" than the CRT's fair and impartial adjudication.

Passengers, including the Applicant, reasonably prefer bringing their claims against airlines to the CRT's fair and impartial adjudication. The Respondent should not be permitted to override the Applicant's choice and dictate to passengers in which forum they pursue their rights.

iv. The Applicant's Choice of Forum Should Be Respected

Finally, the Applicant chose to bring this matter forward in the CRT. If the CRT has jurisdiction, that choice should be respected absent a compelling reason to deny an applicant or plaintiff their choice of forum. As the Court of Appeal has recently confirmed in *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd*., 2020 BCCA 295 at para. 27**:**

> A plaintiff is generally entitled to its choice of forum even if it would be more convenient and less expensive for that party to sue in another jurisdiction, subject to competing considerations affecting the interests of the defendant.

Though this comment was made in the context of a dispute over the territorial competency of the British Columbia courts, the underlying principle applies with equal force. The British Columbia legislature has entrusted this Tribunal with jurisdiction including over recovering debts and damages arising through contract. The Applicant has invoked that jurisdiction. There is nothing in the *Canada Transportation Act* which ousts that jurisdiction. Consequently, absent some compelling reason, the Applicant should be entitled to have his claim heard in the forum he has chosen. No such compelling reason has been offered.

This matter should then proceed to determination on the merits.