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Canadian Transportation Agency  
15 Eddy Street  
Gatineau, Quebec K1A 0N9

Dear Madam or Sir:

**Re: Comments on the proposed *Regulations Amending the Air Passenger Protection Regulations* (Canada Gazette, Part I, Volume 155, Number 27)**

Please accept the following comments in relation to the proposed *Regulations Amending the Air Passenger Protection Regulations* [**Proposed Regulations**].

### **Overview**

The Proposed Regulations fall short of the consumer protection purpose and objective of the *Direction Respecting Flight Cancellations in Situations Outside of a Carrier's Control*, [SOR/2020-283](#) [**Ministerial Direction**] and the enabling legislation ([s. 86.11](#) of the *Canada Transportation Act*):

- (I) they do not comply with the Ministerial Direction in that they **do not provide** for a right to a refund if the passenger is unable to complete their itinerary “within a reasonable time,” but instead only if no alternate transportation is available within **48 hours**;
- (II) they fail to codify passengers’ well-established right to exchange vouchers for a cash refund within 30 days;
- (III) they are vague, lack clarity, and invite further litigation; and
- (IV) they amend s. 19(2) of the *APPR* to passengers’ detriment without any consultation.

## I. Failure to Comply with the Ministerial Direction

1. The Proposed Regulations do not comply with the Ministerial Direction in that they **do not provide** for right to a refund if the passenger is unable to complete their itinerary within a reasonable time; instead, the Proposed Regulations require the carrier to refund passengers only if no alternate transportation is available within **48 hours**, which is unreasonable.
2. In practical terms, the Proposed Regulations would mean that an airline could cancel a flight on Christmas Eve (December 24), offer a flight for Boxing Day (December 26), and still not have to refund a passenger for whom the travel may no longer serve its purpose.
3. The Ministerial Direction expressly required the Agency to make regulations that provide for a refund if the passenger is unable to complete their itinerary “within a reasonable time”:

**1** The Canadian Transportation Agency must make a regulation respecting a carrier’s obligations towards passengers in the case of flight cancellations due to situations outside of the carrier’s control that prevent it from ensuring that passengers complete their itinerary within a reasonable time.

**2** The regulation made by the Canadian Transportation Agency must provide for refunds to passengers for flight cancellations due to situations outside of a carrier’s control, including the situations listed in subsection 10(1) of the *Air Passenger Protection Regulations*, that prevent it from ensuring that passengers complete their itinerary within a reasonable time.<sup>1</sup>

4. The “48 hours” threshold was invented by the Agency, and cannot be reconciled with the phrase “within a reasonable time” in the Ministerial Direction for three reasons:
  - (a) it produces absurd consequences;
  - (b) it is inconsistent with the case law on reasonable terms and conditions of carriage; and
  - (c) it leads to a proliferation of disputes and litigation.

### (a) The “48 Hours” Threshold Produces Absurd Consequences

5. The following examples demonstrate the consequences of the Proposed Regulations.
6. Alex lives in Toronto, and works during the week. With the exception of paid vacation days, weekends are Alex’s only opportunity to travel. Alex booked a round-trip ticket, leaving from Toronto to Boston on Friday at 17:00, and leaving Boston on Sunday afternoon at 15:00.

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<sup>1</sup> *Direction Respecting Flight Cancellations in Situations Outside of a Carrier’s Control*, SOR/2020-283 (emphasis added).

On Friday, Alex's flight from Toronto to Boston is cancelled due to bad weather; it is clearly outside the airline's control. The airline offers Alex alternate transportation on a flight departing Toronto at 10:30 on Sunday morning and arriving in Boston at 12:15.

The itinerary no longer serves any purpose for Alex. By the time Alex arrives in Boston, Alex would have to check-in to the 15:00 return flight. Alex, who works five days a week, cannot defer the return flight until Tuesday.

The Proposed Regulations do not provide Alex with a right to a refund, because the airline offered alternate transportation that departs within 48 hours of the departure time indicated on Alex's ticket.

7. Sam studies in Vancouver. Sam's family in Montreal booked Sam a ticket to come home for New Year's Eve, departing Vancouver on December 30 at 23:20, and arriving in Montreal at 06:40 on December 31, the next day, and departing Montreal at 10:30 on January 2.

On December 30, Sam's flight is cancelled due to a snow storm; it is clearly outside the airline's control. The airline offers to transport Sam on January 1 at 15:00, arriving in Montreal at 22:30.

The itinerary no longer serves any purpose for Sam. If Sam were to accept the alternate itinerary, Sam would not be spending New Year's Eve and New Year's Day with Sam's family, and would be spending a mere 12 hours in Montreal.

The Proposed Regulations do not provide Sam (or Sam's family) with a right to a refund, because the airline offered alternate transportation that departs within 48 hours of the departure time indicated on Sam's ticket.

8. Alex and Sam are average passengers, who exemplify common time constraints present in the lives of virtually every person in a contemporary Western society. Their travel may be far less time-sensitive than passengers travelling to attend a wedding, a funeral, or a court hearing. Yet, the Proposed Regulations offer no meaningful protection to Alex and Sam:
  - (a) alternate transportation "within 48 hours" serves no purpose for them; and
  - (b) the offer of alternate transportation "within 48 hours" deprives them of the right to a refund under the Proposed Regulations.
9. We believe that these are absurd consequences that would defeat the purpose of the Ministerial Direction. It is inconceivable that the Minister intended the Agency to enact regulations that are futile and offer no meaningful protection to average passengers like Alex and Sam.

10. It is a well-established principle of statutory interpretation that legislature is presumed not to have intended to produce absurd consequences that defeat the purpose of a statute or render some aspect of it pointless or futile.<sup>2</sup> Therefore, interpreting “within a reasonable time” as “within 48 hours” must be rejected.

**(b) A “36 Hours” Threshold Was Previously Found To Be Unreasonable**

11. In 2004, the Agency held that it **was not reasonable** to have a 36-hour time limit for long delays before the carrier would be required to issue a refund.<sup>3</sup>
12. In 2003, the Agency confirmed that it is **not just and reasonable** to withhold refunds from passengers whose flight is cancelled, and who do not agree with the alternate travel arrangements being offered.

The Agency is of the opinion that this tariff provision may not be just and reasonable in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers’ control. The Agency is of the opinion that Air Transat should include a tariff provision that provides a refund, at the request of the passenger, should a flight be delayed for more than a certain period of time, e.g. 12 hours, irrespective of flight cancellation.

[...]

The Agency is of the view that the current tariff provision may not be just and reasonable, as it does not include a requirement that the passenger agree to the alternate travel arrangements. The Agency is of the opinion that Air Transat should include a tariff provision that provides for a refund in the event a passenger finds the alternate travel arrangements, unsatisfactory.

[...]

The Agency is of the opinion that this provision may not be just and reasonable, as it does not provide the passenger with any recourse should such passenger find the anticipated time, or the alternate travel arrangements provided by the carrier, to reach the passenger’s ticketed destination, to be unacceptable. The Agency is of the view that, in this circumstance, Air Transat should, at the request of the passenger, provide a refund.<sup>4</sup>

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<sup>2</sup> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27.

<sup>3</sup> *Re: Air Transat*, Decision No. 28-A-2004.

<sup>4</sup> Decision No. LET-A-112-2003 (emphasis added).

13. Since the “36 hours” threshold was previously found to be unreasonable, the substantially longer “48 hours” threshold in the Proposed Regulations cannot be reasonable, and is inconsistent with the intent of the phrase “within a reasonable time” in the Ministerial Direction.

**(c) The “48 Hours” Threshold Leads to Proliferation of Disputes and Litigation**

14. Under the Proposed Regulations, there is a substantial difference in passengers’ right to a refund depending on how the flight delay or cancellation’s cause is classified.
  - (a) If it is within the carrier’s control (ss. 11 or 12), then the passenger may reject the alternate transportation offered regardless of how soon it would departing (s. 17(2)), and the carrier must issue a refund.
  - (b) If it is outside the carrier’s control (s. 10), then the passenger may reject the alternate transportation offered and seek a refund only if the alternate flight is scheduled to depart more than 48 hours after the original departure time (s. 18).
15. This means that under the Proposed Regulations, a simple dispute about a \$500 refund will also require the complex and resource-intensive determination of the cause and classification of the cancellation or delay.<sup>5</sup> Such proliferation of disputes and litigation could not have possibly been the Ministerial Direction’s intent.
16. We believe that the regulations should codify passengers’ right to a refund in the event of a flight cancellation or a long delay (over three hours) **regardless** of the reason for the cancellation or delay, thereby relieving decision-makers and parties from having to address the cause and classification of the cancellation or delay.
17. It may be worth noting that other jurisdictions (EU, Israel, USA, and Turkey) that have adopted passenger protection regimes all provide for an unconditional right to a refund in the event of flight cancellations or long delays, regardless of the cause of the flight cancellation or delay and the alternate transportation being offered. The regimes adopted by other jurisdictions suggest that having a uniform refund obligation applicable irrespective of the cause is more practical and helpful to conserve valuable judicial resources.

**(d) Conclusion**

18. Requiring airlines to refund passengers for cancelled or delayed flights only if no alternate transportation is available within **48 hours** is inconsistent with the Ministerial Direction and the case law on reasonable terms and conditions of carriage, and leads to a proliferation of disputes and litigation.

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<sup>5</sup> See *Geddes v. Air Canada*, [2021 NSSM 27](#).

19. We urge the Agency to amend the *APPR* to provide a right to a refund in the event of a flight cancellation or a delay of more than three hours, **regardless** of the cause or classification of the cancellation or delay.

## II. Method Used for Refund: “Right to Exchange”

20. Proposed s. 18.2(1) appears to be inconsistent with the Ministerial Direction insofar as it purports to permit refunds in a form other than the original form of payment and in the absence of the well-established safeguards to protect passengers’ rights.
21. Section 2 of the Ministerial Direction provides that the regulations to be made “must provide for refunds to passengers [...]” The word “refund” means:

1 : to give or put back

2 : to return (money) in restitution, repayment, or balancing of accounts<sup>6</sup>

Consequently, the common and ordinary meaning of a “refund” encompasses the requirement that the repayment be made using the original method of payment, and not alternate methods. Therefore, s. 18.2(1) in its current form may be *ultra vires*.

22. It is a well-established consumer protection principle that a carrier may not pay compensation to passengers in a form **other than** cash unless five safeguards, established by the Agency in 2013, are **simultaneously** in place to protect passengers’ interests:<sup>7</sup>

(R1) the airline must inform passengers of the amount of cash payment that would be due, and that the passenger may decline travel vouchers, and receive cash or equivalent;

(R2) the airline must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;

(R3) the airline must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of payment;

(R4) the amount of the travel voucher must be not less than 300% of the amount of cash payment that would be due (i.e., CAD\$1 in cash being equivalent to CAD\$3 in travel vouchers); and

(R5) **passengers are entitled to exchange the travel vouchers for cash** at the rate of CAD\$1 in cash being equivalent to CAD\$3 in travel vouchers **within one (1) month**.

<sup>6</sup> [Definition of “Refund”](#), Merriam-Webster Dictionary Online.

<sup>7</sup> [Lukács v. Air Canada](#), [Decision No. 342-C-A-2013](#) at paras. 43 and 47-50.

23. In its 2013 decision, the Agency endorsed passengers’ “right to exchange” and underscored the importance of passengers being afforded ample time to make an informed decision as to whether they prefer cash or other methods of compensation:

The Agency agrees with Mr. Lukács’ submission that passengers must be afforded ample opportunity to determine whether they wish to choose travel vouchers in lieu of a cash payment [...]<sup>8</sup>

24. In a subsequent decision, the Agency reaffirmed requirements (R1)-(R5), and held that the absence of these safeguards renders offering vouchers instead of cash is unreasonable.

[110] The Agency finds that in the absence of the safeguards set out in Decision No. 342-C-A-2013 associated with the tendering of travel vouchers [...] fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and [the airline’s] statutory, commercial and operational obligations.<sup>9</sup>

25. Notwithstanding the Agency’s consistent and considered formal opinion that all five requirements (R1)-(R5) must be met, the Proposed Regulations inexplicably codify only (R1)-(R3), but of particular concern is the absence of (R5), the “right to exchange,” from the Proposed Regulations.
26. We are concerned that in the absence of a clear “right to exchange,” passengers may be put under undue pressure to agree to accept vouchers or other benefits without having a reasonable opportunity to inform themselves about their rights.
27. We believe that incorporating the “right to exchange” into s. 18.2(1) would relieve the concerns about this provision being potentially *ultra vires*. Indeed, vouchers that may be exchanged for a prompt refund in the original form of payment at the passenger’s discretion would constitute a “refund” within the meaning of the Ministerial Direction.

### III. Vagueness

28. The Proposed Regulations fail to remedy the *APPR*’s vagueness, and introduce an additional lack of clarity in terms of the carriers’ obligations and passengers’ rights.
29. **First**, the term “cancellation” is not defined. This creates a lack of clarity, because airlines sometimes mislead passengers by stating that their flights were affected by a “schedule change” and not a “cancellation” and therefore the *APPR* does not apply.

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<sup>8</sup> *Lukács v. Air Canada*, [Decision No. 342-C-A-2013](#) at para. 49.

<sup>9</sup> *Lukács v. Porter*, [Decision No. 31-C-A-2014](#) at para. 110; see also paras. 157-160 and 164-167.

30. We propose to amend subsection 1(1) of the *APPR* by adding the following definition:

**cancellation** means the non-operation of a flight which was previously planned and on which at least one seat was reserved.

This would have the added benefit of harmonization with the European Union’s framework.

31. **Second**, the Proposed Regulations use the vague and subjective terms “reasonable air route” and “reasonable distance” with respect to the carrier’s obligation to provide alternate transportation to passengers (s. 18). In the absence of clear and explicit definitions, carriers are likely to twist these notions, leaving passengers without meaningful protection.

32. The vagueness of these terms raise practical questions:

- (a) On the basis of what criteria will it be determined whether an alternate transportation is “reasonable” within the meaning of the Proposed Regulations?
- (b) How will a passenger know that the alternate itinerary they are being offered by the carrier is not a “reasonable air route” and as such they are entitled to a refund?
- (c) How will a carrier know that the alternate itinerary it offers the passenger is a “reasonable air route” and thus the carrier has met its legal obligations?

33. These questions have profound ramifications for both passengers and carriers, and the lack of clarity harms both stakeholder groups. For example, if a direct Montreal-Newark flight is cancelled, would offering to transport the passengers with three (3) stops and/or with an overnight stay at a connecting point be considered a “reasonable air route”?

- (a) If the answer is “no,” the carrier may be found to have contravened the (amended) *APPR*, and (theoretically) could be facing administrative monetary penalties.
- (b) On the other hand, if the answer is “yes”, then under the Proposed Regulations, passengers may not be entitled to a refund, and may be left out-of-pocket if they choose not to take what they consider to be an unreasonable alternate itinerary.

34. We believe that “reasonable air route” and “reasonable distance” should be explicitly defined.

#### **IV. Amendment to Subsection 19(2) to Passengers’ Detriment Without Consultation**

35. The Proposed Regulations substantially reduce passengers’ existing entitlement to compensation under the *APPR* in the event of flight cancellations and delays that are **within** the airline’s control.



- (a) Currently, under s. 19(2) of the *APPR*, passengers whose flight is cancelled or delayed by more than 3 hours for reasons within the carrier's control may opt to get a refund **and** get a \$400/\$125 cash compensation on top of it.
- (b) The Proposed Regulations seeks to amend s. 19(2) of the *APPR* by taking away the general entitlement to the \$400/\$125 cash compensation, and replacing it with compensation only if the passenger is notified less than 14 days in advance about the cancellation or delay.

This amendment is hidden in s. 7 of the Proposed Regulations that amends s. 19(2) of the *APPR* by replacing the phrase

If paragraph 12(2)(c) or (3)(c) applies to a carrier [...]

with

If paragraph 12(2)(d) or (3)(d) applies to a carrier [...]

- 36. The Agency misrepresents this substantial reduction of passengers' existing rights as a mere "housekeeping amendment" and disingenuously claims that "this reference was not included in the *APPR* due to an oversight."
- 37. The *APPR* in its current form was published about two years before the Proposed Regulations. Had there been a genuine oversight in s. 19(2), the Agency and/or the Governor in Council could and would have corrected it long ago.
- 38. Most importantly, this substantial amendment was not contemplated by the Agency's consultation paper, and was not subject to any consultation with stakeholders.
- 39. We therefore believe that subsection 19(2) of the *APPR* should remain unchanged, and any amendments should be made only after a full and meaningful consultation with stakeholders.

Sincerely yours,

Dr. Gábor Lukács  
President