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Transportation Modernization Act (Bill C-49)

**Submissions to the Standing Senate Committee
on Transport and Communications**

by Air Passenger Rights

March 2018

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About *Air Passenger Rights*

Air Passenger Rights (APR) is an independent nonprofit network of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation.

APR is in a unique position to comment on Bill C-49 on behalf of the public interest:

- **Independence.** *APR* accepts no government or business funding.
- **No business interest.** *APR* has no business interest in any clause or proposed amendment.
- **Experience based.** *APR*'s submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.

APR's presence on the social media include the [Air Passenger Rights \(Canada\)](#) Facebook group, with **over 6,800 members**, the [Air Passenger Rights](#) Facebook page, and the [@AirPassRightsCA](#) Twitter feed.

APR was founded and is coordinated by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

Gábor Lukács, PhD (Founder and Coordinator)

Since 2008, Dr. Lukács has filed **more than two dozen successful complaints**¹ with the Canadian Transportation Agency (the Agency), challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers.

Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,² in respect of air passenger rights. He successfully challenged the Agency's lack of transparency and the reasonableness of the Agency's decisions.

In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking. His advocacy in the public interest and expertise in the area of air passenger rights have also been recognized by both the judiciary³ and the legal profession.⁴

¹ See Appendix A.

² *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

³ *Lukács v. Canada*, 2015 FCA 140 at para. 1; *Lukács v. Canada*, 2015 FCA 269 at para. 43; and *Lukács v. Canada*, 2016 FCA 174 at para. 6.

⁴ Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL [Exhibit 1].

Executive Summary

Bill C-49 raises important questions about the rights of passengers, but it provides all the wrong answers. In its present form, the Bill:

- not only fails to offer Canadians adequate protection, but also erodes air passenger rights in Canada;
- falls short by a wide margin of the rights provided by the European Union’s air passenger rights regime; and
- fails to strike a balance between the rights of passengers and the economic interests of airlines.

The Bill confers no specific rights on passengers, and delegates the establishing of tangible rights to the Canadian Transportation Agency (the Agency), a government body of questionable impartiality and integrity, accountable to no one, whose strong ties to the airline industry and dismal enforcement record are well known.

Rolling Back Existing Rights of Canadian Passengers

Bill C-49 proposes to:

- double the length of time passengers may be **confined in an aircraft on the tarmac** without water or food, from the current Canadian standard of **90 minutes to 3 hours**; and
- relieve airlines from the obligation to pay compensation to passengers for flight disruptions caused by “mechanical malfunctions” and similar safety issues within the airline’s control.

These proposals are unfair to Canadian travellers, and are unreasonable.

Barring Public Interest Advocacy and Access to Justice

Bill C-49 also seeks to close the door and nail it shut on public interest advocacy and complaints brought in the public interest, whose importance was recently underscored by the Supreme Court of Canada.⁵

Recommendations

APR recommends ten amendments to Bill C-49 to enshrine existing rights of Canadian travellers and to bring the protection offered to Canadians on a par with the European Union’s air passenger rights regime.

⁵ *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at paras. 19-20.

Summary of Recommended Amendments to Bill C-49

Tarmac Delays: Water, Food, and Option to Disembark (Part I)

1. Amend proposed paragraph 86.11(1)(f) in s. 19 to read:

respecting the carrier's obligations in the case of tarmac delays over ~~three hours~~ 90 minutes, including the obligation to provide timely information and assistance to passengers, as well as the minimum standards of treatment of passengers that the carrier is required to meet; and

Compensation for Flight Disruptions (Part II)

2. Delete proposed subparagraph 86.11(1)(b)(ii) from s. 19 of the Bill.
3. Amend proposed subparagraph 86.11(1)(b)(i) in s. 19 of the Bill to read:

the minimum standards of treatment of passengers that the carrier is required to meet and the minimum compensation the carrier is required to pay for inconvenience when the delay, cancellation or denial of boarding is within the carrier's control, including in situations of mechanical malfunctions,
4. Amend proposed s. 86.11(3) to read:

A person shall not receive compensation from a carrier under regulations made under subsection (1) if that person has chosen to and has already received compensation for the same event under a different national passenger rights regime than the one provided for under this Act.

Public Interest Advocacy (Part III)

5. Delete proposed s. 67.3 from s. 17 of the Bill.
6. Amend proposed subparagraph 86.(1)(h)(iii) in s. 18(2) of the Bill to read:

(iii) authorizing the Agency to direct a licensee or carrier to take the corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage that are applicable to the service it offers and that were set out in its tariffs, ~~if the Agency receives a written complaint and, if the complaint is related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1), it is filed by the person adversely affected~~

Baggage: Delay, Loss, and Damage (Part IV)

7. Amend proposed paragraph 86.11(1)(c) to read:

prescribing the minimum compensation on the basis of full restitution and liability caps for delayed, lost or damaged baggage that the carrier is required to pay with respect to itineraries that are not subject to the international treaties set out in the *Carriage by Air Act*;

Single Point of Failure: Canadian Transportation Agency (Part V)

8. Amend proposed s. 86.11 in s. 19 of the Bill to read:

The Minister shall, after consulting the public, Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

9. Delete proposed subparagraph 86.11(1)(g) from s. 19 of the Bill.

10. Amend proposed subparagraph 86.11(2) in s. 19 of the Bill to read:

The Minister may issue directions to the Agency to make a regulation under paragraph (1)(g) respecting any of the carrier's other obligations towards passengers. The Agency shall comply with these directions.

Part I. Tarmac Delays: Water, Food, and Option to Disembark

APR is profoundly concerned by Bill C-49 proposing to claw back existing rights by **doubling** the length of time passengers may be confined in an aircraft on the tarmac without water or food, from the **current Canadian standard of 90 minutes to 3 hours**.

A. Current State of the Law

The Code of Conduct of Canada's Airlines states that:

If the passenger is already on the aircraft when a delay occurs, the airline will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the airline will offer passengers the option of disembarking from the aircraft until it is time to depart.⁶

These obligations are incorporated in major Canadian airlines' Tariffs. For example:

- Air Canada's Domestic Tariff Rule 80(C)(5)(c);
- Air Transat's International Tariff Rule 21(3)(c);
- Sunwing's Domestic Tariff Rule 15A(c); and
- WestJet's International Tariff Rule 75(D)(3).⁷

The terms and conditions set out in the Tariff are legally binding upon the airline pursuant to s. 67 of the *Canada Transportation Act* and s. 110(4) of the *Air Transportation Regulations*. As the recent Air Transat tarmac delay incidents demonstrate, the tariff provisions are legally enforceable—if only the Agency had the determination to enforce them.

B. Air Transat Tarmac Delay Inquiry and its Aftermath

In July 2017, two Air Transat flights with 590 passengers were diverted to the Ottawa airport due to bad weather. Although Air Transat's own tariff says passengers have the right to get off a grounded flight after 90 minutes, the passengers were kept on board for five hours without adequate water or food – on one of the flights, with no air conditioning. Passengers described their experience on board as inhumane, unacceptable, and “being treated like animals.” At least one passenger called 911, and emergency crews responded to provide aid.

After days of public outcry, the Canadian Transportation Agency conducted an inquiry into the incidents, found that Air Transat breached its Tariff obligations to passengers,⁸ and nominally fined Air Transat.

⁶ [Government of Canada announces Flight Rights Canada for air travellers](#), press release dated September 5, 2008 [Exhibit 2].

⁷ Exhibits 3, 4, 5, and 6.

⁸ [Decision No. A-2017-194](#) at para. 122 [Exhibit 7].

Alas, the fine was a mere slap on the wrist and the Agency waived the fine on the same day that it was issued. The Agency said the airline would get a rebate based on compensation settlements to passengers, thereby subsidizing Air Transat's private obligations to passengers from public money.⁹

An application for judicial review, challenging the low amount and the waiving of the fine, is currently pending before the Federal Court of Appeal.¹⁰

C. Impact of Bill C-49

Bill C-49 proposes to double the length of time passengers may be confined in an aircraft on the tarmac without water or food from the current Canadian standard of 90 minutes to 3 hours.

APR considers this proposed measure unreasonable and seriously harmful for the travelling public. The proposed measure is also unnecessary for the airline industry. The existing 90-minute tarmac delay rule has been the Canadian standard for the past ten (10) years, yet airlines expressed no concern about it.

D. Recommended Amendments

1. Amend proposed paragraph 86.11(1)(f) in s. 19 to read:

respecting the carrier's obligations in the case of tarmac delays over ~~three hours~~ 90 minutes, including the obligation to provide timely information and assistance to passengers, as well as the minimum standards of treatment of passengers that the carrier is required to meet; and

⁹ "Cover letter and notice of violation," issued by a Designated Enforcement Officer of the Canadian Transportation Agency, dated November 30, 2017 [Exhibit 8].

¹⁰ *Lukács v. Canadian Transportation Agency and Air Transat*, Federal Court of Appeal [File No. A-431-17](#).

Part II. Compensation for Flight Disruptions

Bill C-49 overlooks the travelling public's interest by relieving airlines from compensating passengers for flight disruptions caused by "mechanical malfunctions." This is inconsistent with well-established international norms, and falls far short of the rights provided by the European Union's regime with respect to flight delay, cancellation, and denied boarding.¹¹ The ambiguous wording of proposed s. 86.11(3) may also conflict with Canada's international obligations.

A. Current State of the Law

The *Montreal Convention* is an international treaty governing the rights of passengers travelling on international itineraries. Canada is a signatory to the *Montreal Convention*. The *Carriage by Air Act*¹² incorporates the *Montreal Convention* as Schedule VI, and s. 2(2.1) of the Act gives the *Montreal Convention* the force of law in Canada. Under the *Montreal Convention*:

- the airline is presumed to be liable for damages caused by delay of passengers, and the burden of proof is on the airline to establish extraordinary circumstances that may relieve it from liability;¹³
- the airline's liability for delay of passengers is limited to approximately **CAD\$8,800** per passenger (precisely, 4,694 Special Drawing Rights);¹⁴ and
- the airline cannot contract out its liability, and any contractual provision tending to set a lower limit of liability is null and void.¹⁵

Canadian courts have held airlines liable under the *Montreal Convention* for delays caused by "mechanical malfunction,"¹⁶ as did the European Court of Justice, when it was called upon to interpret the notion of "extraordinary circumstances" that exonerate airlines for the liability under the European regime.¹⁷

Airlines operating flights departing from European airports are required to compensate passengers for delay, cancellation, and denied boarding caused by "mechanical malfunction," unless the malfunction itself was due to "extraordinary circumstances," such as acts of sabotage or terrorism. There is no evidence to suggest that this financial obligation has negatively impacted flight safety or that any airline has ever allowed an unsafe aircraft to carry passengers to avoid paying compensation.

¹¹ [Regulation \(EC\) 261/2004](#).

¹² *Carriage by Air Act*, R.S.C., 1985, c. C-26.

¹³ *Montreal Convention*, Article 19.

¹⁴ *Montreal Convention*, Articles 22 and 24; [Notification to Air Carriers of Upward Revision of the Limits of Liability for International Transportation Governed by the Montreal Convention](#), Canadian Transportation Agency.

¹⁵ *Montreal Convention*, Article 26.

¹⁶ *Lukacs v. United Airlines Inc., et al.*, 2009 MBQB 29 at para. 48; leave to appeal ref'd, 2009 MBCA 111.

¹⁷ See, for example, *Wallentin-Hermann v. Alitalia*, Case C-549/07 at para. 25.

In 2013, the Canadian Transportation Agency adopted the view of the European Court of Justice in the context of flights within Canada:

[43] The Agency’s position in this matter corresponds to that taken by the European Court of Justice in *Wallentin-Hermann v. Alitalia*, in which the Court concluded that, with reference to European Union Regulation (EC) No. 261/2004, the responsibility rests with the carrier to establish whether events were beyond its control, and ultimately with the court to determine whether those events existed.

[44] The Agency is also of the opinion that the burden must rest with Air Canada to establish that the events prompting the substitution were beyond Air Canada’s control and that it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures. Air Canada should not be expected to tender compensation when it has demonstrated that substitution occurred for operational and safety reasons beyond its control, and that it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures. In the event that Air Canada fails to so demonstrate, compensation should be due to the affected passengers.¹⁸

In short, currently the rule is that airlines are liable for flight disruptions, but in extraordinary circumstances they can exonerate themselves from liability.

B. Impact of Bill C-49

Bill C-49 imposes no presumption of liability on airlines, and instead creates three categories of flight disruptions without defining their meanings:

- (i) within the airline’s control (proposed subparagraph 86(1)(b)(i));
- (ii) within the airline’s control, but is required for safety purposes, including in situations of mechanical malfunctions (proposed subparagraph 86(1)(b)(ii)); and
- (iii) due to situations outside the carrier’s control, such as natural phenomena and security events (proposed subparagraph 86(1)(b)(iii)).

Bill C-49 requires an airline to pay compensation to passengers **only in case (i)**, but imposes no such obligation in case (ii), thereby relieving airlines from accountability for “mechanical malfunctions.”

In *APR*’s view, the distinction between “mechanical malfunctions” and other causes of flight disruptions within the airline’s control is inconsistent with the principles of the *Montreal Convention*, is unfair to passengers, unnecessarily complicates the regime, and will be the focal point of a large number of disputes. *APR* recommends deleting proposed paragraph 86.11(1)(b)(ii), and amending proposed paragraph 86.11(1)(b)(i) to encompass mechanical malfunctions.

¹⁸ *Lukács v. Air Canada*, [Decision No. 204-C-A-2013 at paras. 43-44](#) (emphasis added).

APR is also concerned that proposed subsection 86.11(3) is ambiguous and unfavourable to passengers:

- The phrase “different passenger rights regime” is ambiguous, and could be misconstrued to include an airline’s own goodwill policy or compensation owed to passengers under the *Montreal Convention*. Removing the right to compensation under the *Montreal Convention* would be contrary to Canada’s international obligations.
- It appears to allow the airline and not the passenger to choose under which air passenger rights regime the passenger is compensated.

To avoid conflict with Canada’s international obligations, *APR* recommends amending proposed s. 86.11(3) by clarifying that any compensation payable under the Canadian air passenger rights legislation is **in addition to** rights provided by the *Montreal Convention* or other similar **international** treaties, but excludes compensation based on other **national** compensation regimes, such as the European Union’s regime.

C. Recommended Amendments

2. Delete proposed subparagraph 86.11(1)(b)(ii) from s. 19 of the Bill.
3. Amend proposed subparagraph 86.11(1)(b)(i) in s. 19 of the Bill to read:

the minimum standards of treatment of passengers that the carrier is required to meet and the minimum compensation the carrier is required to pay for inconvenience when the delay, cancellation or denial of boarding is within the carrier’s control, including in situations of mechanical malfunctions,
4. Amend proposed s. 86.11(3) to read:

A person shall not receive compensation from a carrier under regulations made under subsection (1) if that person has chosen to and has already received compensation for the same event under a different national passenger rights regime than the one provided for under this Act.

Part III. Barring Public Interest Advocacy

APR is deeply concerned about Bill C-49 seeking to close the door and nail it shut on complaints brought in the public interest by introducing a new requirement that the complainant must be “adversely affected.”¹⁹

A. Current State of the Law

The Supreme Court of Canada recently decided that the *Canada Transportation Act* does permit public interest complaints, and **does not require** a complainant to be “adversely affected.” Chief Justice McLachlin, writing for the majority, held that:

[19] [...] Applying these tests in the way the Agency did would preclude any public interest group or representative group from ever having standing before the Agency, regardless of the content of its complaint. [...] In effect, only a person who is herself targeted by the impugned policy could bring a complaint.

[20] This is contrary to the scheme of the Act. Parliament has seen fit to grant the Agency broad remedial authority. [...] To refuse a complaint based solely on the identity of the group bringing it prevents the Agency from hearing potentially highly relevant complaints, and hinders its ability to fulfill the statutory scheme’s objective. [...] It is unreasonable, however, for the Agency to apply a test that would prevent it from hearing the complaint of any such group.²⁰

B. Importance of Public Interest Complaints

Most Canadians do not have the time, knowledge, and resources to know their rights and to pursue them on their own. The regulatory complaint process is, inevitably, lengthy and complex, often involving numerous motions, production of documents, and interrogatories. The Canadian Transportation Agency’s *Annotated Dispute Adjudication Rules* is a **90-page document** that most Canadians without legal training are not capable of understanding.²¹ Thus, in practice, only consumer advocates or advocacy groups with expertise and resources are capable of meaningfully taking advantage of the regulatory complaint process.

The role of public interest advocacy in the context of air travel is ensuring that airlines obey the law, and holding airlines that disobey the law accountable. Public interest complaints are of a preventive nature, seeking to prevent future harm to the travelling public before anyone incurs damages or further damages. The focus of such complaints is the chasm between the existing consumer protection laws and the airlines’ policies and practices that blatantly disregard and misrepresent the law to the public. Decisions arising

¹⁹ Proposed section 67.3 and subparagraph 86(1)(h)(iii).

²⁰ *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at paras. 19-20 (emphasis added).

²¹ [Canadian Transportation Agency’s Annotated Dispute Adjudication Rules](#) [Exhibit 9].

from such public interest complaints include:

- *Lukács v. Air Canada*, Decision No. 208-C-A-2009, ordering Air Canada to comply with its obligations under the *Montreal Convention*,²² and abolish its policy of refusing to compensate passengers for damage to their baggage under the guise of “wear and tear.”
- *Lukács v. WestJet*, Decision No. 483-C-A-2010, ordering WestJet to comply with its obligations under the *Canada Transportation Act*, and raise its liability cap for checked baggage on domestic flights from \$250 to match the levels of the *Montreal Convention* (approx. \$1,800 in 2010); and
- *Lukács v. Air Canada*, Decision No. 342-C-A-2013, ordering Air Canada to comply with its obligations under the *Canada Transportation Act*, and raise its denied boarding compensation amounts from \$100 to up to \$800 in cash.

A common feature of the more than two dozen successful public interest complaints brought by *APR*’s founder, Dr. Lukács,²³ is that the airlines were found disobeying the clear and unambiguous language of Canada’s existing laws that protect passenger rights.

The significance of public interest complaints, filed before anyone would be adversely affected, has also been recognized by the Canadian Transportation Agency:

[...] it is not necessary for a complainant to present “a real and precise factual background involving the application of terms and conditions” for the Agency to assert jurisdiction under subsection 67.2(1) of the CTA and section 111 of the ATR.

⋮

Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a “real and precise factual background” could very well dissuade persons from using the transportation network.²⁴

C. Impact of Bill C-49

Bill C-49 proposes to eliminate public interest advocacy in air travel by requiring complainants to be “adversely affected” by the airline policy or practice complained of. This proposal is a radical departure from the current state of the law, as articulated by the Supreme Court of Canada.²⁵

APR considers this proposed measure incompatible with the purpose of regulatory law, which is to protect the public from harm before it happens: to remove spoiled food from circulation **before** anyone gets sick, to get an incompetent driver off the road **before** anyone is injured, etc. Waiting until after someone is actually

²² Incorporated as Schedule VI to the *Carriage by Air Act*.

²³ See Appendix A.

²⁴ *Krygier v. WestJet et al.*, Decision No. LET-C-A-104-2013, at p. 5 (emphasis added).

²⁵ *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at paras. 19-20.

harmed and “adversely affected” by an airline policy or practice defeats the objective of regulatory law and harms the public.

D. Recommended Amendments

5. Delete proposed s. 67.3 from s. 17 of the Bill.

6. Amend proposed subparagraph 86.(1)(h)(iii) in s. 18(2) of the Bill to read:

(iii) authorizing the Agency to direct a licensee or carrier to take the corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee’s or carrier’s failure to apply the fares, rates, charges or terms or conditions of carriage that are applicable to the service it offers and that were set out in its tariffs, ~~if the Agency receives a written complaint and, if the complaint is related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1), it is filed by the person adversely affected~~

Part IV. Baggage: Delay, Loss, and Damage

Bill C-49 creates ambiguity with respect to the right to compensation for baggage delay, and the ambiguous wording of proposed s. 86.11.(1)(c) may also conflict with Canada’s international obligations; however, there is a clear need for regulation of liability for baggage on domestic itineraries.

A. Current State of the Law

As noted earlier, the *Montreal Convention* is an international treaty governing the rights of passengers travelling on international itineraries. Canada is a signatory to the *Montreal Convention*. The *Carriage by Air Act*²⁶ incorporates the *Montreal Convention* as Schedule VI, and s. 2(2.1) of the Act gives the *Montreal Convention* the force of law in Canada. Under the *Montreal Convention*:

- the airline is presumed to be liable for **delay**, loss, and damage to checked baggage, and the burden of proof is on the airline to establish extraordinary circumstances that may relieve it from liability;²⁷
- the airline’s liability for **delay**, loss, and damage to checked baggage is limited to approximately **CAD\$2,100** per passenger (precisely, 1,131 Special Drawing Rights);²⁸ and
- the airline cannot contract out its liability, and any contractual provision tending to set a lower limit of liability is null and void.²⁹

The *Montreal Convention* distinguishes between “baggage **delay**” (baggage missing up to 21 days) and “baggage **loss**” (baggage missing for more than 21 days). In the case of baggage **delay**, the airline is required to compensate the passenger for reasonable interim expenses incurred, including clothing items needed for the passenger’s purpose of travel. In the case of baggage **loss**, the airline must compensate the passenger for the replacement cost of their baggage and its contents, up to the above-noted liability limit.

Canada cannot enact baggage liability rules applicable to itineraries governed by the *Montreal Convention*. The Supreme Court of Canada held that in subject matters where the *Montreal Convention* applies, it is the exclusive remedy, and renders all other Canadian laws and regulations inapplicable.³⁰

Baggage liability during travel entirely within Canada is governed by the airlines’ respective Tariffs. The Agency has recognized the *Montreal Convention* as a persuasive international standard for determining whether an airline’s policies are reasonable.³¹

²⁶ *Carriage by Air Act*, R.S.C., 1985, c. C-26.

²⁷ *Montreal Convention*, Articles 17 and 19.

²⁸ *Montreal Convention*, Articles 22 and 24; [Notification to Air Carriers of Upward Revision of the Limits of Liability for International Transportation Governed by the Montreal Convention](#), Canadian Transportation Agency.

²⁹ *Montreal Convention*, Article 26.

³⁰ *Thibodeau v. Air Canada*, 2014 SCC 67 at paras. 37-40.

³¹ See, for example, *Lukács v. WestJet*, Decision No. 483-C-A-2010.

APR is of the view that a uniform liability regime, applicable to all travel by air within Canada, would be a most welcome change as long as it is based on the full restitution principle enshrined in the *Montreal Convention*.

B. Impact of Bill C-49

Proposed paragraph 86.11(1)(c) makes no reference to “delay” of baggage, which is one of the most common issues experienced by passengers. Delay of baggage may leave a lawyer without their gown, a businessperson without their suit, a vacationer without their bathing suit or golf clubs, or a bride without her wedding dress, requiring passengers to spend many hundreds of dollars to replace missing items. While the drafters of Bill C-49 most likely intended “loss” of baggage to encompass “delay” too, APR is concerned that the lack of clear wording may create ambiguity, and consequently stir up more litigation.

APR therefore recommends to remove this ambiguity by adding an explicit reference to “delay” to proposed paragraph 86.11(1)(c).

APR is of the view that proposed paragraph 86.11(1)(c) may conflict with Canada’s international obligations under the *Montreal Convention*, unless its scope is restricted to itineraries that are not governed by the *Montreal Convention* (or its predecessor, the *Warsaw Convention*).

APR is also concerned by the lack of clear language to establish or mandate establishing uniform liability caps for baggage applicable to travel within Canada, based on the principle of restitution. For comparison, the uniform liability cap for domestic flights in the United States is US\$3,500 per passenger.³²

C. Recommended Amendments

7. Amend proposed paragraph 86.11(1)(c) to read:

prescribing the minimum compensation on the basis of full restitution and liability caps for delayed, lost or damaged baggage that the carrier is required to pay with respect to itineraries that are not subject to the international treaties set out in the *Carriage by Air Act*;

³² 14 CFR 254.4.

Part V. Single Point of Failure: Canadian Transportation Agency

Bill C-49 has a “single point of failure”: the Agency itself.

The Bill confers no specific rights on passengers, and delegates the establishing of tangible rights to the Agency, a government body of questionable impartiality and integrity, whose strong ties to the airline industry and dismal enforcement record are well documented.

APR is concerned about government bureaucrats accountable to no one deciding the specific rights of passengers and definitions of key terms. *APR* is of the view that decisions of such magnitude should be debated and made by elected representatives, whom Canadians can hold accountable through the democratic process.

In light of the mounting concerns about the Agency’s impartiality and willingness to carry out its mandate to act in the public interest, *APR* strongly recommends that all regulation-making powers under Bill C-49 be removed from the Agency, and instead be delegated to the Minister, who is accountable to Canadians through Parliament.

A. Growing Criticism from the Judiciary and Civil Liberties Organizations

The Agency’s conduct has attracted growing criticism both from the judiciary and from civil liberties organizations.

In a 2015 judgment concerning public access to complaints against airlines under the constitutionally protected “open court principle,” Ryer, J.A., writing for a unanimous panel of the Federal Court of Appeal, held that:

[...] Dr. Lukács was entitled to receive the documents that he requested and the Agency’s refusal to provide them to him was impermissible.³³

In 2016, de Montigny, J.A., writing for a unanimous panel of the Federal Court of Appeal, criticized the Agency’s failure to carry out its mandate and enforce the law:

[...] the Agency erred in [...] thereby ignoring not only the wording of the Act but also its purpose and intent. [...] the role of the Agency is [...] also to ensure that the policies pursued by the legislator are carried out.³⁴

³³ *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para. 80.

³⁴ *Lukács v. Canada (Transportation Agency)*, 2016 FCA 220 at para. 19.

In 2017, the British Columbia Civil Liberties Association (BCCLA) and the Justice Centre for Constitutional Freedoms (JCCF) have both expressed concern over the Agency's interference with freedom of speech, protected by s. 2(b) of the *Charter*, through the practice of deleting public comments critical of the Agency's conduct, left under posts on its Facebook page.³⁵

In 2018, Chief Justice McLachlin, writing for the majority of the Supreme Court of Canada, found that:

[17] [...] the Agency applied a test for public interest standing that could arguably never be satisfied. [...] The imposition of a test that can never be met could not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints.

[...]

[21] For these reasons, I conclude that the Agency's decision fails to meet the indicia of reasonableness enumerated in *Dunsmuir*.³⁶

B. Loss of Impartiality and Integrity: Regulatory Capture

Before 2013, the Agency used to exemplify the best of Canada's tradition of professional and independent public servants, acting impartially and in the public interest. Unfortunately, this is no longer the case. In 2018, the Agency is best described as a regulator captured by the very industry it is supposed to regulate.

It is *APR*'s view that since 2013, the Agency has gradually lost its independence, and the integrity of its consumer protection activities has been compromised. The Agency's actions and failure to act to enforce the law have undermined public confidence in its impartiality.

- **Airline Lobbyist Appointed Vice-Chair (2013).** Mr. Sam Barone was appointed Vice-Chair and Member of the Agency in March 2013. Prior to his appointment to the Agency, Mr. Barone was President and CEO of the Canadian Business Aviation Association (2008-2013) and President and CEO of the Air Transport Association of Canada (2006-2008).³⁷
- **Manager of Enforcement is on First-Name Basis with Industry Executives (2014).** Ms. Simona Sasova, the manager of the enforcement division of the Agency, has acknowledged that she is on a "first-name basis with executives of corporations against whom" she is supposed to take enforcement actions.³⁸

³⁵ Letter of the BCCLA to the Agency, dated September 5, 2017 [Exhibit 10]; and Letter of the JCCF to the Agency, dated September 13, 2017 [Exhibit 11].

³⁶ *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at paras. 17 and 21 (emphasis added).

³⁷ **Members**, Canadian Transportation Agency's website [Exhibit 12].

³⁸ Federal Court of Appeal File. No A-167-14: Transcript of the Cross-Examination of Ms. Simona Sasova, p. 109, Q. 423 [Exhibit 13].

- **Lawyer Suspended for Professional Misconduct Appointed Chief Dispute Resolution Officer (2015 or 2016).** The Law Society of Upper Canada found that Mr. Douglas W. Smith “engaged in professional misconduct,” suspended Mr. Smith, and imposed numerous conditions on his reinstatement. Mr. Smith has remained suspended since 2004, and has been either unable or unwilling to comply with the terms of his reinstatement.³⁹ Nevertheless, Mr. Smith was appointed Chief Dispute Resolution Officer of the Agency in 2015 or 2016. The appointment of a person with an unresolved disciplinary record such as Mr. Smith’s to a key position in the resolution of air travel complaints speaks to the nature of the Agency’s integrity.
- **Agency Privately Consults IATA About Regulations to be Developed Under Bill C-49 (2017).** The International Air Transport Association (“IATA”) is an international trade association of the airline industry, representing the interests of the airlines. Court documents revealed that before Bill C-49 would be passed by Parliament and before any public consultation would take place about the regulations to be developed, the Agency has “sought IATA’s input with regard to the regulations that” the Agency would draft after Bill C-49 becomes law.⁴⁰
- **Agency Tips Off Air Transat About Outcome of Inquiry and Notice of Violation (2017).** Federal Court of Appeal records reveal that on November 30, 2017, the Secretary of the Agency wrote in a confidential email to Air Transat’s counsel that:

As discussed yesterday evening, this Determination is confidential until its public release by the Agency. A copy of this Determination is being released to you under embargo in advance of its release to the public, expected to take place at or after 2:00 p.m. today. I would ask that you strictly manage the distribution of this document within Air Transat on a need to know basis and upon receipt by you of signed confidentiality undertakings (provided to you already under cover of a separate email) by the individuals who will receive a copy.

You should be aware that the matter is also under review by a Designated Enforcement Officer and a Notice of Violation may issue this afternoon as well.⁴¹

C. Lack of Enforcement

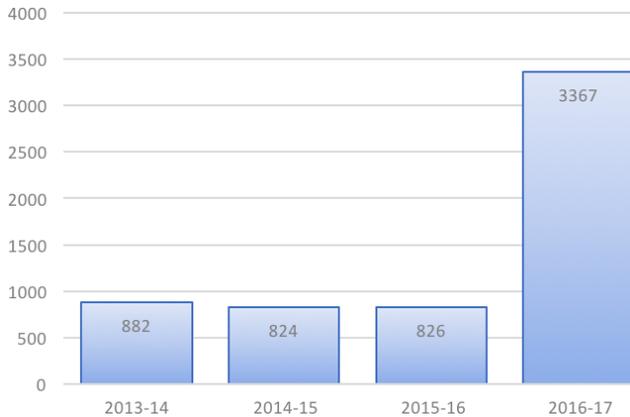
Implementation of the existing consumer-protection laws, regulations, and regulatory decisions has been thwarted by lack of enforcement and financial consequences for airlines that breach the rights of passengers. This anomaly is readily visible in the published statistics of the Agency: since 2013, the number of **complaints** received by the Agency has **quadrupled**, while **enforcement** actions have seen a near **four-fold decrease**.⁴²

³⁹ Disciplinary History Information relating to Mr. Smith, obtained from the Law Society of Upper Canada [Exhibit 14].

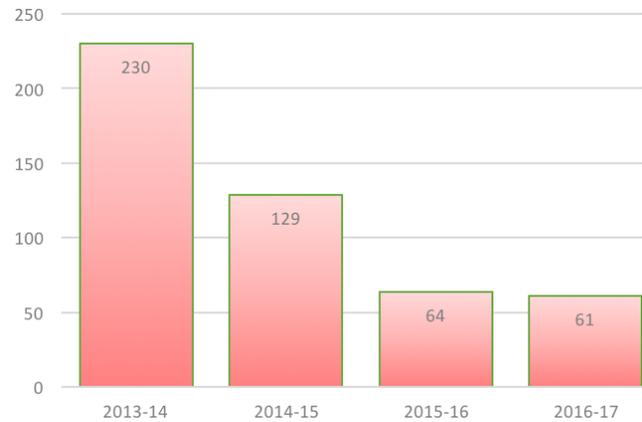
⁴⁰ Affidavit of Nicola Colville, Affirmed June 16, 2017, filed on behalf of IATA in Supreme Court of Canada File No. 37276, at para. 25 [Exhibit 15].

⁴¹ Confidential email of Ms. Elizabeth C. Barker, Secretary of the Agency, to Mr. Jean-Emmanuel Beaubrun, counsel for Air Transat, dated November 30, 2017 [Exhibit 16].

⁴² [Agency’s Statistics 2016-17](#), Canadian Transportation Agency’s website (September 3, 2017) [Exhibit 17].



Complaints Against Airlines



Enforcement Actions by the Agency

The decline in the number of enforcement actions is part of a troublesome pattern of failure of the Agency to carry out its mandate.

Prior to 2014, the Agency issued a number of well-reasoned decisions that promoted passenger rights by ordering an airline to remove or substitute terms and conditions in its Tariff that the Agency found to be unreasonable.⁴³ These rulings were thwarted by airlines keeping “two sets of books,” the official Tariff that nominally conforms to the Agency’s ruling, and a collection of “internal policies” that direct airline agents and employees to do something entirely different.⁴⁴

- Flight cancellation and involuntary denied boarding.** The Agency ruled that Air Canada, Air Transat, and WestJet must rebook passengers whose flights were cancelled (for reasons within the airline’s control) or who were involuntarily denied boarding, on flights of competitor airlines, and cannot restrict the search for rebooking to its own network. For example, if Air Canada cancels a flight, it may have to buy its passengers tickets on a WestJet flight, even though the two airlines have no “interline” agreement.⁴⁵

Although all three airlines changed their Tariffs to reflect the Agency’s decisions, *APR* found that Air Canada and WestJet agents were instructed not to rebook passengers whose flights were cancelled by the airline (likely due to insufficient seats sold) on flights of a competitor airline.⁴⁶

- Seating children next to an accompanying adult.** The Agency ruled that all major Canadian airlines must have a supplementary seating policy to make reasonable efforts to ensure that children on

⁴³ See the *Act*, s. 67.2(1) and *ATR*, ss. 111 and 113.

⁴⁴ See, for example: [When is a passenger reimbursement policy not a policy? Ask Air Canada](#), CBC News (February 11, 2016) [Exhibit 18].

⁴⁵ *Lukács v. Air Transat*, Decision No. 248-C-A-2012; *Lukács v. WestJet*, Decision No. 249-C-A-2012; *Lukács v. Air Canada*, Decision No. 250-C-A-2012; *Lukács v. Air Canada*, Decision No. 251-C-A-2012; and *Lukács v. WestJet*, Decision No. 252-C-A-2012.

⁴⁶ For example: [WestJet agents refuse to rebook passengers on Air Canada, contrary to Int’l Tariff Rule 75\(C\)\(2\)\(c\)](#), YouTube (February 22, 2017); and [Air Canada refuses to reprotect passengers on WestJet, contrary to Int’l Tariff Rule 80\(C\)\(4\)\(f\)](#), YouTube (March 13, 2017).

board are seated, free of charge, next to an accompanying adult.⁴⁷

While all airlines have obediently changed their Tariffs to reflect this decision of the Agency, some of the airlines did not implement the substance of the decision at all. For example, agents at Air Canada’s call centre kept telling parents that they would have to pay CAD\$40 per passenger in order to ensure that their children were seated next to them. *APR* has received similar complaints with respect to Air Transat.

Only after public outcry and attention from the mainstream and social media,⁴⁸ Air Canada actually changed its practice. *APR* found no record of Air Canada facing any consequences, such as a fine, for its failure to comply with the substance of the Agency’s ruling for more than a year.

- **Montreal Convention vs. internal policies.** Air Canada’s Tariff applicable to international travel incorporates the *Montreal Convention* by reference. In practice, however, Air Canada has a second and entirely different set of rules about compensating passengers who are delayed for their out-of-pocket expenses (meals, ground transportation, and accommodation),⁴⁹ which purports to limit Air Canada’s liability to a fraction of the CAD\$8,800 set out in the *Montreal Convention*. Alas, the Agency found nothing untoward about Air Canada using the “two sets of books” method, and dismissed a complaint about this practice.⁵⁰

D. Turning Away Passengers without Adjudication or Due Process

Starting in 2014, *APR* began to receive reports from passengers about Agency staff turning them away, unceremoniously advising them that their complaint filed with the Agency would be closed. Common features of these cases are that:

- the complaint file was closed by a case officer reviewing the complaint,⁵¹ not by a Member of the Agency who is authorized by law to decide complaints;
- the Agency did not make a decision or order dismissing the complaint, yet complainants were made to understand that their complaint had been dismissed; and
- complainants were either not informed about their right⁵² to ask for formal adjudication of their complaints or were discouraged from exercising that right by Agency staff.

The cases of Ms. Bartell and of Mr. Cooke demonstrate these common features:

⁴⁷ *Krygier v. WestJet et al.*, Decision No. 459-C-A-2014.

⁴⁸ [Air Canada backs down on \\$40 fee to seat child with parent](#), CBC News (April 29, 2016) [Exhibit 19].

⁴⁹ [Air Canada – Expense Policy](#), provided on January 11, 2016 [Exhibit 20].

⁵⁰ *Johnson et al. v. Air Canada*, Decision No. 286-C-A-2016.

⁵¹ Under s. 85.1(1) of the *Act*.

⁵² Under s. 85.1(3) of the *Act*.

- Ms. Anna Bartell filed a complaint with the Agency against Air Canada in 2013. In May 2014, she expressed to Ms. Yinka A. Aiyede, Director, Air Travel Complaints, the following concerns:

I will say I have been deeply disturbed by your attempt to dissuade me from filing a formal complaint, which is, as I understand, is my right as a citizen. And Lastly I have been also troubled by your attempt to dissuade me from associating with Mr. Lukacs and from involving him in my case.⁵³

- Mr. Gerard Cooke filed a complaint with the Agency against Air Canada in 2015. In January 2017, Mr. Cooke complained to Mr. Douglas W. Smith, Chief Dispute Officer, Dispute Resolution Branch, about the conduct of the case officer that was assigned to his complaint:

First, Gaetano created the false impression that she was a decision-maker at the Canadian Transportation Agency and that my complaint has been dismissed by the Agency.

I have recently found out that this was clearly not the case. Gaetano is not a Member of the Agency within the meaning of s. 7(2) of the *Canada Transportation Act*, and as such she has no authority to rule on my complaint.

Second, Gaetano misrepresented to me the obligations of Air Canada under its Tariff. She neither considered nor informed me about the liability of Air Canada under Article 19 of the *Montreal Convention*, which is incorporated in Air Canada's International Tariff Rule 105(B)(5).⁵⁴

Unfortunately, the cases of Ms. Bartell and Mr. Cooke are not isolated incidents, but part of a pattern.⁵⁵

E. Recommended Amendments

8. Amend proposed s. 86.11 in s. 19 of the Bill to read:

The Minister shall, after consulting the public, ~~Agency shall, after consulting with the Minister,~~ make regulations in relation to flights to, from and within Canada, including connecting flights,

9. Delete proposed subparagraph 86.11(1)(g) from s. 19 of the Bill.

10. Amend proposed subparagraph 86.11(2) in s. 19 of the Bill to read:

The Minister may ~~issue directions to the Agency to make a regulation under paragraph (1)(g)~~ issue directions to the Agency to make a regulation under paragraph (1)(g) respecting any of the carrier's other obligations towards passengers. ~~The Agency shall comply with these directions.~~

⁵³ Email sent by Ms. Bartell to Ms. Aiyede, Director, Air Travel Complaints, dated May 13, 2014 [Exhibit 21].

⁵⁴ Email sent by Mr. Cooke to Mr. Smith, Chief Dispute Resolution Officer, dated January 2, 2017 [Exhibit 22].

⁵⁵ See, for example: Email correspondence between Mr. Tony Mariani and Mr. Robert Armitage, Case Officer, Dispute Resolution Branch, dated between April 1 and May 13, 2016 [Exhibit 25]; Email sent by Ms. Debra Orr, Senior Complaints Officer, Air & Accessibility ADR Directorate, to Mr. Frank Morris, dated July 29, 2016 [Exhibit 26]; and Email sent by Mr. Robert Armitage, Case Officer, Dispute Resolution Branch, to Mr. Jonathan Hislop, dated October 6, 2016 [Exhibit 27].

Appendix

A. Final Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.