



**Flights Cancelled Because of the Pandemic:
Refunds for Air Passengers**

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

**Option consommateurs
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INTERVENER'S PRESENTATION

A product of the family economics cooperative movement known as the ACEF, more specifically the ACEF's Montreal chapter, Option consommateurs was established in 1983 and is dedicated to helping and advocating for consumers.

Option consommateurs relies on a dynamic, competent team. Over the years, Option consommateurs has developed expertise in the fields of financial services, business practices, privacy protection, access to justice, personal finance, debt, energy and agri-food.

Each year, Option consommateurs provides direct assistance to people in the central boroughs of Montreal and to all Quebec consumers. Through budget consultations, information and awareness activities and its Prêt du quartier microcredit program, it provides tangible support to the most vulnerable consumers. Option consommateurs also runs a legal information service to answer Quebec consumers' questions concerning their rights and recourse.

Option consommateurs also grants numerous media interviews, sits on several working committees and boards, carries out large-scale intervention projects with major partners and produces research reports, briefs and practical guides.

Since the beginning of the pandemic, Option consommateurs has been receiving a record number of calls and emails, from consumers in Quebec and elsewhere in Canada, concerning travel-related issues. More specifically, these consumers are requesting information on how to obtain ticket refunds for flights that were cancelled because of the pandemic.

An Option consommateurs representative appeared before the Standing Committee on Transport, Infrastructure and Communities during the meeting of December 8, 2020. In this brief, Option consommateurs presents its observations and recommendations in greater detail.

INTRODUCTION

The global health crisis has shaken many sectors of the economy and affected the lives of billions of people. Canada is no exception. In addition to disrupting the daily lives of Canadian consumers, the pandemic has also jeopardized several sectors of the economy, including air travel.

Be it because of the various measures imposed by government authorities (border closures, recommendations limiting trips to essential travel) or as a result of decisions made by airlines (consolidating or cancelling flights because of low seat occupancy), many passengers were unable to take the flight for which they had paid. However, even though they did not receive any service, most airlines are refusing to give them refunds.

Instead of a refund, these airlines are forcing travellers to accept a travel credit. Claiming that issuing refunds to passengers would jeopardize their financial situation,¹ they have assumed the right to keep their customers' money. Consumers are then forced to provide interest-free financing to airlines, without any guarantee of a refund. It goes without saying that this situation is completely unacceptable.

FEDERAL LEGISLATIVE FRAMEWORK

Until now, the Canadian Transportation Agency (CTA) has maintained that the *Air Passenger Protection Regulations*² (APPR) do not require airlines to refund passengers when a disruption outside their control prevents them from transporting their customers according to their itinerary within a reasonable time.³ First of all, Option consommateurs would like to point out that that is a very narrow interpretation of the APPR and of a premise that must be corrected.

In fact, the protection of passengers' rights and the obligations of airlines are detailed in several legislative, regulatory and contractual texts. To understand the scope of these rights and obligations, it is important to consider these texts as a whole, not individually. There is, of course, the APPR, but there is also the *Canada Transportation Act*⁴ (Transportation Act) and the *Air Transportation Regulations*⁵ (ATR), in addition to each airline's tariffs.

Airline tariffs are contracts that set out the relationship between these airlines and their passengers.⁶ For the most part, they are long texts⁷ written in a legal language that is difficult to understand for anyone who is not a legal expert. The average passenger cannot reasonably be expected to wade through them before purchasing a plane ticket, let alone compare airline tariffs to see which one is more advantageous.

At the federal level, these tariffs must comply with the Transportation Act and the ATR. Thus, the ATR clearly states that tariffs must contain a refund policy for services purchased but not used, including when the air carrier was unable to provide them.⁸ In addition, section 111 of these Regulations requires airlines to establish reasonable conditions. Yet, it is difficult to conceive that, in a society based on the rule of law, one could consider it reasonable for a business, such as an airline, to impose upon consumers a condition whereby it could keep the

¹ Sylvain Larocque, "Transat veut l'aide des gouvernements pour rembourser les clients," *Le Journal de Montréal*, June 11, 2020, <https://www.journaldemontreal.com/2020/06/11/air-transat-dans-le-rouge>, accessed on January 22, 2021.

² *Air Passenger Protection Regulations*, SOR/2019-150.

³ Canadian Transportation Agency, *Consultation paper: Development of new airline refund requirements*, <https://otc-cta.gc.ca/eng/consultation-paper-development-new-airline-refund-requirements>, page accessed on January 13, 2021 (*Consultation paper*).

⁴ *Canada Transportation Act*, S.C. 1996, c. 10.

⁵ *Air Transportation Regulations*, SOR/88-58.

⁶ *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269 (CanLII), para. 20.

⁷ For example, Air Canada's international tariff is 123 pages.

https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/en/International_Tariff_en.pdf, accessed on January 18, 2021.

⁸ Subparagraph 107(1)(n)(xii) and paragraph 122(c)(xii) of the *Air Transportation Regulations*.

money that they paid for services even if those services were not provided. However, that is what airlines are doing.

It is important to remember that the CTA has the authority to intervene. In fact, section 113 of the ATR gives it the authority to suspend or even substitute any portion of a tariff that does not conform with sections 111 and 112 of those Regulations. However, it is clear that, until now, the CTA has chosen not to exercise that authority.

Consumers are complaining, and so they should. Moreover, our petition, tabled in the House of Commons and requesting the government's intervention to order airlines to refund their customers, collected more than 32,000 signatures.⁹ Another similar petition collected more than 75,000 signatures.¹⁰ The CTA, in turn, indicated that it has received more than 6,500 consumer complaints regarding refund requests.¹¹ Once again, the CTA can intervene. On one hand, section 67.2 of the Transportation Act gives it the authority to suspend, disallow or substitute an unreasonable term or condition of carriage following a complaint. In addition, section 27 of that Act gives the CTA the authority to grant further relief.

In that context, the government's and the CTA's inaction is difficult to understand. Also, the declaratory Bill C-249, An Act to amend the Canada Transportation Act (refund – cancelled air service),¹² was introduced in the House of Commons last October. That bill reiterates passengers' right to obtain a refund for flights cancelled for reasons beyond the carrier's control.

PROVINCIAL LEGISLATIVE FRAMEWORKS

Although airlines' activities may fall under the jurisdiction of the federal parliament, they are not excluded from the application of all provincial legislation. In fact, the provinces have jurisdiction in civil law matters.¹³ As the Supreme Court of Canada confirmed with regard to banks in *Marcotte*,¹⁴ the right of each Canadian province may open the door to the right of air passengers to be refunded for flights that have been cancelled.

For illustrative purposes, Option consommateurs will focus on Quebec legislation because that is the one with which it is most familiar. However, many of Quebec's legislative provisions may be invoked by consumers who wish to be refunded for cancelled flights.

No one could have predicted the health crisis that the COVID-19 pandemic has caused, and no one could escape its impacts. This situation can therefore be considered superior force within the meaning of article 1470 of the *Civil Code of Québec* (C.C.Q.).¹⁵ The Code states that if a

⁹ Petition e-2604 (Transportation), <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-2604>, accessed on January 25, 2021.

¹⁰ <https://www.change.org/p/air-canada-refund-for-airline-travel-covid-19>, accessed on January 25, 2021.

¹¹ Canadian Transportation Agency, *Consultation paper*, supra, note 3.

¹² Bill C-249, An Act to amend the Canada Transportation Act (refund – cancelled air service), <https://parl.ca/DocumentViewer/en/43-2/bill/C-249/first-reading>, accessed on January 25, 2021.

¹³ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), subsection 92(13).

¹⁴ *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 SCR 725.

¹⁵ *Civil Code of Québec*, 1991, c. 64.

party can no longer perform an obligation by reason of superior force, the party is released from the obligation.¹⁶ In consideration of that release, that party may not demand correlative payment from the other party for that obligation. If payment has already been received, restitution is owed.¹⁷ In more concrete terms, airlines may, in the event of superior force, be exempted from the obligation to transport their customers, but they must refund them for the cost of tickets and services. In a recent judgment,¹⁸ the Court of Québec ordered Transat Tours Canada Inc. and Air Transat to provide a refund to a couple of passengers whose flight had been cancelled.

Air passengers may raise another argument. As noted earlier, the airlines' tariff constitutes the contract that binds them to the air passengers. These contracts are entirely written by the airlines and imposed on all their passengers, who cannot negotiate or change anything. This type of contract can therefore be considered a contract of adhesion, as defined in the first paragraph of article 1379 of the C.C.Q.

Article 1437 of the C.C.Q. stipulates the following:

An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

Here again, it seems inconceivable and abusive that a company can, in a contract in which it imposes conditions, assume the right to not perform its principal obligation while keeping the adhering party's money. It should also be noted that the Court of Appeal acknowledged that this provision is of public order.¹⁹

In addition to being a contract of adhesion, the contract between an airline and its passenger is also a consumer contract within the meaning of article 1384 of the C.C.Q. and section 2 of the *Consumer Protection Act* (CPA).²⁰ As a result, the protection against abusive clauses provided for in article 1437 of the C.C.Q. also applies here.

But there is more. It also follows that airlines must comply with the provisions of the CPA, which are of public order.²¹

¹⁶ Article 1693 of the C.C.Q.

¹⁷ Article 1694, C.C.Q.

¹⁸ *Lamontagne and Landry v. Transat Tours Canada Inc. et al*, Court of Québec, Small Claims Division, 100-32-700270, January 21, 2021, Justice Denis Paradis.

¹⁹ *United European Bank and Trust Nassau Ltd. v. Duchesneau*, 2006 QCCA 652 (CanLII), para. 52.

²⁰ *Consumer Protection Act*, CQLR. c. P-40.1.

²¹ *Nichols v. Toyota Drummondville (1982) Inc.*, 1995 CanLII 5322(QC CA), [1995] R.J.Q. 746 and *Richard v. Time Inc.*, 2012 SCC 8 (CanLII), [2012] 1 SCR 265.

On one hand, section 8 of the CPA allows consumers to demand the nullity of an abusive clause or a reduction in their correlative obligation. Here again, a clause that would allow an airline to keep a consumer's money without providing any services to them seems abusive on its face.

On the other hand, section 256 of the CPA requires all merchants to transfer sums of money received into a trust account when the principal obligation is to be performed more than two months after the contract is made. These amounts must remain in trust until the obligation has been performed by the merchant, who is the trustee during that time.

Section 308 of the CPA provides that a merchant may be exempted from that obligation if he pays, to the president of the Office de la protection du consommateur, a security, the amount of which is prescribed by regulation.²² However, there are no airlines on the list of companies exempted from the application of section 256 of the CPA.²³

As a result, according to that section, airlines should keep, in trust, the money from all passengers who have paid for their tickets more than two months before their departure and have had their flights cancelled. These sums should normally be kept in an account separate from the airlines' assets. In addition, as at June 30, 2020, Air Canada's financial results showed \$2.4 billion in "advance ticket sales," while Air Transat posted \$638 million in "customer deposits and deferred revenues" as at July 31, 2020.²⁴ Therefore, refunding these amounts should not affect the solvency of these companies in the short term.

TRAVEL CREDITS: AN UNFAIR AND UNACCEPTABLE SOLUTION

Instead of refunding passengers whose flights have been cancelled, most airlines have offered their customers a travel credit. Some of these credits may be subject to conditions, for example, that they be used within a given time or that they cannot be transferred. In addition, these credits sometimes apply only to a small fraction of the price that the passenger paid.²⁵ While these credits may be appropriate for some passengers, that is not the case for all of them. This solution, imposed unilaterally by the airlines, cannot be considered acceptable.

Still today, more than 10 months since the health crisis began, government authorities strongly recommend avoiding all non-essential travel. Even Prime Minister Trudeau recently urged

²² *Regulation respecting the application of the Consumer Protection Act*, CQLR, c. P-40.1, r. 3

²³ Office de la protection du consommateur, *Liste détaillée des permis en vigueur le 2021-01-20 - Catégorie: Exemption - article 256*, available at <https://www.opc.gouv.qc.ca/a-propos/publication/registre/>, accessed on January 20, 2021.

²⁴ Jean-François Codère, "Transport aérien - Ottawa forcera les transporteurs à rembourser leurs clients," *La Presse*, November 9, 2020, https://plus.lapresse.ca/screens/3e12671e-133b-4566-b0b5-17ca302a06a8_7C_0.html?utm_content=email&utm_source=lpp&utm_medium=referral&utm_campaign=international, accessed on January 28, 2021.

²⁵ Sylvain Larocque, "Un credit de vol de 47\$ d'Air Canada pour un Montréal-Paris," *Le Journal de Montréal*, January 16, 2021, <https://www.journaldemontreal.com/2021/01/16/un-credit-de-vol-de-47-dair-canada-pour-unmontreal-paris>, accessed on January 21, 2021.

Canadians not to travel.²⁶ Despite the fact that the vaccination campaign has begun, no one can currently predict when it will be possible to travel safely.

Until then, the situation can change for many passengers. For some, the trip they had planned is simply no longer relevant. Consider, for example, a wedding or a trip to celebrate graduation.²⁷ Others will no longer be able to travel for health reasons or because their personal or employment situation will no longer allow them to do so. There are also some who will no longer wish to travel at all. For all these people, a travel credit has no value or use. Without a pure and simple refund, these people will lose hundreds, if not thousands of dollars that will only pad the coffers of airlines that will have no service to offer them in return. These airlines will thus enrich themselves on the backs of consumers.

In addition, travel credits offer no guarantee to their holders as to the price that they will have to pay for their future travel. At the moment, we do not know how the crisis will impact the price of plane tickets when the travel industry resumes its normal activities. It is therefore possible that the credits that passengers will have in hand will not be enough to cover a trip equivalent to the one they had originally planned. This situation will require them to either pay additional amounts (which they may not be able to afford to do), or to change their trip. In doing so, airlines are, in a way, guaranteeing themselves a captive clientele once the crisis is over. And consumers will be the ones to lose out.

While the crisis has been difficult for many businesses, that is also the case for a lot of Canadian consumers. Many have lost their jobs or have seen their incomes decrease considerably. Many simply can no longer afford the luxury of a trip. The value of the travel credit is a significant amount that could be put to better use. These people need to have access to their money.

NEGOTIATING FINANCIAL ASSISTANCE FOR AIRLINES

By assuming the right to keep consumers' money, air carriers are forcing consumers to collectively provide them with hundreds of millions of dollars in interest-free loans with no guarantee of repayment.²⁸ No financial institution or government would agree to provide such financing. It is unacceptable to require consumers to do so.

²⁶ Mélanie Marquis, "Au nom de tous les Canadiens, annulez," *La Presse*, January 19, 2021, <https://www.lapresse.ca/covid-19/2021-01-19/voyages-a-l-etranger/au-nom-de-tous-les-canadiens-annulez.php#>, accessed on January 20, 2021.

²⁷ Stéphanie Grammond, "L'angle mort du remboursement des voyageurs," *La Presse*, November 10, 2020, <https://www.lapresse.ca/affaires/finances-personnelles/2020-11-10/l-angle-mort-du-remboursement-des-voyageurs.php>, accessed on January 22, 2021.

²⁸ *Statement by Minister Garneau on measures to protect Canadians from the impacts of COVID-19 on the air travel sector*, Transport Canada, November 8, 2020, <https://www.canada.ca/en/transport-canada/news/2020/11/statement-by-minister-garneau-on-measures-to-protect-canadians-from-the-impacts-of-covid-19-on-the-air-travel-sector.html>, accessed on January 21, 2021.

Airlines are pleading with the government to provide financial assistance.²⁹ They argue that, without that assistance, they cannot refund consumers without jeopardizing their survival.³⁰ Option consommateurs does not doubt that the health crisis has hit the travel industry hard, but if assistance is to be provided, it absolutely must be conditional upon refunding travellers.

Furthermore, it would be false to claim that airlines have not received any government assistance. They were able to take advantage of the assistance programs available to all businesses and employers. Moreover, Air Canada alone received nearly half a billion dollars in public support.³¹ That being said, it is up to the government to decide whether or not this industry requires additional assistance.

In a statement released on November 8, 2020,³² Marc Garneau, then Minister of Transport, stated that any additional assistance to airlines would be conditional upon their refunding consumers first. More recently, Prime Minister Justin Trudeau also mandated the new Minister of Transport, Omar Alghabra, to ensure that passengers receive refunds for flights cancelled because of the pandemic.³³

For Option consommateurs, that condition to providing any additional assistance to airlines should remain a prerequisite. Similarly, in the interest of all Canadian consumers, Option consommateurs is of the opinion that that assistance should also be aimed at maintaining healthy competition, protecting jobs and ensuring that essential services are maintained, particularly in remote areas whose communities greatly depend on air services.

To date, it appears that negotiations between the government and airlines have not yet yielded concrete results, yet the health crisis started about 10 months ago. That is a long time, and Canadian consumers have been waiting all that time.

If the arrival of a new Minister of Transport can bring a new dynamic to the negotiations, Option consommateurs fears that this could also cause additional delays. Without an agreement with the airlines, Option consommateurs strongly urges the government to take binding measures to require airlines to refund consumers by establishing its own conditions for government assistance, whether or not those conditions appeal to the industry.

²⁹ Jean-François Codère, "Aide gouvernementale: l'industrie aérienne lève le ton," *La Presse*, April 29, 2020, <https://www.lapresse.ca/affaires/entreprises/2020-04-29/aide-gouvernementale-l-industrie-aerienne-leve-le-ton>, accessed on January 25, 2020, and IATA, "IATA Appeals to Canadian Government for Immediate Relief for Airlines in Face of COVID-19 Crisis," Press release published on April 30, 2020, <https://www.iata.org/en/pressroom/pr/2020-05-01-01/>, accessed on January 26, 2021.

³⁰ Sylvain Larocque, "Air Canada pourrait rembourser... si c'est Ottawa qui paie la facture," *Le Journal de Montréal*, November 18, 2020, accessed on January 25, 2021.

³¹ Stéphane Parent, "Un demi-milliard à Air Canada et des passagers toujours sans remboursements," RCI Radio Canada International, December 7, 2020, <https://www.rcinet.ca/fr/2020/12/07/un-demi-milliard-a-air-canada-et-des-passagers-toujours-sans-remboursements/>, accessed on January 20, 2021.

³² *Statement by Minister Garneau on measures to protect Canadians from the impacts of COVID-19 on the air travel sector*, supra, note 28.

³³ Office of the Prime Minister, *Minister of Transport Supplementary Mandate Letter*, January 15, 2021, <https://pm.gc.ca/en/mandate-letters/2021/01/15/minister-transport-supplementary-mandate-letter>, accessed on January 21, 2021.

