

Halifax, NS

AirPassengerRights.ca

lukacs@AirPassengerRights.ca



# ***The Transportation Modernization Act (Bill C-49)***

**Submissions to the Standing Committee  
on Transport, Infrastructure and Communities**

***by Air Passenger Rights***

**September 2017**

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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.

- **Educate** passengers about their rights and enforcement of those rights.
- **Advocate** for the enforcement of the existing rights of passengers and for better consumer protection for travel by air within, to, and from Canada.
- **Investigate and expose** anomalies affecting travellers, including, but not limited to: non-compliance of airlines with their own terms and conditions or the law; misinformation and deception of passengers by airlines; practices that put passengers' safety at risk; and collusion between the airline industry and regulatory or administrative bodies mandated to oversee the activities of airlines.
- **Litigate** to foster: compliance of airlines with their own terms and conditions and the law; conformity of the terms and conditions of airlines with the law; transparency, reasonableness, and legality of the actions of regulatory and administrative bodies in their dealings with passengers and airlines; and reasonable and correct interpretation of legislation affecting the rights of passengers.

*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**<sup>1</sup> 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. He has also appeared before the Federal Court of Appeal, and 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 Federal Court of Appeal<sup>2</sup> and the legal profession.<sup>3</sup>

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<sup>1</sup> See Appendix A.

<sup>2</sup> *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.

<sup>3</sup> Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.

## **Executive Summary**

Bill C-49 does not offer Canadian passengers adequate protection, falls short 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 leaves establishing tangible rights to the Canadian Transportation Agency (Agency), whose enforcement record and strong ties to the airline industry raise concerns about its impartiality and integrity.

### **Failure to Address the Key Issue: Lack of Enforcement**

The key problem that has plagued Canadian passengers is lack of enforcement of their rights. The existing regime of laws, regulations, and regulatory decisions could provide substantial protection for passengers in their dealings with airlines—if only the regime were enforced by the regulator, the Agency. Alas, airlines can disregard and disobey the regime with impunity, because the Agency rarely takes enforcement action in the absence of significant media attention.

Bill C-49, as it reads now, does nothing to remedy this state of affairs. Lack of enforcement will undermine any new regime, regardless of how generous and consumer-friendly it otherwise might be.

### **Inadequate Protection for Passengers**

For the all too common event of mechanical malfunction, Bill C-49 proposes to relieve airlines from the obligation to compensate passengers for inconvenience.<sup>4</sup> In sharp contrast, under the European Union's regime, airlines must compensate passengers for inconvenience in the event that their flight is delayed or cancelled due to mechanical malfunction, or denied boarding due to downsizing of the aircraft.

In addition, Bill C-49 does a disservice to air passengers by clawing back on existing standards by doubling the acceptable tarmac delay from 90 minutes to 3 hours,<sup>5</sup> hindering advocacy groups in making preventive complaints,<sup>6</sup> and offering no protection for children travelling alone or passengers with disabilities.

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<sup>4</sup> See the distinction between subparagraphs (i) and (ii) of proposed paragraph 86.11(1)(b).

<sup>5</sup> See proposed para. 86.11(1)(f).

<sup>6</sup> See proposed s. 67.3.

## Summary of Recommendations

### Systemic Issues (PART II)

1. Attach mandatory compensation and fines to **every** breach of a passenger's rights by an airline.
2. Direct decision-makers to award passengers who are successful in their claim against an airline their full legal costs.
3. Amend s. 19 to offer special protection to unaccompanied minors, regardless of the cause of the flight delay, flight cancellation, or denial of boarding.
4. Enhance the protection of passengers with disabilities.
5. Delete proposed s. 67.3 from s. 17 of the Bill in order to maintain the ability of advocacy groups to bring preventive complaints.

### The Proposed "New Rules" (PART III)

6. Spell out in s. 86.11(1) specific rights of passengers and definitions of key terms in order to ensure clarity and consistent interpretation.
7. Delete proposed subpar. 86.11(1)(c)(ii), and amend proposed subpar. 86.11(1)(b)(i) to clarify that in the event of mechanical malfunctions, airlines are liable to compensate passengers for their inconvenience.
8. Amend proposed paragraph 86.11(1)(c) to protect passengers in the event of baggage delay, and to ensure primacy of international treaties.
9. Amend proposed paragraph 86.11(1)(f) to replace "3 hours" with the existing standard of "90 minutes" maximum tarmac delay before passengers are entitled to beverages, snacks, and the right to disembark.
10. Amend proposed s. 86.11(3) to ensure the primacy of international treaties governing the rights of passengers, and give passengers the choice between Canadian and foreign compensation regimes when both are applicable.

### Remedy Regulatory Capture (PART IV)

11. Transfer regulation-making powers from the Agency to the Minister, and transfer other responsibilities relating to air passenger rights to a separate consumer protection body.

## PART I. The Current State of Affairs

The existing regime of laws, regulations, and regulatory decisions could provide substantial protection for Canadian passengers in their dealings with airlines—if the regime were enforced by the regulator, the Canadian Transportation Agency (Agency). Alas, airlines can disregard and disobey the regime with impunity, because the Agency rarely takes enforcement action in the absence of significant media attention.

### A. The *Montreal Convention* (Schedule VI of the *Carriage by Air Act*)

The *Montreal Convention* is an international treaty governing the rights of passengers travelling on international itineraries. The *Carriage by Air Act*<sup>7</sup> 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.

The *Montreal Convention* imposes absolute liability on airlines for injury or death of passengers, and strict liability for damage, delay, loss, or destruction of checked baggage and for delay of passengers.<sup>8</sup> “Strict liability” means that the airline is presumed to be liable, and the burden of proof is on the airline to establish extraordinary circumstances that may relieve it from liability. The *Montreal Convention* sets out the following liability limits:<sup>9</sup>

- Damage, delay, loss, or destruction of checked baggage: 1,131 SDR ≈ **CAD\$1,957.**
- Delay of passenger: 4,694 SDR ≈ **CAD\$8,122.**
- Injury or death of passenger: 113,100 SDR<sup>10</sup> ≈ **CAD\$195,700.**

Liability under the *Montreal Convention* cannot be contracted out. Article 26 of the *Montreal Convention* renders any contractual provision null and void that tends to set a lower limit of liability.

### B. The Tariff System

Airlines operating flights to, from, or within Canada are required to create and publish a “Tariff” setting out the terms and conditions of carriage.<sup>11</sup> The Tariff must address an enumerated list of core areas, including: compensation for denied boarding; delays and cancellations; passenger re-routing; liability limits; exclusions of liability; procedures for making claims; refunds; acceptance of children; and carriage of persons with disabilities.<sup>12</sup>

<sup>7</sup> *Carriage by Air Act*, R.S.C., 1985, c. C-26.

<sup>8</sup> *Montreal Convention*, Articles 17 and 19.

<sup>9</sup> *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.

<sup>10</sup> [Special Drawing Rights \(SDR\)](#) is an international reserve asset, created by the IMF in 1969.

<sup>11</sup> *Canada Transportation Act*, S.C. 1996, c. 10 (“Act”), s. 67 and *Air Transportation Regulations*, SOR/88-58 (“ATR”), ss. 110, 116, and 116.1.

<sup>12</sup> The ATR, ss. 107 and 122.

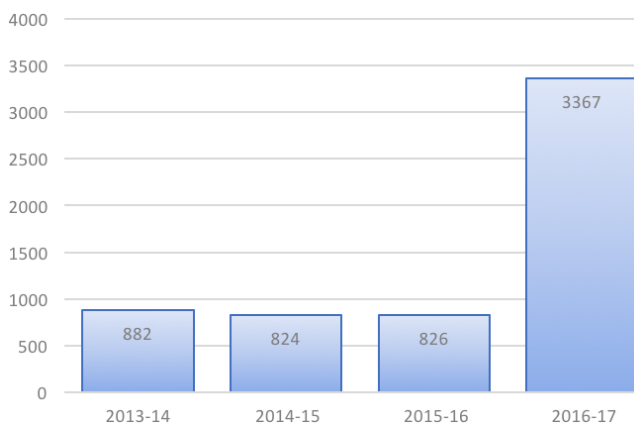
The Tariff is not simply a contract of carriage between the carrier and its passengers. Airlines are required, by explicit legislative language, to apply the terms and conditions set out in the Tariff.<sup>13</sup> Failure of an airline to apply the terms and conditions set out in the Tariff is:

- punishable by a fine (Administrative Monetary Penalty) of up to CAD\$10,000;<sup>14</sup> and
- an offence punishable on summary conviction.<sup>15</sup>

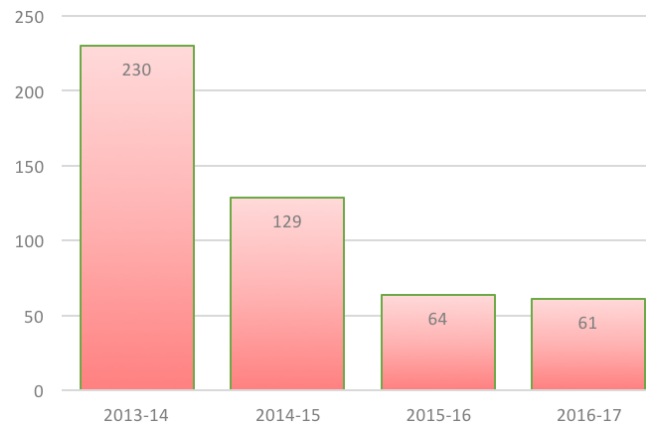
In practice, airlines that disobey their Tariff face no consequences. At best, the Agency orders the airline to comply with the Tariff, but we could find no record of any fine being issued to an airline on the basis of failure to comply with the terms and conditions set out in its Tariff.

### C. The Problem: 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**.<sup>16</sup>



**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. This issue is addressed in detail in PART IV, starting on page 13.

<sup>13</sup> The *Act*, s. 67(3) and *ATR*, s. 110(4).

<sup>14</sup> The *Act*, s. 180 and *Canadian Transportation Agency Designated Provisions Regulations*, SOR/99-244, Schedule, item 82.

<sup>15</sup> The *Act*, s. 174.

<sup>16</sup> *Agency's Statistics 2016-17*, Canadian Transportation Agency's website.

## **PART II. Shortcomings of the Proposed Legislation**

### **A. Lack of Enforcement Mechanism and Consequences for Breaking the Rules**

The most significant shortcoming of the existing regime is the lack of enforcement of the rights of passengers and the lack of financial consequences for airlines that break the rules (*Montreal Convention*, Tariff, or Agency decisions). The airlines' current behaviour is the result of a sound cost-benefit analysis: compliance increases costs, while non-compliance carries no penalty. The worst consequence of non-compliance is being ordered to comply.

Access to justice is also a major concern in the context of the rights of travellers. Passengers seeking to enforce their rights against airlines face a no-win dilemma: if they proceed without a lawyer, they may be easily outgunned by the airline's legal department,<sup>17</sup> and if they retain counsel, the legal fees incurred would likely well exceed the amount of compensation that can be recovered. Consequently, for most passengers, the rights conferred by the regime remain dead letter.

These fundamental systemic issues have jeopardized the current regime and will undermine any new regime regardless of how generous and consumer-friendly it may be. In *APR*'s view, the benevolent objectives of Bill C-49 cannot be achieved without remedying these concerns, which the Bill fails to address.

### **B. No Protection of Children Travelling Alone and Passengers with Disabilities**

Bill C-49 fails to protect the most vulnerable passengers: children travelling alone and persons with disabilities. There is a growing number of reports about unaccompanied minors being abandoned by airlines, without adequate food or shelter, in the event of a flight delay, cancellation, or involuntary denied boarding.<sup>18,19,20</sup> *APR* is of the view that such incidents call for a zero-tolerance policy.

Prior to 2013, the Agency issued a number of decisions that promoted the rights of passengers with disabilities: the "One Person One Fare" decision,<sup>21</sup> prohibiting charging passengers who need more than one seat due to their disability a higher fare on domestic flights; rulings concerning service animals;<sup>22</sup> and rulings relating to the protection of passengers with allergies.<sup>23</sup> Since 2013, this positive trend seems to have been reversed.<sup>24</sup> In *APR*'s view, this lack of consistency underscores the need for modern legislation protecting the rights of passengers with disabilities.

<sup>17</sup> Navigating the Agency's 90-page long [Annotated Dispute Adjudication Rules](#) is in and on its own a significant challenge.

<sup>18</sup> [Air Canada policy change urged after minor left alone to sleep on airport floor overnight](#), CBC News (July 27, 2016).

<sup>19</sup> ['I was crying': 10-year-old bumped from Air Canada flight describes ordeal](#), The Guardian (April 18, 2017).

<sup>20</sup> [Air Canada Put 14-Year-Old In Hotel Room With Strangers, Mother Says](#), Huffington Post (September 6, 2017).

<sup>21</sup> [Decision No. 6-AT-A-2008](#).

<sup>22</sup> For example, [Decision No. 521-AT-A-1999](#) and [Decision No. 221-AT-A-2004](#).

<sup>23</sup> For example, [Decision No. 245-AT-A-2010](#), [Decision No. 228-AT-A-2011](#), and [Decision No. 227-AT-A-2012](#).

<sup>24</sup> For example, the Agency refused to consider extending the "One Person One Fare" decision to international itineraries; see [Decision No. 324-AT-A-2015](#).



### C. Barring of Preventive Complaints

For the past two decades, preventive complaints, seeking to prevent future harm to the travelling public before anyone incurs damages, have played an important role in protecting travellers from unreasonable terms and conditions that were unilaterally imposed by the airlines. In such complaints, the complainant has not been adversely affected by the practice complained of: their baggage was not damaged or lost nor were they denied boarding. Instead, the focus of a preventive complaint is the reasonableness of the terms and conditions set out in the airline's Tariff. Decisions arising from such preventive complaints include:

- *Lukács v. WestJet*, Decision No. 483-C-A-2010, ordering WestJet to raise its liability cap for checked baggage on domestic flights from \$250 to \$1,800; and
- *Lukács v. Air Canada*, Decision No. 342-C-A-2013, ordering Air Canada to raise its denied boarding compensation amounts from \$100 to up to \$800 in cash.

Preventive complaints have resulted in substantial improvement of the rights of travellers.<sup>25</sup> The significance of preventive complaints, filed *before* the complainant would be adversely affected, has been recognized by the 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.<sup>26</sup> [Emphasis added.]

APR is profoundly concerned about Bill C-49 proposing to shut the door on preventive complaints by imposing a new requirement that the complainant be “adversely affected.”<sup>27</sup> This proposal is a radical departure from the *status quo*, which allows “any person” to make a preventive complaint about unreasonable terms and conditions of airlines,<sup>28</sup> and it undermines the purpose of regulatory oversight.

APR considers this proposed measure as incompatible with the purpose of regulatory law. The purpose of regulatory law is to prevent 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 harmed and “adversely affected” by an airline practice defeats the objective of regulatory law and harms the public.

<sup>25</sup> See the Appendix A.

<sup>26</sup> *Kyrgier v. WestJet et al.*, Decision No. LET-C-A-104-2013, at p. 5.

<sup>27</sup> Proposed s. 67.3.

<sup>28</sup> The Act, s. 67.2.

## D. Recommendations

In order to address the fundamental systemic barriers relating to enforcement and access to justice for passengers, *APR* makes the following recommendations for amending Bill C-49:

1. Introduce a system of mandatory compensation for passengers whose prescribed rights have been violated, which establishes a simple-to-apply and easy-to-understand policy of assigning a specific dollar value to each and every violation of the regime.<sup>29</sup>
2. Replace the current system of discretionary fines with a system of mandatory ones by amending s. 177 of the *Act* to prescribe minimum fines and replacing “may” with “shall” in s. 180 of the *Act*.
3. Direct decision-makers to award passengers who are successful in their claim against an airline their full legal costs.<sup>30</sup>

In order to protect children travelling alone and passengers with disabilities, *APR* makes the following recommendations for amending Bill C-49:

4. Amend s. 19 of the Bill by appending to paragraph 86.11(b) subparagraph 86.11(1)(b)(v) that reads as follows: “the minimum standards of treatment of unaccompanied minors, regardless of the cause of the flight delay, flight cancellation, or denial of boarding, and the compensation payable to such passengers in the event of failure to comply with the minimum standards.”
5. Replace both occurrences of “may” with “shall” in s. 172 of the *Act*.
6. Codify the “One Person One Fare” principle as a rule applicable to all travel by air to, from, and within Canada.
7. Codify the rights of passengers with disabilities who rely on a service animal to travel with their service animal on board.
8. Codify the rights of passengers with allergies for accommodation.

With respect to systemic complaints seeking to prevent future damage, *APR* makes the following recommendations for amending Bill C-49:

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

<sup>29</sup> For example, passengers stranded on the tarmac for over 90 minutes should be compensated at the rate of \$250 per hour.

<sup>30</sup> A similar language exists, for example, in the *Expropriation Act*, R.S.C. 1985, c. E-21, s. 39(2).

## PART III. Critique and Recommendations on the Proposed “New Rules”

In *APR*'s view, Bill C-49 raises important questions relating to the rights of passengers, but provides inadequate answers. Canada has been lagging behind other developed countries that have adopted some form of an air passenger bill of rights, and modernization of the Canadian regime governing travel by air has been long overdue. Bill C-49, however, does not bring Canada on a par with other developed countries, and in some areas may even be a step backwards.

Of particular concern are airlines being relieved from the obligation to compensate passengers for inconvenience in the event of a flight delay, cancellation, or denial of boarding caused by mechanical malfunctions,<sup>31</sup> and possible inconsistency of Bill C-49 with Canada's obligations under international treaties, such as the *Montreal Convention* and its predecessors.<sup>32</sup>

### A. Lack of Specifics and Definitions

Bill C-49 confers no specific rights on passengers. It does not set out any amount of compensation payable to passengers nor does it fix a penalty for airlines that break the rules. Instead, the Bill leaves establishing regulations that might confer tangible rights upon passengers to the Agency, whose strong ties to the airline industry raise concerns about its impartiality and integrity.<sup>33</sup> *APR* recommends amending the Bill to set out specific rights, including compensation amounts, and leaving only the periodic update of the compensation amounts to regulations.

The Bill uses terms without defining their meaning, which defeats the objective of creating clarity and transparency. For example, the Bill refers to “flight delay” and “flight cancellation” without defining their meanings. Airlines have consistently taken the position that schedules do not form part of the contract of carriage, are not guaranteed, and are subject to change. Thus, from an airline perspective, a flight is not delayed or cancelled, but rather is simply affected by a “schedule change.” Similarly, airlines have been found to masquerade denial of boarding as a missed connection, a no-show,<sup>34</sup> or to misinform passengers that their itinerary had changed instead of admitting that the flight was overbooked.<sup>35</sup> *APR* recommends amending the Bill to include clear definitions.

Proposed s. 86.11(3) is both ambiguous and unfavourable to passengers. First, the phrase “different passenger rights regime” is ambiguous, as it could be construed to include an airline's own goodwill policy or compensation owed to passengers under the *Montreal Convention*. Second, it appears to allow the airline and not the passenger to choose under which air passenger rights regime the passenger is compensated.

<sup>31</sup> Bill C-49, s. 19; proposed s. 86.11(1)(b)(ii).

<sup>32</sup> Incorporated into the *Carriage by Air Act*, R.S.C., 1985, c. C-26.

<sup>33</sup> See PART IV.

<sup>34</sup> *Paine v. Air Canada*, 2017 NSSM 7.

<sup>35</sup> *Janmohamed v. Air Transat*, Decision No. 95-C-A-2016.

*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.

## **B. Delay, Cancellation, and Denied Boarding (proposed paragraph 86.11(1)(b))**

Bill C-49 falls short of the rights provided by the European Union’s air passenger rights regime with respect to flight delay, cancellation, and denied boarding.<sup>36</sup> In sharp contrast with the European regime, the Bill proposes to relieve airlines from the obligation to compensate passengers for their inconvenience caused by events that are “within the carrier’s control, but is required for safety purposes, including in situations of mechanical malfunctions.”<sup>37</sup>

Under the European Union’s regime, airlines must compensate passengers for their inconvenience even if the delay, cancellation, or denied boarding was caused by mechanical failure;<sup>38</sup> only “extraordinary circumstances” such as volcanic ash or other natural phenomena can relieve an airline from liability.<sup>39</sup>

In *APR*’s view, the distinction created by proposed paragraph 86.11(1)(b)(ii) 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.

## **C. Baggage (proposed paragraph 86.11(1)(c))**

Proposed paragraph 86.11(1)(c), purporting to confer regulation-making powers on the Agency with respect to “minimum compensation for lost or damaged baggage that the carrier is required to pay,” is flawed in a number of ways.

First, compensation of passengers travelling on international itineraries for damage, delay, and loss of their checked baggage is governed by the *Montreal Convention*, which has the force of law in Canada.<sup>40</sup> The “minimum compensation” set out by the *Montreal Convention* is full restitution.<sup>41</sup> [Article 29](#) of the *Montreal Convention* precludes Canada from enacting baggage liability rules that would apply to flights that are governed by the *Montreal Convention*.

<sup>36</sup> [Regulation \(EC\) 261/2004](#).

<sup>37</sup> Bill C-49, s. 19: proposed subparagraph 86.11(1)(b)(ii).

<sup>38</sup> [Wallentin-Hermann v. Alitalia](#), European Court of Justice, Case C-549/07 and [van der Lans v. KLM](#), European Court of Justice, Case C-257/14.

<sup>39</sup> The European Union’s approach is also consistent with the “all reasonable measures” standard established by [Article 19](#) of the *Montreal Convention*.

<sup>40</sup> *Carriage by Air Act*, R.S.C., 1985, c. C-26, s. 2(2.1).

<sup>41</sup> *Montreal Convention*, [Articles 17](#) and [19](#).

Second, 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.

Third, proposed paragraph 86.11(1)(c) does not establish nor mandate establishing uniform liability caps for baggage applicable to all domestic flights. For comparison, the uniform liability cap for domestic flights in the United States is US\$3,500.<sup>42</sup>

*APR* recommends amending proposed paragraph 86.11(1)(c) to include “delay” of baggage, incorporate the principle of full restitution, and exclude itineraries that are subject to international treaties.

#### **D. Seating of Children (proposed paragraph 86.11(1)(d))**

Bill C-49 proposes to codify the Agency’s existing ruling requiring airlines to seat children next to an accompanying adult without further payment.<sup>43</sup> Due to the substantial auxiliary revenue that seat selection fees bring, airlines are unlikely to comply and implement this rule in practice unless non-compliance comes with significant financial consequences.<sup>44</sup> *APR* recommends amending proposed paragraph 86.11(1)(d) by imposing consequences on airlines that fail to comply.

#### **E. Tarmac Delays: A Step Backwards (proposed paragraph 86.11(1)(f))**

Major Canadian airlines’ Tariffs include a provision requiring the airline to provide passengers with beverages, snacks, and the option to disembark after **90 minutes** of tarmac delay.<sup>45</sup> While extending these rules to all airlines is most welcome, *APR* is deeply concerned about the proposed **doubling** of the delay for triggering these rights **from 90 minutes to 3 hours**. *APR* recommends keeping the current standard of 90 minutes, and imposing consequences on airlines that break the rules.

#### **F. Recommendations**

*APR* recommends the following amendments to s. 19 of Bill C-49:

10. Amend proposed s. 86.11(1) by spelling out specific rights, including compensation amounts, while leaving only the periodic update of the compensation amounts to regulations.

<sup>42</sup> 14 CFR 254.4.

<sup>43</sup> *Krygier v. WestJet et al.*, Decision No. 459-C-A-2014.

<sup>44</sup> See, for example, [Air Canada backs down on \\$40 fee to seat child with parent](#), CBC News (April 29, 2016).

<sup>45</sup> For example, Air Canada’s International Tariff [Rule 80\(C\)\(5\)\(c\) on page 86](#) and Air Transat’s International Tariff [Rule 5.2\(d\) on page 10](#).

11. Amend proposed s. 86.11(1) by defining the terms: “flight delay”; “flight cancellation”; “denial of boarding”; “within the carrier’s control”; and “ outside the carrier’s control.”
12. 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.
13. Insert s. 86.11(3.1) to read:
 

Compensation payable under regulations made under subsection (1) is payable in addition to any compensation owed under international treaties set out in the *Carriage by Air Act*.
14. Delete proposed subpar. 86.11(1)(c)(ii), and amend proposed subpar. 86.11(1)(b)(i) 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,
15. 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*;
16. Amend proposed paragraph 86.11(1)(d) to read:
 

respecting the carrier’s obligation to facilitate the assignment of seats to children under the age of 14 years in close proximity to a parent, guardian or tutor at no additional cost and to make the carrier’s terms and conditions and practices in this respect readily available to passengers, and the compensation payable to passengers in the event of failure to comply with said obligations;
17. Amend proposed paragraph 86.11(1)(f) 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 the compensation payable to passengers in the event of failure to comply with said obligations; and

## **PART IV. Canadian Transportation Agency: Regulator Captured by the Industry**

### **A. Turning Away Passengers without Adjudication or Due Process**

**Discouraging Complainants:** In 2013, Ms. Anna Bartell filed a complaint with the Agency against Air Canada. In May 2014, Ms. Bartell 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.<sup>46</sup>

**Misleading Complainants to Believe Their Complaint was Dismissed:** 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:

[...] 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.<sup>47</sup>

The cases of Ms. Bartell and Mr. Cooke are not unique. 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.<sup>48</sup> Common features of these cases are that:

- the complaint file was closed by a case officer reviewing the complaint,<sup>49</sup> 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 right<sup>50</sup> to ask for formal adjudication of their complaints or were discouraged from exercising that right by Agency staff.

These unfortunate practices are consistent with the drastic decline in the number of enforcement actions taken by the Agency, shown on page 5 above.

<sup>46</sup> Supreme Court of Canada File No. 37276: Motion Record (June 29, 2017), [Tab 6B, p. 45](#).

<sup>47</sup> Supreme Court of Canada File No. 37276: Motion Record (June 29, 2017), [Tab 6F, p. 69](#).

<sup>48</sup> Supreme Court of Canada File No. 37276: Motion Record (June 29, 2017), [Tab 6, pp. 33-37](#).

<sup>49</sup> Under [s. 85.1\(1\)](#) of the *Act*.

<sup>50</sup> Under [s. 85.1\(3\)](#) of the *Act*.

## B. “Two Sets of Books” Method

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.<sup>51</sup> 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.<sup>52</sup>

**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.<sup>53</sup>

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.<sup>54</sup>

**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 board are seated, free of charge, next to an accompanying adult.<sup>55</sup>

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,<sup>56</sup> 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

<sup>51</sup> See the *Act*, s. 67.2(1) and *ATR*, ss. 111 and 113.

<sup>52</sup> See, for example: [When is a passenger reimbursement policy not a policy? Ask Air Canada](#), CBC News (February 11, 2016).

<sup>53</sup> *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.

<sup>54</sup> 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).

<sup>55</sup> *Krygier v. WestJet et al.*, Decision No. 459-C-A-2014.

<sup>56</sup> [Air Canada backs down on \\$40 fee to seat child with parent](#), CBC News (April 29, 2016).



different set of rules about compensating passengers who are delayed for their out-of-pocket expenses (meals, ground transportation, and accommodation),<sup>57</sup> which purports to limit Air Canada's liability to a fraction of the CAD\$8,122 set out in the *Montreal Convention*.

The Agency found nothing untoward about Air Canada using the “two sets of books” method, and dismissed a complaint about this practice.<sup>58</sup>

### C. Criticism from the Federal Court of Appeal

The conduct of the Canadian Transportation Agency has also attracted the criticism of judges of the Federal Court of Appeal. In a judicial review concerning public access to complaints against airlines, Ryer, J.A., writing for a unanimous court, held:

[...] Dr. Lukács was entitled to receive the documents that he requested and the Agency's refusal to provide them to him was impermissible.<sup>59</sup>

More recently, de Montigny, J.A., writing for a unanimous court, 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.<sup>60</sup>

### D. Lack of Impartiality and Integrity

It is *APR*'s view that as of 2013, the Agency 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.

**Private Consultation with IATA About Regulations to be Developed:** The International Air Transport Association (“IATA”) is an international trade association of the airline industry, representing the interests of the airlines. 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.<sup>61</sup>

<sup>57</sup> *Air Canada – Expense Policy* (January 11, 2016).

<sup>58</sup> *Johnson et al. v. Air Canada*, Decision No. 286-C-A-2016.

<sup>59</sup> *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, para. 80.

<sup>60</sup> *Lukács v. Canada (Transportation Agency)*, 2016 FCA 220, para. 19.

<sup>61</sup> Supreme Court of Canada File no. 37276: Motion Record (June 19, 2017), *Tab 1*, p. 13, para. 25.

**Vice-Chair is a Former Airline Lobbyist:** 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).<sup>62</sup>

**Manager of Enforcement is on First-Name Basis with Industry Executives:** 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.<sup>63</sup>

**Chief Dispute Resolution Officer remains Suspended for Professional Misconduct:** Mr. Douglas W. Smith, the Chief Dispute Resolution Officer of the Agency, is a suspended lawyer.<sup>64</sup> The Law Society of Upper Canada found that Mr. 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. 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 impartiality and integrity.

## **E. Recommendations**

In light of the mounting concerns relating to the independence, impartiality, and integrity of the Agency, *APR* makes the following general recommendations for amending the proposed legislation:

18. Amend s. 19 (proposed s. 86.11) to confer the new regulation-making powers on the Minister exclusively, without any involvement of the Agency.
19. Transfer all regulation-making powers relating to air travel under the *Canada Transportation Act* from the Agency to the Minister.
20. Transfer all responsibilities relating to air passenger rights, other than regulation-making powers, from the Agency to a separate enforcement body whose sole mandate is consumer protection.

<sup>62</sup> [Members](#), Canadian Transportation Agency’s website.

<sup>63</sup> Federal Court of Appeal File. No A-167-14: Transcript of the Cross Examination of Ms. Simona Sasova, p. 109, Q. 423.

<sup>64</sup> Supreme Court of Canada File No. 37276: Motion Record (June 29, 2017), [Tab 6J](#), p. 86.

## 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.