From the Ground Up: Revamping Canada's Air Passenger Protection Regime

Submissions to the House of Commons' Standing Committee on Transport, Infrastructure and Communities

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About *Air Passenger Rights*

Air Passenger Rights [**APR**] is an independent nonprofit organization of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation. APR is in a unique position to comment on behalf of the public interest on revamping Canada's air passenger protection regime:

- **Experience based.** APR's submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independent.** APR takes no government or business funding.
- **No business interest.** APR has no business interest in the aviation sector.

APR's presence on social media includes the Air Passenger Rights (Canada) Facebook group, with over 90,600 members, and the @AirPassRightsCA Twitter feed.

APR was founded and is led 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 (President)

Since 2008, Dr. Lukács has filed more than two dozen successful complaints[1] with the Canadian Transportation Agency [**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. 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.

Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar,[2] the academic community,[3] and the judiciary.[4] Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,[5] in respect of air passenger rights. He successfully challenged the Agency's lack of transparency and the reasonableness of the Agency's decisions. In 2020, the Federal Court of Appeal allowed Dr. Lukács to intervene in the airlines' challenge to the *Air Passenger Protection Regulations*, noting that he "would defend the interests of airline passengers in a way that the parties cannot."[6]

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1 See Appendix A.
2 Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.
3 Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018.
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 *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.
6 Order of the Federal Court of Appeal (Near, J.A.), dated March 3, 2020 in File No. A-311-19; see also *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211 at para. 8.

Executive Summary

In 2017, the air passenger protection framework created by the *Transportation Modernization Act* [***TMA***] was predicted to "double the amount of compensation that passengers are not going to receive."[7]

By 2022, that prediction has proven to be an underestimate. The soaring backlog of 30,000 passenger complaints at the Canadian Transportation Agency [**CTA**][8] shows that the *TMA*'s framework is incapable of providing Canadians with meaningful protection comparable to the European Union's gold standard.[9]

The *Air Passenger Protection Regulations* [**APPR**], promulgated to implement the *TMA*'s framework, create an undue hurdle for passengers seeking compensation and require a complex evidentiary record whose consideration consumes disproportionately large resources compared to the amounts at stake. Barriers to access to justice that the *APPR* creates have been aptly identified by the Nova Scotia Small Claims Court:

> 2. When consumer protection is the intended outcome of a regulatory regime, it should be assumed the regime will be in plain language, easy to understand and supports a simple claims process. The APPR, which was intended to accomplish enhanced passenger rights, accomplishes none of these. The language is complex and legalistic; one needs detailed or specific knowledge to invoke the claims system; and the process to seek compensation, once invoked, does not lend itself to quick resolution. This case illustrates that complexity, as lengthy pre-hearing processes involved the issuance of subpoenas to obtain detailed records from the Defendant about aircraft fleet information, maintenance records and other matters to support the Claim.
>
> 3. Few individuals would undertake such efforts to seek a few hundred dollars in compensation. Even if they wanted to, fewer could undertake such a claim. Close to 1000 pages of paper were exchanged, in a $400 claim.[10]

These design flaws of the *APPR*, which largely emanate from the *TMA*'s misguided framework, make determining whether compensation is owed to a passenger unnecessarily labour-intensive, and have also contributed to the CTA's soaring backlog of passenger complaints in spite of substantial additional temporary funds announced in the 2022 budget and reduced travel during the pandemic.[11] In addition, the CTA's systemic failure to use its existing powers to impose meaningful Administrative Monetary Penalties (fines) on airlines that disobey the *APPR* make violating passengers' rights more profitable than obeying the law.

The *status quo* is untenable. The *TMA*'s framework should be harmonized with the European Union's passenger protection regime, which has been tested and proven to work for more than 16 years.

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7 Standing Committee on Transport, Infrastructure and Communities, Evidence (Sep. 14, 2017) at 1905 (emphasis added).
8 Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1605.
9 *Regulation (EC) 261/2004*.
10 *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3 (emphasis added); aff'd: 2022 NSSC 49.
11 Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1545.

Simple Criteria for Automatic Standardized Compensation. Parliament should adopt the EU's classification for flight disruptions and reduce the number of categories from three to two: (1) ordinary disruptions; and (2) disruptions caused by extraordinary circumstances not inherent to the normal exercise of the airline's activity and beyond the airline's control, which could not have been avoided even if all reasonable measures had been taken.

Ordinary disruptions should include those caused by circumstances that were known or should have reasonably been known to the airline before the ticket was sold, all crew shortages, and all aircraft maintenance and/or safety issues except those caused by acts of sabotage or terrorism or by a manufacturing defect in an aircraft identified by the aircraft's manufacturer or a competent state authority.

In the event of an ordinary disruption, the airline should pay affected passengers a standardized compensation for their inconvenience automatically, without the passengers having to make a claim.

Clear Burden of Proof. Parliament should seal the debate on burden of proof under the *APPR* by declaring that it is the airline and not the passenger that has to prove all facts relating to the reasons for a flight's delay or cancellation, or denial of boarding. Canada's *Carriage by Air Act*, which incorporates international treaties such as the *Montreal Convention*, and the EU's *Regulation (EC) 261/2004* both place the onus on the airline to prove extenuating circumstances to relieve itself from compensating passengers. Indeed, common sense and fairness dictate that it is the airline that should be required to present evidence of this nature, which is normally within the airline's exclusive control. It should be clarified that the law is the same with respect to the *APPR*.

Common Sense Definitions. Parliament should define the terms "flight cancellation" and "denial of boarding" in a manner that comports to common sense and harmonizes with the EU's *Regulation (EC) 261/2004*. The *APPR* restricts the meaning of "denial of boarding" to situations caused by overbooking, leaving passengers denied boarding for no fault of their own but for reasons other than overbooking unprotected. Furthermore, some airlines mislead passengers by referring to flight cancellations as a "schedule change."

Right to a Refund. Parliament should enshrine in primary legislation passengers' fundamental right to a refund in the original form of payment of the unused portion of any itinerary a passenger chooses to forego due to a flight's cancellation or delay, or denial of boarding. The September 2022 amendments to the *APPR* backpedal on passengers' well-established right to a refund for flights cancelled by the airlines, which even the CTA had recognized for decades. The amendments appear to force passengers to accept alternate transportation even if doing so defeats the passengers' purpose for travel.

Enforcement by Administrative Monetary Penalties. Obeying the *APPR*, and more generally, provisions of the *Canada Transportation Act*, should be made more profitable than disobeying them. To achieve this objective, Parliament should introduce: (1) mandatory notices of violation and Administrative Monetary Penalties (fines) for violations instead of discretionary ones; (2) prescribed minimum penalties for violations; (3) higher maximum penalties; and (4) a higher, 36-month, limitation period.

Summary of Recommended Legislative Amendments

Criteria for Automatic Standardized Compensation and Right to Refund

1. Replace paragraph 86.11(1)(b) of the *Canada Transportation Act* with:

> (b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including
>
> (i) the minimum standardized monetary compensation the carrier is required to pay to each affected passenger, promptly and without the passenger having to request payment, for inconvenience for ordinary delay, cancellation or denial of boarding, as defined in this Act;
>
> (ii) the minimum standards of treatment of passengers that the carrier is required to meet, irrespective of the reasons for the delay, cancellation or denial of boarding;
>
> (iii) the carrier's obligation to provide timely information and assistance to passengers, irrespective of the reasons for the delay, cancellation or denial of boarding; and
>
> (iv) the carrier's obligation to refund in the original form of payment the cost of all unused services purchased in connection with a passenger's original ticket, irrespective of the reasons for the delay, cancellation or denial of boarding, if the passenger chooses not to travel;

2. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

> **ordinary delay, cancellation, or denial of boarding** means a flight delay, flight cancellation or denial of boarding that is not extraordinary;
>
> **extraordinary delay, cancellation, or denial of boarding** means a flight delay, flight cancellation or denial of boarding that could not have been avoided even if all reasonable measures had been taken, and is simultaneously:
>
> (1) caused in whole by extraordinary circumstances not inherent to the normal exercise of the airline's activity and beyond the airline's control; and
>
> (2) not caused, in whole or in part, directly or indirectly, by one or more of
>
> i. acts or omissions of the carrier, its agents or servants, or any third party with whom the carrier has a contractual relationship;
>
> ii. crew shortage, including but not limited to missing crew members;
>
> iii. any circumstances that were known or should have reasonably been known to the carrier before the ticket was sold to the passenger; or

iv. aircraft maintenance and/or safety issues, except those due to acts of sabotage or terrorism or a manufacturing defect in an aircraft identified by the aircraft's manufacturer or a competent state authority;

Burden of Proof

3. Add subsection 86.11(1.1) to the *Canada Transportation Act*:

> A flight delay, flight cancellation, or denial of boarding is deemed to be ordinary unless the carrier proves otherwise on a balance of probabilities.

Definitions

4. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

> **ticket** means a document entitling a passenger to transportation, or anything equivalent in paperless form, including electronic form, issued or authorized by the carrier or its authorized agent;
>
> **booking** means the fact that the passenger has a ticket or other proof that indicates that the booking has been accepted by the carrier;
>
> **denied boarding** means the refusal to carry a passenger on a flight on which the passenger previously held a booking, including the transfer of the passenger from the flight on which they previously held a booking to another flight, for reasons other than the passenger's failure to present themselves at the airport for check-in by the time prescribed in the applicable tariff, the passenger posing a health, safety, or security risk, or the passenger lacking adequate travel documents;
>
> **flight cancellation** means the failure to operate a flight that was previously planned and on which at least one passenger previously held a booking;

Enforcement

5. Replace the words "the enforcement officer may issue" with "the enforcement officer shall issue" in section 180 of the *Canada Transportation Act*.

6. Replace the words "prescribe the maximum amount payable" with "prescribe the minimum and maximum amount payable" in subsection 177(1)(b) of the *Canada Transportation Act*.

7. Increase the maximum amount payable for each violation to $50,000 in the case of an individual and $250,000 in the case of a corporation, respectively, in section 174 and subsection 177(1)(b) of the *Canada Transportation Act*.

8. Replace the words "twelve months" with "thirty-six months" in sections 176 and 181 of the *Canada Transportation Act*.

1. Criteria for Compensation

Canada's *APPR* has been rightly criticized by the courts for its complex and legalistic language, the need for specific knowledge to invoke the claims system, and a labour- and evidence-intensive process requiring detailed records from the airline about fleet information and maintenance. Claims under the *APPR* do not lend themselves to quick resolution, and require disproportionately large resources compared to the amounts at stake, thereby also posing a barrier to access to justice[12] and wasting scarce judicial resources.

There is mounting evidence of airlines abusing the *APPR*'s unnecessary complexity, vagueness, and its various loopholes to skirt their obligations to compensate passengers for travel disruptions that were foreseeable and could have been prevented had the airline exercised due diligence. Air Canada and WestJet have been arguing about travel disruptions caused by their own crew shortages, claiming that these disruptions are "outside the carrier's control" or were "for safety purposes," and therefore no standardized compensation was owed to affected passengers under the *APPR*. The incidents ultimately spawned expensive and time-consuming litigation, where the airlines square off with lay passengers in the Federal Court of Appeal about the *APPR*'s interpretation.[13] These disputes would have been unlikely under the European Union's simple and clear eligibility criteria for compensation.

In contrast, the European Union's *Regulation (EC) 261/2004* is a prominent example of a functional air passenger protection regime that does not suffer from the same shortcomings as the *APPR* does. It also highlights that the *APPR*'s unnecessarily complicated classification of travel disruptions and eligibility criteria for compensation is partly responsible for the CTA's backlog of 30,000 passenger complaints,[14] which continues to soar in spite of substantial additional temporary funds the CTA has received.[15]

This point can be further illuminated by estimating how long it would take a team of 60 analysts or decision-makers to clear up the CTA's 30,000-complaint backlog. If the eligibility criteria are so complex that it takes 8 working hours (1 working day) on average to resolve a complaint, then clearing up the backlog will take 500 working days, which is almost two calendar years.[16] If the criteria were only moderately complex, requiring 2 working hours on average to resolve a complaint, then clearing up the backlog would take 125 working days, which is approximately six calendar months. If the criteria were so simple that a complaint could be resolved in 30 minutes on average, then the entire backlog could be cleared in less than 32 working days, which is less than seven calendar weeks.

Canada should harmonize its air passenger protection regime with that of the European Union. It has been tested and proven to work for more than 16 years.

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[12] *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3; aff'd: 2022 NSSC 49.

[13] "Air Canada, WestJet launch legal battles to overturn orders to compensate passengers for cancelled flights," CBC News (Nov. 4, 2022).

[14] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1605.

[15] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1545.

[16] There are about 260 working days in a calendar year.

A. Eligibility for Standardized Compensation: European Union vs. Canada

Canada's *APPR* categorizes flight delay, cancellation, and denial of boarding into three categories that mirror subparagraphs 86.11(1)(i)-(iii) of the *Canada Transportation Act*, albeit in reverse order:

(i) due to situations outside the carrier's control (s. 10);
(ii) within the carrier's control but required for safety purposes (s. 11); and
(iii) within the carrier's control but not required for safety purposes (s. 12).

The airline must pay standardized monetary compensation to passengers only if the disruption falls in the *residual* category of "within the carrier's control but not required for safety purposes." This classification makes denial of compensation the norm—and payment of compensation the exception.

To conclude that compensation is owed, a passenger, analyst, or decision-maker must first rule out that the disruption was "due to situations outside the carrier's control," and then must rule out that it was "required for safety purposes." Doing so also requires considering potential knock-on effects of previous disruptions (*APPR*, ss. 10(2) and 11(2)). Addressing these alternatives requires voluminous evidence, such as historic weather information records, airline fleet information, and aircraft maintenance records. As the Nova Scotia Small Claims Court aptly observed:

> Few individuals would undertake such efforts to seek a few hundred dollars in compensation. Even if they wanted to, fewer could undertake such a claim. Close to 1000 pages of paper were exchanged, in a $400 claim.[17]

In contrast, *Regulation (EC) 261/2004* requires the carrier to pay standardized compensation for denial of boarding irrespective of the cause, and establishes payment of compensation as the norm in the event of flight delay and flight cancellation. Under the EU's regime, the airline can avoid paying compensation only in exceptional cases where the airline proves that the flight delay or cancellation was caused by "extraordinary circumstances,"[18] a narrow concept reserved for events such as volcanic eruptions, and which excludes situations that are inherent to the normal exercise of the airline's activity.

Notably, under the EU's regime, aircraft maintenance and/or safety issues are not considered to be "extraordinary circumstances" *unless* they are caused by acts of sabotage or terrorism or a manufacturing defect identified by the manufacturer or a competent state authority.[19] Similarly, having crew members missing was held to be part of the normal exercise of the airline's activity and outside the narrow scope of "extraordinary circumstances."[20] In short, maintenance issues and crew shortages do not relieve airlines from paying passengers standardized compensation for the resulting travel disruptions in the EU or the United Kingdom, which adopted the EU's regime as its own following Brexit.

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[17] *Geddes v. Air Canada*, 2021 NSSM 27 at para. 3; aff'd: 2022 NSSC 49.
[18] *Regulation (EC) 261/2004*, Article 5(3).
[19] *Wallentin-Hermann v. Alitalia*, European Court of Justice, Case C-549/07 at para. 26.
[20] *Lipton & Anor v. BA City Flyer Ltd*, [2021] EWCA Civ 454.

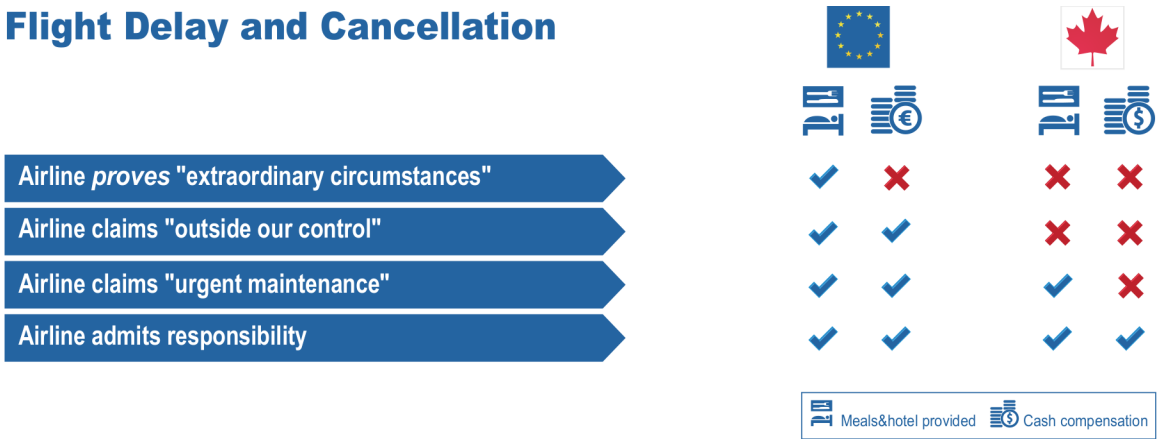

Figure 1. Flight Delay and Cancellation: European Union vs. Canada

To determine whether standardized compensation is owed to a passenger under *Regulation (EC) 261/2004*, in the vast majority of cases only limited information and minimal documentary evidence is required: the arrival time shown on the passenger's original ticket, the passenger's actual arrival time at their destination, and some publicly available information on the rare and exceptional events that could possibly fall within the narrow scope of "extraordinary circumstances."

Determinations of eligibility for compensation under the the EU's regime lend themselves to automatization. Indeed, unlike the *APPR*, *Regulation (EC) 261/2004* requires airlines to pay passengers standardized compensation for flight delay and flight cancellation without the passenger having to submit a claim in writing to the airline.

B. A Case Study

Owen Lareau was originally scheduled to travel on WestJet flights from Regina to Ottawa via Toronto in July 2021. His flight from Regina to Toronto was cancelled on the day of departure because of a crew shortage. WestJet rebooked Mr. Lareau to travel the following day. He arrived at his destination 21 hours later than originally scheduled. WestJet refused to pay Mr. Lareau standardized compensation pursuant to the *APPR* on the basis that his flight was cancelled due to crew member availability, and that this cancellation was required for safety purposes.[21]

Ultimately, the CTA ordered WestJet to pay Mr. Lareau $1,000 standardized compensation owed under the *APPR*.[22] The CTA reasoned that "disruptions within the carrier's control but required for safety purposes should be limited to events that cannot be foreseen nor prevented or, in other words, that cannot be prevented by a prudent and diligent carrier."[23] The CTA went on to hold that:

[21] *Lareau v. WestJet*, CTA Decision No. 89-C-A-2022 at paras. 1-2.
[22] *Ibid* at para. 15.
[23] *Ibid* at para. 9 (emphasis added).

> The carrier must demonstrate that it could not have reasonably prevented the disruption despite proper planning. This includes not only contingency planning, but also advance planning to ensure that the carrier has enough staff available to operate the services it offers for sale, considering that various events can affect a carrier's day-to-day operations.
>
> [...] Nonetheless, if a crew shortage is due to the actions or inactions of the carrier, the disruption will be considered within the carrier's control for the purposes of the APPR. Indeed, a disruption caused by a crew shortage should not be considered "required for safety purposes" when it is the carrier who caused the safety issue as a result of its own actions.[24]

This reasoning undoubtedly reflects a fair common sense approach to passenger protection; nevertheless, Mr. Lareau is having to pay a high price for the legislative drafting omission of failing to spell out these basic principles in the *Canada Transportation Act* and the *APPR*.

WestJet applied for leave to appeal the CTA's decision to the Federal Court of Appeal. WestJet argued that the CTA erred in holding that the airline's own crew shortage falls outside the "within the carrier's control but required for safety purposes" category under the *APPR* and in expecting the airline to present evidence about its own crew situation. The court concluded that WestJet raised a fairly arguable case, and agreed to hear WestJet's appeal.[25] So, by the end of the day, Mr. Lareau, a lay passenger, has to square off with WestJet in the Federal Court of Appeal about the *APPR*'s interpretation—over a $1,000 compensation.

C. Simplifying the Canadian Criteria and Compensation Process

Airline tickets are unique in that they are purchased days, weeks, and often months before the services' delivery date, and their price tends to increase as the travel date approaches. This means that a mere refund of an airfare paid months in advance is unlikely to cover the costs of purchasing alternate transportation or other consequences of a travel disruption that is discovered only a few days before or on the day of travel.

Requiring airlines to pay passengers standardized compensation for travel disruptions, being the only means to financially incentivize airlines to minimize loss of productivity to society caused by such disruptions, is an economically necessary mechanism to optimize the use of society's resources.

Optimal use of society's resources also includes considerations of judicial economy: how scarce and valuable judicial and quasi-judicial resources are being expended. Accordingly, the eligibility criteria and payment of standardized compensation must lend itself to quick resolution.

Determination of a passenger's entitlement to a $400 to $1,000 compensation should require only readily-available information and minimal documentary evidence, so as to permit a decision to be made within 30 minutes or less on average.

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[24] *Ibid* at paras. 11-12 (emphasis added).

[25] Order of the Federal Court of Appeal (Oct. 12, 2022) in File No. 22-A-12.

Fortunately, Canada does not need to reinvent the wheel. The European Union's *Regulation (EC) 261/2004*, rightly dubbed a gold standard of air passenger protection, already meets the bill: it is simple, straightforward, and fair to both passengers and airlines. The strengths of the EU's regime were recognized by the United Kingdom's choice to retain and adopt that regime even in the strong post-Brexit EU-adverse political climate.[26]

We recommend that Canada follow course, and adopt key elements of the EU's regime. First, the number of categories for travel disruptions should be reduced from three to two: ordinary and extraordinary, with standardized compensation payable for ordinary disruptions.

Second, the delineation between ordinary and extraordinary disruptions should incorporate the European Union's common sense approach. Ordinary disruptions should include those caused by circumstances that were known or should have reasonably been known to the airline before the ticket was sold, all crew shortages, and all aircraft maintenance and/or safety issues except those caused by acts of sabotage or terrorism or by a manufacturing defect identified by the aircraft's manufacturer or a competent state authority. Extraordinary disruptions should only be those extraordinary circumstances that are not inherent to the normal exercise of the airline's activity and beyond the airline's control, and which could not have been avoided even if all reasonable measures had been taken.

Third, in the event of an ordinary disruption, the airline should pay affected passengers a standardized compensation for their inconvenience automatically, without the passengers having to make a claim.

Incorporating these sound principles into the *Canada Transportation Act*'s legislative text would also nip in the bud expensive and time-consuming legal debates about statutory interpretation of the kind that Mr. Lareau has been caught up in with WestJet.

Recommended Legislative Amendments

1. Replace paragraph 86.11(1)(b) of the *Canada Transportation Act* with:

> (b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including
>
> (i) the minimum standardized monetary compensation the carrier is required to pay to each affected passenger, promptly and without the passenger having to request payment, for inconvenience for ordinary delay, cancellation or denial of boarding, as defined in this Act;
>
> (ii) the minimum standards of treatment of passengers that the carrier is required to meet, irrespective of the reasons for the delay, cancellation or denial of boarding;

[26] *Lipton & Anor v. BA City Flyer Ltd*, [2021] EWCA Civ 454.

(iii) the carrier's obligation to provide timely information and assistance to passengers, irrespective of the reasons for the delay, cancellation or denial of boarding; and [...]

2. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

ordinary delay, cancellation, or denial of boarding means a flight delay, flight cancellation or denial of boarding that is not extraordinary;

extraordinary delay, cancellation, or denial of boarding means a flight delay, flight cancellation or denial of boarding that could not have been avoided even if all reasonable measures had been taken, and is simultaneously:

(1) caused in whole by extraordinary circumstances not inherent to the normal exercise of the airline's activity and beyond the airline's control; and

(2) not caused, in whole or in part, directly or indirectly, by one or more of

i. acts or omissions of the carrier, its agents or servants, or any third party with whom the carrier has a contractual relationship;

ii. crew shortage, including but not limited to missing crew members;

iii. any circumstances that were known or should have reasonably been known to the carrier before the ticket was sold to the passenger; or

iv. aircraft maintenance and/or safety issues, except those due to acts of sabotage or terrorism or a manufacturing defect in an aircraft identified by the aircraft's manufacturer or a competent state authority;

2. Burden of Proof

The question of whether it is the passenger or the airline that has to prove the reasons for a flight delay, flight cancellation, or denial of boarding has been a source of confusion and a barrier to compensation for passengers. Since airlines normally have exclusive control over evidence of this nature, common sense, fairness, and international norms dictate that the burden of proof is on the airline to present such evidence. However, the *Canada Transportation Act*'s and the *APPR*'s failure to expressly address this salient point has turned the question of burden of proof into a central battleground.

Parliament should end this debate by harmonizing Canada's regime with international standards, and declaring that it is the airline and not the passenger that has to prove all facts relating to the reasons for a flight's delay or cancellation, or denial of boarding.

A. The *Carriage by Air Act*, the *Montreal Convention*, and *Regulation (EC) 261/2004*

Schedule VI to the the *Carriage by Air Act*, also known as the *Montreal Convention*, creates a presumption of liability for the airline and the obligation to compensate the passenger in the event of flight delays on most international itineraries to and from Canada. The airline can exonerate itself from liability and payment of compensation only if it establishes an affirmative defence:

> **Article 19 - Delay**
>
> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.[27]

The principle that the burden of proof to establish extenuating circumstances is on the airline and not the passenger is the law not only in Canada,[28] but in all 139 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries. Drafters of the *Montreal Convention* recognized that the carrier is in the best position to present evidence on the circumstances of a delay or cancellation and any facts that may relieve it from liability.

Regulation (EC) 261/2004 of the European Union is based on the same fundamental principle. Payment of compensation to passengers for travel disruption is the norm, while the airline has to establish exceptional circumstances to exonerate itself from the obligation to compensate passengers:

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[27] *Carriage by Air Act*, Schedule VI ("*Montreal Convention*"), Article 19 (emphasis added).
[28] *Carriage by Air Act*, s. 2(2.1).

> 3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
>
> 4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.[29]

B. Burden of Proof Under the *APPR*

The CTA's longstanding position has been that passengers bear the burden of proving facts necessary to establish that the airline failed to comply with its obligations.[30] This could mean that passengers seeking compensation under the *APPR* need to prove, on balance of probabilities, that their travel disruption was *not* caused by reasons outside the carrier's control *nor* was it necessary for safety purposes.

The Nova Scotia Small Claims Court correctly recognized the unfairness caused by this state of affairs:

> It would not be fair, especially in interpreting legislation that is designed to provide consumer protection for airline passengers, for a claimant to be required prove anything about the reasons for a cancellation.[31]

In *Lareau v. WestJet*, the CTA held that "when a carrier claims that a disruption was within its control but required for safety purposes, or outside its control, it must establish this claim."[32] While this may be indicative of a shift in the CTA's approach to disputes of such nature, the Federal Court of Appeal's decision to hear WestJet's appeal on this point of law is indicative of the difficulty created by the *Canada Transportation Act*'s and the *APPR*'s silence on burden of proof.

We recommend that Parliament seal this debate by bringing burden of proof under the *APPR* in line with the existing and internationally accepted standards for burden of proof set out in the *Carriage by Air Act*, incorporating the *Montreal Convention*, and the European Union's regime.

Recommended Legislative Amendments

3. Add subsection 86.11(1.1) to the *Canada Transportation Act*:

> A flight delay, flight cancellation, or denial of boarding is deemed to be ordinary unless the carrier proves otherwise on a balance of probabilities.

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[29] *Regulation (EC) 261/2004*, Articles 5(3) and 5(4).
[30] *Nawrots v. Sunwing*, Decision 432-C-A-2013, para. 38.
[31] *Geddes v. Air Canada*, 2021 NSSM 27 at para. 44; aff'd: 2022 NSSC 49.
[32] *Lareau v. WestJet*, CTA Decision No. 89-C-A-2022 at para. 7.

3. Definitions and Absence Thereof

Clear definitions that reflect common sense are essential to every regulatory regime. The *Canada Transportation Act* fails to define key concepts such as "flight cancellation" and "denial of boarding" at all. The *APPR* is also silent about the meaning of "flight cancellation" and represents a step backwards in defining "denial of boarding" unreasonably narrowly.

The lack of definition of "flight cancellation" enables airlines to mislead passengers about their rights by euphemistically referring to flight cancellations as a "schedule change." The unreasonably narrow definition of "denial of boarding" deprives passengers of compensation in many cases where compensation would have been owed prior to the *APPR* and continues to be owed under the European Union's regime.

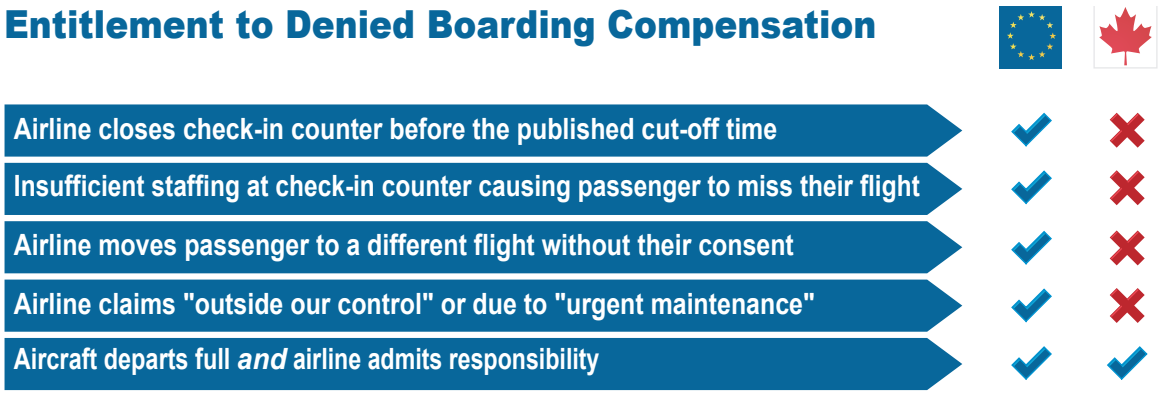

Figure 2. Denied Boarding Compensation: European Union vs. Canada

Canada should harmonize its definitions with those of the European Union, which are also more consistent with Canada's broader interpretation of denial of boarding prior to the *APPR*.

A. Denied Boarding Compensation Under *Regulation (EC) 261/2004*

In sharp contrast with the *APPR*, *Regulation (EC) 261/2004* defines "denied boarding" as an outcome, based on simple facts that are within the passenger's knowledge, irrespective of causes that are within the airline's exclusive knowledge:

> **2(j)** "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

> **3(2)** Paragraph 1 shall apply on the condition that passengers:
>
> (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,
>
> — as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,
>
> or, if no time is indicated,
>
> — not later than 45 minutes before the published departure time; or
>
> (b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.

In other words, under the EU's regime, a passenger who is refused transportation does not have to prove that the flight was overbooked, but only has to prove that they held a "confirmed reservation" and that they "presented themselves for check-in" on time or that they "have been transferred" by the airline to a different flight. Both of these are within the knowledge of a passenger and can reasonably be proven.

B. Denied Boarding Compensation Before and Under the *APPR*

In 2013, before the *Transportation Modernization Act* [***TMA***] was enacted and the *APPR* was promulgated, the CTA held that:

> [84] Where a carrier fails to check in passengers because of the absence of personnel at the counter prior to the cut-off time for check in, the Agency is of the opinion that it is reasonable that compensation be tendered:
>
> - when passengers holding confirmed and ticketed reservations can demonstrate that they presented themselves at the ticket counter prior to the cut-off time for check in; and,
> - when the ticket counter was closed.
>
> [85] For greater clarity, where such passengers present themselves for boarding before the cut-off time, only to discover that the check-in counter has been closed, the carrier cannot avoid paying denied boarding compensation, regardless of whether or not the flight is fully booked, nor can it avoid liability by closing the check-in counter early.[33]

Similarly, in 2016, also before the *TMA* and the *APPR*, the CTA coined the notion of *de facto* or constructive denied boarding, and confirmed passengers' entitlement to compensation in such situations:

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[33] *Nawrots v. Sunwing*, Decision 432-C-A-2013, paras. 84-85 (emphasis added).

> [19] The Agency agrees with the applicants that the affected passengers had previously confirmed space on a flight, and then were subsequently denied seats on that flight because of a lack of available seats on the aircraft. According to Air Transat, Flight No. TS246 departed with only one empty seat, and Flight No. TS247 departed with no empty seats. The fact that Air Transat notified the passengers in advance about having moved them to other flights does not relieve Air Transat of the obligation to pay denied boarding compensation. The fact is that there were insufficient seats to accommodate the applicants, despite the fact that they had previously confirmed seats, and that they were involuntarily moved to another flight. This is a case of *de facto* or constructive denied boarding.
>
> [20] The Agency appreciates that this situation may be unique, and not a typical case of denied boarding that normally occurs at the gate. However, effectively, the applicants were involuntarily denied boarding on their original flight because Air Transat elected, unilaterally, to give preference to other passengers who had been moved to their flight with the effect that the flight became oversold, resulting in prejudice to the applicants. Rather than wait for the applicants to arrive at the airport and deny them boarding at that time, they were instead moved, without their consent, to another flight in advance. The effect is the same. The applicants were not permitted to board their original flight because there was no longer room for them. It was oversold and they were "bumped".[34]

The *APPR* has substantially narrowed the definition of "denial of boarding" by superimposing the requirement that the flight is actually *overbooked* at the time of boarding:

> For the purpose of these Regulations, there is a denial of boarding when a passenger is not permitted to occupy a seat on board a flight because the number of seats that may be occupied on the flight is less than the number of passengers who have checked in by the required time, hold a confirmed reservation and valid travel documentation and are present at the boarding gate at the required boarding time.[35]

Under the *APPR*'s narrow definition, *de facto* or constructive denied boarding are not considered "denied boarding" because the unilateral change to the passengers' itinerary happens in advance and not at the airport, and the number of passengers present at the boarding gate is not greater than the number of seats available. This provides a loophole for airlines and offers no protection to passengers in these situations.

A Case Study

Mia and Joel Mackoff held confirmed bookings on an Air Canada flight to Vancouver. Yet, when they presented themselves for check-in, they were refused boarding, because the airline's agent mistakenly believed that they did not meet some travel requirements. As a matter of fact, they were both eligible to travel. Air Canada refused to pay the Mackoffs denied boarding compensation under the *APPR*, because overbooking was not the reason for their denial of boarding.[36]

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[34] *Janmohamed v. Air Transat*, Decision No. 95-C-A-2016, paras. 19-20 (emphasis added).
[35] *APPR*, s. 1(3) (emphasis added).
[36] *Mackoff v. Air Canada*, 2022 BCCRT 1121 at paras. 2 and 12-19.

Common sense would dictate that the Mackoffs should have been paid denied boarding compensation. Indeed, had the Mackoffs' case happened at an airport in the European Union, they would have undoubtedly been eligible for denied boarding compensation under *Regulation (EC) 261/2004*.

The British Columbia Civil Resolutions Tribunal [**CRT**], however, concluded that "denial of boarding" in the *APPR* can only be interpreted to mean denial of boarding *due to overbooking*, and agreed with Air Canada that no denied boarding compensation was owed to the Mackoffs under the *APPR*.[37]

The CRT's analysis demonstrates the significant tension between the *APPR*'s terminology and common sense, which cries for Parliament's intervention.

Recommended Legislative Amendments

4. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

> **ticket** means a document entitling a passenger to transportation, or anything equivalent in paperless form, including electronic form, issued or authorized by the carrier or its authorized agent;
>
> **booking** means the fact that the passenger has a ticket or other proof that indicates that the booking has been accepted by the carrier;
>
> **denied boarding** means the refusal to carry a passenger on a flight on which the passenger previously held a booking, including the transfer of the passenger from the flight on which they previously held a booking to another flight, for reasons other than the passenger's failure to present themselves at the airport for check-in by the time prescribed in the applicable tariff, the passenger posing a health, safety, or security risk, or the passenger lacking adequate travel documents;
>
> **flight cancellation** means the failure to operate a flight that was previously planned and on which at least one passenger previously held a booking;

[37] *Ibid* at paras. 26-29.

4. Right to a Refund

For close to twenty years, it has been settled law in Canada that passengers whose flights were cancelled by the airline for any reason are entitled to a refund of all amounts paid for unused services. This common sense principle, coined a "fundamental right,"[38] is deeply rooted in the common law and provincial and federal legislation, and has been expressly recognized in this Committee's recent report.[39]

Yet, passengers' fundamental right to a refund has not been consolidated in the *APPR*. The *APPR*'s September 2022 amendments compound the confusion by purporting to backpedal on passengers' well-established right to a refund, and appearing to force passengers to accept alternate transportation even if doing so defeats the passengers' purpose for travel. This state of affairs not only creates confusion, but is also inconsistent with the standards of not only the European Union or the United States, but also of Israel, and even Turkey.

Parliament should bring Canada in line with other jurisdictions by codifying in primary legislation passengers' fundamental right to a refund in the original form of payment of the unused portion of any itinerary a passenger chooses to forego due to a flight's cancellation or delay, or denial of boarding.

A. The State of the Law Before and After the Original *APPR*

Passengers' fundamental right to a refund had already been established well before the *APPR*. The legislative provisions giving effect to this right are found in the *Canada Transportation Act* and the *Air Transportation Regulations*. Every air carrier operating an air service within, to, and from Canada must establish a "tariff,"[40] setting out clearly the airlines' policies with respect to certain enumerated matters, including:

> refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,[41]

The tariff operates as the contract of carriage between the air carrier and passengers. The terms and conditions set out in the tariff are legally binding on the air carrier.[42] The terms and conditions are subject to the statutory requirement that they must be just and reasonable.[43]

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[38] *Lukács v. Sunwing Airlines*, CTA Decision No. 313-C-A-2013 at para. 15.
[39] Emerging from the Crisis: A Study of the Impact of the COVID-19 Pandemic on the Air Transport Sector, Report of the Standing Committee on Transport, Infrastructure and Communities (June 2021), p. 6, Recommendations 22-24.
[40] *Canada Transportation Act*, s. 67(1); *Air Transportation Regulations*, SOR/88-58, s. 110(1).
[41] *Air Transportation Regulations*, SOR/88-58, ss. 107(1)(n)(xii) and 122(c)(xii) (emphasis added).
[42] *Canada Transportation Act*, s. 67(3); *Air Transportation Regulations*, SOR/88-58, s. 110(4).
[43] *Canada Transportation Act*, s. 67.2(1); *Air Transportation Regulations*, SOR/88-58, s. 111(1).

In 2004, some 15 years before the *APPR*, the CTA already formally recognized that the aforementioned legislative provisions give rise to the right to a refund for passengers whose flights were cancelled by the airline for any reason.[44] In 2013, the CTA reaffirmed this right, and coined it a "fundamental right."[45] In a second decision from 2013, the CTA reaffirmed this right again, and held that:

> [...] it is unreasonable for [the airline] to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond [the airline's] control.[46]

In a subsequent 2014 decision, the CTA reinforced this conclusion:

> [33] The Agency finds that as they allow [the airline] to refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger's control, Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR. The Agency finds that the Rules fail 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.[47]

At the time the *APPR* was drafted, we expressed serious concerns about the *APPR*'s silence on passengers' existing fundamental right to a refund. We predicted that this omission would cause confusion and enable abuse by the airlines.[48] Regrettably, the CTA failed to follow our recommendation to consolidate this right into the *APPR*.

The omission of passengers' fundamental right to a refund from the *APPR* does not negate that right, because the *APPR* is not a complete code. The provisions of the *Canada Transportation Act* and the *Air Transportation Regulations* giving rise to passengers' fundamental right to a refund were not amended or negated by the *TMA* nor by the *APPR*, and remain in full force. In short, passengers' fundamental right to a refund has always been and remained the law, and part of the parties' contracts. Parliament should put to rest any confusion by enshrining the right to refund in primary legislation.

B. The Government's Disinformation Campaign About Passengers' Right to Refunds

At the beginning of the COVID-19 pandemic, the Government of Canada engaged in a calculated disinformation campaign to defeat passengers' fundamental right to a refund under federal and provincial legislation, and to thereby unlawfully secure financial benefits for airlines. For example, on March 18, 2020, Mr. Colin Stacey, the Director General of Air Policy at Transport Canada, wrote to Ms. Marcia Jones, the former Chief Strategy Officer at the CTA, that:

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[44] *Re: Air Transat*, CTA Decision No. 28-A-2004.
[45] *Lukács v. Sunwing*, CTA Decision No. 313-C-A-2013 at para. 15.
[46] *Lukács v. Porter*, CTA Decision No. 344-C-A-2013 at para. 88 (emphasis added).
[47] *Lukács v. Porter*, CTA Decision No. 31-C-A-2014 at para. 33 (emphasis added).
[48] Deficiencies of the Proposed Air Passenger Protection Regulations, pp. 42-44 (February 2019).

> Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.[49]

Subsequently, both Air Canada and Air Transat submitted lists of "asks" to the CTA that included the CTA stating publicly that passengers were not owed refunds for flights the airlines cancelled.[50]

On March 25, 2020, the CTA published its "Statement on Vouchers" that told the public, without any basis or authority, that airlines do not have to refund cancelled flights, but may provide an I-owe-you instead. The CTA advanced pseudolegal propositions that conflate a "refund" with "compensation for inconvenience." The CTA conceded that the "Statement on Vouchers" was not legally binding and did not alter passengers' rights to a refund only after it was directed to explain itself by the Federal Court of Appeal. Yet, the Agency continued to display an amended version of the "Statement on Vouchers" on its website.

In December 2020, the Government of Canada continued its disinformation campaign by stating that the COVID-19 pandemic highlighted a "gap" in the *APPR*,[51] and the Transport Minister directing the CTA to enact further regulations to close this purported gap.[52] These were nothing more than face-saving measures to excuse the government's failure to enforce passengers' fundamental right.

There was no gap in the laws of Canada nor in the obligations of airlines in terms of refunding passengers for flights cancelled by the airlines, irrespective of the reasons for the cancellation. These well-established obligations flow from provisions of the *Canada Transportation Act* and the *Air Transportation Regulations*, and were previously recognized by the CTA in multiple decisions.

C. The *APPR*'s September 2022 Amendments Create Even More Confusion

The *APPR*'s September 2022 amendments address flight delays and cancellations that are classified as being "outside the carrier's control." They require airlines to offer passengers the choice between a refund in the original form of payment and alternate transportation only if no alternate transportation is available within 48 hours.

The amended *APPR* offers no protection to passengers whose flight is cancelled due to reasons outside the carrier's control, but for whom travelling 6 or 12 or 24 hours later defeats the purpose of their travel. Instead, they create even more confusion. While passenger may be able to enforce their right to a refund in small claims courts, airlines will undoubtedly argue that the *APPR*'s amendments permit the airline to keep passengers' money if they are able to offer alternate transportation departing within 48 hours.

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[49] Mr. Stacey's Email dated March 18, 2020 at 2:57 PM (emphasis).
[50] Asks.docx, CTA disclosure dated July 21, 2022 in Federal Court File No. A-102-20.
[51] Consultation paper: Development of new airline refund requirements, CTA's website.
[52] *Direction Respecting Flight Cancellations for Situations Outside of a Carrier's Control*, SOR/2020-283.

i. Impact on Weekend Travel: Example

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.

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 *APPR*, as amended, offers Alex no right to a refund, because the airline offered alternate transportation that departs within 48 hours of the departure time indicated on Alex's ticket.

ii. Impact on Holiday Travel: Example

Sam studies in Vancouver. Sam's family in Montreal booked a ticket for Sam 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 their family, and would be spending a mere 12 hours in Montreal.

The *APPR*, as amended, does not provide Sam (or Sam's family) with a right to a refund, because the airline offered alternate transportation departing within 48 hours of the time indicated on Sam's ticket.

iii. Travel is Time-Sensitive

Alex and Sam are average passengers, who exemplify common time constraints present in the lives of virtually every person in a contemporary Western society. The travel of passengers attending a wedding, a funeral, a business meeting, a conference, or a court hearing is even more time-sensitive.

Canada's treatment of passengers' fundamental right to a refund is an outlier. Alex and Sam would have no difficulty obtaining a refund in the original form of payment not only in the European Union or the United States, but also in Israel or even Turkey.

D. Passengers' Fundamental Right to a Refund in Other Jurisdictions

Passengers' fundamental right to a refund for flights cancelled by airlines, irrespective of the reasons for the cancellation, is a universal commercial standard that is widely recognized outside Canada.

European Union. The key provisions of *Regulation (EC) 261/2004* on passengers' fundamental right to a refund are as follows:[53]

- *Eligibility:* Flight is cancelled or delayed by more than 5 hours (irrespective of reasons).
- *Rights:* Refund and transportation to point of departure.
- *Time Line for Refund:* Within 7 days.
- *Form of Refund:* Cash, electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

United States. The United States Department of Transportation's longstanding position has been that airlines must promptly refund tickets when the airline cancels the passenger's flight or makes a significant change in the schedule and the passenger chooses not to accept the alternative offered by the carrier:

> Since at least the time of an Industry Letter of July 15, 1996 [...] the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.[54]

On April 3, 2020, the United States Department of Transportation issued an Enforcement Notice reminding airlines of their obligation to promptly refund passengers for cancelled flights, reaffirmed the aforementioned principles,[55] and reinforced its position in a subsequently issued FAQ:

> Airlines and ticket agents are required to make refunds promptly. For airlines, prompt is defined as being within 7 business days if a passenger paid by credit card, and within 20 days if a passenger paid by cash or check.[56]

In November 2021, Air Canada agreed to pay a record US$4.5 million fine for having breached passengers' fundamental right to a refund in the United States.[57]

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[53] *Regulation (EC) 261/2004*, Articles 5(1)(a), 6(1)(iii), 8(1)(a), and 7(3).

[54] Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011) (emphasis added).

[55] Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, US DOT (April 3, 2020).

[56] Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, US DOT (May 12, 2020) (emphasis added).

[57] Air Canada agrees to $4.5-million settlement over delayed U.S. passenger refunds, Financial Post (Nov. 22, 2021); see also Joint Motion for Approval of Proposed Settlement Agreement (Nov. 22, 2021).

The United States Department of Transportation is currently conducting consultations to not only codify passengers' fundamental right to a refund of flights that are cancelled or significantly delayed by the airline, but to include situations where a flight does operate on time but a passenger decides to forego travel due to circumstances related to a serious communicable disease.[58]

Israel. In 2012, Israel passed the *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions), 5772-2012* [***ASL***],[59] whose key provisions on passengers' fundamental right to a refund are as follows:

- *Eligibility:* Flight is cancelled or delayed by more than 8 hours (irrespective of reasons).
- *Rights:* Reimbursement of consideration (including fees, levies, taxes and other obligatory payments) or replacement ticket, at the passenger's choice.
- *Time Line for Reimbursement:* Within 21 days.
- *Form of Reimbursement:* Original form of payment.

Turkey. In 2012, Turkey adopted its Regulation on Air Passenger Rights (SHY-Passenger), which mirrors the European Union's *Regulation 261/2004*.[60]

We recommend that Parliament grant Canadian passengers the same rights and protections that European, American, Israeli, and even Turkish passengers have been enjoying for years.

Recommended Legislative Amendments

1.* Add to proposed paragraph 86.11(1)(b) of the *Canada Transportation Act* set out in Recommended Legislative Amendment No. 1:

> (b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including
>
> [...]
>
> (iv) the carrier's obligation to refund in the original form of payment the cost of all unused services purchased in connection with a passenger's original ticket, irrespective of the reasons for the delay, cancellation or denial of boarding, if the passenger chooses not to travel;

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[58] Airline Ticket Refunds and Consumer Protections, 87. Fed. Reg. 51550-01, at 51576-51579 (Aug. 22, 2022).

[59] *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions), 5772-2012* in English.

[60] SHY-Passenger in English, Articles 6(1)(a), 7(1)(3), and 9(1)(a).

5. Enforcement: Efficiency and Lack Thereof

In addition to the CTA's well-documented cozy relationship with the airline industry and well-founded concerns about its impartiality, the CTA is also caught in a "graveyard spiral" with respect to enforcement.

The CTA's enforcement actions are virtually nonexistent. The few notices of violation and the attached Administrative Monetary Penalties are merely symbolic, making it more profitable for airlines to systematically disobey the *APPR* rather than obeying it. Due to the systemic violations of the *APPR*, the CTA is overwhelmed with a ballooning number of passenger complaints. Soaring passenger complaints tie up more and more of the CTA's resources, thereby further undermining any real prospect of meaningful enforcement actions, and causing unnecessary waste of taxpayer dollars.

Parliament's intervention is sorely needed to break this vicious circle.

A. Requirements of an Effective Enforcement Mechanism

Statutes and regulations must be supported by *effective* enforcement mechanisms that not only correct non-compliance, but also create sufficient disincentives for disobeying the law to keep violations down to manageable levels. For example, if the only consequence for theft were having to return the stolen goods and only when caught, theft would become rampant and the police would be hopelessly overwhelmed.

This principle applies with greater force to regulatory legislation, whose purpose is to protect broad segments of the public, such as consumers, from the potentially adverse effects of otherwise *lawful* activity.[61] While stiffer penalties are known to have little to no effect in curbing crime, they are powerful tools in enforcing regulatory legislation.

When the objective of a regulatory regime is behaviour modification of profit-oriented activities, the disincentives for disobeying the law must be significant enough to make obeying the regime more profitable than risking being caught disobeying it. If the odds and the costs of being caught are too small compared to the cost of compliance, then it is more profitable to disobey the law and treat the penalties as merely the cost of doing business.

For example, if the cost of obeying the law is $4 per transaction and the odds of being caught disobeying the law is 2% (1 out of 50 transactions), then the penalty has to exceed 50 × $4 = $200 per violation to make obeying the law the more profitable option. While a penalty in excess of $200 may appear harsh at first sight in the context of a transaction where the cost of compliance is only $4, any lesser penalty makes unlawful behaviour a net cost saver, and incentivizes all rational actors who seek to maximize profits to disobey the law.

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[61] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 (*per* Cory, J.).

B. The *Canada Transportation Act*'s Enforcement Provisions and Their Points of Failure

Contravening any provision of *Canada Transportation Act* [***Act***] and any regulation made under the *Act*, such as the *APPR*, is a summary conviction offence punishable by a fine of up to $5,000 in the case of an individual, and up to $25,000 in the case of a corporation (s. 174).

The CTA may also designate provisions of the *Act* and of regulations made under the *Act* as provisions the contravention of which may be dealt with by way of a notice of violation and an Administrative Monetary Penalty of up to $5,000 per violation in the case of an individual, and up to $25,000 per violation in the case of a corporation (s. 177). Once a provision has been designated, it is up to the discretion of a Designated Enforcement Officer of the CTA whether to issue a notice of violation and a corresponding penalty (s. 180).

Both enforcement mechanisms are discretionary, with no prescribed minimum but only maximum penalties, and proceedings must be commenced within twelve (12) months of the violation (ss. 176 and 181).

The vast majority of the *APPR*'s provisions have been designated as provisions the contravention of which may be dealt with by way of a notice of violation and an Administrative Monetary Penalty of up to $5,000 for an individual and $25,000 for a corporation, per violation.[62] Yet, no notice of violation nor Administrative Monetary Penalty has ever been issued to any airline for contravening the *APPR*'s key provisions about providing passengers with alternate transportation[63] or the payment of monetary compensation for inconvenience.[64]

The only marginally relevant notice of violation to date was issued to WestJet on September 13, 2022 for fifty-five (55) contraventions of subsection 19(4) of the *APPR* that all took place on January 18-30, 2022, for not providing prescribed compensation or an explanation as to why compensation was not payable within 30 days after receiving the passenger's request for compensation. WestJet was issued a **$200** Administrative Monetary Penalty per violation, for a total of $11,000 for the 55 violations.[65]

WestJet's notice of violation is symptomatic of the points of failure of the *Act*'s enforcement provisions. First, given that 55 contraventions were found within the 12-day period from January 18 to 30, 2022, these are likely a small fraction of WestJet's violations of just one provision of the *APPR*. Yet, because notices of violation are discretionary and proceedings must be commenced within twelve months of the violation, a large number of violations likely had no consequences for WestJet.

Second, and perhaps more importantly, the penalty of $200 is grossly inadequate for violations where the gain from disobeying the law is between $400 and $1,000 per violation, as it is in the case for failing to pay standardized compensation owed under the *APPR*.

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[62] *APPR*, s. 32.
[63] *APPR*, s. 17(1).
[64] *APPR*, ss. 19(1)-(2) and 20(1).
[65] WestJet Contravention, Canadian Transportation Agency's Website.

As noted earlier, if the odds of the airline being caught and issued a notice of violation is 2% (1 out of 50 actual contraventions), then the penalty has to exceed 50 × $400 = $20,000 per violation to make obeying the *APPR* more profitable than refusing to compensate passengers. By the same logic, if the odds of being caught are lower, say 1% (1 out of 100 actual contraventions), then the penalty has to exceed 100 × $400 = $40,000 per violation. Notably, this is more than what the *Act* currently permits. Yet, any lesser penalty makes unlawful behaviour a net cost saver, and incentivizes airlines to disobey the *APPR* and pay the few Administrative Monetary Penalties that are actually issued.

The presence of a financial incentive for airlines to disobey the *APPR* is also evidenced by, and explains in part, the CTA's backlog of 30,000 passenger complaints,[66] which continues to soar in spite of substantial additional temporary funds the CTA has received.[67]

We are of the view that Parliament's intervention is needed to correct this state of affairs. First, issuance of notices of violation and Administrative Monetary Penalties for contraventions should be mandatory and not a matter of discretion. Second, minimum penalties should be introduced so that obeying provisions of the *Act* and regulations made under the *Act* is more profitable than disobeying them. Third, the maximum penalties should be raised to match the levels for violations of the *Accessible Canada Act* (s. 177(3)).

Lastly, bearing in mind that it currently takes 18-24 months from the filing of a complaint with the CTA until it is actually reviewed, the limitation period for commencing proceedings for violations should be raised to thirty-six (36) months.

Recommended Legislative Amendments

5. Replace the words "the enforcement officer may issue" with "the enforcement officer shall issue" in section 180 of the *Canada Transportation Act*.

6. Replace the words "prescribe the maximum amount payable" with "prescribe the minimum and maximum amount payable" in subsection 177(1)(b) of the *Canada Transportation Act*.

7. Increase the maximum amount payable for each violation to $50,000 in the case of an individual and $250,000 in the case of a corporation, respectively, in section 174 and subsection 177(1)(b) of the *Canada Transportation Act*.

8. Replace the words "twelve months" with "thirty-six months" in sections 176 and 181 of the *Canada Transportation Act*.

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[66] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1605.
[67] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1545.

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.