Losing Ground: Erosion of Canada's Air Passenger Protection Regime

Submissions to the House of Commons Standing Committee on Finance

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Table of Contents

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 has a track record of successfully predicting shortcomings and loopholes in legislation relating to air passenger rights.

- In 2017, APR appeared before the House of Commons Standing Committee on Transport, Infrastructure and Communities [**TRAN**] and submitted a brief, cautioning that the *Transportation Modernization Act* (Bill C-49) was inadequate.
- In 2018, APR appeared before the Standing Senate Committee on Transport and Communications and submitted a brief, cautioning again that the *Transportation Modernization Act* was inadequate.
- In 2019, APR published a 52-page report entitled "Deficiencies of the Proposed Air Passenger Protection Regulations" about how airlines would exploit the *APPR*'s shortcomings and loopholes.
- In 2020, APR appeared before the TRAN and in 2021 submitted a brief entitled "Withheld Passenger Refunds: A Failure by Design" on the refunding of flights cancelled by airlines.
- In November 2022, APR appeared before the TRAN and in December 2022, mere days before the 2022 holiday season air travel meltdown, APR submitted a 29-page brief entitled "From the Ground Up: Revamping Canada's Air Passenger Protection Regime" setting out detailed recommendations for legislative amendments.
- In 2023, following the 2022 holiday season air travel meltdown, APR appeared before the TRAN again as part of the study of the *Air Passenger Protection Regulations*.

APR's key predictions about the shortcomings and loopholes created by the *Transportation Modernization Act* and the *Air Passenger Protection Regulations* have been validated in the four years that have passed since the regulations came into force.

APR's success in predicting shortcomings and loopholes in consumer protection legislation in the air travel sector is grounded in three factors:

- **Experience based.** APR's predictions and 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 111,000 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 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,[1] the academic community,[2] and the judiciary.[3] Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,[4] 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."[5]

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

2 Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018.

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

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

5 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."[6]

By 2023, that prediction has proven to be an underestimate. The soaring backlog of 45,000 passenger complaints at the Canadian Transportation Agency [**CTA**][7] shows that the *TMA*'s framework is incapable of providing Canadians with meaningful protection comparable to the European Union's gold standard.[8]

Today, it is clear to everyone that the *status quo* is untenable, and even the government acknowledges that Canada's air passenger protection regime needs to be substantially strengthened. The question is how.

In March 2023, MP Taylor Bachrach tabled the *Strengthening Air Passenger Protection Act* (Bill C-327), a private member's bill to harmonize Canada's air passenger protection regime with the European Union's gold standard. Bill C-327 has been endorsed by Canada's leading consumer protection organizations.

Instead of adopting the *Strengthening Air Passenger Protection Act* (Bill C-327) as a government bill and listening to thousands of Canadians who signed a House of Commons petition, the government has put forward legislative amendments in the *Budget Implementation Act* [***BIA***] that have the opposite effect.

Encroachment on Fundamental Rights. The *BIA* proposes to create a secretive, Star Chamber-like process for binding adjudication of consumer disputes between passengers and airlines, deeming all information used in the process confidential, and excluding public and media access (clause 459, s. 85.09). The proposed amendment infringes upon Canadians' freedom of expression and the open court principle guaranteed by s. 2(b) of the *Charter*. In addition, binding orders would be issued on the basis of mere "information" rather than evidence (clause 459, s. 85.06(1)), thereby violating the right to a fair hearing in accordance with the principles of fundamental justice, protected by s. 2(e) of the *Canadian Bill of Rights*.

No Statutory Right of Appeal. The *BIA* unwittingly removes the existing statutory right of appeal from binding orders in consumer disputes between passengers and airlines (clause 459, s. 86.06(2)).

Bypassing the System of Checks and Balances: Henry VIII Clause. The *BIA* proposes to add a "Henry VIII clause" that allows the Agency to change the law in the guise of legally binding guidelines (clause 459, s. 85.12) while bypassing the system of checks and balances set out in the *Statutory Instruments Act*. The Agency will be able to make and modify overnight guidelines affecting Canadian passengers' rights overnight, **without** examination by the Clerk of the Privy Council and the Deputy Minister of Justice, **without** publication in the *Canada Gazette*, and **without** scrutiny by Parliament's committees.

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6 Standing Committee on Transport, Infrastructure and Communities, Evidence (Sep. 14, 2017) at 1905 (emphasis added).
7 "Customer satisfaction with Air Canada and WestJet falls below average, survey finds," Canadian Press (May 10, 2023).
8 *Regulation (EC) 261/2004*.

Perpetuation of Existing and Creation of New Loopholes. The "required for safety purposes" excuse for airlines to avoid paying passengers compensation is a made-in-Canada loophole that has unnecessarily and disproportionately complicated adjudication of disputes between passengers and airlines. The *BIA* retains this loophole (clause 459, ss. 85.07(2), 85.08, and 85.14(1)(iii)) and creates a new loophole that allows airlines that sign a so-called "compliance agreement" to avoid paying penalties for violating passengers' rights (clauses 467-470).

Summary of Recommended Legislative Amendments

Protection of Fundamental Rights

1. In clause 459 of Bill C-47, delete proposed ss. 85.09 and 85.14, and delete clause 462 of the Bill.

2. In clause 459 of Bill C-47, amend proposed s. 85.06(1) by replacing the word "information" with "evidence."

Retaining the Statutory Right of Appeal

3. In clause 459 of Bill C-47, amend proposed s. 85.06(2) to read:

> An order referred to in subsection (1) is an order of the Agency.

Maintaining the System of Checks and Balances

4. In clause 459 of Bill C-47, delete proposed s. 85.12, and in proposed s. 85.1 remove reference to s. 85.12. Alternatively, amend proposed s. 85.12(4) by replacing "does not apply" with "applies."

Closing Loopholes Without Creating New Ones

5. Amend clauses 465(1)-(3) of Bill C-47 to read as clauses 4(1)-(3) of Bill C-327.

6. In clause 459 of Bill C-47, amend proposed s. 85.07(2) to read as proposed s. 85.2 in clause 3 of Bill C-327:

> For greater certainty, the burden is on the carrier to establish, on a balance of probabilities, the cause of a flight delay, flight cancellation or denial of boarding.

As a consequential amendment, delete clause 460 in Bill C-47.

7. Delete clauses 467-470 in Bill C-47.

1. Encroachment on Fundamental Rights

Clause 459 introduces a new process for adjudication of disputes between passengers and airlines that encroaches on two fundamental rights of Canadians: freedom of expression and the right to a fair hearing.

A. Freedom of Expression and the Open Court Principle

The century-old open court principle provides that legal proceedings are presumptively open to the public. Citizens and the media have the right to access court proceedings and the same evidence that the court relied on. The open court principle is a hallmark of a democratic society, which permits the public to discuss and put forward opinions and criticisms of legal practices and proceedings. The open court principle is inextricably tied to freedom of expression and the press guaranteed by section 2(b) of the *Charter*.[9]

Curtailment of public access to legal proceedings can only be justified where there is the need to protect social values of superordinate importance, such as if disclosure would subvert the ends of justice or unduly impair its proper administration, or to protect a vulnerable party from revictimization.[10] Generic privacy concerns, which do not rise to the level of posing a threat to a person's dignity or physical safety, are insufficient to displace the presumption of openness in legal proceedings.[11]

The open court principle was held to apply to tribunals engaged in adjudication of disputes between parties in an adversarial setting in the context of immigration, labour relations, automobile injuries, whistleblower protection, and human rights.[12] Ontario's *Freedom of Information and Protection of Privacy Act* was found to infringe on s. 2(b) of the *Charter* and declared to have no force or effect to the extent it prevented public disclosure of adjudicative records of tribunals that adjudicate disputes in an adversarial setting.[13]

Currently, the Agency is required to follow the open court principle. Documents filed in the Agency in the course of adjudication of consumer disputes between passengers and airlines, such as submissions and evidence, are placed on the public record, unless the Agency makes a confidentiality order on the basis of the same strict legal test used by the courts. In 2015, the Federal Court of Appeal held that it was "impermissible" for the Agency to refuse to provide such documents to members of the public in the absence of a confidentiality order, on the mere basis of generic privacy concerns.[14]

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[9] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 at paras. 21-23; and *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 31-34.

[10] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras. 4-5; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at paras. 14 and 27; *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 30.

[11] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 85.

[12] *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 FC 329; *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110; *Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106 at para. 104; *El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT) at paras. 59-60; *Woodgate v. RCMP*, 2022 CHRT 27 at para. 12.

[13] *Toronto Star v. AG Ontario*, 2018 ONSC 2586.

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

Proposed section 85.09 in clause 459 of Bill C-47 creates a presumption of secrecy and covertness for the new process of adjudication of consumer disputes between passengers and airlines, contrary to s. 2(b) of the *Charter*. If s. 85.09(1) becomes law, all information provided by passengers and the airlines for adjudication would be confidential unless the party providing the information agrees otherwise.

The practical effect of s. 85.09 is a Star Chamber-like process, where the public and the media have no access to the evidence used by the decision maker to determine whether the airline owes compensation to the passenger, and even the reasons for the decision will remain secret. Instead, only bald bottom-line conclusions will be published pursuant to proposed s. 85.14. This, in turn, would shield from public scrutiny both the Agency's conduct in adjudicating disputes and the airlines' treatment of passengers.

Proposed s. 85.09 offends s. 2(b) of the *Charter*. While parties are at liberty to participate in mediation in private, binding adjudication of their disputes by a tribunal remains subject to the open court principle.

We urge lawmakers to not permit a provision that raises such constitutional concerns to become law.

B. Right to Fair Hearing in Accordance with the Principles of Fundamental Justice

Currently, disputes between passengers and airlines are adjudicated on the basis of evidence: documents and signed statements whose authenticity and veracity are capable of being tested. Passengers can also seek an order to compel airlines to answer questions and produce documents necessary for the adjudication.[15]

Proposed subsection 85.06(1) in clause 459 of Bill C-47 would permit binding decisions to be made in consumer disputes between passengers and airlines on the basis of mere "information" (i.e., an airline's say-so) instead of evidence. This will further lower the evidentiary threshold for airlines to avoid paying passengers compensation, and will violate passengers' right to a fair hearing in accordance with the principles of fundamental justice, guaranteed by s. 2(e) of the *Canadian Bill of Rights*.

We recommend retaining the requirement that binding decisions are made on the basis of evidence.

Recommended Legislative Amendments

1. In clause 459 of Bill C-47, delete proposed ss. 85.09 and 85.14, and delete clause 462 of the Bill.

2. In clause 459 of Bill C-47, amend proposed s. 85.06(1) by replacing the word "information" with "evidence."

[15] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, s. 24.

2. Removal of the Statutory Right of Appeal

A statutory right of appeal is an error-correction mechanism to ensure that passenger protection laws are applied fairly and consistently by administrative decision makers. In addition, it signals to the courts that decisions made under the statutory scheme must not only be *reasonable*, but also *correct* at law.[16]

Section 41 of the *Canada Transportation Act* provides a statutory right of appeal from any decision or order of the Agency to the Federal Court of Appeal [**FCA**] on questions of law and jurisdiction, subject to the requirement of being granted leave to appeal by the FCA, which operates as a screening mechanism.

Currently, the adjudication of disputes between passengers and airlines by the Agency are concluded with decisions and orders of the Agency, which are therefore subject to the aforementioned statutory right of appeal under s. 41 of the *Canada Transportation Act*.

Proposed subsection 85.06(2) in clause 459 of Bill C-47 provides that an order made under the newly minted adjudication process "**is not** an order or decision of the Agency" (emphasis added). The practical effect of proposed s. 85.06(2) is that it removes the statutory right of appeal from binding decisions and orders in consumer disputes between passengers and airlines.

If proposed s. 85.06(2) becomes law, passengers and airlines dissatisfied with an order may bring a judicial review application in the Federal Court, without the requirement of having to obtain leave first. The grounds of review will not be confined to questions of law and jurisdiction. The Federal Court will have to review the decision maker's findings of fact and law on the *reasonableness* standard instead of *correctness*.

Proposed s. 85.06(2) is therefore expected to result not only in an inconsistent application of passenger protection laws, but it may also open the floodgate for judicial review applications in the Federal Court. Given the imbalance of resources between airlines and passengers, this is likely to favour airlines that can afford the costs and risk of challenging unfavourable decisions in this way.

We recommend retaining the existing statutory right of appeal for decisions and orders in disputes between passengers and airlines by deeming an order under proposed s. 85.06(1) to be an order of the Agency. Doing so would also be consistent with and obviate proposed s. 85.07(3).

Recommended Legislative Amendments

3. In clause 459 of Bill C-47, amend proposed s. 85.06(2) to read:

> An order referred to in subsection (1) is an order of the Agency.

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[16] *Canada (MCI) v. Vavilov*, 2019 SCC 65 at para. 37.

3. Bypassing the System of Checks and Balances: Henry VIII Clause

The rule of law requires that all legislation be enacted in the manner and form prescribed by law. Proposed section 85.12 is a Henry VIII clause-like provision that allows the executive branch to bypass the proper legislative process in amending passenger protection laws.

When Parliament delegates legislative power to the executive branch, the exercise of those powers is subject to the system of checks and balances set out in the *Statutory Instruments Act* [***SIA***]: proposed regulations must be examined by the Clerk of the Privy Council and the Deputy Minister of Justice (s. 3); regulations must be published in the *Canada Gazette*, (s. 11); and regulations stand permanently referred to any Committee of the House of Commons, of the Senate, or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments (s. 19), which may make a report to revoke said regulations (s. 19.1).

Proposed section 85.12 allows the Agency to make and modify legally binding "guidelines" that *de facto* amend passenger protection laws overnight, and bypasses the system of checks and balances set out in the *SIA*. Pursuant to s. 85.12(1)(b), the guidelines would set out "the extent to which and the manner in which [...] any provision of the regulations applies with regard to complaints." Proposed s. 85.12(4) provides that the *SIA* **does not** apply to these "guidelines."

The practical effect of proposed s. 85.12 is that the Agency could change the law on whether airlines owe passengers compensation or refunds in certain circumstances **without** examination by the Clerk of the Privy Council and the Deputy Minister of Justice, **without** publication in the *Canada Gazette*, and **without** scrutiny by Parliament's committees.

While Henry VIII clauses are constitutionally objectionable,[17] they may not be unconstitutional in Canada, and the debate about the constitutional limits on delegation of power remains unsettled. Justice Côté's powerful and comprehensive dissent in *References re Greenhouse Gas Pollution Pricing Act* provides ample arguments in support of the proposition that legislature should avoid enacting Henry VIII clauses.[18]

We recommend retaining the existing regulation-making powers of the Agency that are subject to the *SIA*, and not conferring new Henry VIII clause-like guideline-making powers for amending substantive rights in a manner that bypasses the system of checks and balances set out in the *SIA*.

Recommended Legislative Amendments

4. In clause 459 of Bill C-47, delete proposed s. 85.12, and in proposed s. 85.1 remove reference to s. 85.12. Alternatively, amend proposed s. 85.12(4) by replacing "does not apply" with "applies."

[17] Dr. Paul Daly, University of Cambridge and Queens' College, Cambridge – Written evidence.
[18] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras. 241-293.

4. Perpetuation of Existing and Creation of New Loopholes

"Required for Safety Purposes." The *Transportation Modernization Act* created a middle category of flight disruptions "within the carrier's control, but is required for safety purposes, including in situations of mechanical malfunctions." If a flight disruption falls within this category, the airline does not have to pay passengers lump sum compensation under the existing Canadian scheme.[19]

This made-in-Canada loophole has contributed to the undue hurdle of passengers seeking compensation. Deciding whether a disruption falls within this middle category requires a complex evidentiary record whose consideration consumes disproportionately large resources compared to the amounts at stake.[20] It has also given rise to specious claims that flight cancellations due to the airline's own crew shortage falls within the category of "required for safety purpose" because it is illegal to fly with insufficient crew.[21]

The emerging consensus is that Canada should close this loophole by harmonizing its regime with the European Union's gold standard embodied by *Regulation (EC) 261/2004*. The EU's regime establishes compensating passengers for flight disruptions as the norm, and allows airlines to avoid paying compensation only in narrowly construed *extraordinary circumstances*. The EU's regime is simple, straightforward, and fair to both passengers and airlines. The strengths of the EU's regime were recognized by the UK's choice to retain and adopt that regime even in the strong post-Brexit EU-averse political climate.[22]

In March 2023, MP Taylor Bachrach tabled the *Strengthening Air Passenger Protection Act* (Bill C-327), a private member's bill to harmonize Canada's air passenger protection regime with the European Union's gold standard. Bill C-327 has been endorsed by Canada's leading consumer protection organizations.

Unfortunately, contrary to the government's public promises to close the "required for safety purposes" loophole, Bill C-47 does not do so, and references the term "required for safety purposes" four times (in proposed ss. 85.07(2), 85.08, and 85.14(1)(iii)). Clauses 465(1)-(2) of Bill C-47, which will come into force later (clause 474(2)), relocate the exceptions to the obligation to compensate passengers from the primary legislation (*Canada Transportation Act*) to the regulations (*Air Passenger Protection Regulations*). Bill C-47 contains no provision to preclude the Agency from retaining the loophole's substance.

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.

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[19] *Canada Transportation Act*, s. 86.11(1)(b)(ii).
[20] *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3 (emphasis added); aff'd: 2022 NSSC 49.
[21] *Lareau v. WestJet*, CTA Decision No. 89-C-A-2022; and *Crawford v. Air Canada*, CTA Decision No. 107-C-A-2022.
[22] *Lipton & Anor v. BA City Flyer Ltd*, [2021] EWCA Civ 454.

Common sense dictates that the burden of proof to establish the cause of a flight disruption should always be on the carrier, regardless of the forum where the dispute is being adjudicated. Such a reverse onus already exists not only in the European Union's passenger protection scheme, but also in the laws of Canada. The *Montreal Convention* is an international treaty governing airline liability for flight delays on most international itineraries to and from Canada. The *Montreal Convention* is implemented as Schedule VI to the federal *Carriage by Air Act*. Article 19 of the *Montreal Convention* also imposes the burden of proof with respect to the circumstances of flight delays on the airline rather than the passenger.

While proposed subsection 85.07(2) in clause 459 aims to do the same, its scope is confined to the new process for adjudication of consumer disputes between passengers and airlines, and fails to address the burden of proof in claims advanced under the *APPR* in small claims courts, provincial superior courts, or the Federal Courts. This shortcoming will likely result in the waste of valuable judicial resources, because it may seriously hinder the use of class proceedings against airlines that systematically violate the *APPR*.

A New Loophole for Avoiding Administrative Monetary Penalties. Currently, ss. 177-181 of the *Canada Transportation Act* confer discretionary power on the Agency's designated enforcement officers to issue notices of violations and impose Administrative Monetary Penalties of up to $25,000 per violation on airlines that violate certain regulatory provisions, including the *APPR*.

Clauses 467-470 of Bill C-47 create a new loophole whereby an airline can avoid paying Administrative Monetary Penalties for violating the *APPR* if they sign a so-called "compliance agreement."

Compliance agreements may be a useful tool to foster cooperation and compliance in areas that require case-by-case consideration of a small number of complex cases, such as accommodation of disabilities; however, they are inappropriate and inefficient in matters involving a high volume of straightforward cases, where the reason for non-compliance is not lack of training or inexperience of the regulated entity, but rather a calculated economic decision (i.e., it is more profitable to break the law than to comply).

Recommended Legislative Amendments

5. Amend clauses 465(1)-(3) of Bill C-47 to read as clauses 4(1)-(3) of Bill C-327.

6. In clause 459 of Bill C-47, amend proposed s. 85.07(2) to read as proposed s. 85.2 in clause 3 of Bill C-327:

> For greater certainty, the burden is on the carrier to establish, on a balance of probabilities, the cause of a flight delay, flight cancellation or denial of boarding.

   As a consequential amendment, delete clause 460 in Bill C-47.

7. Delete clauses 467-470 in Bill C-47.