November 4, 2024

Ms. France Pégeot
Chair and CEO
Canadian Transportation Agency
60 Laval Street, Unit 01
Gatineau, QC J8X 3G9
Via email: France.Pegeot@otc-cta.gc.ca

Dear Ms. Pégeot,

RE: Cost Recovery Provisions for APPR Claims

We are writing to you to express serious concerns with the proposals released by the Canadian Transportation Agency (CTA) on September 18 with respect to cost recovery provisions for APPR-related passenger claims. NACC represents Canada's largest passenger airlines, including Air Canada, Air Transat, Jazz LP, and WestJet. NACC works to ensure safe, accessible, environmentally responsible and competitive air travel in Canada. As such, we share the goal of improving the air passenger experience in Canada. However, as presented, these proposals will not contribute towards addressing the ever-growing backlog of passenger claims at the CTA, will have a number of unintended consequences on air passengers in Canada, and, more generally, lack fairness and balance.

NACC has outlined its key concerns below. In addition, NACC has appended a legal analysis prepared by Norton Rose Fulbright LLP ("Norton Rose") to provide a legal analysis of the CTA proposals. As a reputable law firm with considerable expertise in the aviation sector, Norton Rose's legal analysis provides valuable perspective on the proposals under consideration.

1. The CTA should prioritize efforts on addressing the backlog of complaints.

In April 2024, it was reported that the backlog of complaints at the CTA reached 74,000, with wait times of more than 18 months for a passenger's claim to be reviewed[1]. In September 2023, just when the Agency was about to launch its new process, the backlog was reported to be at 57,000 cases. [2]Passengers

[1] https://www.cbc.ca/news/politics/air-passenger-compensation-complaints-1.7183619
[2] https://www.cbc.ca/news/canada/montreal/air-passenger-complaints-rising-in-canada-1.6970589

are understandably frustrated by these timelines, and the backlog and timelines for processing are growing even further. However, the CTA has not established clear targets nor standards to process current claims, despite a one time $75 million funding increase to the CTA in 2023, and even though it is meant to issue decisions within 90 days[3].

Airlines are doing their part, by meeting the CTA's obligations and requirements related to responding to filed claims – despite the very short timeframe in which the CTA requires that airlines provide information. As such, NACC members firmly believe that the CTA must establish timelines and targets and prioritize efforts to reduce the backlog of complaints. All parties should benefit from a fair, efficient, consistent and evidence-based system, and airlines should not be held responsible for the CTA's failure to reduce the existing backlog.

Even with the proposed cost recovery framework, the CTA would still remain unable to reduce its backlog[4], which will only continue to increase. In addition, as more fully explained below, the proposed cost recovery framework would incentivize the filing of ill-founded claims (notably by claim farms) resulting in an even larger backlog.

2. The proposals, as presented, will have unintended consequences on air passengers in Canada and the Canadian air travel system.

It was suggested during Parliamentary hearings that the cost recovery levy will serve as an incentive for airlines to settle claims, and, as a result, will ultimately lead to a reduction in the current backlog of claims. In our opinion, the opposite will happen. With the proposed $790 fee to be paid by airlines regardless of their responsibility, the filing of claims will be incentivized regardless of their basis, assuming that airlines will be more incented to settle and pay costly, even unfounded claims, rather than pay a $790 administrative fee – especially when the compensation being sought is lower than, or comparable to, the cost recovery levy and the costs to defend.

Given this incentive for passengers to file claims, NACC members are deeply concerned that the CTA's proposal will lead to a growth in "claim farms" - entities whose aim is to exploit passengers' right to compensation for the purposes of profit. They are in fact the only entities or stakeholders that derive profit from APPR. So-called claim farms are prevalent in Europe and are cited as a cause for a significant

[3] The CTA's start notice process requires a decision within 90 days: s. 85.05 and 85.06 of the Act.

[4] The CTA's consultation documents states: "the CTA estimates it will have the capacity to close – with decision, 22,615 eligible air travel complaints per year." https://otc-cta.gc.ca/eng/publication/consultation-air-travel-complaints-fee-proposal

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growth in costs and legal activity in the European air travel system, without any positive impact on air travel performance.

The CTA needs to consider mechanisms to limit the proliferation of claims farms or frivolous claims. For instance, one option that could be considered is that passengers and their representatives should pay a nominal filing fee when submitting an APPR claim with the CTA. This fee could be recoverable should they be deemed to be successful in their claim. This would disincentivize claims farms from filing bulk or frivolous claims that will otherwise risks further increasing the backlog.

NACC members are also concerned with the lack of transparency and accountability for the CTA's administrative costs. For instance, according to the CTA's proposal, $16.2 million of the breakdown is for direct salaries; yet airlines, who are being asked to contribute 60% of these costs, have no say nor line of sight into the efficient use of time by the CTA in their claims management processes, or how salaries are established.

According to the analysis provided in the September 18 consultation document, the CTA claims it will be able to process 22,615 claims per year, at a total cost of over $29.7 million. This equates to a per claim cost of $1,316. This is an extremely high cost for a system that was meant to be streamlined and made more efficient. To NACC's knowledge, a $790 fee is higher than any other dispute resolution scheme in Canada, especially given that airlines are being asked to pay 60% of that cost but with no insight nor accountability from the CTA into how those costs are managed.

The CTA has proposed a $790 fee per claim that airlines would need to pay for each adjudicated claim. The CTA has justified this amount by noting that it represents 60% of the total administration costs. This rate is purely arbitrary – there is nothing in the enabling legislation or in any guiding principle stating that the cost recovery proportion needs to be established at such a rate, and there is nothing in the CTA's cost recovery proposal document justifying the 60% level. In short, airlines are being asked to contribute the majority of the CTA's administration budget with no input into how that budget is set, and with no assurance that improvements or efficiencies will be implemented. The appended Norton Rose analysis provides more perspective on this issue.

Moreover, proposing a $790 per claim fee, regardless of fault, ignores the broader conversation that is happening in Canada today regarding aviation. In spring 2024, the House of Commons Standing Committee on Transport, Infrastructure and Communities, held a series of meetings as part of its study on the State of Airline Competition in Canada, and the Competition Bureau of Canada is currently undertaking a market study regarding Competition in Canada's airline industry. As numerous stakeholders have stated in responses to the Competition Bureau and before the Parliamentary Committee, Canada is one of the

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highest cost jurisdictions in the world in which airlines operate. The impact of excessive third-party fees, taxes and charges inherent in Canada's air travel system is impacting affordability of travel for Canadians and has put the Canadian aviation sector at a competitive disadvantage versus other jurisdictions. Ultimately, the cost of excessive fees, charges and taxes will be passed on to the consumer – and, as such, charging airlines millions of dollars[5] in additional costs will inevitably lead to even higher airfares for Canadians. At a time when affordability is the topmost public policy issue in the country, the CTA's proposal – which would inevitably increase the cost of air travel in Canada - is counterproductive.

3. The proposals lack fairness and balance.

The cost recovery proposal includes the notion that airlines would need to pay the cost recovery levy even in cases where adjudication finds that airlines acted in compliance with the APPR. By including this proposal, the CTA ignores the most fundamental of legal principles, which is that parties which are found to have complied with their legal obligations are not to be held financially liable for the adjudication process. There are no known comparable systems where such a policy is in place, given that it contravenes established legal principle. No fee should be owed in the event that airlines are found to have complied with their compensation obligations under the APPR.

In addition, applying arbitrary fees retroactively[6] in any sort of legal process is contrary to legal principles. It would in fact hold carriers financially liable for the CTA inefficiencies, despite the additional funding it received from government.

More generally, NACC members have raised significant concerns with the CTA's current complaint adjudication process and have provided multiple examples where CTA decisions have been inconsistent, where airlines have not been provided with reasonable time nor opportunity to provide the evidence required to make an informed decision, where ineligible cases have been allowed to proceed to a decision, and where evidence provided is not understood, misunderstood or disregarded without reason. Tremendous inefficiencies exist in the current system, which has led to lengthy defences, burdensome and unreasonable evidentiary requirements, and avoidable costs in resources invested in processing claims both on the airlines' and the CTA's part.

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[5] As noted, the CTA's proposal indicates a total cost of approximately $30 million, which will inevitably increase.

[6] In the Questions and Answers document accompanying the September 18 proposal, the CTA stated that, "If an air travel complaint was made to the Canadian Transportation Agency before September 30, 2023, are those complaints going to be subject to this charge? Response: Yes". Although this statement lacks detail or clarity, it would suggest that the CTA is proposing that a cost recovery charge would be retroactive to every eligible claim currently in the CTA backlog.

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Until such time that the CTA adjudication process is improved, and where rulings are consistent and based on evidence, it is premature to move forward with a cost recovery process.

Furthermore, over the past several years, NACC has outlined that air travel requires an ecosystem approach, where multiple entities need to work together. Oftentimes the cause of a disruption has nothing to do with an airline, but can be attributable to another organization within the ecosystem, which is why NACC has long called for a principle of "shared accountability". However, under the CTA's proposal, there is no distinction or recognition of system disruptions on the part of other ecosystem entities. In other words, airlines would still be required to pay the cost recovery levy even if another ecosystem partner is at fault – which again violates legal principles. The appended Norton Rose analysis further supports this position.

4. There is no similar funding mechanism in any other equivalent domestic body, nor any international comparative system.

Following inquiries with domestic counterparts, NACC is unaware of any similar 'cost recovery' framework as suggested in the September 18 proposal within any similar quasi-judicial complaints-based system in Canada, whether that be in the transport related sector or any other industry sector. Following inquiries with our international counterparts, notably via the International Air Transport Association (IATA), we are unaware of any such cost recovery scheme globally. This lack of any equivalent cost recovery system, whether domestic or international, not only raises questions of basic fairness, but would further exacerbate the competitive disadvantage that the Canadian aviation system faces in comparison to other international systems – which ultimately will lead to increased costs, a reduction in regional connectivity, and reduce access to air travel for Canadians.

To make matters worse, in July 2024, then Transport Minister Pablo Rodriguez sent the following message on X (formerly Twitter*):*

"Marine Atlantic is an essential service for Newfoundlanders. With Budget 2024, we're investing in Marine Atlantic to keep services affordable. And we're eliminating the overall cost recovery policy because that's what's fair."

It is quite staggering that the Government of Canada publicly stated its support for eliminating cost recovery in marine travel, while the CTA simultaneously introduces a proposal for a costly and legally problematic cost recovery framework for air travel.

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NACC National Airlines Council of Canada **CNLA** Conseil national des lignes aériennes du Canada

Conclusion

As the aforementioned arguments and the appended Norton Rose analysis outlines, the proposals in the CTA's consultation document would add significant cost to the air travel system, violates legal principles, lacks accountability, would put Canada at a further competitive disadvantage, and most notably, would negatively impact passengers; all within a system that is in need of reform and cost efficiencies.

NACC recommends that the CTA focus its efforts and energy on improving the administration of the APPR claims process as an immediate priority, so that claims can be processed in a fairer, more timely, more consistent, and more evidence-based manner. The CTA should not consider a cost-recovery mechanism until such reforms have been introduced, which would need to reflect the concerns raised in this submission - and by other industry stakeholders.

Air travel is essential in Canada, and Canadians deserve an aviation system that is world class, accessible, sustainable, affordable, and responsive to the needs of the millions of passengers that are transported every year. NACC believes this is a vision shared by the Government of Canada and the CTA. However, we cannot achieve this vision alone. We look forward to working with the federal government and the CTA to improve the APPR system so that our collective vision for air travel in Canada can be realized.

Yours truly,

Jeff Morrison
President and CEO
National Airlines Council of Canada

CC: Hon. Anita Anand, P.C., M.P., Minister of Transport

Attachment

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memorandum

From	François Fontaine, Ad.E. Alexa Biscaro	**Date**	November 4, 2024
Email	francois.fontaine@nortonrosefulbright.com Alexa.biscaro@nortonrosefulbright.com		
To	Jeff Morrison, President and Chief Executive Officer National Airlines Council of Canada		
Your ref	CTA Fee Proposal		

Memorandum re CTA Fee Proposal and Passenger Complaint Process

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Memorandum re CTA Fee Proposal and Passenger Complaint Process

I. INTRODUCTION AND EXECUTIVE SUMMARY

The Canadian Transportation Agency (**CTA**) has launched a consultation with respect to a proposed fee for processing and closing eligible air travel complaints under the *Canada Transportation Act* (**Act**) (the **Fee Proposal**). The Fee Proposal aims to recuperate some of the operating costs incurred by the CTA in operating its passenger complaint process directly from defendant airlines.

The National Airlines Council of Canada (**NACC**) has asked us to provide an assessment of the legality of the Fee Proposal, both on its own and within the broader context of the CTA's passenger complaint regime as whole. As explained in detail below, we have been unable to find a similar cost recovery scheme to the one set out in the Fee Proposal, which imposes set costs exclusively on defendants, irrespective of the outcome of the complaint. We have identified several concerns with the legitimacy and fairness of the Fee Proposal, concerns which are compounded by existing issues within the CTA and its adjudicative tribunal in relation to procedural fairness and inefficiencies, as well as impartiality and independence. Our assessment can be summarized as follows:

- The Fee Proposal does not justify why airlines must exclusively bear the operational costs of the CTA tribunal, especially in a context where passenger delays and disruptions, as well as the CTA's current complaints backlog, are caused by a multitude of events and actors.
- The $790 set cost recovery fee is disproportionate to the quantum of passenger complaints. The fact that the Fee Proposal would impose a disproportionate set fee on defendant airlines irrespective of the outcome of the matter, combined with comments made by government representatives, raises concerns as to the constitutionality of the Fee Proposal, as it appears to aim to discourage recourse to the CTA tribunal and may therefore be contrary to the rule of law, which requires access to justice.
- Concerns as to the legitimacy and overall fairness of the Fee Proposal are increased by several factors, including (i) the fact that the CTA did not conduct an operation and efficiencies audit prior to drafting the Fee Proposal, (ii) historical issues with respect to the CTA's lack of impartiality, (iii) the new reverse onus imposed on defendant airlines, and (iv) lack of adequate separation between the CTA and its tribunal.

II. ANALYSIS

A. Preliminary Observations

Our assessment of the CTA's Fee Proposal takes into account the context in which the amendments to the Act were enacted, as well as the recent changes to the operation of the CTA passenger complaint process.

First, the amendments to the Act mandating that the CTA establish fees to recover its costs relating to passenger complaints were contained not in a standalone bill, but in the *Budget Implementation Act, 2023*. As mentioned by members of the Standing Senate Committee on Transport and Communications, the proposed amendments to the Act were "very complex in nature" and had no clear connection to the government budgetary policy.[7] Such complex amendments should normally have been introduced via separate legislation, allowing the legislature the time to properly consider these changes to the aviation sector, without urgency, and to make a meaningful contribution, including the ability to propose amendments.[8] Instead, stakeholders – including passengers – were deprived of a fulsome opportunity to review, scrutinize, and debate the proposed amendments.

Second, the amendments to the Act were enacted in response to the unique and unprecedented travel disruptions that occurred in the summer of 2022[9], as demand for air travel in Canada resumed abruptly.[10] As the CTA representative testified before the Standing Senate Committee on Transport and Communications, the CTA had a backlog of 46,000 complaints in May 2023. The CTA received 40,000 of those passenger complaints in 2022, had 5,000 complaints five years prior, and received approximately 1,000 complaints a year "not long before that".[11] In other words, the 2023 amendments to the Act were quickly pushed through in an anomalous context, where the CTA was facing an enormous administrative backlog, which was largely due to the sudden easing of Covid-19 restrictions in the summer of 2022 after over two years of travel inertia.[12]

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[7] ***Report #116586 - Standing Senate Committee on Transport and Communications*, Senate, Standing Committee on Transport and Communications: Report of the Standing Committee on Transport and Communications (June 2023) (Chair: Leo Housakos) online: <sencanada.ca> https://sencanada.ca/en/committees/TRCM/Report/116586/44-1**

[8] **See Standing Senate Committee – May 16, 2023, Senate, Standing Committee on Transport and Communications, Evidence, 44-1, No 55:10 (16 May 2023) (Senator Wallin) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/55EV-56219-E; Standing Senate Committee – May 17, 2023, Senate, Standing Committee on Transport and Communications, Evidence, 44-1, No 56:5-56:6 (17 May 2023) (Senator Housakos, Chair) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/56EV-56229-E**

[9] **See e.g. *House of Commons Debates,* 44-1, No 186 (27 April 2023) at 1450 (Hon Omar Alghabra) online: <ourcommons.ca> https://www.ourcommons.ca/Content/House/441/Debates/186/HAN186-E.PDF. *House of Commons Debates,* 44-1, No 184 (25 April 2023) at 1510 (Hon Omar Alghabra) online: <ourcommons.ca> https://www.ourcommons.ca/Content/House/441/Debates/184/HAN184-E.PDF. "Mr. Speaker, I was proud to share with Canadians the news that our government was taking action to learn from last summer's challenges that we saw in our air sector". See also *Senate Debates,* 44-1, No 133 (13 June 2023) at 1540 (Senator Loffreda) online: <sencanada.ca> https://sencanada.ca/content/sen/chamber/441/debates/pdf/133db_2023-06-13-e.pdf. "These changes are in response to the challenges we witnessed with airlines and airports last year".**

[10] **YYZlaw – William F. Clark, Ehsan T. Monfared and Shaul Gordon, *Enhanced Accountability, Shared Responsibility and Service Standards in Canada's Air Travel Ecosystem* (prepared for National Airlines Council of Canada), May 11, 2023, at p. 3. Available online: https://airlinecouncil.ca/wp-content/uploads/2023/05/Shared-Accountability-Report_May-2023_Amended.pdf [YYZlaw Report]**

[11] **See Standing Senate Committee – May 16, 2023, Senate, Standing Committee on Transport and Communications, Evidence, 44-1, No 55:20 (16 May 2023) (France Pégeot, Chair and Chief Executive Officer, Canadian Transportation Agency) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/55EV-56219-E.**

[12] **Senate, Standing Committee on Transport and Communications, *Evidence,* 44-1, No 56:2-56:3 (17 May 2023) (Hon. Omar Alghabra) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/56EV-56229-E . "As the air sector began to quickly recover, passenger volumes surged. We saw that the sector struggled in coping with the significant increase in demand, resulting in many disruptions here in Canada and around the world. We also saw an increase in passenger complaints at the Canadian Transportation Agency, or CTA."**

Third, the amendments to the Act must be considered in conjunction with the provisions of the *Guideline on the Canadian Transportation Agency's Complaint Resolution Office air travel complaints process* (**Guideline**), which apply to all complaints made to the CTA on or after September 30, 2023 and have brought important changes to the passenger complaint resolution process.

B. Proposed Fee Imposed Exclusively on Airlines

Subsection 85.16(1) of the amended Act states that the CTA shall establish fees or charges for the purposes of recovering all or a portion of the costs that the CTA determines to be related to the process of dealing with complaints, other than those complaints which a complaint resolution officer (**CRO**) refuses to deal with under subsection 85.04(2) of the Act. Pursuant to subsection 85.16(2), the airlines that are the subject of complaints that are not rejected by a CRO prior to the mediation phase are liable for the payment of the fees or charges.

We note from the outset that we have been unable to find any similar regime to the Fee Proposal, being an adjudicative body cost recovery fee imposed solely on defendants, irrespective of the outcome of the matter. Indeed, most cost recovery schemes impose filing fees either exclusively on plaintiffs or on both plaintiffs and defendants.[13] Courts and tribunals then often have the discretionary power to waive administrative fees for certain plaintiffs and/or to award costs against the losing party.[14]

Pursuant to the new provisions of the Act, the Fee Proposal proposes to impose a standard $790 cost recovery fee exclusively on the defendant airline for every passenger complaint that is deemed eligible and is fully resolved by a CRO. Our research shows, however, that the CTA tribunal's costs – largely driven by the number of complaints received – cannot be exclusively attributed to airlines. This is because (i) passenger delays and disruptions are not solely caused by airlines and (ii) the number of passenger complaints logged with the CTA may be artificially increased by the involvement of so-called claim agencies. As such, imposing cost recovery fees exclusively on airlines may, in combination with the other factors outlined below, not only affect the legitimacy and overall fairness of the Fee Proposal, but also raise doubts as to its constitutionality, given that it may impede access to dispute resolution and thereby affect the rule of law.[15]

1) Passenger delays and disruptions are the result of multiple factors

During the legislative debates relating to the Act's amendments, government representatives recognized that the unprecedented passenger disruptions experienced in the summer of 2022 were caused in large part by the fact that the aviation industry had to quickly recover from the Covid-19 slowdown at a time when passenger volumes suddenly surged. Both in Canada and internationally, the aviation sector as a whole struggled to keep up with the significant increase in

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[13] See e.g. Ontario Court of Justice – Fees, O Reg 2017/07; Small Claims Court – Fees and Allowances, O Reg 332/16; Superior Court of Justice and Court of Appeal – Fees, O Reg 293/92; *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), s 30.11(2).

[14] See e.g. *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), s 30.16(1); *The Copyright Regulations*, SOR/97-457, s. 34(3); *Administration of Justice Act*, RSO 1990, c A.6, s 5(1); *Residential Tenancies Act, 2006*, SO 2006, c 17 at s 181.1.

[15] See e.g. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at paras. 38, 64.

demand, which led to travel disruptions.[16] In other words, the unprecedented travel disruptions that occurred in 2022 and continued to ripple through the next several months were attributable to multiple factors, including the sudden lifting of Covid-19 restrictions in Canada and the surge in passenger volumes worldwide.

Industry sources confirm that passenger delays and disruptions are the result of decisions made and obstacles encountered at several stages of a passenger's journey, from initial security clearance to deplaning and customs clearance. For example, Pearson Airport experienced massive delays in May 2022 as a result of increased wait times to clear security. This was due in large part to staffing challenges within the Canadian Air Transport Authority and US Customs and Border Protection. Moreover, passengers arriving from international destinations were facing bottlenecks and a significant increase in customs clearance processing times. In order to prevent severe passenger congestion, airports and airline staff were often forced to delay passengers from deplaning, which caused further knock-on effects for those passengers and other travelers.[17]

2) Mass claims filed by claim agencies

Paragraph 85.04(1)(b) of the Act states that a person can file a complaint with the CTA if they are the person adversely affected by a term or condition of carriage set out in an airline's tariff. Similarly, subsection 113.1(2) of the *Air Transportation Regulations* states that complaints made by passengers on international flights in respect of obligations relating to, *inter alia*, flight delay, cancellation, and denial of boarding must be filed by a person adversely affected.

In its clause-by-clause pre-study of the Budget Implementation Act, 2023, the Standing Senate Committee on National Finance noted that the intent of new section 85.04 of the Act was to establish the eligibility criteria for a complaint so that passengers as well as airlines know whether a case is eligible for the new process for resolving air travel complaints. In respect of paragraph 85.04(1)(b), the Committee noted the following:

> This requirement reproduces an existing obligation (i.e., paragraph 86(1)(h)(iii) of the *Canada Transportation Act* for domestic air travel complaints and section 113.1 of the *Air Transportation Regulations* for international air travel complaints) specifying that a person who alleges an entitlement under the tariff or the APPR can submit a complaint under the new process for resolving air travel complaints, <u>but this cannot be done on someone else's behalf</u>.[18] [emphasis added]

Despite these clear legislative provisions and comments from the Senate, the Guideline – which, as stated above, applies to all passenger complaints filed with the CTA on or after September 30, 2023 – allows a passenger to be represented by another person in the complaint process if that person is identified as their representative in the complaint form.[19] Although the CTA is

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[16] See e.g. Senate, Standing Committee on Transport and Communications, *Evidence,* 44-1, No 56:2-56:3 (17 May 2023) (Hon. Omar Alghabra) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/56EV-56229-E . "As the air sector began to quickly recover, passenger volumes surged. We saw that the sector struggled in coping with the significant increase in demand, resulting in many disruptions here in Canada and around the world."

[17] Greater Toronto Airports Authority, "Statement on departures and arrivals delays at Toronto Pearson", May 4, 2022. Available online: https://www.torontopearson.com/en/corporate/media/press-releases/2022-05-04. See also Christopher Reynolds, "Nearly half a million international flight passengers held up at Pearson in May," CBC News, June 10, 2022. Available online: https://www.cbc.ca/news/canada/toronto/toronto-pearson-delays-airport-1.6484131

[18] Standing Senate Committee on National Finance, TRCM - May 17, 2023 - Pre-study of particular elements of Bill C-47, The Budget Implementation Act, 2023, No. 1, 4.(d) Clause-by-Clause - Improving Passenger Rights, Clause 459. Available online: 4.(d) Clause-by-Clause - Improving Passenger Rights

[19] *Guideline on the Canadian Transportation Agency's Complaint Resolution Office air travel complaints process*, s. 2(5).

empowered by the Act to issue guidelines respecting the manner of and procedures for dealing with passenger complaints filed under subsection 85.04(1) of the Act[20], it does not have the power to issue guidelines that contradict the provisions of the Act. As such, there is an argument to be made that the provision of the Guideline allowing third parties to file complaints on behalf of passengers is *ultra vires* the CTA's powers and should be declared invalid.

Even if the Guideline were not invalid and a third party could validly act as a passenger's representative, the Guideline is not clear as to who, exactly, can act and in what circumstances. Specifically, the Guideline does not contain any provisions mandating third party representatives to provide a valid Power of Attorney. Such a requirement was enacted by the European Commission in response to concerns about the "incorrect practices and misbehaviour" of certain claim agencies acting within the European Union.[21] The lack of clarity in the Guideline currently allows for so-called claim agencies to file a large amount of complaints on behalf of passengers, whether the complaint is meritorious or not.

Because claims farms advertise their services as hassle and risk-free, many passengers may be incited to file frivolous and/or unfounded complaints that otherwise would never have been made, which needlessly adds to the CTA's complaint backlog. All of the time spent by CROs examining unfounded, and/or frivolous complaints filed by claim agencies necessarily contributes to increasing the CTA's cost of administering the air passenger complaint regime which, according to the Fee Proposal, would then be imposed exclusively on airlines.

3) Allocating costs to all CTA tribunal users

As mentioned above, as currently drafted, the Fee Proposal would make airlines exclusively bear the operational costs incurred as a result of unprecedented passenger delays and disruptions (caused by a multitude of factors and actors), as well as those costs caused by arguably unclear rules that allow mass (and potentially unmeritorious) claims to be filed by claim agencies. This suggests that the overall approach to the Fee Proposal and its enabling statutory provisions was not balanced and that the legislator and CTA may, as discussed in detail below, have had certain underlying improper intentions.

Comments from government officials discussing the 2023 amendments to the Act often make reference to the objective of holding airlines "even more accountable".[22] But when considering who should be bearing the cost of administering the CTA's complaint tribunal – especially in the context of a crippling complaint backlog – the objective of the Fee Proposal should have been to ensure that all parties make use of the system in an efficient and responsible manner. Filing fees (even modest) imposed on complainants can help to meet that objective, by deterring the filing of frivolous or unfounded complaints.[23] Although the Fee Proposal states that the cost recovery fee would not be imposed on airlines with respect to complaints that are deemed ineligible by CROs, ineligible and frivolous complaints nevertheless put significant pressure on the overall dispute

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[20] ***Canada Transportation Act***, **S.C. 1996, c. 10, s. 85.12(1)(a).**

[21] **The European Commission has required since 2017 that claim agencies be able to produce a clear power of attorney, as well as a copy of identification or passport for each passenger that they represent. See European Commission, *Information notice on relevant EU consumer protection, marketing and data protection law applicable to claim agencies' activities in relation to Regulation 261/2004 on air passenger rights*, March 9, 2017. Available online: https://transport.ec.europa.eu/document/download/604d45f0-cc92-430e-935a-ef92bd3788cb_en**

[22] **See e.g. Senate, Standing Committee on Transport and Communications, *Evidence,* 44-1, No 56:2 (17 May 2023) (Hon. Omar Alghabra) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/56EV-56229-E**

[23] ***Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at para. 47.**

resolution system and result in wasted costs and resources for both the CTA (as CROs still have to assess each claim's eligibility) and airlines (as they are required to file a full defence *before* eligibility is assessed).

Section 85.16 mandates that the CTA enact a cost recovery scheme in which costs are to be recovered from airlines. However, paragraphs 86(1)(m) and (n) of the Act empower the CTA to make regulations (i) prescribing any matter or thing that is not already prescribed in Part II of the Act (on Air Transportation) and (ii) generally, for carrying out the purpose and provisions of Part II of the Act. This means that the CTA has the power to enact regulations with respect to the cost recovery scheme, including imposing fees on other CTA tribunal users.

It is our opinion that a more equitable – and efficient – way of recovering the CTA's operating costs would be to allocate some of the operating costs amongst *all* CTA tribunal users, to encourage a responsible and efficient use of the passenger complaint process by all parties. For example, the Fee Proposal could impose (i) a filing fee for all passenger complaints filed by professional third-party representatives (as opposed to a relative, for example), to be paid by the representative and (ii) a modest processing fee on unrepresented passengers who file complaints that are deemed ineligible by the reviewing CRO under subsection 85.04(2) of the Act. With respect to filing fees imposed on professional representatives, the set fee could increase once the same company or individual has filed a certain number of passenger complaints in a calendar year. This same system is used in Ontario courts with respect to frequent claimants.[24]

This is in keeping with the overall public policy objective of discouraging parties from bringing unfounded and frivolous claims and needlessly burdening Canada's adjudicative tribunals and courts. In *Trial Lawyers Association*, the Supreme Court of Canada clarified that fees that prevent litigants from bringing frivolous or vexatious claims are not problematic. There is no constitutional right to bring frivolous or vexatious claims, and measures that deter such cases *may actually increase efficiency and overall access to justice*.[25] In this case, discouraging claim agencies and passengers from bringing frivolous, clearly unfounded complaints would mean that CROs would have more capacity to deal with complaints that are meritorious and therefore can award compensation to those passengers more quickly. Moreover, imposing only a modest fee on unrepresented passengers who file frivolous or clearly unfounded complaints would respect the power imbalance between passengers and airlines. For example, filing fees at the Ontario Landlord Tenant Board are higher for landlords than they are for tenants.[26]

If, contrary to our reading of section 85.16 and paragraphs 86(1)(m) and (n) of the Act, these provisions do not allow the CTA to impose any cost recovery fees on actors other than defendant airlines, the Fee Proposal remains highly problematic. The CTA has identified a fee of $790 to be recovered to compensate its operating costs to assess and close each passenger complaint that moves beyond the eligibility stage. As outlined above, both government representatives and industry stakeholders agree that passenger delays and disruptions are the result of multiple

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[24] **For example, the Small Claims Court defines a frequent claimant as someone who files more than 10 claims in the same location in a calendar year. Once that threshold is met, the standard filing fee increases by $120: Small Claims Court – Fees and Allowances, O Reg 332/16, s. 1(2)2. See also Service Ontario, Small claims court: suing someone, Cost of filing a claim, online: https://www.ontario.ca/page/suing-someone-small-claims-court#section-1**

[25] ***Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at para. 47.**

[26] **Tribunals Ontario, "Filing and Fees," (last visited 16 October 2024), online: <tribunalsontario.ca> https://tribunalsontario.ca/ltb/filing-and-fees/.**

factors and events, involving multiple actors in the aviation industry. In this context, it is grossly unjust to then impose the entirety of any cost to be established for the resolution of passenger disruption complaints on one single industry stakeholder, being the defendant airlines.

C. Imposing Cost Recovery Fee Irrespective of Outcome

The $790 standard fee set out in the Fee Proposal would be imposed on the defendant airline of each eligible passenger complaint, irrespective of the outcome. However, the passenger success rate before the CTA tribunal militates against imposing a cost recovery fee on airlines even when the passenger is unsuccessful. This because, as the data shows, there is no indication that airlines are systematically refusing to compensate passengers. For example, of the first 500 recorded complaints on the CTA's website for the period of September 30, 2023 to June 30, 2024, 255 complaints were dismissed in favour of the responding airline.[27] Prior to filing a complaint with the CTA, passengers must make a claim directly to the airline. Only those passenger claims that are dismissed by the airline are eligible to be adjudicated by a CRO.[28] The CTA's passenger complaint data therefore demonstrates that, more often than not, the CTA agrees with the airlines' original assessments of passengers' claims.

We note comments made by government representatives that allowing the CTA to recover the cost of air passenger complaints from airlines was meant to "incentivize airlines to address complaints directly with travellers as quickly as possible".[29] What these comments seem to suggest is that the cost recovery scheme set out in the Fee Proposal is meant to encourage airlines to pay compensation to every single passenger who makes a claim to the airline, *irrespective of the merit of the claim*. This raises a concern that the underlying objective of the Fee Proposal is to severely restrict the CTA's role as an administrative tribunal and to discourage the use of its adjudicative system altogether. It is telling that even the President of Air Passenger Rights suggested that a more efficient way of passing on the costs of operating the CTA tribunal on defendant airlines would be to impose the equivalent of court costs only on airlines that resist meritorious claims.[30]

As the Supreme Court of Canada observed in *Trial Lawyers Association*, at a certain point, there is no material difference between a regulation that discourages dispute resolution and one that precludes dispute resolution altogether.[31] There is an argument to be made that the CTA has structured the Fee Proposal in a way to force airlines to settle with any and all complainants and avoid the CTA tribunal entirely. This is compounded by the fact that the Fee Proposal and Guideline place no risk on passengers who make a complaint, as they pay no filing fee and bear no risk of having to pay adverse costs if they are unsuccessful. In this light, that the Fee Proposal imposes a set fee exclusively on airlines – and irrespective of the outcome – takes on a potentially punitive aspect in that it is meant to sanction airlines for defending passenger complaints that

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[27] **Website accessed on October 15, 2024. Note: Complaints that include multiple issues (for example a flight delay AND lost baggage) or multiple outcomes requested (such as compensation for inconvenience, refund and reimbursement of expenses), may have more than one order in a decision.**

[28] ***Canada Transportation Act*, S.C. 1996, c. 10, s. 85.07(2).**

[29] **Senate, Standing Committee on Transport and Communications, *Evidence,* 44-1, No 56:2 (17 May 2023) (Hon. Omar Alghabra) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/56EV-56229-E**

[30] **See Senate, Standing Committee on Transport and Communications, Evidence, 44-1, No (55:34) (16 May 2023) (Mr. Lukács) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/55EV-56219-E.**

[31] ***Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 114 (Justice Brown, concurring).**

they legitimately consider to be devoid of merit. This concern is again compounded by the quantum of the cost recovery fee, which is grossly disproportionate to the quantum of the disputes at issue.

D. Proposed Fee Disproportionate to Quantum of Disputes

Prior to assessing the quantum of the cost recovery fee, we note that the CTA does not seem to have conducted any audit of the tribunal's operational efficiency prior to drafting the Fee Proposal. We outline in further detail in Section E how certain aspects of the current passenger complaint process may lead to inefficiencies, which may then lead to an increase in operational costs that are then passed onto defendant airlines.

With respect to the amount of the cost recovery fee set out in the Fee Proposal – $790 per defended claim, representing 60% of the CTA's operating costs to assess and close each claim – we note that a cost recovery fee amounting to 60% of an adjudicative body's operating costs is unusually high. Most court and tribunal fees would usually be characterized as "modest", especially in comparison with the quantum in dispute or the importance of the issue for the parties.[32] For example, for claims filed before the Small Claims Court of Ontario – which can hear civil claims for up to $35,000 – the standard filing fee for plaintiffs is $108 per claim.[33]

The amount of the proposed cost recovery fee is even more incongruous when one considers the quantum of the statutorily-mandated compensation that passengers can receive if their complaint is meritorious, especially where a complaint only contains one claim. For instance, in the case of complaints for compensation for delay or cancellation, section 19 of the *Air Passenger Protection Regulations* sets the standardized compensation that a passenger may receive at $125 to $500 for small carriers and $400 to $1,000 for large carriers. This means that with respect to the gross majority of air passenger complaints that are processed by the CTA for delay or cancellation, airlines are being charged a mandatory fee that is larger than the amount that can be awarded to the complainant. In the case of a complaint for a delay between three and six hours by a small carrier, the $790 cost recovery fee is more than 6.3 times the standardized amount of compensation.[34] Although the regulated compensation for denial of boarding is higher – between $900 and $2,400[35] – the cost recovery fee of $790 remains disproportionate to the quantum of dispute.

Courts have found that in certain circumstances, where the cost of pursuing a claim is disproportionate to the quantum of likely disputes to arise from the agreement at issue,[36] hearing fees or costs can have the effect of denying access to dispute resolution fora by imposing undue hardship on a party.[37] Where such disproportionate costs are payable irrespective of the merit of the claim, they bear no resemblance to litigation costs awarded at the end of a proceeding and

[32] See e.g., *Ontario (Attorney General) v. $25,610 in Canadian Currency (In Rem)*, 2017 ONCA 251, at paras. 2-3.
[33] Small Claims Court – Fees and Allowances, O Reg 332/16, s. 1(2)1.
[34] *Canada Transportation Act*, S.C. 1996, c. 10, s. 19(1)(b)(i).
[35] *Canada Transportation Act*, S.C. 1996, c. 10, s. 20(1).
[36] *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at paras. 39, 131-132 (Justice Brown, concurring); *Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency)*, 2021 FC 36, at para. 53.
[37] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at para. 45; *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 131 (Justice Brown, concurring).

may act as a powerful disincentive to bringing proceedings of any kind, suggesting undue hardship.[38] As the Supreme Court of Canada made plain in *Trial Lawyers Association*, access to justice is fundamental to the rule of law. Therefore, fees that prevent access to dispute resolution fora may be unconstitutional as they are inconsistent with the rule of law.[39]

Although the comments made above are with respect to fees imposed on plaintiffs, the principle remains that disproportionate, mandatory adjudication costs imposed on a party irrespective of the merit of the claim at issue may result in denying access to a dispute resolution forum. As shown above, there is a clear and strong argument to be made that the set $790 cost recovery fee set out in the Fee Proposal is grossly disproportionate to the quantum of disputes that are likely to arise between passengers and airlines. This raises further concerns as to the underlying objectives of the Fee Proposal and the amendments to the Act mandating that the operational costs of the CTA tribunal be borne exclusively by airlines.

E. Passenger Complaint Process and Overarching Considerations

This last section of our memorandum assesses the Fee Proposal in the overall context of the passenger complaint resolution process, including the provisions of the Guideline, which apply to all passenger complaints filed on or after September 30, 2023. First, we consider any inefficiencies and procedural fairness issues that arise from the current structure of the passenger complaint resolution process. Second, we assess the impact of issues relating to the CTA tribunal's lack of independence and impartiality.

The Fee Proposal indicates that the proposed $790 flat fee per eligible passenger complaint is likely temporary as it "will be replaced when the CTA establishes broader cost recovery schemes to encompass the cost of all its activities". While we cannot opine on a future scheme that has yet to be developed, we note that the issues canvassed below are equally applicable to any permanent cost recovery scheme, especially in a context where the CTA purports to enact such a permanent scheme prior to undertaking a full assessment of its operational efficiencies and any issues relating to procedural fairness, independence, and impartiality.

1) CTA tribunal inefficiencies and procedural fairness issues

As mentioned above, there is no indication in the Fee Proposal that the CTA undertook any analysis of any operational issues and inefficiencies of its passenger complaint resolution process prior to determining the average cost of assessing and closing a passenger complaint. As we outline below, however, there are several procedural fairness issues and inefficiencies within the current complaint resolution process, especially since the implementation of the Guideline in September 2023. These inefficiencies are likely contributing to an inflation of the CTA tribunal's operational costs which, as per the Fee Proposal, are then imposed exclusively on defendant airlines. There is an argument to be made that defendant airlines should not be made to bear the majority of the costs associated with the inefficiencies and procedural issues described below.

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[38] ***Uber Technologies Inc. v. Heller*, 2020 SCC 16, at paras. 131-132 (Justice Brown, concurring).**

[39] ***Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at paras. 38, 64.**

This would not only unfairly infringe on their fundamental rights to defend themselves, but also improperly penalize them for doing so.

First, it appears that the CTA itself may have contributed to the current backlog of passenger complaints. It is our understanding that during the Covid-19 pandemic, the CTA delayed its adjudicative body from ruling on an existing backlog of complaints until the CTA's regulatory branch issued a new policy decision on refunds.[40] By (arguably, unnecessarily) withholding decisions on existing complaints, the CTA contributed to additional delays in complaint processing, which necessarily added to the growing backlog of passenger complaints and, therefore, contributed to increased operational costs. We further note that this may have constituted an impermissible interference by the CTA's regulatory branch with the work of its tribunal – a potential example of lack of institutional independence which is considered in more detail below.

Second, some decisions rendered by CROs tend to show a lack of understanding of airline operations. In one case, a CRO found that an Environment Canada weather report was not readable for those without expertise.[41]

The *audi alteram partem* rule, known as the right to be heard, requires decision makers to "hear the other side" and "ensures that parties have an opportunity to present submissions on matters relevant to the disposition of the dispute."[42] Thus, the defendant in any proceedings must be allowed to present a complete defence before a decision is rendered against them. Making arguments before an adjudicator who does not understand the fact pattern at issue may impact the parties' fundamental right to be heard. Moreover, a lack of adjudicative expertise may lead to delays and additional expenditure of resources for both the CTA – as the CROs may need more time to assess each claim – and the airlines, who must spend more time explaining concepts and evidence that are standard in the aviation industry.

Third, it is our understanding that airlines are essentially foreclosed from raising preliminary arguments that could allow CROs to quickly dismiss frivolous and unmeritorious complaints. If there were a mechanism allowing for the eligibility assessment to be conducted earlier, there would be an opportunity to reduce the time and resources spent by both the CTA tribunal and airlines on each of these complaints.

Fourth, it appears that the statutorily-mandated mediation process exists in name only. Subsection 85.05(1) of the Act states that if the CRO deems a complaint to be eligible, "they shall mediate the complaint". However, we understand that the current practice is to merely "encourage" mediation by giving the parties each others' coordinates. In other words, the CROs do not actually mediate the dispute nor does the CTA provide any other third party neutral to conduct a mediation. This issue is compounded by the fact that, because the parties must have submitted their pleadings in full prior to the mediation stage, they are both more likely to be set in their respective positions. If the parties were afforded an opportunity for meaningful mediation – especially prior to the deadline imposed on airlines for filing a full defence – more complaints

[40] How the CTA will be processing Air Canada refund-related complaints resulting from the pandemic | Canadian Transportation Agency (otc-cta.gc.ca).
[41] See e.g. Air Travel Complaint Decision No. ATC-350606-CO-2024, dated November 28, 2023.
[42] *Air Canada* v. *Robinson*, 2021 FCA 204, para. 54.

could likely be resolved at an earlier stage, thereby further contributing to reducing overall operating costs.

There is an argument to be made that, by shifting the majority of the CTA tribunal's costs onto airlines through the cost recovery scheme the Fee Proposal disincentivizes the CTA from addressing any procedural inefficiencies or unfairness. We further note that the operational and financial impact of these inefficiencies may increase over time. This is an additional consideration in assessing the overall fairness and legitimacy of the Fee Proposal.

2) Impartiality and independence of the CTA Tribunal

As stated by Justice Brown (as he then was) in his concurring reasons in *Uber*, any means of dispute resolution that serves as a final resort for contracting parties must be *just*.[43] Whether a dispute resolution process is "just" depends on several factors, including whether there is a sufficient degree of procedural fairness and adjudicative impartiality and independence.

Historically, courts have noted some issues with respect to institutional independence and lack of impartiality within the CTA. For example, the Federal Court of Appeal recently raised concerns regarding the CTA's impartiality in a case involving an airline where the CTA "crossed the line" by taking an improper adversarial position in the context of an appeal.[44]

There is an argument to be made that concerns regarding a potential lack of impartiality and independence within the CTA were compounded in 2023 with (ii) the imposition of a reverse onus on airlines in relation to flight delays, flight cancellations, or denial of boarding and (ii) the creation of the CRO role.

First, the reverse onus set out at new subsection 85.07(2) of the Act states that if a complaint raises an issue as to whether a flight delay, flight cancellation, or denial of boarding is within a carrier's control, is within a carrier's control but is required for safety reasons, or is outside a carrier's control, it is presumed to be within the carrier's control and not required for safety reasons *unless the carrier proves the contrary*.

Existing concerns as to the CTA tribunal's impartiality, which were arguably increased with the imposition of a reverse onus on airlines and the short timeframe (14 days) within which airlines must put together a statement of defence under the Guideline, would be further compounded by the imposition of a disproportionately high-cost recovery fee which is exclusively imposed on defendant airlines. Together with the comments made by government representatives in debates relating to the *Budget Implementation Act, 2023* which suggest that the cost recovery fee is meant to discourage airlines from defending complaints before the CTA.[45] Indeed, as per these factors, the starting point for a CRO assessing a passenger complaint is that the airline is guilty, simply because it has not compensated the passenger and is exercising its right to file a full statement of defence. In this context, especially where the cost recovery fee is imposed irrespective of the

[43] ***Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 117 (Justice Brown, concurring).**
[44] ***Air Canada* v. *Robinson*, 2021 FCA 204, at paras. 70-72.**
[45] **Senate, Standing Committee on Transport and Communications, *Evidence,* 44-1, No 56:2 (17 May 2023) (Hon. Omar Alghabra) online: <sencanada.ca> https://sencanada.ca/en/Content/Sen/Committee/441/TRCM/56EV-56229-E**

outcome of the complaint, it results in the fee having an underlying punitive aspect, which raises further concerns as to the CTA's lack of impartiality.

Second, although the new sections of the Act outline the functions and powers of the CROs,[46] these provisions do not provide for adequate separation of roles and functions as between the CTA and its adjudicative tribunal.

A lack of impartiality may arise from the structure of the organization itself. If the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality may not be met.[47] This can happen where, for example, an overlapping of functions results in excessively close relations among employees involved in different stages of the adjudicative or investigative process.[48]

The lack of official separation between the CTA as a regulatory agency and the CRO role raises concerns as to the degree of independence of the CROs. For instance, the amended Act provides no guarantee that CROs will never be called upon to exercise regulatory or enforcement functions. Moreover, there is no insight into the role previously occupied by an individual CRO who was an existing member of the CTA prior to their appointment. There is an argument to be made that a CRO previously involved with the CTA's policymaking branch, which helped create pro-consumer policy, may be biased towards passengers (whether consciously or not) in their new role. This concern is compounded by the CTA's past actions, including, as described above, imposing a moratorium on passenger complaint resolution while the regulatory branch issued new directives.

Finally, section 85.11 of the Act raises further concerns as to the CTA's ability to influence the adjudicative process. This provision stipulates that the CTA may provide administrative, technical and legal assistance to a CRO. There is no clarity as to whom within the CTA can provide legal assistance and in what respect. For example, can CROs request CTA legal advice with respect to the adjudication of a specific complaint? This raises concerns that a member of the CTA charged with regulatory functions may be participating in – and providing legal advice in relation to – the adjudicative process.

FF/AB

[46] ***Canada Transportation Act*, S.C. 1996, c. 10, s. 85.02 and following.**
[47] ***Ruffo* v. *Conseil de la magistrature*, [1995] 4 SCR 267, para. 44.**
[48] ***2747-3174 Québec Inc.* v. *Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919, paras. 47-48.**