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AIR 
PASSENGER
 RIGHTS



An Act to ensure a barrier-free Canada (Bill C-81)

Submissions to the Standing Committee on Human Resources, Skills and
Social Development and the Status of Persons with Disabilities

by *Air Passenger Rights*

October 2018

Table of Contents

About *Air Passenger Rights* 1

Executive Summary 2

I. Appearance of a Conflict Between Bill C-81 and the *Carriage by Air Act*..... 3

II. Travel with Mobility Aids and Service Animals 4

III. Exclusion of Judicial Review in Certain Cases (subclause 103(4)) 5

IV. Weakening of Enforcement 6

Appendix..... 7

 A. Final Decisions Arising from Dr. Lukács’s Successful Complaints (Highlights)... 7

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-81 insofar as it relates to travel by air. *APR*'s submissions are based on the expertise and experience accumulated through daily assisting passengers in general, including passengers with disabilities,¹ in enforcing their rights.

APR's presence on the social media includes the [Air Passenger Rights \(Canada\)](#) Facebook group, with **over 9,000 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**² 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,³ 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 judiciary⁴ and the legal profession.⁵

¹ See, for example: "[Two women kicked off plane at Pearson after refusal to muzzle guide dogs,](#)" Toronto Star (July 3, 2015). *APR* has been assisting the victims before the Canadian Human Rights Commission.

² See Appendix A.

³ *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

⁴ *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.

⁵ Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.

Executive Summary

APR warmly welcomes the initiative to pass a national accessibility legislation and strengthen human rights by offering additional protection to vulnerable Canadians. *APR* considers Bill C-81 one of the most important bills before Parliament in its current session.

At the same time, *APR* substantially agrees with the views of the Accessibility for Ontarians with Disabilities Act (AODA) Alliance that Bill C-81, in its current form, is deficient and needs correction by amendments. *APR* also shares AODA Alliance's concern about entrusting enforcement for transportation to the Canadian Transportation Agency (CTA), a body known, and often criticized, for its inadequate track record of enforcement and cozy relationship with the industries it is supposed to regulate.

APR would like to augment the thorough submissions of other stakeholders in the following areas.

Appearance of a conflict between Bill C-81 and the *Carriage by Air Act*

1. *APR* recommends amending subclause 172(3) of Bill C-81 to state that the *Carriage by Air Act* shall not be construed as limiting the remedial powers introduced in Bill C-81.

Travel with Mobility Aids and Service Animals

2. *APR* recommends amending Bill C-81 by inserting provisions to mandate the creation of regulations governing the transportation of and liability for mobility aids and the right to travel with service animals in all modes of transportation.

Exclusion of judicial review in certain cases (subclause 103(4))

3. *APR* is of the view that this provision raises constitutional concerns, and recommends that subclause 103(4) be deleted.

Weakening of enforcement

4. *APR* is of the view that Bill C-81 undermines the benevolent objectives of the bill by entrusting enforcement for transportation to the CTA and conferring discretionary enforcement powers to issue warnings instead of monetary penalties. *APR* recommends that the Accessibility Commissioner be entrusted with enforcement in all sectors (including transportation), and that violations of the bill carry mandatory monetary penalties.

I. Appearance of a Conflict Between Bill C-81 and the *Carriage by Air Act*

APR welcomes the remedial powers introduced in Bill C-81 to award monetary compensation up to \$20,000 for any pain and suffering experienced by a person with a disability arising out of the barrier, and additional compensation up to \$20,000 if the barrier is the result of a wilful or reckless practice.⁶

APR is concerned that the legislative intent to include passengers with disabilities travelling internationally by air to and from Canada in the scope of these remedial powers may be thwarted by the appearance of a conflict with provisions of the *Montreal Convention*. 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* incorporates the *Montreal Convention* as Schedule VI, and s. 2(2.1) gives the *Montreal Convention* the **force of law in Canada**.

In 2014, the United Kingdom Supreme Court held that the *Montreal Convention* provided an exclusive remedy (if at all) in the context of international travel by air, and thus precluded awarding monetary compensation for infringements of the rights of passengers with disabilities, which otherwise would be available under the UK Disability Regulations and its European counterpart.⁷

Recently, in *Thibodeau v. Air Canada*, the Supreme Court of Canada was called upon to decide whether monetary damages were available under the *Official Languages Act* for violations that took place on board an international flight. The majority of the Court held that the *Montreal Convention* is exclusive and preempts domestic law with respect to matters falling within the substantive and temporal scope of the *Convention*,⁸ and consequently precluded such an award.

Regretably, Bill C-666 of the 41st Parliament, seeking to correct this state of affairs by clarifying that the *Carriage by Air Act* should not be construed as limiting the remedial powers set out in the *Official Languages Act* and the *Canadian Human Rights Act*, died on the order paper.

In order to create clarity, and avoid a statutory interpretation that would defeat the laudable objectives of Bill C-81, APR recommends amending clause 172(3) to clarify that these remedial powers apply notwithstanding provisions of the *Carriage by Air Act*.

Recommended Amendments

1. Amend proposed s. 172(3) (clause 172(3) of the Bill) to read:

Notwithstanding the *Carriage by Air Act*, on determining that there is an undue [...]

⁶ Bill C-81, clause 172(3), adding paragraphs 172(3)(d)-(e) to the *Canada Transportation Act*.

⁷ *Stott v. Thomas Cook*, [2014] UKSC 15.

⁸ *Thibodeau v. Air Canada*, 2014 SCC 67 at paras. 36-38, 48, and 57.

II. Travel with Mobility Aids and Service Animals

Mobility aids and service animals are inherent parts of the body of persons with disabilities: they **are** the legs, hands, or eyes of the person, and deserve the same level of protection from society as one's body.

Passengers with disabilities often face barriers in air travel. These barriers range from airlines refusing to accept mobility aids or their batteries (thereby rendering the mobility aid of no use at the destination), through damage and loss of mobility aids, and ending with de facto refusing to allow service animals to accompany the passengers.⁹

APR is of the view that the existing regulations fail to adequately protect the rights of travellers with disabilities, and are limited in scope to **air travel within Canada**,¹⁰ leaving such vulnerable persons without any protection when travelling internationally.

APR therefore recommends amending Bill C-81 by inserting provisions to mandate the creation of regulations governing the transportation of and liability for mobility aids and the right to travel with service animals in all modes of transportation.

Recommended Amendments

2. Amend proposed s. 170(1) (clause 170 of the Bill) by:
 - (i) replacing the phrase "The Agency may" with "The Agency shall"; and
 - (ii) appending to s. 170(1) of the *Canada Transportation Act* immediately after paragraph (d):
 - (e) transportation of and liability for mobility aids; and
 - (f) the right to travel with service animals.

⁹ See "Egan: Busted wheelchair after flight puts brakes on man's Cuban getaway," *Ottawa Citizen* (March 16, 2018); "Airline passenger stranded without wheelchair at airport calls for better treatment of travellers," *CBC* (June 21, 2018); and "Two women kicked off plane at Pearson after refusal to muzzle guide dogs," *Toronto Star* (July 3, 2015).

¹⁰ *Air Transportation Regulations*, ss. 146-156.

III. Exclusion of Judicial Review in Certain Cases (subclause 103(4))

APR is of the view that the provisions of Bill C-81 excluding judicial review of the Accessibility Commissioner's refusal to investigate or decision to discontinue investigation are fundamentally flawed, and may be unconstitutional.

Clauses 95 and 100 of the Bill permit the Accessibility Commissioner to refuse to investigate or discontinue an investigation into a complaint. The sole remedy provided to complainants in such cases is to request, under subclause 103(1), a "review" of the decision by the very same Accessibility Commissioner who made the decision being reviewed.

Subclause 103(4) of the Bill purports to exclude any form of judicial review of the Accessibility Commissioner's decision on such a review:

Every decision made by the Accessibility Commissioner under any of paragraphs (2)(a) to (d) is final and is not to be questioned or reviewed in any court.

In light of the findings of the Supreme Court of Canada about courts' constitutional duty to ensure that public authorities do not overreach their lawful powers and to maintain legislative supremacy,¹¹ *APR* is concerned that this provision may be unconstitutional.

Recommended Amendments

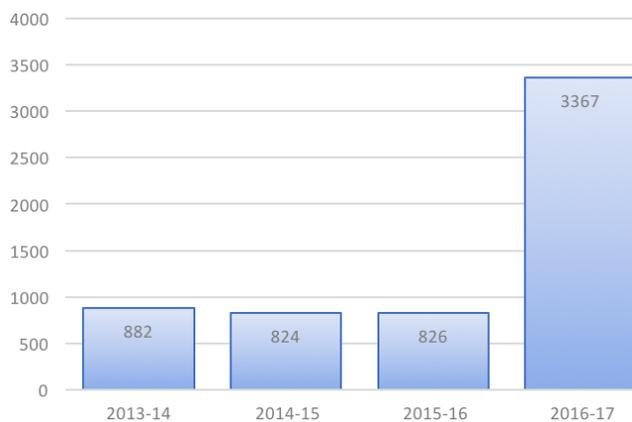
3. Delete subclause 103(4) of Bill C-81.

¹¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9 paras. 27-30

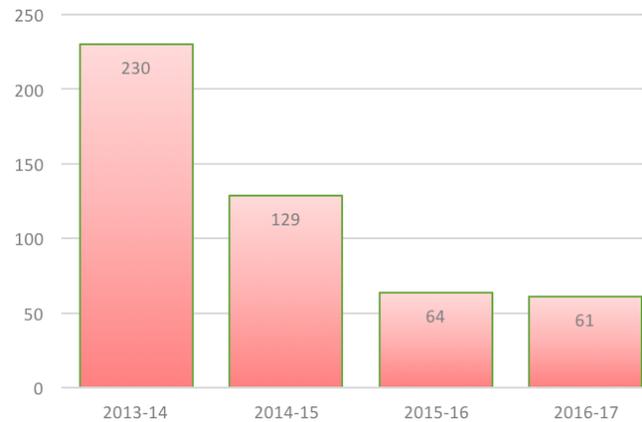
IV. Weakening of Enforcement

APR shares AODA Alliance’s concern about entrusting enforcement of Bill C-81 for transportation to the Canadian Transportation (CTA), a body known for its inadequate track record of enforcement and cozy relationship with the industries it is supposed to regulate.¹²

Since 2013, the number of **complaints** received by the Agency has **quadrupled**, while **enforcement** actions have seen a near **four-fold decrease**.¹³



Complaints Against Airlines



Enforcement Actions by the Agency

Our understanding is that the number of complaints against airlines in 2017-2018 was even higher, exceeding 5,500. *APR* believes that the substantial decline in the enforcement may have contributed to the soaring number of complaints.

APR is particularly concerned with the introduction of discretionary powers to issue warnings **instead of monetary penalties**.

Recommended Amendments

4. Amend proposed s. 180 (clause 178 of the Bill) by:
 - (i) replacing the phrase “the enforcement officer may issue” with “the enforcement officer shall issue”; and
 - (ii) deleting proposed paragraph 180(b)(i) (“contains a warning, or”).

¹² Federal Court of Appeal File. No A-167-14: Transcript of the Cross-Examination of Ms. Simona Sasova, p. 109, Q. 423.

¹³ [Agency’s Statistics 2016-17](#), Canadian Transportation Agency’s website (September 3, 2017).

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.