



Air Passenger Protection Regulations

Shortcomings and Improvements

Brief Submitted to the Standing Committee on

Transport, Infrastructure and Communities

**Option consommateurs
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About us

Created in 1983, Option consommateurs is a non-profit association whose mission is to help consumers and defend their rights. We focus on issues related to personal finance, commercial practices, financial services, privacy, energy, debt and access to justice.

Every year, Option consommateurs provides direct assistance to the residents of Montreal's central boroughs and to all Quebec consumers. Through personal finance sessions, information and awareness activities and the Prêt du quartier micro-credit program, we provide tangible support to the most vulnerable consumers. Option consommateurs also offers a legal information service that addresses Quebec consumers' questions about their rights and recourse options.

Option consommateurs gives numerous media interviews, sits on a number of working groups and boards of directors, carries out large-scale projects with key partners and produces research reports, briefs and practical guides.

An Option consommateurs representative appeared before the Standing Committee on Transport, Infrastructure and Communities at its meeting of November 21, 2022. In this brief, Option consommateurs presents its observations and recommendations in greater detail.

Introduction

During the pandemic, Option consommateurs received a record number of calls and emails from consumers not only in Quebec, but also from other parts of Canada, regarding travel-related issues. More specifically, these consumers were requesting information about obtaining refunds for cancelled flights. Despite the implementation of air carrier refund programs, some consumers still have not been reimbursed.

To prevent a similar situation from reoccurring, the *Air Passenger Protection Regulations* were amended to clarify the right of passengers to be reimbursed, even if the flight cancellation or disruption is beyond the air carrier's control. While these amendments are a positive step, they are unfortunately not enough. The chaos at Canadian airports this summer that made Canada an international laughingstock proved two things:

1. Customer satisfaction is not a priority for air carriers; and
2. Current regulations do not adequately protect passengers.

Likewise, the large number of complaints the Canadian Transportation Agency received—which, in our opinion, are only the tip of the iceberg—shows that the current regulations are difficult to enforce.

Flight delays and cancellations

For flight delays and cancellations, the air carrier's liability varies depending on the degree of control it has over the situation. For example, if a situation is attributable to the carrier, passengers may be entitled to compensation, but not when the situation is beyond the carrier's control. Similarly,

passengers do not have the same rights when a disruption is attributable to the air carrier, but required for safety purposes. This puts the carrier in a position where it has an interest in ensuring that the delay or cancellation is not attributable to it or is related to a safety issue.

Yet, to know what treatment they are entitled to, passengers depend entirely on the information provided by the carrier. Option consommateurs has received many requests for information on this subject. Some consumers reported receiving different information to explain a delay for the same flight over the course of their communications with the carrier. Others said they received very brief explanations indicating only that a delay was beyond the carrier's control.

It is important to keep in mind that “the carrier has the responsibility to provide evidence to support its categorization of a disruption.”¹ In 2020, a report by the Canadian Transportation Agency's inquiry officer noted that “issues were found with respect to the provision of information to passengers, either during or after the flight disruption, for many of the flights that are subject to the complaints that form part of the inquiry.”² It might be worthwhile to provide an update on the situation two years later.

Lastly, other consumers explained that they were not compensated because the air carrier argued that the delay was due to a labour shortage beyond its control. On this point, the Canadian Transportation Agency stated that “the threshold for establishing that a crew shortage is not within the carrier's control is high, given that air carriers generally have control over staffing issues, such as hiring, dispatching and training.”³

We would also like the Standing Committee on Transport to address the concept of “required for safety purposes.” Although the *Air Passenger Protection Regulations* (APPR) provide a short definition of this concept—namely, “required by law in order to reduce risk to passenger safety and includes required by safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a *safety management system*”—it is nevertheless ambiguous in practice.⁴

While it appears to us, on the face of it, that the Canadian Transportation Agency's intention for section 11 of the APPR was to put the safety of passengers first, and thereby alleviate carriers' fear of having to take on an additional economic burden for decisions that protect people's safety, in practice, this section poses a problem.

In many cases, consumers have no way of knowing the actual cause of the disruption because the carrier refers only to the safety requirement, without describing the problem. Indeed, section 13 of the APPR states that carriers are required to provide the reason for the delay, which is limited to “required for safety purposes.” It seems obvious to us that a problem arises where the lack of details and explanations

¹ Decision No. 107-C-A-2022, Canadian Transportation Agency, August 25, 2022, <https://otc-cta.gc.ca/eng/ruling/107-c-a-2022>, para. 8.

² Tom Oommen, Inquiry Officer, *Inquiry Officer's Report into complaints that airlines did not respect communications obligations under the Air Passenger Protection Regulations*, Canadian Transportation Agency, September 30, 2020, Case No. 20-01590, <https://otc-cta.gc.ca/eng/inquiry-officers-report-complaints-airlines-did-not-respect-communications-obligations-under-air>, accessed December 7, 2022.

³ Decision No. 107-C-A-2022, Canadian Transportation Agency, August 25, 2022, <https://otc-cta.gc.ca/eng/ruling/107-c-a-2022>, para. 14.

⁴ *Air Passenger Protection Regulations*, SOR/2019-150, ss. 1(1).

provided to passengers when safety reasons are involved is combined with the lack of additional compensation in these circumstances.

Even when more details about the cause of the disruption are provided, passengers still struggle to judge whether or not the cause raises safety issues. Ultimately, almost any issue can, in the eyes of a non-expert, have an effect on safety.

The definition of “required for safety purposes” includes decisions deemed as such by the pilot of the aircraft.⁵ We believe that this discretion left to the pilot is also very broad. Here again, it can be very difficult for the passenger to get accurate information about the reason for the disruption.

In short, passengers may have trouble verifying the information they receive even though the onus is on them to demonstrate that the APPR has not been properly applied when filing a complaint with the Canadian Transportation Agency.

Moreover, the European rules do not distinguish whether or not the disruption is caused by a safety issue. If a flight is cancelled, air carriers must compensate passengers unless they can demonstrate that the cancellation is “caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”⁶ A similar rule, if adopted in Canada, could ease the burden currently placed on passengers.

Excessive delays for rerouted flights

Where a flight is delayed or cancelled for reasons beyond the carrier’s control, the carrier’s primary obligation is to offer an alternative flight or routing. Passengers can request a refund only when they cannot be rerouted within 48 hours.

Option consommateurs believes a 48-hour period is too long in some cases. A trip may become pointless by then. For example, a passenger may have booked a flight to get to the departure port for a cruise. The 48-hour delay could cause the passenger to miss the departure. The regulations should therefore give passengers the option of a refund if the delay defeats the purpose of their trip.

For example, the European regulation establishing common rules for compensating and assisting passengers in the event of denied boarding, flight cancellations or lengthy flight delays enables passengers to obtain refunds for their tickets, subject to certain conditions, “for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan.”⁷

⁵ *Air Passenger Protection Regulations*, SOR/2019-150, ss. 1(1).

⁶ *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*, Article 5, para. 3.

⁷ *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*, Article 8, para. 1.(a).

This regulation also provides for refunds after a delay of five hours.⁸ Imagine a situation where a passenger needs to travel quickly—to visit a sick relative, for example—and wants to find an alternative route before the 48 hours currently provided by the APPR. In addition, foreign passengers may want to make arrangements to return to their point of origin more quickly because of the inconvenience of a 48-hour delay (expenses related to alternative accommodations and meals, missed work days, etc.).

Overbooking: A practice that should be reconsidered

Overbooking is a highly questionable practice that, in our opinion, breaches the basic principles of contract law. An airplane ticket reservation is a contract by which the air carrier undertakes to transport the passenger according to agreed conditions. The passenger has a right to expect that the air carrier will honour that commitment; they should not have to worry about losing the overbooking lottery.

Since carriers know exactly how many seats are available on an aircraft, overbooking is simply a practice that allows carriers to offer better conditions to more affluent passengers and ensure additional profits. The result is that passengers are denied a service for which they have already paid. The carrier has sold them a service knowing that it may not be offered, solely because of its desire to maximize profits. Passengers' rights should not take a back seat to optimizing revenue. This practice should simply be prohibited.

Alternatively, passengers who are denied boarding because of overbooking should be compensated at a higher level than is currently provided for, to discourage carriers from engaging in this practice.

Currently, compensation for denial of boarding attributable to the carrier ranges from \$900 to \$2,400, depending on the length of the delay.⁹ Denial of boarding is defined in the APPR as “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.”¹⁰ Option consommateurs believes that this compensation should also explicitly apply to passengers who have agreed to delay their departure after the overbooking has been announced and the carrier has sought volunteers.

Powers of the Canadian Transportation Agency: Some that should be expanded

In its *Annual Report 2021–2022*, the Canadian Transportation Agency proposed that the APPR be amended to grant it the power to intervene on the reasonableness of domestic tariffs on its own

⁸ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, Article 6, para. 1, second subparagraph, (iii) and 8, para. 1.(a).

⁹ *Air Passenger Protection Regulations*, SOR/2019-150, ss. 20(1).

¹⁰ *Air Passenger Protection Regulations*, SOR/2019-150, ss. 1(3).

motion. It currently has that power only for international tariffs. It further proposed to be allowed to proactively launch inquiries into large-scale flight disruptions.¹¹ We support these proposals.

Delayed baggage

A recent Federal Court of Appeal decision found that subsection 23(2) of the APPR on “temporary loss” of baggage exceeded the powers of the Canadian Transportation Agency under section 86.11 of the *Canada Transportation Act*.¹² This section enables making regulations for lost or damaged baggage, but not for delayed baggage.¹³ Subsection 23(2) of the APPR will therefore need to be reviewed in the near future.

However, the *Montreal Convention*, which is incorporated into the *Carriage by Air Act*, states that “[t]he carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.”¹⁴ As a result, it would be possible to extend the powers provided by section 86.11 of the *Canada Transportation Act* to allow the Canadian Transportation Agency to make regulations respecting delayed baggage, reflecting the *Montreal Convention* duties in this regard.

Passengers have contacted Option consommateurs about delayed baggage. In some cases where baggage could not be traced for several weeks, these passengers reported difficulty in obtaining compensation.

The *Montreal Convention* sets out the time limits for filing a complaint about this issue. According to the convention, the passenger’s complaint “must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.”¹⁵ In our opinion, this time frame should therefore begin once the baggage is received, even if it has been in transit for more than 21 days.

At the very least, the 21-day period for filing a claim should begin following the 21 days after which the baggage is considered lost under subsection 23(1) of the APPR. If not, passengers are left in a situation where they have to file a claim as soon as a delay occurs, without knowing whether the baggage will ultimately be lost or found—which may affect the substance of the claim—in order to protect their rights.

Therefore, we propose that the APPR be amended to clearly state the time limits for claims regarding lost and delayed baggage.

¹¹ Canadian Transportation Agency, *Annual Report 2021–2022*, https://otc-cta.gc.ca/sites/default/files/documents/canadian_transportation_agency_-_annual_report_2021-2022.pdf, accessed December 15, 2022, pp. 34–35.

¹² *International Air Transport Association et al. v. Canadian Transportation Agency and the Attorney General of Canada*, 2022 FCA 211, para. 155.

¹³ *Canada Transportation Act*, S.C. 1996, c. 10, para. 86.11(1)(c).

¹⁴ *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309, Article 19.

¹⁵ *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309, Article 31(2).

Conclusion

Even though the *Air Passenger Protection Regulations* are now in force, passengers are still having trouble obtaining the compensation they are entitled to, particularly in the event of flight disruptions or when their baggage does not arrive at their destination on time. The burden of obtaining justice is too heavy when air carriers control the information that passengers receive. As a result, the Regulations should be amended to re-establish a balance between the interests of passengers and air carriers.