



THE AVIATION LAW REPORT

Presented by
A.P. STROM & Associates

June 2023

WHEN ARE EXPANDED AIR PASSENGER RIGHTS PERHAPS THE WRONG APPROACH?

Rebecca Jaremko Bromwich

A significantly bolstered regime for air passenger rights in Canada may sound like a good idea, but it’s perhaps not such a great suggestion when Canadians want to fly anywhere.

Tabled in Canada’s federal Budget Implementation Act in March 2023, Canada’s government is touting a new legislative proposal; Bill C-47 includes a mechanism to make its air passenger rights regime “the toughest in the world”. Among other things, this new legislative proposal will produce a tenfold increase to the fines against airlines for passenger rights breaches.

An expanded regime of rights for air passengers, at first blush, sounds like a great idea. However, there are several reasons why it may be problematic to accord airline passengers stronger rights and remedies against airlines:

Costs: Air travel within Canada is already massively expensive. In fact, domestic flights within Canada constitute some of the most expensive air travel in the world. A bolstered passenger rights regime presents increased costs to airlines: If airlines are required to provide passengers with an ever-expanding range of rights, such as compensation for delays or cancellations, it will significantly increase the cost of doing business, thus imposing operational and cost burdens that may be insurmountable. This imposition is likely to result in even higher ticket prices for consumers or loss of choice in the marketplace if airlines are unable to absorb the costs.

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Disruptions to airline schedules: Post-Covid, Canadian airlines have made “meaningful reductions” to flight schedules. Bill C-47 increases the capacity for passengers’ rights to demand compensation or other remedies for flight delays or cancellations. While these rights sound beneficial to passengers, they can also lead to disruptions in airline schedules. The new passenger protection scheme incentivizes airlines to cancel flights proactively rather than risk the possibility of having to provide compensation to passengers.

Increased legal disputes: A wider range of rights against airlines and bigger sums in compensation are a combination likely to lead to an increase in legal

disputes. Interestingly, while it might seem like lawyers would gain from increased litigation of passenger rights disputes, the Canadian Bar Association, comprised of 37,000 of Canadian lawyers, opposed the introduction of Canada’s initial air passenger rights legislation in 2009. Litigation can be expensive and time-consuming for passengers and airlines, which taxes an already stressed legal system.

In sum, while protecting air passengers' rights is a laudable goal, Bill C-47’s expansion of passenger rights may have negative consequences for airlines and, ultimately, for Canadian consumers. It's important to strike a balance between protecting passenger rights and ensuring that airlines can operate in a sustainable and efficient manner, especially if Canadians ever want to fly anywhere.



A NOTE ABOUT PROCESS

Adam P. Strömbergsson-DeNora

Air Passenger Rights and Professor Paul Daly noted up concerns with bill C-47 that undermine the fairness of administrative proceedings at the Canadian Transportation Agency. These concerns are presented below. The thrust of these concerns is that CTA proceedings will become inaccessible to the public and that the CTA will have the ability to make regulations through guidelines to decision-making officials known as Dispute Resolution Officers. In both cases, the worry is that the Canadian Transportation Agency's powers are increasing to the detriment of passengers' and the industry's ability to publicly engage with protection standards. These concerns are important, and Doctors Lukacs and Daly do a fine job addressing them in their parliamentary briefs. They pale, however, in comparison to the

manner in which these updates to air passenger protections were enacted.

Omnibus legislation has been used to pass controversial measures, typically as part of a budget implementation bill. In so doing, however, the government (the inevitable sponsor for legislation that implements a budget) gives Parliament short shrift. The Standing Senate Committee on National Finance made its preoccupation clear in its report on the bill:

The Committee expresses its concern about the continued use of Omnibus Bills. Bill C-47 is 430 pages long and includes many sections that are unrelated to the fiscal policy of the Government, such as the amendments to the Criminal Code and the Canada Elections Act. They should have been introduced as separate Bills. This practice is unacceptable.



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The Committee is also concerned that insufficient time was provided to the Senate to thoroughly study the Bill, and to determine its impact.

Part of Parliament's review of legislation involves soliciting and reviewing stakeholder opinions. In the instant case, as with many omnibus bills, Parliament has not been given the ability to properly review the changes to the air passenger protections scheme. The significant errors pointed up in the amendments suggest that special interest groups may challenge these amendments through the courts.

Regulatory changes that affect the aviation industry are often slow affairs that begin with international consultations. Air passenger protections are, however, idiosyncratic in that they only apply to carriers operating within Canada at some point along a passenger's route. They must nevertheless be reviewed for international implications, not least of which is the potential impact that enhanced protections may have on small-to-medium or budding carriers.

Saddling the industry and Parliament with amendments buried in an omnibus bill that must pass in order for the government to retain the confidence of the House of Commons is not good governance. It is efficient government, which uses legislation as a blunt instrument.

The resulting amendments have, in this case, resulted in only a few dissatisfied voices submitting their concerns to Parliament. More, however, may come as the industry wakes to the Canadian Transportation Agency's increased regulatory powers.

More to the point: there will come a time when the aviation industry may have to politely yet publicly break from an increasingly efficient government. Legislative and regulatory measures take time because they garner public and internal input. Hence Dr. Lukac's concern with Bill C-47 allowing the CTA to interpret law for the benefit of its dispute

resolution officers. These interpretations come awfully close to regulations themselves. An overly definite interpretation may cross the line, but Parliament quickly passed an amendment that exempts the CTA's interpretations from the regulatory implementation process.

Similar moves have been made in other parts of the aviation industry. NAV Canada's ADS-B mandate, for example, is sponsored by the Minister of Transport but rammed through using incorporation by reference. Incorporation by reference circumvents the regulatory implementation process. Parliament placed limits on the practice: reference documents can only define concepts and technical matters that are incidental to the existing rules. The ADS-B mandate, however, overhauls the regulatory definition of a transponder to include new equipment without changing the regulations.

This point may seem trifling to most, especially commercial operators for whom ADS systems are already mandatory. A government's failure to abide by its own processes signals increasingly large regulatory hurdles being cleared in comparatively less time. This pace of change will start costing money--money (again) that small-to-medium-sized operators may ill-afford. The government will need to set efficiency aside in order to maintain a thriving aviation industry in the world's second largest country by landmass.

CASE LAW

April 19, 2023--*R v Sailer*--2023 ABCJ 90

MASKING REQUIREMENT--On July 20, 2021, Mr. Sailer was pax. who refused to comply with cabin crew's directive to wear a mask. A man in the seat behind Sailer had a seizure mid-flight, which increased Sailer's anxiety. Sailer suffered from diagnosed anxiety and asthma. Sailer grew short of breath, so removed his mask. Sailer was charged with failing to comply with cabin crew's instructions. Dr. Tyler Duncan Poth Brooks, director of Civil Aviation Medicine, gave expert testimony for the Crown.





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The Crown proved the offence, but the Court accepted Sailer's defence of due diligence. He removed the mask because he felt that he was and indeed was in some danger.

June 1, 2023--*Roy v Gander Flight Training*-- 2023 CanLII 52009 (NL HRC)

JURISDICTION--Does a provincial human rights statute apply to the relationship between a flight school and a student pilot?--Flight school brought motion to dismiss for want of jurisdiction--motion granted--provincial tribunal did not have jurisdiction to adjudicate a dispute regarding flight training--flight training “at the core of the federal competency in aeronautics”--two-part test to determine jurisdiction: (1) are the parties subject to federal regulation of the activity underlying the human rights complaint? ; (2) is the federal regulation impaired by the application of provincial regulation?--flight training is regulated by the Canadian Aviation Regulations and the regulations exist to ensure public safety--provincial regulation exists with respect to the educational aspects of a flight training school--the federal regulations ensure public safety--flight training protects the public--the federal regulator must play a part in a human rights decision that affects its core competence over aeronautics.

June 12, 2023--*Lowey v. Air Canada*-- 2023 BCCRT 490

MOTION TO STAY--Pax. brought small claim to BC Civil Resolution Tribunal for \$2,855.00--pax. self-represented--carrier brought motion to indefinitely stay proceedings because class action claims were

filed in BC and QC--classes not yet certified--ongoing Federal Court of Appeal proceeding (docket no. A-267-22) may also have bearing on the Tribunal's decision--Tribunal rejected motion--the carrier's reasons for requesting an indefinite stay were speculative--BC class actions were opt-out; pax. had effectively opted out by filing a small claim--Federal Court of Appeal deliberations and decision were not on the substance of dispute, but on motion for leave--carrier did not provide compelling reason for stay.

CTA DECISIONS

June 5, 2023 -- Sylvie Papineau against Société Tunisienne de l'Air (Tunisair)-- Decision No. 89-C-A-2023

REASON FOR DELAY--Pax. scheduled return flight from Montréal to Lyon, France, via Tunis, departing on December 20, 2019. The outbound flight was delayed for approximately six hours, which caused pax. to miss connecting flight in Tunis. Carrier did not file a response. Pax. submitted that carrier did not provide cogent reasons for delay. CTA applied decision no. 122-C-A-2021; found that carrier had not complied with APPRs; awarded \$700 damages. Pax. complaint that carrier had fallen below APPR standard of treatment unfounded.

June 5, 2023 -- Mark Hamilton, Justine Hamilton and their minor children against Air Canada-- Decision No. 90-C-A-2023

EVIDENCE--Pax. scheduled flight from Vancouver to Cancun, departing on January 5, 2020. The departure was delayed twice and then cancelled, which led to a late arrival of approximately twenty-four hours.



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Pax. claimed damages under the APPRs for inconvenience, general damages, and lost vacation time. The CTA found that the subject aircraft was grounded for maintenance. The maintenance problem had to do with the aircraft's weather radar. The carrier argued that the problem was not in its control. It did not, however, provide sufficient evidence to prove that the equipment malfunctioned during the aircraft's turnaround in Vancouver. The CTA awarded \$1,000.00 to each pax. in damages. The carrier was required to inform each pax. scheduled on the cancelled flight who submitted a claim of the agency's decision and reconsider any denied claims in light of the decision.

June 9, 2023 -- Josiane Lord against ABC Aerolineas, S.A. de C.V. (Interjet)-- Decision No. 92-C-A-2023

FARE REFUND--Pax. scheduled return flight from Montréal to Lima, Peru, via Mexico City, departing June 5, 2020, returning June 17, 2020. Carrier cancelled flight and provided only travel credit; no refund. Pax. complained to CTA. Carrier had not filed a tariff with the CTA prior to commencing operations. Carrier did not file a response to the application; Agency found for the pax; declared the cancellation within the carrier's control, and required a full refund.

June 13, 2023 -- Louise Nadeau, Caroline Bordeleau, Édith Campbell, Jennifer Gohier, José Paquin, Martine Couture and Nathalie Labelle against ABC Aerolineas, S.A. de C.V. (Interjet)-- Decision No. 98-C-A-2023

FARE REFUND--Pax. scheduled return flights from Montréal to Mexico, departing on June 27, 2020, returning in early July. Pax. sought refunds for the price of their tickets. The carrier did not submit a response to the pax. applications. The carrier's tariff required it to provide a refund if it cancelled a flight for reasons within its control. Absent submissions from the carrier, the CTA ruled that the carrier admitted the allegations. The CTA ordered refunds totaling \$3,082.00.

June 23, 2023 -- Autumn Evoy, Erin Maxwell, Hunter Troup, Lara Plokhaar, Kandi Smiley, Edwina Brooks against Air Canada, WestJet, Air Transat, K.L.M. Royal Dutch Airlines (KLM) and VIA Rail Canada Inc. (VIA)-- Decision No. 105-AT-C-A-2023

CARRIAGE OF EMOTIONAL SUPPORT

ANIMALS--Pax. (including rail pax.) claimed that they were denied the ability to travel with an emotional support animal. Five air pax. were traveling with dogs; one rail pax. traveled with a rabbit. After receiving submissions, the CTA determined that unrestricted carriage of emotional support animals would cause carriers undue hardship. Certain species of emotional support dogs, however, could be carried with pax. in the cabin under appropriate conditions. Pax. must provide proof that they suffer from a mental health disability and require an emotional support dog. A veterinary's certificate must also attest to the animal's good health. Such documentation should be provided to the carrier at least ninety-six hours from the departure time. If not provided within that time, the carrier remains bound to make every reasonable effort to transport the pax. with their emotional support dog. The dog must fit comfortably within a carrier at the pax. seat or under the seat. The pax. must comply with any international requirements for the transport of animals. Any accommodation for the transportation of emotional support dogs must be free of charge. The carrier may refuse to further transport the animal if it poses a risk to the safe operation of the transport or if the dog is removed from the carrier.

CASES BEFORE THE COURTS

June 21, 2023--*Davis v Canada (Attorney General)*, ONSC docket CV-23-92467 (Ottawa)

AVIATION MEDICAL CERTIFICATION--Statement of claim issued against the Attorney General for negligence; against defendant doctor for negligence and misfeasance in public office--Minister of Transport, through defendant doctor, found plaintiff to suffer from substance abuse disorder (alcohol)



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No evidence suggested that such a disorder existed or that treatment was warranted--plaintiff, a pilot, had aviation medical certification revoked in 2016--despite submitting evidence of no substance abuse and complying with TC mandatory treatment, Minister and defendant doctor persisted in denying medical certification--plaintiff lost currency and unable to be employed--claim for damages--Charter of Rights and Freedoms violations--TATC found in favour of plaintiff on review--TATC unable to overturn Minister's decision--matter remitted to Minister--Charter challenge against TATC's limited jurisdiction to provide relief in clear cases of Minister's error.

June 22, 2023--*Brosseau Estate v Dubarry Estate*, 2023 ABKB 378

COSTS--Aircraft, a Cirrus SR22, suffered fatal accident (Springbank, Sept. 24, 2010) during pre-purchase test flight--pilot and pax. killed--pax. estates brought action against pilot's estate, insurance broker, underwriter, and aircraft insurer--the broker and underwriter were released from the action (2022 ABQB 60)--action continues against defendant estate and insurer.

LEGISLATIVE UPDATES

An Act to implement certain provisions of the budget
Royal assent: June 22, 2023

Bill C-47, now enacted as Statutes of Canada, 2023, chapter 26, is omnibus legislation. Sections 436-473 amend the Canada Transportation Act to strengthen the Canadian Transportation Agency's ability to protect air passenger rights. The legislation notably allows the government to require air carriers to publish information respecting their performance on their Internet site; permits the sharing of information to ensure the proper functioning of the national transportation system or to increase its efficiency; broadens the scope of the administrative monetary penalties scheme; broadens the Canadian Transportation Agency's authority to set fees and charges to recover its costs; replaces the current

process for resolving air travel complaints with a more streamlined process designed to result in more timely decisions; imposes a greater burden of proof on air carriers whereby it is presumed that compensation is payable to a complainant unless the air carrier proves the contrary; and requires air carriers to establish an internal process for dealing with air travel claims. The Act also strengthens the Canadian Transportation Agency's ability to enforce air passenger protections.

Air Passenger Rights was the only organization to submit a brief to parliamentary committees regarding modifications to the air passenger protection scheme. The organization noted that CTA proceedings would be less accessible. It further took issue with Parliament's decision to remove the statutory right of appeal, which leaves passengers and airlines alike with a more murky judicial review process if they disagree with a CTA decision. The organization also disputed the CTA's new ability to issue guidelines that are exempt from the Statutory Instruments Act. It framed such an exemption as a Henry VIII clause that granted the agency unchecked power to create new law through policy instruments.

Professor Paul Daly submitted a short brief to the Senate Committee on Transportation and Communication that buttressed Air Passenger Rights' position.

CIVIL AVIATION CONSULTATIONS

CIVIL AVIATION MEDICINE – PROGRAM MODERNIZATION

Transport Canada is in the midst of undergoing program modernization, including the medical certification process. One area TC is looking into is to improve the service delivery and minimize the duration of medically necessary suspensions. TC is therefore seeking ideas and comments as to how the aviation medical evaluation processes can better accommodate individuals with health conditions to try and avoid situations where their medical certificates are suspended under the Canadian Aviation Regulations.



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If you would like to contribute any input, ideas, comments, or questions on this matter, please send an email to

CivAvCAMModernization-modernisationMACAvCiv@tc.gc.ca

before September 1, 2023. Please note this address has been set up specifically for queries related to this matter and cannot be used as a forum to discuss individual cases. Furthermore, no confidential information should be sent to this address, which will only be open for the duration of this project.

MODERNIZING THE CANADIAN AVIATION REGULATIONS: GENERAL AVIATION AMENDMENTS AND PROPOSED AMENDMENTS

CAR 551.103 - ADS-B Out installations

Standard 722 – Carriage of Persons

Minor Amendments & Codification of Exemptions

NEW Subpart 407 - Approved Training Organizations

CADORS Manual

Minimum Visual Meteorological Conditions for VFR

Notice of Proposed Amendment 2023–009

TREATIES AND INTERNATIONAL INSTRUMENTS

ANAC/TCCA Implementation Procedures for Airworthiness

On June 12, 2023, Transport Canada Civil Aviation (TCCA) and the National Civil Aviation Agency of Brazil (ANAC) signed their formal bilateral Implementation Procedures for Airworthiness (IPA). The IPA covers bilateral procedures for conducting initial design and post-design approval activities,

cooperation on continuing airworthiness, and provisions for technical assistance.

The IPA will enter into force on September 10, 2023.

ANAC/TCCA bilateral procedures feature the following provisions, subject to the conditions specified in the IPA:

- Use of three (3) streams in accepting or approving each other's products;
- Acceptance, Streamlined Validation, and Technical Validation;
- Acceptance provides for the automatic acceptance of each other's TSO design approvals, repair design approvals and replacement part design approvals;
- Introduction of Basic and Non-Basic criteria for the classification of applications for validation;
- Eligibility for Streamlined Validation for applications classified as Basic;
- Eligibility for Technical Validation of applications classified as Non-Basic;
- Use of a management-approved validation work plan that is scalable to the complexity of the validation activity;
- Employing risk-based validation principles through the identification of the Validating Authority's levels of involvement; and
- Cooperation on continuing airworthiness issues

TSB REPORTS

TSB Annual Report to Parliament 2022–23

Runway overrun (CYHU)--Airmédic Inc.--Pilatus PC-12/47E, C-GIOX

Collision with terrain (CTN6)--Pembina Air 1999 Ltd.--Rockwell International, Commander Aircraft Division S-2R, C-GOKD

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ABOUT US

We are a hub of lawyers, researchers, investigators, and assistants that help patrons understand their legal rights and strategies. We take an interdisciplinary, or hybrid approach to this work, one particularly suited to the aviation industry's legal needs. We cast a wide net to generate a global view of problems. A global view implies understanding not only the present manifestation of a problem; it also requires knowledge about the problem's origins. This approach is particularly suited to addressing complex negotiations, transactions, and litigation. Our familiarity with aviation regulations, corporate law, and commercial transactions allows us to assist members of the aviation industry.



Adam Strömbergsson-
DeNora
MA, JD

Adam owns and flies an Ercoupe. He enjoys pouring over Canadian aviation regulations, and, when he isn't flying or thinking of flying, likes to work with members of the aviation industry on policy and legal issues.

Adam practices as an instructing solicitor: he prepares and coordinates litigation. He is a procedural nut familiar with judicial and parliamentary procedure, which allows him to assist clients through court proceedings and parliamentary processes. Adam also serves as A.P.Strom and Associates' coordinating lawyer—he manages the day-to-day activities of the lawyers and staff working on files.

Adam draws from his research background and voluminous knowledge of Canadian law. His specialty is organizing complex litigation, such as civil trials involving claims of real property, contract, or fraud / misrepresentation. He is also experienced with administrative law matters and works on constitutional challenges. He also draws on his background in English literature to advise clients about drafting and interpreting legal instruments.

Rebecca works as a barrister and solicitor. She has enjoyed a varied career in law, business, and academia, spanning over 20 years. Her work as a lawyer began in 2003 with civil litigation with a large firm, and she has returned to litigation in this role.

Rebecca's experience includes working as Staff Lawyer, Law Reform and Equality, at the Canadian Bar Association, then as a Policy Counsel with the Federation of Law Societies of Canada. Subsequently, Rebecca served as a per diem Crown Attorney with the Ministry of the Attorney General in Ottawa. She then shifted gears and joined the management team of Gowling WLG, serving as Equity, Diversity, and Inclusion Manager for a large, multinational law firm.

Rebecca is a member of the Ontario Bar Association Council.

Rebecca is licensed to practice in Ontario and Manitoba.



Dr. Rebecca Jaremko
PhD, LLM, MBA, LLB

