Submission on Bill C-310
Air Passengers' Bill of Rights

NATIONAL AIR AND SPACE LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Air and Space Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Air and Space Law Section of the Canadian Bar Association.

TABLE OF CONTENTS

Submission on Bill C-310
The Air Passengers' Bill of Rights

Submission on Bill C-310
Air Passengers' Bill of Rights

I. INTRODUCTION

The National Air and Space Law Section of the Canadian Bar Association (CBA Section) is pleased to comment on Bill C-310, the *Air Passengers' Bill of Rights.* Bill C-310 would impose significant financial and operational burdens on Canadian air carriers and foreign air carriers operating in Canada, as well as inconvenience and accessibility challenges for the travelling public. In particular, Bill C-310:

- duplicates existing federal regulatory schemes;
- imposes standards of conduct that in many cases would be unrealistic or impossible to fulfil and lacks flexibility to respond to individual situations;
- requires the payment of fixed "compensation" without a requirement of corresponding or any damages; and
- denies due process and fairness by imposing fixed penalties regardless of circumstances and not incorporating principles of mitigation and due diligence.

Therefore, the CBA Section recommends that Bill C-310 not be passed.

II. GENERAL PRINCIPLES AND COMMENTS

Contrary to Transportation Policy Objectives

Canada's national transportation policy is set out section 5 of the *Canada Transportation Act*. It declares Canada's transportation objectives are most likely to be achieved when, among other things:

- competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services; and
- regulation occurs only if it is necessary to achieve economic, environmental or social outcomes that cannot be achieved sufficiently by competition and market forces and it does not unfairly favour, or reduce the inherent advantages of, any particular mode of transportation.

It is the CBA Section's view that Bill C-310 runs contrary to this declaration and seeks to impose unnecessary and inappropriate regulation. Canadians are protected by numerous consumer protection laws. We do not see any public policy justification for targeting one mode (air) of one industry (transportation). Passengers in other modes of transport (bus, rail and ferry) are all subject to potential trip disruptions equivalent to those addressed in Bill C-310. Parliament has jurisdiction in many of those cases. There is no apparent basis for creating this special set of rules for aviation alone.

Duplication with Other Legislation

There is already an industry-and mode-specific consumer protection mechanism for airline passengers in Canada. Established under the *Canada Transportation Act*, the Canadian Transportation Agency (CTA) is well equipped to deal with consumer complaints. Its website states:

> Air travelers can complain to the Agency about any issue in respect of an air carrier service that they have been unable to resolve with the carrier. The Agency will review and try to resolve these complaints either directly or in cooperation with other government bodies. Depending on the nature of the complaint, there are a number of remedies available to the Agency. These include mediating the complaint, ordering the carrier to take corrective action, to pay compensation, or even to pay a fine.[1]

Air carriers are required to have tariffs that form the terms of the contract of carriage of its passengers. Most tariffs address issues of delay, cancellations and denied boarding. The operation of tariffs and the wide variety of price and product choices generally offered to Canadians reflect the reliance the *Canada Transportation Act* places on competitive market forces. Under the *Air Transportation Regulations,* the CTA has jurisdiction to determine if a tariff has been properly applied and to suspend or disallow a carrier's tariff if it is not just and reasonable or if it is unjustly discriminatory or preferential and may substitute other terms and conditions. The CTA can order compensation in appropriate circumstances. The CTA's 2008-2009 Annual Report states:

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[1] Online: http://www.otc-cta.gc.ca/doc.php?did=273&lang=eng.

Resolving Air Travel Complaints

Each year, the Agency receives a large number of complaints from air travelers related to the problems they have experienced with air carriers operating publicly available services to, from or within Canada.

The Agency can deal with such issues as:

- Baggage (e.g. damaged, delayed, excess, liability, lost, size limits, theft);
- Flight disruptions (e.g. cancellation, missed connection, revised schedules);
- Tickets and reservations (e.g. lost, refunds, restrictions, availability of seats, cancellation);
- Denied boarding (e.g. inability to fly as a result of carrier overbooking);
- Refusal to transport (e.g. late check-in, reconfirmation, travel documents);
- Passenger fares and charges;
- Cargo (e.g. transportation of animals, and delayed, damaged or lost cargo); and
- Carrier-operated loyalty programs (e.g. Advantage, World Perk or Skymiles, but excluding loyalty and frequent shopper programs such as Aeroplan and Air Miles).

In 2008-09, the Agency received 901 new air travel complaints. It also processed 1,209 complaints, some of which were received in the previous year.

676 of these cases were closed through the Agency's informal investigation process.

Of these,

6 were determined to be outside the Agency's mandate;
54 were withdrawn or dismissed;
607 were settled through facilitation; and
9 were referred to the Agency's formal adjudication process.
121 cases were still undergoing facilitation at year end.

Additionally,

1 air travel dispute was resolved through mediation;
23 were resolved through formal adjudication; and
14 cases were still in formal adjudication at year end.[2]

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[2] Online: http://www.otc-cta.gc.ca/doc.php?did=2233&lang=eng#air.

According to the Statistics Canada publication *Air Carrier Traffic at Canadian Airports, 2008,*[3] there were in excess of 54 million air passenger trips to, from or within Canada during 2008. Based on the 901 air travel complaints reported that year by the CTA, the complaint ratio is less than 1 in 60,000 passenger trips. Given the aversion to unnecessary regulation expressed in Canada's national transportation policy, that level of complaints does not appear to justify this further regulation. In addition to CTA complaints, travelers have recourse to civil claims where a carrier has been negligent or breached its contractual obligations and injury, inconvenience or loss results.

Section 14 of Bill C-310 adds provisions relating to airline advertising and disclosure with respect to pricing. These practices, if misleading, are already within the scope of the misleading advertising provisions of the *Competition Act*. Those provisions were recently amended to enhance their effectiveness by adding a non-criminal enforcement track (see Part VII.1 of *Competition Act*).

In 2003, Bill C-26 sought to impose provisions on the airline industry similar to those in Bill C-310. The CBA Air and Space Law and Competition Law Sections opposed that proposed legislation in a joint submission, which stated:

> [T]he CBA Sections are concerned about the apparent trend of creating separate competition-related rules for different industries or sectors where there does not appear to be a clear basis for creating different rules, as opposed to applying the same general principles contemplated in the *Competition Act* in the appropriate context. We have already seen special provisions added to the *Competition Act* dealing with airlines under the abuse of dominance provisions and merger review under the CTA, as well as previous proposals to amend the *Competition Act* to deal specifically with the retail gasoline industry. These examples raise a concern about where this trend will stop and that the result may be a needlessly complex set of rules and regulations applicable to a range of different industries that gain public profile from time to time… The creation of multiple sets of rules for different industries is unnecessary and inefficient.[4]

Impossibility of Compliance

Bill C-310 imposes obligations which will be difficult, if not impossible, for air carriers operating out of smaller or remote aerodromes to meet. Many specific requirements in Bill

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[3] Statistics Canada (Ottawa: Transportation Division, 2009), online: http://www.statcan.gc.ca/pub/51-203-x/51-203-x2008000-eng.pdf .

[4] *Submission on Bill C-26, Transportation Amendment Act,* May 2003 at 8-9.

C-310 do not reflect the infrastructure and facilities at many Canadian airports, aerodromes and communities. For example:

- In the case of flight cancellations or delays under sections 4 and 5, the air carrier may be required to offer meals, refreshments, communications and accommodations. Small airports and aerodromes have limited or no facilities to provide these services and many remote communities lack available or adequate accommodations, meal facilities, communications or local transportation to permit compliance.
- Subsection 17(1) requires public announcements of cancellations, delays and diversions by means of public audio announcements and posting on airport television monitors. Many airports do not have those facilities. Failure carries a $1,000 penalty.

Smaller air carriers generally lack the personnel, resources and facilities to comply with the Bill's requirements in the event of a delay or other service interruption. In the most basic operations in remote communities, a pilot may self-dispatch flights with no local personnel or facilities available to fulfill these obligations. Yet Bill C-310 would impose fixed penalties for failure to meet these commitments.

In many cases, adding the facilities and personnel to allow an air carrier to comply with Bill C-310 in the isolated cases when trip disruptions occur would impose additional costs on all flights. We encourage Parliament to determine if there is any evidence that the benefit of Bill C-310 outweighs the burden of those additional costs to air carriers and their customers.

In short, the CBA Section opposes legislation which would impose penalties for non-compliance where there is no realistic chance for compliance.

Mandatory Compensation Regardless of Fault or Actual Damage

Bill C-310 would impose a requirement to provide mandatory compensation without regard to the damage actually suffered by the passenger or to any due diligence on the part of the carrier. This scheme has the potential to produce anomalous and unfair results.

The compensation payable to passengers under a number of circumstances in the Bill has no connection to the damages, if any, actually suffered by the passenger. As a result, some passengers may be under-compensated by the mandatory amounts while others may be

overcompensated. In some cases, the compensation payable may be a multiple of the fare paid. The CBA Section is strongly of the view that, for fairness to both the passenger and the carrier, compensation payable should be based on actual damage and not fixed amounts.

The Bill provides no due diligence defence. In many circumstances, compensation is payable without negligence or default on the part of the carrier. A requirement for those who have suffered damage to use reasonable attempts to mitigate that damage is also missing from the scheme. The Bill lacks any indication of whether the scheme of compensation precludes or limits further claims by passengers arising from the same causes.

The CBA Section supports incorporating sensible flexibility into legal standards. Subsection 16(1) requires an air carrier acquiring any information on the location of lost baggage to make every reasonable effort to inform the passenger within one hour of acquiring that knowledge. Carriers will be faced with the difficult choice of phoning a passenger in the middle of the night with a timely update, or having to pay $100 compensation to avoid waking the passenger and waiting until morning to pass on the news.

It seems inevitable that Bill C-310 will often be unfair to either the carrier or the passengers, or both.

Absolute Offences

The administrative monetary penalties in Bill C-310 are fixed, not maximums. While there is a right of review by the Transportation Appeal Tribunal of Canada, there is no due diligence defence, as found, for example, in the *Aeronautics Act*. Nor is there flexibility in the amount of the penalty. The range of circumstances that could contribute to a flight disruption is immaterial. A diligent first-time slip receives the same sanction as a callous repeat offender.

The CBA Section is of the view that, as a matter of fairness, a carrier should be entitled to raise the defence of due diligence and penalties should be proportionate to the degree of fault or blame. The imposition of fixed penalties without regard to fault or blameworthiness is contrary to natural justice.

III. CONCLUSION

The CBA Section does not believe that Bill C-310 is required in the public interest. Passengers have established avenues for redress that appear to be functioning well. Bill C-310 imposes a universal standard of conduct that cannot necessarily be met – at all or without costs that may not be appropriate for the benefit obtained. The Bill's scheme of compensation and penalties is arbitrary to the point of unfairness.

Accordingly, we encourage Parliament not to adopt the Bill.