

**Preparing for the unexpected:
Compensating consumers for
catastrophic events**

RESEARCH REPORT

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About Option consommateurs

Option consommateurs is a non-profit association whose mission is to help consumers and defend their rights.

Option consommateurs informs consumers who have a disagreement with a merchant, through consultation on budgeting and information sessions on debt, consumer law and privacy protection. Each year, we produce research reports on important consumer issues. We also intervene with policy-makers and the media to denounce unacceptable situations.

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class actions suits and applying pressure on government authorities and businesses. You can help us do more by supporting Option consommateurs. For more information: www.option-consommateurs.org.

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Summary

During the Covid-19 pandemic, many merchants who were unable to provide services due to the prevailing health measures refused to reimburse consumers, preferring to offer them credit vouchers, extend subscription periods, or, in the case of events, issue rain checks. This research will use the experience of the Covid-19 pandemic in order to better understand the issues raised by the compensation measures that merchants offer during catastrophic events.

The majority of consumers in our focus groups reported that they were able to obtain satisfactory compensation from merchants during the pandemic. However, they complained of having to deal with interminable delays, a chronic lack of information from companies and major communication difficulties. In addition, consumers claimed to have lost money in a number of situations, for instance when they preferred to cancel rather than accept the service that the company was able to provide at a later date. Clearly, consumers want the option of getting a refund, despite being sympathetic to businesses that are having difficulty.

Reimbursement terms for business purchases are sometimes unclear and vary from one industry to another. In particular, online platforms for the purchase of travel services or tickets tend to disavow responsibility in the transaction and leave it to the final service provider to determine the rights of the consumer. In addition, some companies lay down conditions that could make it difficult for consumers to be fully compensated in the event of a catastrophic occurrence, in particular by authorizing them to withhold a fee from the amount remitted, by offering insurance with exclusions, by prohibiting consumers from transferring their right of access to the service or by simply prohibiting them from claiming certain of their legal remedies.

While Canadian law requires that consumers be reimbursed when a service is impossible to provide, it nevertheless tends to promote the stability of contracts and the maintenance of performance of a service, even when the service is provided in a very different way. The various consumer protection laws do contain some cancellation mechanisms for consumers, but these are fragmentary at best, varying from one jurisdiction to the next and depending on the type of transaction involved. In short, there is no truly comprehensive regime. In addition, the law provides no solutions for specific situations that arose in the wake of the Covid-19 pandemic, particularly that of consumers requesting the cancellation of a service they no longer wish to benefit from for legitimate reasons such as fears for their health. Unlike other countries worldwide, Canada did not intervene energetically in contractual relations during the pandemic.

Due to climate change, catastrophic events are not only likely to continue to occur in the years to come, but to do so with greater frequency and intensity. Consequently, Option consommateurs recommends the establishment of a consumer protection regime applicable in the case of catastrophic events, which would include cancellation and reimbursement rights for consumers, the imposition of specific deadlines for such compensation, and a prohibition on imposing fees on refunds.

Introduction

The Covid-19 pandemic has had a profound impact on the Canadian economy as a whole. The introduction of health measures aimed at curbing the spread of the disease, in particular the closure of non-essential businesses and imposition of travel restrictions, completely disrupted the provision of services in many areas including transport, accommodation, restaurants and arts and recreation.¹

A host of problems arose for consumers in the context of the pandemic. Broken supply chains gave rise to shortages,² delays in delivery³ and even instances of abusive price increases.⁴ The pandemic also propelled other business practices that impacted consumers, such as the introduction of “covid fees,”⁵ refusal to accept cash⁶ and the transition to e-commerce.⁷

This research focuses on a specific problem: the compensation measures offered to consumers when merchants could not provide services as a result of the health measures in force. Several companies, deprived of revenue, refused to reimburse consumers, preferring to issue deferred purchase vouchers, extend subscription periods, or, in the case of sporting or cultural events, issue rain checks. These practices, which are unprecedented on such a large scale, gave rise to strong public criticism and have been the subject of significant media attention.

Research objectives and methodology

Through the experience of the Covid-19 pandemic, this research aims to better understand the issues raised by the compensation measures offered by merchants during catastrophic events.

What were the compensation measures Canadian merchants offered to consumers during the Covid-19 pandemic? Why did merchants opt for these measures? What are the advantages and disadvantages of the measures? What are the impacts on consumers, their experiences and their opinions? What do Canadian merchants’ contracts provide for in the event of a catastrophic event? Is Canadian law adapted to these issues? What is the situation in other countries?

¹ Wulong Gu, *Economic Impact of the COVID-19 Pandemic on Canadian Businesses across Firm Size Classes*, Statistics Canada, Catalog No. 11-626-X — 2020017 - No. 119, August 19, 2020

² Jacques Nantel, “S’en sortir! Notre consommation entre pandémie et crise climatique,” *Somme toute*, 2022, p. 31, 2022, p. 31; Éric Desrosiers, “Quand les chaînes d’approvisionnement sautent,” *Le Devoir*, January 8, 2022.

³ Émile Gagnon, “Les consommateurs devront s’armer de patience,” *Le Quotidien*, June 26, 2021.

⁴ Government of Ontario, “Ontario Protecting Consumers from Price Gouging,” news release, March 20, 2020; Doug Schmidt, “Canada’s first COVID-19 ‘price gouging’ lawsuit filed in Windsor,” *Windsor Star*, April 23, 2020.

⁵ Roxane Trudel, “Déménagement: attention aux «frais COVID-19», rappelle l’OPC,” *Journal de Montréal*, June 29, 2020; Maud Cucchi, “Les commerçants peuvent-ils ajouter des « frais COVID » à votre facture?” Radio-Canada, June 26, 2020.

⁶ Bank of Canada, “Update: Bank of Canada asks retailers to continue accepting cash,” May 28, 2020, <https://www.bankofcanada.ca/2020/05/bank-canada-request-retailers-continue-to-accept-money/>; Jean-Michel Genois Gagnon, “COVID-19: Bannir l’argent comptant va faire mal aux plus démunis,” *Journal de Montréal*, March 20, 2020.

⁷ André Léonard and Sarah Lemelin-Bellerose, “Impacts of COVID-19 on Selected Sectors of the Canadian Economy,” *HillNotes*, Library of Parliament, April 8, 2020.

In an attempt to find answers to these questions, we deployed a multi-pronged strategy. First, a literature and media review allowed us to profile the compensation measures offered to consumers during the Covid-19 pandemic (Section 1). We then held six focus groups with Canadian consumers to gather their views (Section 2). We subsequently looked at the terms of use of 40 merchants in order to determine the applicable terms in such situations (Section 3). Finally, we analyzed the legal framework with regard to service cancellation situations in the context of catastrophic events, in Canada and abroad (Sections 4 and 5).

To inform our analysis, we also solicited interviews with consumer and service industry experts, as well as business representatives.⁸ We interviewed Jacob Charbonneau, president and co-founder of Volenretard.ca, Michelle Cumyn, professor of law at Université Laval, Brian H. Bix, professor of law at the University of Minnesota, Jason Kerr, Director, Government Relations at CAA, Gábor Lukács, President of the organization Air Passenger Rights, Jérémie Torres-Ceyte, professor at Université de Montréal, and Marc-Antoine Vachon, holder of the Transat Chair in Tourism at the School of Management Sciences Université du Québec à Montréal. Representatives of the European Consumer Center (France) also agreed to answer our questions.

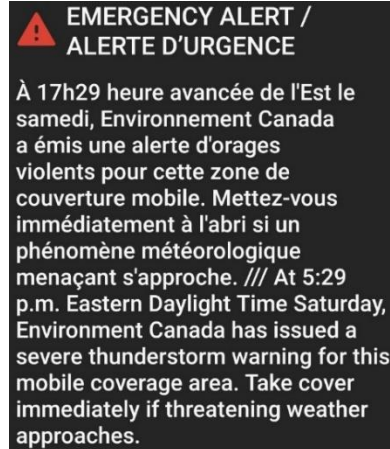
⁸ We requested interviews from all the companies included in our selection for the purposes of contract analysis (see Section 3) as well as from business groups. All of these refused our requests for an interview, or left them unanswered, with the exception of the Éconofitness chain of fitness centers.

1. Background

1.1. Increasingly predictable unforeseen circumstances

Epidemics, heat waves, droughts, floods, hurricanes, forest fires, the list goes on. Due to the impact of human activities on the environment, catastrophic events⁹ such as the Covid-19 pandemic are likely to become increasingly common in the coming decades.

Not only will pandemics occur more often, but they will cause greater economic losses and a higher number of casualties, a IPBES report says¹⁰. This increase is explained in large part by deforestation and the construction of infrastructures that encroach on natural environments, which multiply our interactions with wildlife and increase the risk of transmitting new viruses to humans.¹¹



Example of a severe thunderstorm warning for the Montreal area (May 21, 2022). According to the Intergovernmental Panel on Climate Change (IPCC), extreme weather events are likely to occur more frequently in the coming years.¹²

⁹ In this report, we will use the terms “catastrophic event,” “force majeure” and “fortuitous event” interchangeably to designate an unforeseeable, irresistible situation that impedes a merchant’s ability to provide a service paid for by a consumer. These terms obviously apply to pandemics, but also to natural disasters. Our definition is inspired by the concept of “force majeure” in civil law (see Section 4.1.1).

¹⁰ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *IPBES Workshop Report on Biodiversity and Pandemics*, IPBES, 2020.

¹¹ *Ibid.*

¹² Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2021: The Physical Science Basis*, Cambridge University Press, 2021, pp. 15-19.

The risks of natural disasters are also growing. According to a UN report, there has been a dramatic increase in extreme weather events over the past 20 years.¹³ From 2000 to 2019, the report cited 7,348 natural disasters worldwide, resulting in losses of US\$2.97 trillion. In comparison, only 4,212 natural disasters had been recorded in the previous twenty years (1980 to 1999).¹⁴ The increase in the number of these catastrophic events is once more explained by human activity and its resultant impact on climate.

In sum, the Covid-19 pandemic was perhaps only a prelude to other catastrophic events that will occur more frequently in the future. There is therefore every reason for us to draw lessons from this crisis and better understand the issues it raises so that the law and commercial practices can be adapted to this new reality.

1.2. Compensation measures during the Covid-19 pandemic

Beginning in March 2020, governments across Canada decreed the closure of many types of non-essential businesses in an attempt to limit the spread of Covid-19. These closures, which were in effect for discontinuous periods, were supplemented by other types of restrictions, particularly those limiting the number of individuals authorized to participate in certain types of activities.

Finding themselves unable to provide services as agreed, many merchants offered their customers compensation measures¹⁵ such as credits, but declined to offer them a refund. Air transport was unquestionably the emblematic sector for this type of commercial practice (Section 1.2.1). Similar practices were observed in many other types of businesses, however (Section 1.2.2). In addition, faced with the refusal of some merchants to return the money paid to them, consumers also sought out other stakeholders in an attempt to receive compensation (Section 1.2.3).

1.2.1. Reimbursing air passengers: the long stalemate

Due to the health restrictions decreed as of March 2020, millions of Canadians saw their travel plans fall through.¹⁶ Air carriers initially offered these consumers a credit, which they could use to purchase a new ticket, generally within a period of two years.

This practice incurred widespread dissatisfaction among consumers, who wanted their money back instead. As of October 2020, the Canadian Transportation Agency (CTA) had received

¹³ Center for Research on the Epidemiology of Disasters and United Nations Office for Disaster Risk Reduction, *The human cost of disasters: an overview of the last 20 years (2000–2019)*, 2020, pp. 6-7.

¹⁴ Ibid.

¹⁵ In this report, the term “compensation measure” means any measure aimed at compensating a consumer who was unable to receive a service; these measures include a refund, a credit, a postponement or any other formula.

¹⁶ According to Air Passenger Rights, 3,870,000 consumers in Canada were affected by flight cancellations as of September 30, 2020. See: Air Passenger Rights, *Withheld Passenger Refunds: A Failure by Design, Submissions to the House of Commons’ Standing Committee on Transport, Infrastructure and Communities*, February 2021, p. 7.

nearly 10,000 consumer complaints related to flight cancellations.¹⁷ While several jurisdictions around the world reaffirmed the right of air passengers to obtain a refund,¹⁸ a number of public stakeholders have deplored the slowness of the Canadian government to act and the CTA's failure to demand that passengers be reimbursed.¹⁹

A strong mobilization of civil society followed. Class actions suits were initiated against carriers.²⁰ Petitions launched by consumer groups garnered tens of thousands of signatures.²¹ A federal bill was introduced to reassert passengers' right to reimbursement.²² The House of Commons Standing Committee on Transport also considered the issue; among the recommendations in its report were that public support for the industry be conditional on the reimbursement of passengers and that the legal framework be modified to guarantee reimbursement for consumers.²³

The impasse was finally resolved after consumers had waited for over a year. First, starting in April 2021, the federal government concluded piecemeal agreements with the country's biggest air carriers.²⁴ In exchange for financial support from the government, each carrier agreed to reimburse customers who so requested; however, since refunds were not automatic and had to be claimed within strict time limits, some consumers were unable to get their money back.²⁵ Then, in 2022, following consultations with stakeholders, *Air Passenger Protection Regulations* were amended to guarantee, in the future, the right to reimbursement when a carrier has to cancel flights for reasons beyond its control (see Section 4.2.1).

¹⁷ Ashley Burke, "Grounded travellers call on government to force airlines to issue refunds for cancelled flights," CBC News, May 22, 2020. A similar increase has been observed outside Canada. In the United States, the Department of Transportation recorded 102,550 complaints in 2020, a 500% increase over 2019. See: The Office of Aviation Consumer Protection, *Air Travel Consumer Report*, Department of Transportation, February 2021, pp. 63-64. In the United Kingdom, the Competition & Markets Authority also received thousands of complaints, three-quarters of which concerned the airline and vacation sector. See: Competition & Markets Authority, *Protecting consumers during the coronavirus (COVID-19) pandemic: update on the work of the CMA's Taskforce*, May 21, 2020, <https://www.gov.uk/government/publications/cma-coronavirus-taskforce-update-21-may-2020/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cmas-taskforce>

¹⁸ This was particularly the case in the European Union and the United States (see Section 5).

¹⁹ Vance Badawey et al., *Emerging from the Crisis: A Study of the Impact of the Covid-19 Pandemic on the Air Transport Sector*, Report of the Standing Committee on Transport, Infrastructure and Communities, June 2021, pp. 30-31, 36-39; Ashley Burke, "Grounded travelers call on government to force airlines to issue refunds for cancelled flights," CBC News, May 22, 2020.

²⁰ See in particular: *Lachaine v. Air Transat AT Inc.*, 2021 QCCS 2305; *Donaldson v. Swoop Inc.*, 2020 FC 1089

²¹ Petition to the Government of Canada, e-2604 (Transportation), House of Commons of Canada, <https://petitions.noscommunes.ca/en/Petition/Details?Petition=e-2604>; Refund for Airline Travel (COVID-19), Change.org, <https://www.change.org/p/air-canada-refund-for-airline-travel-covid-19>.

²² *An Act to amend the Canada Transportation Act (refund—cancelled air service)*, Bill C-249 (October 23, 2020), 2nd Sess., 43rd Parl., 69 Elizabeth II.

²³ Vance Badawey et al., *Emerging from the Crisis: A Study of the Impact of the Covid-19 Pandemic on the Air Transport Sector*, Report of the Standing Committee on Transport, Infrastructure and Communities, June 2021, pp. 5-7.

²⁴ The Canadian Press, "Après Air Canada: d'autres clients attendent un remboursement," *Les Affaires*, April 14, 2021. Sums were paid to Air Canada (\$1.4 billion), Air Transat (\$310 million), Sunwing (\$100 million) and Porter (\$20.5 million). Westjet, for its part, took the initiative of reimbursing its customers without receiving public money. See: Isabelle Dubé and Julien Arsenault, "On peine à retracer les voyageurs non remboursés," *La Presse*, May 30, 2022.

²⁵ Faced with these difficulties, Air Canada even extended its claim period. See: Air Canada, "Air Canada Extends COVID-19 Refund Policy by 30 Days," News Release, June 10, 2021; Isabelle Dubé and Julien Arsenault, "On peine à retracer les voyageurs non remboursés," *La Presse*, May 30, 2022.

1.2.2. Variable measures according to sector

In addition to air travel, consumers encountered pitfalls with other types of enterprises. Although the compensation measures offered vary depending on the type of merchant and situation involved, certain trends were observed in major activity sectors.

As in the airline industry, several Canadian companies offered consumers credits (also called “vouchers”) that could later be exchanged for another service of equivalent value. This was the case in the events sector, where the large ticket distributors initially imposed the granting of credits to consumers whose show was cancelled.²⁶ Ski resorts also offered pass holders a voucher for the purchase of a pass for the following season.²⁷

In other cases, merchants instead chose to put off the provision of the service until later. In the sports and recreation sector, several fitness centers offered consumers an extension of their membership equal to the time lost while the establishment was closed.²⁸ In the events sector, several companies refused to reimburse tickets for shows that were postponed, arguing that the consumer could simply show up on the new date.²⁹

To encourage consumers to accept a credit or deferral, some companies offered a rebate or financial incentive to any consumers who took advantage of this option. For example, Éconofitness added 30 additional days to the subscription of customers who agreed to continue their monthly payments “as a thank you for their trust.”³⁰ Similarly, in the event sector, Stubhub offered a credit equivalent to 120% of the value of the initial ticket.³¹

Some merchants also chose to deal with health restrictions by providing the service, but in a different way. In the absence of being able to offer activities requiring group attendance, many offered distance courses or virtual performances.³²

²⁶ Dave Seglins, Laura Clementson and Sylvene Gilchrist, “Live Nation/Ticketmaster decision to withhold refunds ‘reprehensible,’ say fans, members of Congress,” CBC News, April 17, 2020; Pat Foran, “Fans want refunds for cancelled concerts, not credits,” CTV News, June 1, 2020.

²⁷ Stephanie Ip, “COVID-19: Whistler Blackcomb offers credit to pass holders, free insurance,” *Vancouver Sun*, April 27, 2020; Erika Engel, “Blue Mountain Resort asks for patience as it works through refunds, deferrals,” *Barrie Today*, December 22, 2020.

²⁸ We found mentions to this effect on the websites of: Good Life Fitness, Éconofitness, Planet Fitness, Nautilus Plus and Énergie Cardio. See, for example: <https://blog.goodlifefitness.com/article/goodlife-fitness-updates-covid-19> (May 17, 2020).

²⁹ Émilie Côté, “Politique de remboursement : tirs groupés contre Ticketmaster,” *La Presse*, April 15, 2020.

³⁰ <https://faq.econofitness.ca/gym-zone-rouge> (October 29, 2020).

³¹ Raphaël Guillemette, “Saisons sportives suspendues : vos billets seront-ils remboursés?” Radio-Canada, 14 mars, 2020

³² Ezra Belotte-Cousineau, “Des gyms se réinventent pendant le confinement,” Radio-Canada, January 19, 2021; Sylvie Mousseau, “COVID-19: des artistes présentent leur spectacle en ligne,” *Acadie Nouvelle*, March 16, 2020.

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Excerpt from the Théâtre du Nouveau Monde website (May 7, 2020). During the pandemic, several cultural businesses invited consumers to make a donation.

At times, consumers came up against restrictive policies by merchants, who refused consumer requests for refunds even if the service would be provided in a significantly different way due to prevailing health rules. For example, service providers in the wedding industry sometimes asked consumers to pay extra to reschedule a reservation or withheld the deposit from consumers who requested a cancellation.³³

On the other hand, we noted that some merchants chose to adopt the opposite route, i.e. to relax their cancellation and refund policies. In the resort sector, some large hotel groups adopted flexible policies that made it possible to cancel a reservation free of charge up to 24 hours before the date of stay.³⁴ In addition, in the events sector, some ticket sales platforms changed their minds and offered a refund option in response to the dissatisfaction aroused by the imposition of credit vouchers.³⁵

1.2.3. Other remedies available to consumers

Consumers who were unable to obtain a refund from merchants attempted to appeal to other companies involved in the purchasing process. Such tactics were not always successful, however.

In the travel sector, consumers turned to the intermediaries they had made the transaction with, such as online platforms or travel agencies. However, these companies often relied on the policies of end-service providers in determining options for reimbursing consumers. As a result, they often refused to release funds to consumers until the carriers or other service providers

³³ Erica Johnson and Kimberly Ivany, "Couples fight for refunds after COVID-19 cancels wedding events," Social Sharing, CBC News, March 22, 2021; Isabelle Roberge, "COVID-19: À défaut de pouvoir vous marier, pourrez-vous être remboursés?" Radio-Canada, May 1, 2020.

³⁴ Stephanie M. Hughes, "Need to cancel a trip due to COVID-19? Here's how to get your money back," *The Star*, March 12, 2020; Sarah Firshein, "Help! I'm Owed a Refund, But the Hotel Owner Refuses to Budge," *New York Times*, July 7, 2020.

³⁵ Radio-Canada, "Le géant du divertissement AEG offre le remboursement des billets de spectacles reportés," April 17, 2020; Philippe De Montigny, "StubHub remboursera finalement les billets d'événements annulés," Radio-Canada, May 3, 2021.

offered refunds.³⁶ In Ontario, the law has even been changed to temporarily allow travel agencies to give their customers a credit rather than a refund if the inability to provide services is related to Covid-19.³⁷ Even when refunds were finally granted, consumers complained of administrative bungling and travel agencies withholding fees from the amounts obtained.³⁸

Another option available to consumers was to turn to the issuer of the credit card used during the transaction to obtain chargeback for their purchase or, if necessary, to block pre-authorized payments. According to the laws of several provinces, credit card issuers must, under certain conditions, reimburse the consumer if the service they purchased via the Internet is not provided (see Section 4.2.2). However, although some consumers have been able to obtain reimbursements using this method, others report that they were turned down by their financial institution.³⁹

Consumers could also contact their insurer. However, Canadian insurers generally considered credit issued by a merchant to be an acceptable form of compensation than reimbursement.⁴⁰ Nevertheless, travel insurance was beneficial in various circumstances, particularly when the merchant was able to provide the service, but it was of little use to the consumer. Such a situation might arise, for example, when a consular advisory to avoid all non-essential travel came into force in the country of destination or if the consumer contracted Covid-19.⁴¹

Finally, in some provinces, customers of travel agencies can receive protection from funds created to compensate them if the service is not provided or if the merchant goes bankrupt. In Québec, the Compensation Fund for Customers of Travel Agents (CFCTA) was so overwhelmed by tens of thousands of claims for a cash refund from consumers who had received a credit, that it took several years to process them.⁴² Conversely, similar funds in Ontario and British Columbia accepted only a very small number of complaints.⁴³

³⁶ Mélissa Pelletier, “Les crédits voyage financent les compagnies aériennes,” Radio-Canada, September 15, 2020; Stéphanie Grammond, “Un crédit? Non merci!” *La Presse*, March 25, 2020.

³⁷ O. Reg. 101/20: GENERAL, s. 5

³⁸ Isabelle Dubé and Julien Arsenault, “On peine à retracer les voyageurs non remboursés,” *La Presse*, May 30, 2022; Marie-Eve Fournier, “Cancelled trip: who should pay?,” *La Presse*, December 24, 2021; Jean-Marie Yambayamba, “Vols annulés pendant la pandémie : l’indemnisation se fait attendre,” ICI Alberta, June 19, 2022.

³⁹ Jeremy McDonald and Asha Tomlinson, “Credit card chargebacks a challenge for some airline customers,” CBC News, May 22, 2020; Anne Drewa, “WestJet Vacations customer endures long battle getting refund after COVID cancellation,” Global News, February 3, 2022; Annie Hudon-Friceau, “Rétrofacturation : certaines institutions bancaires font fi de la loi,” Radio-Canada, February 7, 2023.

⁴⁰ Canadian Life and Health Insurance Association, Advisory: “Travel cancellation insurance and airline vouchers or credits,” News Release dated April 1, 2020. By way of illustration, Assurances Desjardins informs consumers: “We consider any amount given to you or any travel credit offered to you to be a refund, whether you accept it or not.” See: <https://www.desjardins.com/covid-19/travel-insurance/index.jsp>. Note that a class action against an insurer on this issue was settled out of court: *Lyons v. TD Home and Auto Insurance Co.*, 2023 ONSC 1149.

⁴¹ Canadian Life and Health Insurance Association, “Submission to the Canadian Transportation Agency in response to the Public Consultation on the Development of New Airline Refund Requirements,” March 1, 2021, p. 3; Travel Insurance Association of Canada, Covid-19 FAQs, https://www.thiaonline.com/COVID19_FAQ_En.html

⁴² Marie-Eve Fournier, “L’Office de la protection du consommateur doit bouger,” *La Presse*, June 14, 2021. A class action was even been brought against the Consumer Protection Office regarding the processing times for complaints: *Lamoureux v. Consumer Protection Office*, 2021 QCCS 2683.

⁴³ In British Columbia, the assurance fund received only 20 claims in 2020. The fund says most of these claims were ineligible: “The few claims received were largely ineligible as the losses related to COVID-19 trip cancellations, which

That said, although consumers encountered many obstacles in their attempts to recover their money, the data we have assembled seems to indicate that the majority were able to obtain the compensation they desired in the end. According to Air Canada, the country's largest carrier, 58% of customers took advantage of the refund program instituted in 2021; others were able to benefit from the credit offered by the company, which was enhanced with additional loyalty points.⁴⁴

In Québec, the statistics on claims submitted to the CFCTA allow us to paint a similar picture. As of March 7, 2023, 45,584 compensation claims had been received by CFCTA; of these, 20,000 were cancelled because the consumer was eventually reimbursed by a third party (either the service provider, the insurer or the credit card issuer), 12,606 refunds were issued, and 9,000 files were closed because consumers did not respond to requests for additional information.⁴⁵ Excluding the closed files, we see that claimants obtained reimbursement in 89% of cases and that, in 54% of cases, the reimbursement came from third parties.

1.3. Merchants in survival mode

Why refuse to reimburse consumers? From the merchants' point of view, the choice to opt for other compensation measures is easily explained by the financial difficulties they faced.

The tourism industry suffered enormously from the pandemic. According to the International Air Transport Association, air traffic experienced the "worst decline in the history of aviation,"⁴⁶ down 66% in 2020 compared to 2019. The Association of Canadian Travel Agencies estimates that the industry saw a 95% drop in revenue from March to December 2020; in Québec, approximately 16% of travel agencies are reported to have permanently closed their doors as a result of the pandemic.⁴⁷

Other sectors were hard hit by the health restrictions, which prohibited gatherings. Operating revenue in the entertainment industry fell by 33.9% in 2020, the largest drop ever recorded.⁴⁸ In

were not covered because of force majeure clauses in many travel contracts." See: CONSUMER PROTECTION BC, *2020 Annual Report*, 2021, p. 20. In Ontario, the fund explains that it received fewer claims during the Covid-19 pandemic, in particular due to the temporary regulatory changes allowing the granting of credit to consumers by travel agencies. See: TICO, *2021 Annual Report & Business Plan*, 2021, pp. 38-39.

⁴⁴ Julien Arsenault, "Air Canada n'aura pas besoin de l'argent d'Ottawa, sauf pour rembourser ses clients," *La Presse*, November 19, 2021; Air Canada, "Air Canada Extends Deadline of Its COVID-19 Refund Policy by 30 Days," Press release, June 10, 2021.

⁴⁵ Émilie Bilodeau, "Une équipe de hockey peine encore à se faire rembourser," *La Presse*, March 20, 2023. In addition, 2,471 requests were refused, 1,180 files were incomplete, and 9,000 files were closed because consumers, despite multiple requests, did not provide the required information. The rest of the requests were still being analyzed.

⁴⁶ International Air Transport Association (IATA), "2020 Worst Year in History for Air Travel Demand," News Release, February 3, 2021.

⁴⁷ Marie-Eve Fournier, "Voyage annulé : qui doit payer?" *La Presse*, December 24, 2021.

⁴⁸ Statistics Canada, "Operating revenues of spectator sports, event promoters, artists and related industries decline sharply amid pandemic restrictions," *The Daily*, March 9, 2022.

the sports and recreation sector, fitness centers suffered a drop in operating revenue of 39.7% in 2020; ski resorts, 22.7%.⁴⁹

Although government programs were implemented to support businesses that had to cease operations, many merchants said they lacked the cash to reimburse all their customers. The companies' insurers could not be called upon to absorb these sums, since as a rule, they did not cover income lost due to the Covid-19 pandemic.⁵⁰ Similarly, funds obtained from consumers were often already committed when the pandemic hit (for example, to pay the agency's third-party suppliers) with the result that many companies no longer had the money paid by consumers in their possession.⁵¹

In addition, at a time when mass layoffs were occurring across the country,⁵² obliging consumers to bear the financial loss consumers must have left a bitter taste for many citizens who, deprived of income, were also feeling the financial impact of Covid-19.⁵³ On the other hand, merchants who adopted policies that made it easier for consumers to cancel reservations and obtain reimbursement might have helped restore consumer confidence and thereby produced a positive effect on their reputation.

⁴⁹ Marie-Christine Bernard and Megan McMaster, "Financial impacts of the pandemic on the culture, arts, entertainment and recreation industries in 2020," Statistics Canada, Catalog no. 45-28-0001, August 17, 2021.

⁵⁰ OECD, "Responding to the COVID-19 and pandemic protection gap in insurance," OECD Policy Responses to Coronavirus (COVID-19), March 16, 2021.

⁵¹ In addition, representatives of travel agencies claim that financial institutions used the sums in their bank accounts to reimburse customers in response to requests for chargebacks: Marie-Eve Fournier, "L'Office de la protection du consommateur doit bouger," *La Presse*, June 14, 2021.

⁵² According to Statistics Canada, 12.4% of Canadian workers were laid off on a monthly basis in June 2020. See: Ping Ching Winnie Chan, René Morissette and Hanqing Qiu, "COVID-19 and job displacement: Thinking about the longer term," Statistics Canada, June 10, 2020.

⁵³ Financial Consumer Agency of Canada, "Consumer Vulnerability: Evidence from the Monthly COVID-19 Financial Well-being Survey," Canada, November 2022.

2. Covid-19: the consumers' perspective

In order to better understand their views on the compensation measures made available during the Covid-19 pandemic, we organized six videoconference focus groups with 41 Canadian consumers who suffered a purchase cancellation during the Covid-19 pandemic.⁵⁴

Our selection of participants roughly corresponded to the demographic profile of the general Canadian population. The groups included workers, retirees, students and job seekers from all age groups with varying levels of education.

Two groups were formed of participants from Québec, two others, participants from Ontario, another, participants from the Atlantic provinces, and the last, participants from Western Canada. The Québec sessions were conducted in French; in the rest of Canada, they were in English.

2.1. Feedback on consumer experiences

2.1.1. Satisfactory outcomes

Participants reported a total of 55 cases of cancellation of purchases in four main categories: events (28), travel (15), subscriptions to sports or artistic activities (10) and accommodation (2). In the vast majority of cases, the participants considered the compensation they received for their cancelled purchases to be acceptable. Although the cancellations resulting from the pandemic gave rise to a tidal wave of consumer complaints, we observed that in the end, almost all of these situations were resolved amicably.⁵⁵

In most cases, consumers got a refund. In the travel sector, for example, almost all of the participants claimed they were able to receive a cash refund for the amounts they had paid. In the events sector, this proportion was over half.

Some consumers accepted other compensation measures, most often a credit or a rain check for the planned event, and more rarely, other formulas. For example, one participant opted to take virtual classes offered by his fitness center. In order to support the cultural community affected by the pandemic, another participant chose to donate the amount reimbursed for her ticket for the show to the theater itself.

In the end, out of all the participants, only four said they were dissatisfied with what the company offered them (about 10%). One person said they were still waiting for a refund from a concert promoter, another wanted to be compensated for the fees withheld from a credit issued by the merchant. Two others, who had initially accepted a postponement or a credit, later declared they would have preferred a refund.

⁵⁴ The discussion guide for these groups is included in Appendices 1 (French) and 2 (English). The firm BIP was mandated to recruit the participants and to hold the focus groups, which took place on July 19 and 20, 2022 (for Québec), July 21, 2022 (for Ontario) and July 26, 2022 (for Western Canada and the Atlantic provinces).

⁵⁵ This finding, moreover, is consistent with what the statistics on consumer reimbursement indicate (Section 1.2.3).

2.1.2. Unresolved issues

Although a large majority of participants said they were satisfied with the compensation received, many experienced specific difficulties for which they could not be compensated.

Participants reported 12 instances in which they personally cancelled a purchase when the company was able to provide the service. These consumers preferred not to use the service, often because they had Covid-19 or had concerns about the risk of contracting it.

On the whole, these situations were dealt with in ways consistent with the merchants' contractual terms (see Section 3). Participants who had hotel reservations were generally able to obtain reimbursement, regardless of whether the cancellation was due to a personal reason; similarly, those who purchased event tickets were generally able to resell them. In the travel sector, however, several consumers testified that they were unable to obtain a refund. As for those who had purchased subscriptions, one participant from Québec explained that she was unable to obtain reimbursement for sports classes she did not attend.

In addition, three participants said they lost sums not because of the merchant's failure to reimburse them, but on other purchases they had made in anticipation of this service. For instance, although one consumer was able to get a refund for his cancelled flight, he could not get a refund for tickets to the show he missed at his planned destination.

Finally, a few participants who had initially agreed to be reimbursed in a different way stated they were disappointed with what was provided. One participant from Québec said she had signed up for the virtual classes offered by her fitness center, but that the experience was "very unsuccessful." Another, also from Québec, explained that the tickets she was offered for a postponed show were not of the same value, so she ended up requesting a refund from the promoter.

2.2. A painful process

Obtaining compensation for cancelled services was not without its difficulties. About half of the participants said they were dissatisfied with the process they had to follow, due to the complexity of the procedures, the waiting times and communication problems with the company.⁵⁶ Dissatisfaction was most pronounced in the travel sector, where the purchases involved large sums.

⁵⁶ The same type of difficulty has often been reported in the media. See: Mathieu Dion, "Des détenteurs de billets du Grand Prix F1 du Canada 2020 toujours non remboursés," Radio-Canada, June 22, 2021.

2.2.1. Multiple approaches

Several participants testified that they were obliged to go through a great number of steps, calls and emails, with several intermediaries, in order to obtain compensation. Some participants described the process as a “battle,” in which they felt they were left to their own devices. “Everyone was passing the buck to everyone else,” one participant from Québec said.

The quality of customer service at several companies was the target of strong criticism. Some complained that simply finding a contact person was very complicated, and that they had to explain their problem over and over again, to different employees, each time they attempted to inquire about the status of their file. One participant from Québec explained: “We felt like we always had to explain everything over again and if we didn’t contact them, we didn’t get an update. There should be regular follow-ups.”

These difficulties were particularly marked among consumers who had done business with low-cost companies in the travel sector. For example, one participant from the West explained that she went through an “extremely difficult” process with Swoop, whose customer service department was exceptionally difficult to get through to. One Québec consumer, overwhelmed by hours of waiting on FlightHub’s telephone service, even claims he had to go to the company’s offices in person in his attempt to obtain a refund; in the end, he reports having obtained a credit for the amount originally paid, but was charged a cancellation fee of \$350.

That said, incidents also occurred in other areas, such as ticket sales or sports subscriptions. For example, one participant from Québec said that the owner of his gym stubbornly refused any reimbursement or postponement, and that several members of the establishment had to send him a formal notice to get him to change his mind.

2.2.2. Endless delays

Delays in obtaining compensation often proved to be very long. Many participants waited months or even years for reimbursement. The airline sector particularly tested the patience of consumers:

“It took a year and a half to get the money back on my credit card. I think it’s pretty ridiculous. I understand it was a crazy time for the airline and everything, but essentially you are holding my money hostage. I didn’t know when I was going to travel again. I could have used those funds for something else and here I’m waiting over a year for this huge airline to get back to me.” (Ontario)

Some participants even felt that certain companies, particularly in the travel industry, were deliberately attempting to stretch things out in order to hold onto their customers’ money. One consumer from Ontario concluded: “They are keeping themselves afloat, but they are not considering me, the customer here, who may also need that money.”

2.2.3. Communication problems

Participants also deplored the lack of communication from companies during the crisis. Many consumers criticized the companies for not giving them complete information about what steps to take and the compensation options available when they announced that they were unable to provide the service. “I felt like the communication was poor. I felt like I had to do all of the work, calling and getting information.” (Ontario)

In particular, they emphasized the lack of proactivity on the part of companies, with many criticizing merchants for not taking the initiative to inform them of their options. One participant from Ontario explained, “Communication is the key. They should communicate with people and not wait for people to contact them in case of a problem. They should be the first to reach out.” Some participants explained that greater speed in transmitting information would have enabled them to better adapt to the situation. Similarly, consumers also criticized companies for not keeping them informed of developments during the pandemic: “I understand everything was changing week to week, but you can’t just leave people like that for too long, it’s going to upset them. It was frustrating.” (Ontario)

Even if companies were not in a position to answer every question, the participants believed that more transparency would have helped them accept the delays they had to face. “I just think the clarity and honesty is more important to me than the delay,” one participant from Ontario concluded. Some participants, incidentally, mentioned that they gained a more positive image of a company because of the quality of its communication.

2.3. Consumer opinions and perceptions

2.3.1. A clear preference for reimbursement

Most consumers say that reimbursement is generally more advantageous than other compensation measures. It means they can spend the money how they like, in accordance with their needs, while there is no guarantee that they will have the availability to attend an event postponed to a new date. This is even truer when it comes to travel: “It is easier to postpone an evening than a week of vacation.” (Québec)

Credit, on the other hand, has many disadvantages. A consumer might forget a credit, or it may have an expiration date. In order to use it, the consumer may have to pay more for the same service because of a price increase, or even lose the residual value if he makes a less expensive purchase. Moreover, credit does not guarantee that the consumer will be able to obtain the same service, in terms of value or quality, that he initially purchased (for example, the same class of tickets to a concert).

However, some benefits were pointed out about measures other than reimbursement. For example, postponement offers the assurance that one will indeed have a seat at an event, without suffering a price increase. A participant from Québec stated: “There is an advantage to a postponement when there is a variation in price. With a postponement, the price stays the same, but with a refund or credit, you risk paying more the next time you buy it.”

That said, even though there may be advantages attached to certain compensation measures, several participants considered that merchants should always give consumers the choice of obtaining a refund: “I find it difficult to conceive of a refund not being offered. There are lots of reasons why you wouldn’t be able to go later. I would have found it unacceptable if I was obliged to put it off, even if it was due to the pandemic and there were extraordinary conditions.” (Québec) In fact, many consumers believe that credit and postponements are simply profitable for merchants, who keep the money and hold customers hostage.

In addition, many consumers believe that a company that does not give refunds should offer additional compensation on top of the benefit offered—as was the case, for example, with some fitness centers or concert promoters. Among the compensations suggested were a price freeze, an additional amount, an upgrade or a gift. “They could offer a larger credit than a refund to encourage people to take the credit. It would be to their benefit and it would benefit the customer. It’s a win-win.” (West) However, other participants did not think a company should offer a premium, except in circumstances when its conduct was at fault.

2.3.2. Sympathetic consumers

Even though they would prefer to obtain a refund, the participants were sensitive to the fact that situations of force majeure such as the pandemic represent a hardship for the private sector. One must therefore take the companies’ ability to stay in business into account when deciding on appropriate solutions. Time and time again, participants stressed the importance of adopting a collaborative approach with merchants.⁵⁷ They said they were ready to accept repayment delays, in consideration of the difficulties experienced by companies.

As for the role of governments during the pandemic, consumers’ opinions were divided. Several participants considered that the governments managed the situation adequately, citing as an example the reimbursement agreements concluded in the airline sector. Others, however, expressed their dissatisfaction with the actions of the government, accusing it of supporting the merchants more than the consumers who were struggling to get reimbursed.

Either way, most consumers understood that governments were grappling with an unparalleled health crisis and that putting extra pressure on the private sector could have resulted in bankruptcies. In general, they were unable to suggest what governments might have done to help consumers more; only a minority believed that specific measures should have been adopted to oblige merchants to reimburse their customers.

2.3.3. Rights and prospects

The participants appeared to be unfamiliar with the legal framework applicable to the cancellation of contracts in the event of force majeure and the protection mechanisms they could benefit from. When asked about this, they ventured different answers, some believing

⁵⁷ This attitude is most marked among participants who responded that, for them, the compensation process was easy or fairly easy.

that refusing reimbursement was legal, others not, still others thinking that the law does not regulate this type of situation: “I think, just like the medical community was caught off guard, so was the legal community and the laws. There was no precedent to this at all. I don’t think that they had the foresight to plan for our protection in advance.” (West)

Generally, the participants believed nevertheless that the law was not sufficiently protective in the context of the Covid-19 pandemic. Some also argued that a clearer law, which would require reimbursement in every circumstance, should be adopted. However, we noted a certain pessimism among consumers, who anticipated that, even if the law were amended, it might be difficult to enforce.

In the absence of a clear idea of their rights, individual consumers modified their behaviour as a result of the difficulties they experienced during the pandemic. About half of them said they are now more cautious when making purchases, in particular by paying more attention to the merchants’ procedures in cases of cancellation and choosing companies with the most favourable conditions: “I think now whenever I’m purchasing or booking something, I always look for cancellation insurance, just in case. Before, that wasn’t even on my radar.” (West)

3. Company policies

In order to determine their compensation measures for catastrophic events, we analyzed the terms of use of 40 of the most popular companies among Canadian consumers.

For the purposes of our analysis, we selected companies in the following sectors: air transport, resorts, travel intermediaries, event ticket sales, and sports subscriptions (fitness centers and ski resorts).⁵⁸ We selected:

- the 5 biggest Canadian air carriers by number of travellers;⁵⁹
- the 5 hotel chains with the most establishments in Canada;⁶⁰
- the 10 most visited online travel intermediaries in Canada;⁶¹
- the 10 most visited online event ticket sales platforms in Canada;⁶²
- 5 of the leading fitness centers in Canada;⁶³

⁵⁸ The data were gathered from February to May 2022, except those for air carriers, which were updated in 2023 (see Section 3.2.1).

⁵⁹ To do this, we selected the 5 Canadian Level I carriers. According to the *Transportation Information Regulations*, a level I air carrier is a one which, in one year, “transported at least 2,000,000 revenue passengers or at least 400 000 tonnes of cargo.” See: *Transportation Information Regulations*, SOR/96-334, s. 3(1). According to Statistics Canada’s *Monthly Civil Aviation Survey*, Canada’s 6 level I airlines are: Air Canada (including Air Canada Rouge), Air Transat, Jazz, Porter, Sunwing and WestJet (including Swoop, WestJet Encore and WestJet Link). See: <https://www150.statcan.gc.ca/n1/daily-quotidien/210826/dq210826b-eng.htm>. We eliminated the carrier Jazz from this list, as it is owned by Air Canada and has exactly the same pricing.

⁶⁰ According to the count conducted by Horwath HTL in 2018, the chains with the most establishments in Canada in 2018 were: Comfort Inn & Suites (151), Super 8 (124), Best Western Plus (121), Days Inn (112) and Holiday Inn Express (97). See: Howarth Htl, *Canada: Hotels & Chains Trends, Market report*, April 2018, pp. 4-5.

⁶¹ In making our selection, we chose the platforms that allow consumers to purchase travel services offered by third parties (hotels and air carriers) ranked among the most visited websites in Canada in the “Travel and Tourism” category compiled by SimilarWeb. This led us to select the following companies: Booking, Expedia, Hotels.com, Flighthub, Priceline, CheapOair, Cheapflights, Travelzoo, AirBNB and VRBO. Our selection includes both independent companies (CheapOair and Flighthub) and peer-to-peer lodging rental platforms (AirBNB and VRBO). Note that we did not select sites that function as “aggregators,” i.e. platforms that simply refer clients to other sites (Tripadvisor, Trivago, Kayak, home-to-go.ca).

⁶² In making our selection, we chose the most visited ticket sales websites in Canada according to the ranking established by SimilarWeb in the “Tickets” category. This led us to select the following companies: Eventbrite, Ticketmaster, Vividseats, Axs, Viagogo, Tickets-center.com, Ticketweb.ca, Ticketnetwork.com, Seatgeek and Stubhub. This selection includes, without distinction, ticket sales companies operating in the primary or secondary market or in both at the same time. Note that we eliminated from our selection sites that act as “aggregators,” i.e. sites that simply refer clients to other platforms that carry out the final transaction (e.g., Livenation and Evenko).

⁶³ The fitness center market is made up of a large number of independent businesses, including a few large banners. For the purposes of our selection, we chose the most prominent banners in Canada, based on a market study produced by the firm IBISWorld as well as by collecting information on the number of locations of each of these banners (as of March 14, 2022). Our final selection includes: Goodlife Fitness (over 200 locations in Canada), Éconofitness (67 locations in Québec), Planet Fitness (54 locations), Nautilus Plus (32 locations), Energie Cardio (31 locations) and World Gym (27 locations). See: Matthew Bichko, *Gym, Health & Fitness Clubs in Canada*, IBISWorld Industry Report 71394CA, May 2021.

- the top 5 ski resorts in Canada⁶⁴.

In the end, we arrived at the following selection:

Business	Category
Air Canada	Air carrier
Air Transat	
Porter	
Sunwing	
WestJet	
Comfort Inn & Suites	
Super 8	
Best Western	
Days Inn	
Holiday Inn Express	
Booking	Travel intermediary
Expedia	
Hotels.com	
Flighthub	
Priceline	
CheapOair	
Cheapflights	
Travelzoo	
Airbnb	
VRBO	

Business	Category
Eventbrite	Ticket sales
Ticketmaster	
Vividseats	
Axes	
Viagogo	
Tickets-center.com	
Ticketweb.ca	
Ticketnetwork.com	
Seatgeek	
Stubhub	
Goodlife Fitness	Fitness center
Econofitness	
Planet Fitness	
Nautilus Plus	
Energie Cardio	
Whistler Blackcomb	Ski resort
Fernie	
Lake Louise	
Mont Tremblant	
Blue Mountain	

We analyzed the user agreement and the information published on the websites of each of these companies. In cases in which the companies selected had the same owner,⁶⁵ we considered them to be distinct from the consumer's point of view. Since the data was collected in 2022, i.e. two years after the onset of the Covid-19 pandemic, our analysis shows how (or whether) these merchants adapted their contractual terms to take into account the new challenges posed by an event of this nature.

3.1. A lack of clarity

A major difficulty in our analysis was obtaining accurate information about the policies of certain companies in situations in which they are obliged to stop providing a service due to a catastrophic event.

Sometimes companies gave details about when consumers change their minds and want to cancel their purchase, but were evasive about what happens when they are no longer able to provide the service.⁶⁶ The length and complexity of some documents also added to the confusion. Air carrier contracts are an eloquent example of this: Air Canada's contract, for

⁶⁴ Our selection is based on the ranking of the most important ski resorts in Canada according to the ranking established by Skiresort.info: <https://www.skiresort.info/ski-resorts/canada/sorted/slope-length/>. Since all of the largest ski resorts are located in Western Canada, we have added the most important resorts in Ontario and Québec. This approach led us to select the following companies: Whistler Blackcomb, Fernie, Lake Louise, Mont-Tremblant and Blue Mountain. More specifically, we analyzed the terms and conditions applicable to season passes.

⁶⁵ A few of the companies in our analysis have the same owner: Super 8 and Days Inn (Wyndham); Expedia, Hotels.com, VRBO (Expedia); Booking, Priceline, Cheapflights (Booking).

⁶⁶ As will be seen in Section 3.2, this is particularly the case with companies in the hotel and fitness sectors.

instance, is some 94 pages long, and includes multiple references, which could be very daunting for any consumer attempting to get a better understanding of their rights.⁶⁷

One observation appears essential from the start: companies should clearly and simply state their policies with regard to cancellations due to a catastrophic event, without consumers having to painfully decipher vague, complex contracts in an attempt to find answers to their questions.

3.2. The hotchpotch of cancellations

Our analysis of the contracts shows that each sector has its own particular way of proceeding when it comes to cancellations due to a catastrophic event. Some companies offer consumers the option of a refund, while others prefer to issue a credit or simply omit to address the issue in their contract. Additionally, some companies offer consumers the possibility, under certain conditions, of cancelling the transaction at their discretion.

3.2.1. Air carriers

In 2022, we carried out an initial analysis of airline tariffs. However, given the changes in air transport regulations during that year (see Section 4.2.1), we conducted a new analysis in 2023 of the carriers' stipulations regarding flight cancellations⁶⁸.

During our initial analysis, we found that the air carriers' contracts were ambiguous with regard to the possibility of consumers obtaining a refund when the cancellation of the flight was due to circumstances "beyond the control" of the carrier, "force majeure" or to other extraneous circumstances. Following the entry into force of the regulatory changes, however, most airlines modified these contracts in order to clearly provide consumers with the option of a refund if their flight is delayed for more than 48 hours.⁶⁹ In addition, most of these contracts stipulate that federal regulations take precedence over their content.⁷⁰

Moreover, when the flight delay is attributable to the air carrier, their contracts stipulate that the air carrier must provide the consumer with food, accommodation and, depending on the circumstances and the length of the delay, monetary compensation. These stipulations are once more consistent with Canadian regulatory obligations.

⁶⁷ See: https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/en/ac_domestic_tariff_en.pdf. The difficulty entailed in understanding these contracts has also been raised in case law: *Lachaine v. Air Transat AT inc.*, 2021 QCCS 2305, para. 72-76.

⁶⁸ Collection of contracts for the new analysis took place in March 2023.

⁶⁹ We found these provisions in the tariffs rules of Air Canada (Rule 100D), Porter (Rule 14), Sunwing (Rule 15(3)) and Westjet (Rule 90(I)). We were unable to detect any contractual changes in Air Transat's domestic tariff rules. However, this tariff rule states: "The obligations of the carrier under the Air Passenger Protection Regulations (APPR) form part of the tariff and supersede any incompatible or inconsistent term and condition of carriage set out in the tariff to the extent of such inconsistency or incompatibility."

⁷⁰ We found these provisions in the tariffs rules of Air Canada (Rule 5(C)), Air Transat (Rule 2) and Sunwing (Rule 2.1). Westjet has no specific clause acknowledging APPR precedence, but does refer to it in several Sections.

With the exception of economy class tickets, carriers also offer the consumer, for a fee, the option of cancelling a flight or rebooking up to one hour before departure. However, this option generally will not allow consumers to obtain a refund, only a credit. Also, several airlines offer consumers the possibility of cancelling a ticket purchase up to 24 hours after the transaction.⁷¹

3.2.2. Hotel chains

The websites of hotel chains do not detail the terms specific to situations in which a hotel is inaccessible due to force majeure. However, in general, they state that consumers can choose to cancel their stay within a certain period without having to pay a penalty for doing so. On the other hand, consumers risk being imposed a penalty equivalent to the price of a one-night stay if they cancel too late or if they simply do not show up.

One could assume, therefore, that during an unforeseen situation such as the Covid-19 pandemic, consumers could simply avail themselves of these cancellation policies. However, it should be noted that some establishments in the same hotel chain may have different policies. For example, the Wyndham chain (which owns Super 8 and Days Inn) states that “[r]eservations must be canceled in accordance with the cancellation policy outlined by the hotel for the rate and dates booked.”⁷²

3.2.3. Travel intermediaries

Travel intermediaries generally present themselves as third parties between the consumer and the final service provider, whether this is the air carrier or the hotel. As a result, these companies rely on the policies of the end service providers to determine what will happen to the consumer as the result of an unforeseen event that prevents the service from being provided. Their contracts may also contain various clauses aimed at exonerating them from any liability, or from any obligation to reimburse if the service is not provided by the end service provider.

For example, Hotels.com makes it very clear that it does not issue refunds in cases of force majeure:

HOTELS.COM COMPANIES AND HOTELS.COM AFFILIATES HAVE NO OBLIGATION AND WILL NOT ISSUE ANY REFUND IN THE EVENT OF DELAY, CANCELLATION, OVERBOOKING, STRIKE, FORCE MAJEURE OR ANY OTHER CAUSE BEYOND THEIR CONTROL. FURTHERMORE, THEY ASSUME NO RESPONSIBILITY FOR ANY ADDITIONAL EXPENSES, OMISSIONS, DELAYS, CHANGES TO THE ITINERARY OR ANY ACTION TAKEN BY ANY GOVERNMENT OR OTHER AUTHORITY.⁷³ [TRANSLATION]

In short, whether one can be reimbursed or not will depend on the individual end service provider. According to the terms of their contracts, nothing obliges these intermediaries to

⁷¹ This is the case with Air Canada, Porter and Westjet.

⁷² <https://www.wyndhamhotels.com/en-ca/contact-us/faq#cancellation-policy> (March 28, 2022).

⁷³ https://fr.hotels.com/customer_care/terms_conditions.html (April 11, 2022).

provide assistance to consumers who find themselves left high and dry—even if they performed their entire transaction via the interface of their company. At most, some intermediaries undertake to act as interlocutors between the end merchant and the consumer in situations such as a flight cancellation—without, however, guaranteeing that the consumer will obtain any compensation as a result of these procedures. On its website, Booking.com explains it this way:

If you're eligible for a refund, we can send a refund application to the airline on your behalf. Once the request is approved by the airline and the amount has been refunded to us, we'll process your refund as per the airline's policy. The refund amount will be paid out to your original form of payment.⁷⁴

One notable exception is Airbnb, which has an “Extenuating Circumstances Policy” that takes precedence over the service provider's terms of service.⁷⁵ Under this policy, a consumer can cancel the purchase when an event occurs such as an emergency, an epidemic, government travel restrictions, a military conflict or a natural disaster. However, this policy remains unclear as to the exact type of compensation that can be obtained, limiting itself to stating that the consumer will obtain, “depending on the circumstances, a cash refund, travel credit, and/or other consideration.”⁷⁶

In addition, travel intermediaries are registered as travel agencies according to the regulations applicable in certain provinces.⁷⁷ It may therefore be envisaged that, having failed to obtain reimbursement for a cancelled trip, the consumer could submit a claim to the consumer compensation funds established by law (see Section 4.2.2).

3.2.4. Ticket sales platforms

Like travel intermediaries, ticketing companies tend to present themselves as intermediaries between event promoters or ticket resellers on the one hand, and consumers on the other.⁷⁸ Vivid Seats explains this as follows:

Vivid Seats acts as a ticket marketplace. This means that we are an intermediary between ticket buyers and ticket sellers, allowing ticket buyers to find tickets for all their *favourite* live events. It also means that the Vivid Seats Marketplace is not the ticket seller and the listed tickets are not listed by Vivid Seats on behalf of any venue, promoter, team, league or organizing group.⁷⁹

⁷⁴ https://secure.booking.com/help/faqs_list/40/flights-faq-topic-cancel (February 10, 2022).

⁷⁵ <https://airbnb.ca/help/article/1320/policy-on-cases-of-force-majeure> (February 18, 2022).

⁷⁶ <https://airbnb.ca/help/article/1320/policy-on-cases-of-force-majeure> (February 18, 2022). Please note that although Airbnb adopted a temporary policy in 2020 to allow reservations to be cancelled due to Covid-19, this force majeure policy does not apply to cases related to Covid-19. Covid-19 is presumably excluded because it is now a predictable situation.

⁷⁷ We found statements to this effect at: Expedia, Hotels.com, Flighthub and CheapOair.

⁷⁸ Ticketmaster, Stubhub, Eventbrite, Vivid Seats.

⁷⁹ <https://www.vividseats.com/terms.html> (May 20, 2022).

When it comes to the cancellation of an event, these companies' compensation practices differ from one to the next.⁸⁰ Some, such as Ticketmaster, clearly state that the consumer will get a refund for their purchase.⁸¹ Others state instead that the consumer will be able to obtain either a credit or a refund, at the discretion of the company or depending on the applicable law.⁸² Still others state that the applicable measure will be determined on a case-by-case basis, in accordance with the policies of each ticket provider.⁸³

In the case of the postponement of the event, most companies assume that the consumer will not be entitled to a refund, only that they will be able to attend the event at a later date.⁸⁴ However, it is sometimes added that there could be exceptions, depending on the policies of the show promoters. Ticketmaster puts it this way:

If an event is rescheduled or moved, your tickets (including any upgrades or add-ons, such as parking) are still valid for the new date — you won't need to do anything else. In some instances, the Event Organizer may give you the option to request a refund.⁸⁵

Similarly, consumers generally do not have the possibility of obtaining a refund or a credit if, for personal reasons, they are unable to attend the event or if they do not comply with the applicable rules (including health rules related to Covid-19).

3.2.5. Fitness centers

Most of the fitness center contracts we reviewed do not cover events that would disrupt service availability. Only the Good Life Fitness banner briefly mentions that in the event of a temporary closure, the consumer's subscription will be extended for a period equivalent to that of the closure.

Fitness centers do however offer consumers the possibility of cancelling their subscriptions at their discretion. For example, each of these banners offers customers the option of cancelling

⁸⁰ Note that we could not find sufficiently clear information on Viagogo's policies regarding what happens if the event is cancelled. The company offers a "Viagogo Guarantee" but this guarantee is intended mainly for situations when the ticket provided by the reseller is not valid.

⁸¹ Ticketmaster, Ticket network.

⁸² Vividseats, Tickets-Center, Seatgeek, Stubhub.

⁸³ AXS, Ticketweb and Eventbrite have conditions that apply to promoters who set minimum standards that must be respected, but allow to choose, at their discretion, the compensation measure they prefer. That said, one company (Eventbrite) states that it could issue a refund itself in cases when the promoter does not respond to the consumer: "If a participant requests a refund and the Organizer does not respond by refunding or refusing the request within five (5) days, Eventbrite may, at its sole discretion, issue the refund on behalf of the Organizer and collect such amounts directly from the Organizer."

⁸⁴ Ticketmaster, Vivid Seats, Tickets-Center, Ticketnetwork, Seatgeek, Stubhub. Other companies are less clear about what happens in the event of a postponement, generally stating they defer to the policies of the ticket provider.

⁸⁵ <https://ticketmaster-ca.zendesk.com/hc/en-us/articles/10438151149585-What-happens-if-my-event-is-rescheduled-or-moved-> (February 14, 2022).

their subscriptions for short period at the start of the contract,⁸⁶ in accordance with the provisions of the applicable provincial consumer protection laws (see Section 4.3.2).

Beyond such grace periods, the practices of fitness centers may vary. Two companies, Good Life Fitness and Nautilus, have no clause in their contracts authorizing consumers to cancel their subscriptions. Other companies do allow this, provided that the party in question pays a penalty. For example, Énergie Cardio stipulates that the customer must pay “termination fees equivalent to administrative fees for contract termination.”⁸⁷

3.2.6. Ski resorts

Most ski resorts include consumer compensation clauses in their terms and conditions if access to the slopes is interrupted for an extended period of time.⁸⁸ However, situations covered and terms of compensation can vary from one resort to another.

Mont-Tremblant, for instance, offers holders of a “Tonik” pass a free insurance program that allows them to obtain credit for the following season in the event of closure necessitated by the Covid-19 pandemic. However, in addition to the cases covered by this policy, the resort is less clear about the possibility of issuing compensation in case of a fortuitous event:

If the mountain is not in operation on one of the Tonik calendar days, the day will not be re-attributed to a later day in the season. The pass does not guarantee access to the Resort for a minimum number of days or that the Resort will be open for a minimum number of days.⁸⁹

Other stations have instead instituted programs that cover a wide range of fortuitous events. For example, Whistler states that a consumer who has used less than 7 days of their season pass is eligible for a refund if the resort has to close due to an epidemic, natural disaster, terrorist act or armed conflict.

3.3. Obstacles to reimbursement

Throughout our analysis, we have identified various contractual terms that could make it difficult for consumers to get their money back.

⁸⁶ In Québec, Éconofitness, Nautilus Plus and Énergie Cardio comply with the law by allowing cancellation during the first tenth of the duration of the contract. In Ontario, the Good Life Fitness and Planet Fitness banners offer a 10-day respite period following purchase of the subscription.

⁸⁷ https://energiecardio.fidelio.ca/Midgard/Areas/Forms/Content/pdfs/TermeCondition_en.pdf (March 16, 2022).

⁸⁸ Whistler, Fernie, Blue Mountain, Mont-Tremblant. We were unable to identify terms for these circumstances for Lake Louise.

⁸⁹ <https://www.tremblant.ca/about-us/policies> (March 18, 2022)

3.3.1. Paying for a reimbursement

Even in cases when consumers are eligible for a refund following the cancellation of a service, some ticket sales platforms specify that fees could be withheld in the process.⁹⁰ For example, the AXS merchant retains the discretion to withhold fees for issuing a refund:

Refunds will generally be issued if an event is cancelled and not rescheduled, however, this is determined by our Clients, and not by AXS. AXS or our Client, as applicable, reserves the right to retain various fees and charges paid by buyers or sellers on our Service, even if an event is cancelled and not rescheduled.⁹¹

Similarly, low-cost travel intermediaries may add various fees applicable to consumer transactions, including if they wish to change or cancel a flight.⁹² These charges are on top of any charges that may be imposed by the carrier.

Offres d'assistance (Choisissez le type d'assistance qui vous convient)

Chaque passager a des besoins qui lui sont propres - choisissez le forfait qui convient le mieux à vos besoins.

Frais d'annulation ⌵

Temps de réponse ⌵

Changement d'horaires ⌵

Standard	Premium	Suprême
C\$0⁰⁰	C\$18⁹⁵	C\$50⁹⁵
Jusqu'à C\$250 ⁰⁰ (par billet)	Gratuit	Gratuit
Standard	Rapide	Plus rapide
Standard	Priorité	Priorité la plus élevée
Ajouter	Ajouter	✓ Ajouté

CheapOair offers a paid support service. For an additional charge at the time of purchase, the company promises the consumer that they will get faster customer service and avoid cancellation fees that might otherwise be imposed on them.

3.3.2. Insurance... with exclusions

Some companies offer consumers the option of purchasing collateral insurance when purchasing the service. However, these policies may include significant exclusions that consumers should be aware of.

Insurance offered by travel intermediaries⁹³ may cover situations specific to the traveller, such as illness, a road accident on the way to the airport or theft of their passport.⁹⁴ However, other

⁹⁰ We identified such clauses at: Vivid Seats, AXS, Ticketnetwork and Seatgeek. For example, the Vivid Seats contract provides that the consumer will receive the full amount "less possible restocking fees."

⁹¹ https://www.axs.com/about-purchase-agreement_US_v6.html (May 30, 2022).

⁹² We identified clauses to this effect at: Flighthub, Priceline and CheapOair.

⁹³ We found such offers in the transaction process at: Expedia, FlightHub, CheapOair.

⁹⁴ These examples are taken from the CheapOair site.

situations, such as fear of catching Covid-19 or the issuance of a consular advisory advising against travel, may be excluded from coverage. Expedia puts it this way:

COVID-19 is a known or foreseeable event. Cancellation of a trip due to government travel advice, fear of travel or change of mind is not covered. Travel insurance may cover you in the event of illness related to COVID-19. Certain other coverages will not apply.

Similarly, most ski resorts offer consumers the option of purchasing protection to cover cancellation for reasons specific to them.⁹⁵ Again, such insurance may only apply in well-defined circumstances. For example, the Lake Louise resort states: "Refund Insurance is only valid as a result of medical conditions supported by a doctor's certificate, or a transfer of employment supported by a letter from your employer."

It should be noted that the Whistler resort stands out for offering free insurance with rather broad coverage, which may apply if, for example, the consumer is affected by a quarantine, if a travel restriction prevents them from getting to the resort, or even if they lose their job.⁹⁶

3.3.3. Non-transferable tickets

Faced with contractual clauses that limit the possibility of cancellation for personal reasons, one of the solutions available to consumers who no longer wish to attend an event is to sell their ticket. For example, a consumer under quarantine or who is apprehensive about participating in a gathering for health reasons, can simply resell their ticket on an online platform and thereby avoid suffering a loss.

However, while tickets for events can generally be transferred to other individuals, other types of businesses largely prohibit this practice. Our analysis has found that airline tickets and ski passes cannot be transferred or resold to third parties; rights of access to the service are assigned exclusively to the holder.⁹⁷ Considering the difficulties experienced in the context of the pandemic, such restrictions appear excessive for consumers wishing to offset their financial losses in ways that would not be detrimental to the company.

3.3.4. Prohibited remedies

Some companies explicitly prohibit consumers from requesting a refund from their credit card issuer in the event of the merchant's refusal, subject to penalties.⁹⁸ Ticketmaster states:

⁹⁵ We found such offers at: Whistler, Fernie, Lake Louise and Blue Mountain. Note that the Mont-Tremblant contract states that they usually offer such insurance, but were temporarily unable to do so: "Unfortunately, due to a change in our insurance provider, we are unable to offer insurance on your pass purchase at this time. We will contact you once the details are confirmed."

⁹⁶ Note that not being vaccinated does not constitute grounds for reimbursement.

⁹⁷ Fitness centers may have similar prohibitions. For example, Goodlife Fitness states: "You may not assign or transfer this Agreement to anyone else. Any attempt to sell, assign, or transfer this Agreement is null and void and may, at our sole option, result in cancellation of your membership immediately without any refund."

⁹⁸ We found such clauses at: Ticketmaster, Vivid Seats, Ticketweb, CheapOair.

You agree that you will not attempt to evade, avoid, or circumvent any refund prohibitions in any manner with regard to tickets you purchased. Without limiting the generality of the foregoing, you will not contact us to seek a refund or exchange from us when we are prohibited from providing one by the Event Organizer, and you will not dispute or otherwise seek a “chargeback” from the company whose credit card or other method of payment you used to purchase tickets from the Site. Should you do so, your tickets are subject to immediate cancellation, and we may, in our sole discretion, refuse to honour pending and future ticket purchases made from all credit card accounts or online accounts on which such chargebacks have been made, and may prohibit future purchases from all persons in whose name the credit card accounts exist, and from any person who accesses any associated online account or credit card or who otherwise breaches this provision from using the Site.⁹⁹

The validity of such clauses remains questionable for situations in which a consumer, in compliance with the law, requests a refund from their credit card issuer (see Section 4.3.5).

Finally, some of the companies included in our analysis have compulsory arbitration clauses or clauses prohibiting consumers from instituting a class action.¹⁰⁰ Such clauses could impede the legal recourse of consumers who attempt to obtain a refund when a service they purchased is cancelled. Here again, there is some doubt about the legality of such clauses in certain Canadian jurisdictions (see Section 4.3.5).

⁹⁹ <https://help.ticketmaster.ca/s/article/Purchase-Policy?language=en> (February 14, 2022).

¹⁰⁰ We identified clauses aimed at imposing arbitration on consumers and/or obliging them to waive the right to bring class actions at: Expedia, Hotels.com, CheapOair, Cheapflights, Airbnb, VRBO, Ticketmaster, Stubhub, Eventbrite, Vivid Seats, AXS, Tickets-center.com, Ticketnetwork.com, Seatgeek, Whistler. Note that some companies stipulate that these clauses do not apply to certain Canadian provinces, notably Québec. For example, the class action waiver clause in the Expedia contract “applies only to individuals residing outside of Québec, Ontario and Saskatchewan.”

4. Catastrophic events and the law

4.1. General legal principles

Purchasing a plane ticket, making a reservation to attend an event, renting a building or subscribing to a gym are all examples of transactions that, under the law, are considered to be contracts. As soon as they conclude a contract with a consumer, merchants must respect their commitment to deliver the service as agreed, failing which they are liable to compensate the consumer.¹⁰¹ But what happens when the failure to provide the service is caused by a catastrophic event beyond the merchant's control?

Solutions with regard to the consumer's right to reimbursement in such circumstances vary depending on the legal regimes in force in Canada.¹⁰² Under civil law, the notion of force majeure may be invoked by a merchant who fails to respect their contractual obligations, but they are nevertheless required to reimburse consumers (Section 4.1.1). Under common law, the law tends to give more importance to the content of the contract in determining applicable solutions (Section 4.1.2).

4.1.1. In civil law: an obligation to reimburse

In civil law, a merchant may be exonerated for not providing a service if the non-performance of the contract is attributable to a force majeure.¹⁰³ The situation the merchant invokes in order to be exonerated must nonetheless correspond to the legal definition of "force majeure."

In fact, what constitutes force majeure is assessed on a case-by-case basis, according to criteria established in the law.¹⁰⁴ First, it must be an event that was reasonably unforeseeable at the time the obligation was incurred. Second, the situation in question must be irresistible, that is, it must be unavoidable and insurmountable, such that it is impossible to fulfill the obligation. Third, the courts have sometimes considered that force majeure must be an event external to the parties to the contract, namely that it must be beyond their control.¹⁰⁵

Among the situations that have been considered cases of force majeure, we can cite social or political events, natural disasters or actions by third parties in relation to the contract.¹⁰⁶

¹⁰¹ *Civil Code of Québec*, CQLR c CCQ-1991, arts. 1434, 1458, 1590; *Consumer Protection Act*, CQLR c P-40.1, ss. 16, 272; John Manwaring, "Contracts", in Louise Bélanger-Hardy and Aline Grenon (eds.), *Elements of Canadian Common Law: Comparison with Québec Civil Law*, Thomson Carswell, 2008, pp. 335-342.

¹⁰² The legal system in Québec is different from in the other Canadian provinces. The system in force in Québec is civil law, based on the traditional French *droit civil*, while the system in other provinces is based on traditional English common law. For more information, see: <http://www.justice.gc.ca/eng/sjc-csj/just/03.html>

¹⁰³ *Civil Code of Québec*, CQLR c CCQ-1991, arts. 1693-1694, 2100.

¹⁰⁴ *Civil Code of Québec*, CQLR c CCQ-1991, art. 1470 para. 2.

¹⁰⁵ For the defining characteristics of force majeure, see: Didier Luelles, *Droit des obligations*, 3rd edition, Thémis, 2018, para. 2733-2737; Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed., Yvon Blais, 2013, pars. 844-847.

¹⁰⁶ For application of force majeure, see: Didier Luelles, *Droit des obligations*, 3rd ed., Thémis, 2018, pars. 2738-2741; Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed., Yvon Blais, 2013, para. 848.

Recently, the Covid-19 pandemic has been considered a case of force majeure in several decisions reached by Québec courts.¹⁰⁷ However, one must be careful not to conclude that such an event will automatically be considered a case of force majeure in every circumstance: in each instance, it needs to be decided whether the event was indeed irresistible and unforeseeable. For example, one court decided to refuse to exonerate a merchant who invoked the Covid-19 pandemic to justify his inability to fulfill his obligations within the time limit, since he could have foreseen these difficulties.¹⁰⁸

Invoking force majeure does not exempt merchants from reimbursing consumers. Merchants who cannot fulfill their obligation due to force majeure do not have to pay for the damages suffered by the consumer as a result of the non-performance of the contract; however, they must reimburse, in cash, any payments received from the consumer for services not provided.¹⁰⁹ Accordingly, a credit issued by a merchant, as seen frequently during the Covid-19 pandemic, does not comply with Québec civil law.

Finally, it should be noted that civil law standards with respect to force majeure are suppletive, that is to say that the parties to a contract may include a clause that excludes or modulates its application.¹¹⁰ One party, for example, could undertake in the contract to assume the loss in the event of force majeure, and thus not be entitled to any reimbursement. However, in a consumer contract, there is every reason to consider that a clause that makes the consumer bear the consequences of force majeure could be considered abusive, because it would put the consumer at an excessive, unreasonable disadvantage.¹¹¹ For this reason, such a clause could be declared void or the obligations under it reduced.¹¹²

4.1.2. In common law: preponderance on the content of the contract

Common law provides for a concept similar to force majeure in civil law and which could allow a merchant to avoid his contractual obligation: the doctrine of frustration.¹¹³ According to the Supreme Court of Canada, this doctrine applies “when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes ‘a thing radically different from that which was undertaken by the contract’”.¹¹⁴ In order to invoke this doctrine, the situation must not result from a fault of the parties and must not have been

¹⁰⁷ *Provence v. Giguère*, 2022 QCCQ 8411; *Lamontagne v. Transat Tours Canada Inc.*, 2021 QCCQ 200; 9350-3480 *Québec inc. vs. Chitilian*, 2021 QCTAL 20594; *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc.*, 2020 QCCS 2251.

¹⁰⁸ *Feizollahi v. 9313-8865 Québec inc. (Aménagement Soleil Plus)*, 2022 QCCQ 2648, pars. 74-76.

¹⁰⁹ The law requires that the restitution of benefits be made “in kind,” i.e. by handing over the property or the sum of money received. See: *Civil Code of Québec*, CQLR c CCQ-1991, art. 1700; Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed., Yvon Blais, 2013, para.923.

¹¹⁰ Frédéric Pérodeau, “La force majeure comme mécanisme contractuel d'allocation des risques,” in Barreau du Québec, *Développements récents en droit de la construction* (2011), vol. 336, Yvon Blais, 2011.

¹¹¹ Nathalie Vézina and Louise Langevin, “L'exécution de l'obligation”, in Barreau du Québec, *Obligations et contrats*, Collection de droit 2022-2023, vol. 6, Yvon Blais, 2022, p. 111; *Location Rompré Ltée v. Guillemette*, 2005 CanLII 9292; *Société de transport de la Rive-Sud de Montréal v. 158880 Canada inc.*, 2000 CanLII 17690.

¹¹² *Civil Code of Québec*, CQLR c CCQ-1991, art. 1437.

¹¹³ In French, this doctrine is also called *doctrine de la décharge* or *doctrine de l'inexécution*.

¹¹⁴ *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, para. 53 (annotations omitted).

reasonably foreseeable at the time the contract was entered into.¹¹⁵ Application of this doctrine will ensure that a consumer is able to obtain reimbursement of the sums paid to the merchant, subject to the cost of the services from which he was able to benefit before the contract was cancelled.¹¹⁶

From the outset, we note that the common law gives clear preponderance to the content of the contract in determining what happens as the result of a fortuitous event. As the Supreme Court teaches, the doctrine of frustration will only apply when the parties have not stipulated a so-called “force majeure,” clause, namely one that specifies the terms that will take effect due to a fortuitous event.¹¹⁷ By way of illustration, in the context of the Covid-19 pandemic, the Civil Resolution Tribunal of British Columbia refused to order the reimbursement of consumers when such a clause provided for other solutions.¹¹⁸

It is therefore only if no relevant clause is found in the contract that a party may appeal to the doctrine of frustration to escape their obligation. This doctrine has thus been successfully invoked when the service had become illegal after the contract was concluded, when the destruction of property prevented the performance of the service or following an act committed by a third party.¹¹⁹ However, the opening criteria are strict, and simple inconveniences or temporary impediments are insufficient to warrant its application.¹²⁰ For these reasons, several decisions by Canadian courts have ruled that contracts should continue to be honoured despite the risks occasioned by the Covid-19 pandemic.¹²¹

4.2. A fragmented consumer protection regime

In addition to the general applicable rules, the law may provide consumers with additional recourse for certain types of transactions enabling them to obtain a refund when a service is not

¹¹⁵ Zohar Levy and Nicholas Carmichael, “Covid-19 as a Force Majeure, and Other Contractual Considerations” (2020) 2 *BLR* (6th) 32, p. 39.

¹¹⁶ Stephen Waddams, *The Law of Contracts*, 7th ed., Thomson Reuters, 2017, para. 403; John D. McCamus, *The Law of Contracts*, 3rd ed., Irwin Law, 2020, p. 694-701; Angela Swan, Jakub Adamski and Annie Y. Na, *Canadian Contract Law*, 4th ed., LexisNexis Canada, 2018, p. 915-916; *Frustrated contract act*, *RSBC 1996*, c 166, s. 5 (British Columbia); *Frustrated contract act*, *RSA 2000*, c F-27, s. 3 (Alberta); *The Frustrated Contracts Act*, *SS 1994*, c F-22.2, s. 5 (Saskatchewan); *The Frustrated Contracts Act*, *CCSM c F190*, s. 3 (Manitoba); *Frustrated Contracts Act*, *RSO 1990*, c F.34, s. 3 (Ontario); *Frustrated Contracts Act*, *RSNB 2011*, c 164, s. 3 (New Brunswick); *Frustrated Contracts Act*, *RSPEI 1988*, c F-16, s. 3 (Prince Edward Island); *Frustrated Contracts Act*, *RSNL1990 c F-26*, s. 4 (Newfoundland and Labrador).

¹¹⁷ It should be emphasized that the expression “force majeure” in common law does not refer to the civil law concept of force majeure previously described. See: Marel Katsivela, “Canadian Contract and Tort Law: The Concept of Force Majeure in Québec and its Common Law Equivalent” (2012) 90: 1 *Can B Rev* 69, p. 82.

¹¹⁸ *Adam v. Holiday Home Rentals International*, 2022 BCCRT 573; *Byrne v. Whistler Wired Vacations Inc.*, 2021 BCCRT 1197.

¹¹⁹ Stephen Waddams, *The Law of Contracts*, 7th ed., Thomson Reuters, 2017, paras. 369-377; John D. McCamus, *The Law of Contracts*, 3rd ed., Irwin Law, 2020, pp. 662-668; Angela Swan, Jakub Adamski and Annie Y. Na, *Canadian Contract Law*, 4th ed., LexisNexis Canada, 2018, pp. 900-901.

¹²⁰ Zohar Levy and Nicholas Carmichael, “Covid-19 as a Force Majeure, and Other Contractual Considerations” (2020) 2 *BLR* (6th) 32, p. 39.

¹²¹ Hilary A. Brown, “The COVID-19 Pandemic and the Doctrine of Frustration of Contract,” *Toronto Law Journal*, April 2022. See also: Section 4.3.2.

rendered by the merchant. These disparate provisions are distributed randomly from one jurisdiction to the next, and are specific to the type of transaction involved; there is no truly comprehensive regime.

4.2.1. At the federal level: air transport

In Canada, air travel is governed by the Air Passenger Protection Regulations, the federal regulations that define passengers' rights in situations when a carrier cancels a flight.¹²²

At the start of the Covid-19 pandemic, the carrier's obligation under these regulations to reimburse passengers in the event of a flight cancellation that is not attributable to the carrier, for example when flights are prohibited pursuant to a government directive, was still a matter of debate. Certain bodies, including the Canadian Transportation Agency, considered that carriers had no such obligation and that issuing credits to consumers was therefore valid.¹²³

Following the setbacks experienced by consumers during the pandemic, the regulations were amended. The new version provides that if the airline is unable to provide the flight within 48 hours of the time initially scheduled for departure, the consumer may request a refund.¹²⁴ Money must be returned within 30 days, using the same payment method by which the ticket was purchased.¹²⁵ The regulation also specifies the carrier's obligation to provide information, in particular, as to why the flight was cancelled and the assistance it is required to provide.¹²⁶

Note that additional obligations may also apply to the carrier when the cancellation is the result, not of a situation beyond its control, but rather of a situation attributable to it, such as personnel problems or flight consolidations. In these cases, depending particularly on the number of hours the flight is delayed, the carrier will have to pay compensation to consumers and offer them accommodations, such as food or even lodging.¹²⁷

Changes to the air passenger protection framework have solved many of the difficulties related to reimbursing passengers during the Covid-19 pandemic, one positive outcome being that

¹²² *Air Passenger Protection Regulations*, SOR/2019-150.

¹²³ According to the Canadian Transportation Agency, federal regulations state "If an airline delays or cancels a flight for reasons outside its control, it does not have to compensate affected passengers." See: <https://otc-cta.gc.ca/eng/publication/guide-to-flight-delays-and-cancellations> (page consulted on November 4, 2021). However, consumer rights associations, including Option consommateurs, believed that the carriers were legally required to reimburse consumers, particularly under provincial contract law: Option consommateurs, "Vols annulés en raison de la pandémie : pour le remboursement des passagers aériens," Canadian House of Commons Standing Committee on Transport, Infrastructure and Communities January 28, 2021, pp. 3-5; Air Passenger Rights, *Withheld Passenger Refunds: A Failure by Design, Submissions to the House of Commons' Standing Committee on Transport, Infrastructure and Communities*, February 2021, pp. 2-3.

¹²⁴ *Air Passenger Protection Regulations*, SOR/2019-150, ss. 10, 18.

¹²⁵ *Ibid.*, s. 18.2.

¹²⁶ *Ibid.*, s. 13.

¹²⁷ Note that the regulation distinguishes between a situation attributable to the airline and a situation that is attributable to the airline but is "required for reasons of safety," which entails different obligations with regard to compensation. See: *Air Passenger Protection Regulations*, SOR/2019-150, ss. 11-12.

consumers will no longer have to accept credits in the event of flight cancellations.¹²⁸ However, since the carrier is allowed a delay of 48 hours to provide the service, some consumers could find themselves in an awkward position despite these new provisions; this might happen, for example, if the consumer's sole purpose in traveling was to attend an event that would already have taken place by the time they finally caught their flight.

4.2.2. At the provincial level: Internet purchases, travel agencies, resale of tickets

For certain types of transactions, the consumer protection laws in effect in the Canadian provinces provide recourse for consumers when the merchant does not honour the contract.

When it comes to e-commerce, most provincial laws provide that the consumer may obtain the cancellation and reimbursement of a purchase made via the Internet if the merchant does not provide the service within the time prescribed by law.¹²⁹ These cancellation options could prove interesting in cases when a merchant refuses to reimburse a service they are no longer able to provide.¹³⁰ Even more interesting is that a consumer who paid by credit card can approach the issuer of their card to obtain a chargeback for their purchase if the merchant fails to reimburse them¹³¹— a large number of consumers, incidentally, took advantage of this recourse during the Covid-19 pandemic (see Section 1.2.3).

In British Columbia, Ontario and Québec, consumers who make a purchase through a travel agency also have their money protected. As we saw previously, these provinces have established funds to compensate consumers who received no reimbursement for travel services that were not provided.¹³² Also, travel agencies must provide a security¹³³ and deposit the money received from the consumer in a trust account.¹³⁴

¹²⁸ We omit to mention here the difficulties related to explanations given by carriers as to the causes of flight delays and cancellations, which have led to numerous complaints from consumers. See: <https://ici.radio-canada.ca/nouvelle/1893141/canada-office-transport-aerien-voyage-remboursement>

¹²⁹ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 49(1)(d) and 50 (British Columbia); *Internet Sales Contract Regulation*, Alta Reg 81/2001, ss. 6(2)(b) and 10(1) (Alberta); *The Consumer Protection and Business Practices Regulations*, RRS c C-30.2 Reg 1, s. 3-8 (Saskatchewan); *Consumer Protection Act*, CCSM c C200, ss. 130-133 (Manitoba); *Consumer Protection Act*, CQLR c P-40.1, ss. 54.9-54.13 (Québec); *Internet Sales Contract Regulations*, NS Reg 91/2002, ss. 6-7 (Nova Scotia); *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, ss. 32-33 (Newfoundland and Labrador).

¹³⁰ These provisions were invoked in the context of an ongoing class action. See: *Picard v. Ironman Canada Inc.*, 2022 QCCS 2218, paras. 27-28. See also: <https://www.consumerprotectionbc.ca/questions-about-travel-plans-and-covid-19/>

¹³¹ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 52 (British Columbia); *Internet Sales Contract Regulation*, Alta Reg 81/2001, s. 12 (Alberta); *The Consumer Protection and Business Practices Regulations*, RRS c C-30.2 Reg 1, ss. 3-14 (Saskatchewan); *Consumer Protection Act*, CCSM c C200, s. 134 (Manitoba); *Consumer Protection Act*, RLRQ c P-40.1, ss. 54.14-54.16 (Québec); *Consumer Protection Act*, R.S.N.S. 1989, c 92, s. 21AF (Nova Scotia); *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s. 35 (Newfoundland and Labrador).

¹³² *Travel Industry Regulation*, BC Reg. 296/2004, ss. 15-23 (British Columbia); *Travel Industry Act*, 2002, SO 2002, c 30, Sched. D, s. 41; General, O Reg 17/05, ss. 50-71 (Ontario); *Travel Agents Act*, CQLR c A-10, ss. 30.1-30.7 (Québec).

¹³³ *Travel Industry Regulation*, BC Reg. 296/2004, s. 14 (British Columbia); General, O Reg 17/05, s. 25 (Ontario); *Regulation respecting travel agents*, CQLR c A-10, r 1, ss. 28-36 (Québec).

¹³⁴ *Travel Industry Regulation*, BC Reg. 296/2004, s. 13 (British Columbia); General, O Reg 17/05, s. 27 (Ontario); *Travel Agents Act*, CQLR c A-10, s. 33 (Québec).

In the events sector, some provinces have adopted provisions regarding the resale of concert tickets that specify, in certain circumstances, that the reseller must reimburse the consumer when the event to which the ticket gives access is cancelled.¹³⁵ These provisions, which apply only to secondary (not direct) ticket sales, could offer consumers a remedy in cases in which provision of the service is impossible.

4.3. Some special cases

During the Covid-19 pandemic, consumers claiming refunds encountered a myriad of unforeseen problems, which gave rise to just as many legal issues. While not claiming to provide an exhaustive review of such pitfalls, we include here some that emerge from our study.

4.3.1. When consumers choose to cancel a service

During the Covid-19 pandemic, several consumers found themselves in a situation where the merchant was able to provide the service they had paid for, but which they no longer wanted or could no longer use (see section 2.1.2).

Whether because they were in quarantine, afraid of catching Covid-19 or did not have the required vaccination status, many consumers whose flights were not cancelled had to give up taking a trip or refrain from participating in events attended by large numbers of people. In other cases, consumers could no longer benefit from a service (e.g. a concert) provided by the merchant because the flight they had to take to get to their destination had been cancelled.

The law provides few remedies to compensate such consumers. In general, consumers are not entitled to a refund when they choose, for personal reasons, not to avail themselves of a service they have paid for. Merchants may voluntarily adopt an exchange or refund policy, or even agree to negotiate with a consumer who suddenly changes his mind, but they are under no legal obligation to do so.¹³⁶

Nevertheless, consumer law now and then offers the possibility of terminating certain types of transactions that could benefit consumers in situations in which they no longer wish to use a service. For example, provincial laws make it possible to cancel a sports subscription within specific timeframes or under certain conditions, usually by paying the merchant a penalty. In Ontario, a contract of this type can be terminated within 10 days of its signing.¹³⁷ In Québec, a contract with a gym can be terminated during the first one-tenth of its duration¹³⁸ and an

¹³⁵ *Ticket Sales Act*, SBC 2019, c 13, s. 6 (British Columbia); *Consumer Protection Act*, RSA 2000, c C-26.3, s. 57.2 (Alberta); *Ticket Sales Act*, SO 2017, c 33, s. 2 (Ontario); *Consumer Protection Act*, CQLR c P-40.1, s. 54.9.1, 236.3 (Québec).

¹³⁶ For example, the Civil Resolution Tribunal in British Columbia refused to order the reimbursement of a consumer whose trip could go ahead despite the health restrictions, but from which he no longer wished to benefit. See: *Alamolhoda v. Deutsche Lufthansa Aktiengesellschaft*, 2022 BCCRT 1039.

¹³⁷ *Consumer Protection Act*, 2002, SO2 002, c 30, Sch A, s. 35.

¹³⁸ *Consumer Protection Act*, CQLR c P-40.1, ss. 197-205.

assistance or teaching contract can be cancelled at any time.¹³⁹ In British Columbia, a consumer can cancel a training contract for several reasons, including a medical disability that makes it unreasonable for them to participate in the activity.¹⁴⁰

That said, there are no provisions in the law comparable to a true general scheme for reimbursing consumers in the event of a change in their specific circumstances.¹⁴¹ As a result, when the threat of a catastrophic event looms, Canadian law paradoxically creates an economic incentive for consumers to take risks with their safety. While the pandemic was raging, certain consumers chose to maintain their travel plans, even if it meant jeopardizing their health, rather than cancel their stay and suffer financial loss. In short, Canadian law does not reward consumer caution: if they hope to recover their money, they cannot opt to give up a service. Instead, they must wait until the merchant is completely unable to provide it.

4.3.2. A different or deferred service

During the Covid-19 pandemic, several merchants had to change the way they provided services paid for by consumers. This was the case, for example, with educational services that were offered remotely rather than in person, or for events that were staged with a smaller number of guests and in respect of distancing rules. The question then arises: is a merchant who, due to a catastrophic event, provides a service in a different manner than was initially envisaged, breaching their contractual obligations?

In civil law, this issue is being debated in the courts at the time of writing. In class actions against private colleges, plaintiffs are seeking reimbursement of the tuition paid alleging reduced quality and quantity of courses offered remotely during the pandemic.¹⁴² In a similar class action, the plaintiffs accuse a ski resort of allowing customers fewer days of skiing than specified in the contract.¹⁴³ In a decision by the Small Claims Division of the Court of Québec, the court found that the lessor of a chalet had not fulfilled his obligation, because the health rules prevented him from accommodating the agreed number of guests, and they were forbidden access to the kitchen.¹⁴⁴

¹³⁹ *Consumer Protection Act*, CQLR c P-40.1, ss. 189-196. In Québec, the law also gives consumers the option of terminating a service contract at will – this may include various types of transactions, including private lessons or subscriptions to sports leagues. See: *Civil Code of Québec*, CQLR c CCQ-1991, ss. 2126 and 2129; *Consumer Protection Act*, CQLR c P-40.1, s. 11.4. For a case in which this was applied during the pandemic, see: *Kedziora v. 2738-1557 Québec inc. (Salle de réception Le Challenger)*, 2022 QCCQ 7453.

¹⁴⁰ This option applies to “continuous service contracts,” which includes dance lessons, physical training assistance contracts, and subscriptions permitting access to fitness centres. However, the consumer’s incapacity must be confirmed by a medical professional. See: *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss. 17, 25(3); *Consumer Contracts Regulations*, BC Reg. 272/2004, s. 2.

¹⁴¹ For example, a change in the consumer’s financial situation attributable to the Covid-19 pandemic is not grounds for the cancellation of a credit agreement: *Amex Bank of Canada v. Antippa*, 2022 QCCQ 5320; Jérémie Torres-Ceyte, “Libres propos sur la force majeure invoquée par le créancier,” 2022 100-1 *Canadian Bar Review* 26.

¹⁴² *Bernard v. Collège Charles-Lemoyne de Longueuil inc.*, 2021 QCCS 3083. Another case based on facts was dismissed on other grounds: *Larose v. Corporation de l'École des Hautes Études commerciales de Montréal*, 2021 QCCS 2299.

¹⁴³ *Nashen v. Station Mont-Tremblant*, 2022 QCCA 415.

¹⁴⁴ *Smeester v. 9167-2105 Québec inc. (Aubergine, relais de campagne)*, 2021 QCCQ 13959.

While we can expect the case law resulting from the Covid-19 pandemic to shed light on the circumstances in which a contract can remain valid, it appears that each situation will have to be assessed on a case-by-case basis, depending particularly on the intensity of the merchant's obligation and on the content of the contract.¹⁴⁵ According to Professor Lluelles, a contract that temporarily cannot be executed due to force majeure may be validly postponed, as long as the execution period does not constitute a determining factor in the contract; in a sequential performance contract, a contract that is interrupted for a period of time should only be voided "when that period is sufficient to amount to non-performance."¹⁴⁶

In short, although civil law sets forth the principle that a creditor is not bound to receive anything other than the agreed benefit,¹⁴⁷ a contract could remain valid even if it is performed in a different manner than was intended. We should add that if we were to consider that a merchant who provides a service differently has only partially fulfilled his obligations, the consumer may only be entitled to a price reduction rather than a full refund, since he could have benefited partially from the services.¹⁴⁸

In common law, several decisions rendered by the Civil Resolution Tribunal of British Columbia in the context of the Covid-19 pandemic tend to favour the stability of contracts. These decisions have shed light on the parameters of strict application of the frustration doctrine (Section 4.1.2), reiterating that a contract must be absolutely impossible to perform for it to apply—not simply undesirable or difficult to accomplish.¹⁴⁹ The court therefore refused to apply the doctrine of non-performance, and consequently to order the reimbursement of consumers, in cases when the service could still be offered, even if this was in a considerably different way.

In many cases involving weddings, this tribunal considered that a contract concluded with service providers remains valid even if the event has to take place with significant constraints imposed by health restrictions, particularly as regards the number of guests.¹⁵⁰ Similarly, the fact that a merchant provides ballet lessons online rather than in class does not constitute avoidance of the contract.¹⁵¹ Even in situations when the service had to be postponed to a later date, this tribunal did not consider them to be open to the doctrine of non-performance.¹⁵² In short, the fact that a service is rendered differently by the merchant in order to adapt to a catastrophic situation does not automatically entail that the consumer has a right to reimbursement.

¹⁴⁵ Nathalie Vézina and Louise Langevin, "L'exécution de l'obligation" in Barreau du Québec, *Obligations et contrats*, Collection de droit 2022-2023, vol. 6, Yvon Blais, 2022, p. 104.

¹⁴⁶ Didier Luelles, *Droit des obligations*, 3rd ed., Thémis, 2018, para. 2747-2750.

¹⁴⁷ *Civil Code of Québec*, CQLR c CCQ-1991, s. 1561 (2), 1604 CCQ.

¹⁴⁸ The *Civil Code* in fact states, "Where the debtor has performed part of his obligation, the creditor remains bound to perform his own obligation to the extent of his enrichment." See: *Civil Code of Québec*, CQLR c CCQ-1991, s. 1694 para. 2. In the event of force majeure, the *Civil Code* similarly provides that if the debtor's unjustified default is of "minor importance," the creditor is entitled to a reduced obligation. See: *Civil Code of Québec*, CQLR c CCQ-1991, s. 1604 para. 2.

¹⁴⁹ *Ball v. Infinite Entertainment Sound and Lighting Inc.*, 2020 BCCRT 865, para. 19.

¹⁵⁰ *Ball v. Infinite Entertainment Sound and Lighting Inc.*, 2020 BCCRT 865; *LaFrance v. Dream Big Weddings and Events*, 2020 BCCRT 1088; *Call v. CPM Farms Ltd.*, 2020 BCCRT 1378; *Scharf v. CPM Farms Ltd.*, 2021 BCCRT 565; *Sohi v. Bombay Banquet Hall Ltd.*, 2022 BCCRT 817.

¹⁵¹ *Simpson v. Seary (dba WestCoast Ballet)*, 2021 BCCRT 1239.

¹⁵² *Rudichuk v. Newlands Golf & Country Club Ltd.*, 2020 BCCRT 1350; *Locke v. Lloyds Travel & Cruises Ltd.*, 2021 BCCRT 600; *Brahim Jounh (dba Gateway2Morocco) v. Rozenshteyn*, 2020 BCCRT 1175.

4.3.3. The thorny question of the liability of intermediaries

Several transactions in the travel or ticket sales sectors that were cancelled during the Covid-19 pandemic had been concluded via online platforms. As we have seen, the contracts of these intermediaries generally stipulate that the company acts as a third party between the consumer and the final service provider, and essentially defers to the policies of the latter to determine the conditions applicable in the event of cancellation (see Section 3.2). Under the law, however, it is not certain that these intermediaries can so easily avoid responsibility in the transaction.

First, online intermediaries who book airline tickets or vacation stays for consumers could qualify as travel agents within the meaning of provincial laws.¹⁵³ In Québec, these companies are bound by an obligation of result towards the consumer,¹⁵⁴ if services are not rendered, a consumer could submit a complaint to their travel agency or to the CFCTA.¹⁵⁵ It should also be noted that several online travel intermediaries, such as Flighthub or Expedia are holders of a travel agent license issued by Québec's Office de la protection du consommateur.

Next, the regulations on the resale of tickets in force in certain provinces expressly impose an obligation of reimbursement on online intermediaries in the event of cancellation.¹⁵⁶ In Ontario, for example, the *Ticket Sales Act* states that the obligation to guarantee a refund applies to operators of ticket resale platforms, which include, in particular, websites that facilitate these transactions.¹⁵⁷ Therefore, although they claim only to be third parties to the contract, we can see how these resale platforms could be required by law to reimburse consumers in several jurisdictions.

In addition, under the general principles of liability, it is feasible that online intermediaries could be held liable for the contractual breaches of the final service provider depending on their degree of control over the latter. By way of illustration, a platform with which consumers transact directly, which collects payments, imposes the terms of purchase, ensures the

¹⁵³ It will be recalled that British Columbia, Ontario and Québec have adopted laws governing travel agencies: *Travel Industry Regulation*, BC Reg. 296/2004 (British Columbia); *Travel Industry Act*, 2002, SO 2002, c 30, Sched. D (Ontario); *Travel Agents Act*, CQLR c A-10 (Québec). In Québec, the possibility of defining such an intermediary as a travel agency was addressed in a judgment authorizing a class action: *Mihoubi v. Priceline.com*, 2022 QCCS 25, para. 89-91.

¹⁵⁴ Louis JOLIN, *Droit du tourisme au Québec*, 4th ed., Presses de l'Université du Québec, 2018, pp. 82-89; Roland-Yves GAGNÉ, "La responsabilité des différents intervenants en matière de voyage" (1989) 49 R. du B. 521, pp. 543-544.

¹⁵⁵ *Travel Agents Act*, CQLR c A-10, s. 30.4; *Roy v. Vacation Tours Mont-Royal*, 2013 QCCQ 1912; *Lebrun v. Discount Travel* (9129-2367 Québec inc.), 2010 QCCQ 1877; *Béland v. Voyage Charterama Trois-Rivières Itée*, 2010 QCCQ 2842; *Doyon v. Air Transat Holidays*, 2009 QCCQ 5672.

¹⁵⁶ *Ticket Sales Act*, SBC 2019, c 13, s. 6 (British Columbia); *Consumer Protection Act*, RSA 2000, c C-26.3, s. 57.2 (Alberta); *Ticket Sales Act*, SO 2017, c 33, s. 2 (Ontario). In Québec, the provisions of the law respecting the resale of tickets state that the consumer may obtain a refund of the ticket in the event of cancellation, but do not specify their scope: *Consumer Protection Act*, CQLR c P-40.1, s. 54.9.1, 236.3 (Québec). See: *Abihisira v. Ticketmaster Canada*, 2022 QCCS 164, para. 3; *Abihisira v. Stubhub Inc.*, 2020 QCCS 139, paras. 19-24.

¹⁵⁷ *Ticket Sales Act*, SO 2017, c 33, ss. 1-2.

management of the service and sets minimum standards applicable to service providers could be considered to exercise a sufficiently high level of control to be held liable.¹⁵⁸

The fact remains that there is still a measure of uncertainty in the law when it comes to determining the level of liability of online intermediaries. Given the many difficulties consumers encountered with these online platforms during the pandemic and the preponderant role they play in the market, it seems that Canadian laws need to be updated to ensure that such companies are as liable for the proper execution of contracts as the final service provider.

4.3.4. Misleading or incomplete representations

Merchants are required to respect the representations they make to consumers.¹⁵⁹ Consequently, a merchant who voluntarily undertakes to reimburse consumers in the event of the cancellation of a service, for example by announcing it on their website or by including it in their terms of purchase, must comply with the exact content of their commitments. If they go back on their word, the consumer could take action to obtain a reimbursement of the sums paid.¹⁶⁰ By way of illustration, a class action brought in Ontario against Ticketmaster reproached the company for not respecting its own ticket refund policy.¹⁶¹

In addition, for certain types of transactions covered by provincial consumer protection laws, the merchant must disclose this information at the time of purchase. For example, for future performance contracts¹⁶² or for online purchases,¹⁶³ several provinces require that the merchant include, within the contract, information such as a detailed description of the service or their address. If the merchant fails to respect these formal obligations, this could also serve as justification for the consumer to ask for the transaction to be cancelled and to request a refund.¹⁶⁴

¹⁵⁸ Annik Bélanger-Krams, *The Sharing economy: The Canadian Perspective*, Option consommateurs, 2017, pp. 52-63; Annik Bélanger-Krams and Katherine Gauthier, *Les plateformes numériques d'économie partagée : plus qu'un simple bottin téléphonique virtuel?* Option consommateurs, 2021, p. 32-35.

¹⁵⁹ See in particular: *Competition Act*, RSC 1985, c C-34, s. 52; *Consumer Protection Act*, SO 2002, c 30, Sched. A, s. 14 (Ontario); *Consumer Protection Act*, CQLR c P-40.1, ss. 41-42, 219 (Québec).

¹⁶⁰ *Competition Act*, RSC 1985, c C-34, s. 36; *Consumer Protection Act*, 2002, SO 2002, c 30, Sched. A, s. 18(1) (Ontario); *Consumer Protection Act*, CQLR c P-40.1, s. 272 (Québec).

¹⁶¹ *Beaucage v. Ticketmaster Canada Holdings ULC*, 2022 ONSC 5309. See also: *Patterson v. Ticketmaster Canada Holdings*, 2022 QCCS 1998. The Competition Bureau also sanctioned FlightHub for failing to comply with its representations regarding consumer refunds, see: <https://www.canada.ca/en/competition-bureau/news/2021/02/inquiry-over-flighthub-ends-with-sanctions-totaling-58million-dollars-for-the-company-and-directors.html>

¹⁶² The term "future performance" refers to a contractual obligation that must be fulfilled at a future date. See: *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss. 19 and 23 (British Columbia); *The Consumer Protection and Business Practices Regulations*, RRS c C-30.2 Reg 1, ss. 3-5 (Saskatchewan); *General*, O Reg 17/05, s. 24 (Ontario).

¹⁶³ See: *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 46 (British Columbia); *Internet Sales Contract Regulation*, Alta Reg 81/2001, arts. 4-5 (Alberta); *The Consumer Protection and Business Practices Regulations*, RRS c C-30.2 Reg 1, ss. 3-5 to 3-7 (Saskatchewan); *Consumer Protection Act*, CCSM c C200, s. 129 (Manitoba); *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, ss. 38-40 (Ontario); *Consumer Protection Act*, CQLR c P-40.1, ss. 54.4-54.6 (Québec); *Consumer Protection Act*, RSNS 1989, c 92, s. 21X (Nova Scotia).

¹⁶⁴ For cases of application in the context of the Covid-19 pandemic, see: *Cohen v. Rendezvous Dive Adventures Ltd.*, 2021 BCCRT 552; *Locke v. Lloyds Travel & Cruises Ltd.*, 2021 BCCRT 600.

4.3.5. Illegal terms and charges

Several provincial consumer protection laws prohibit binding arbitration clauses or clauses that limit the consumer's ability to bring a class action.¹⁶⁵ Similarly, these laws are of public order, i.e. they cannot be derogated from by a contractual stipulation.¹⁶⁶ Accordingly, clauses that exclude the right to request chargebacks or that would impede the consumer's legal remedies, as set forth in the contracts we analyzed (see section 3.3), could be considered unenforceable against consumers.

Similarly, various provincial laws regulate the fees that may be charged to consumers. In Québec, for example, the *Consumer Protection Act* states, among other things, that no costs can be charged to the consumer, unless the contract precisely indicates this.¹⁶⁷ In Ontario, a travel agency cannot charge fees unless they were disclosed at the time of purchase.¹⁶⁸ Such provisions could counter the practices of companies which, as was sometimes observed during the pandemic, withheld a fee from refunds paid to customers.

¹⁶⁵ *Consumer Protection Act*, RSA 2000, c C-26.3, s. 16 (Alberta); *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s. 101 (Saskatchewan); *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, ss. 7-8 (Ontario); *Consumer Protection Act*, CQLR c P-40.1, s. 11.1 (Québec). For provinces that do not have a provision in the law, the question of the legality of these clauses is less clear. See: Annik Bélanger-Krams, *The Sharing economy: The Canadian Perspective*, Option consommateurs, 2018, p. 33-35.

¹⁶⁶ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 3 (British Columbia); *Consumer Protection Act*, RSA 2000, c C-26.3, s. 2 (Alberta); *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s. 15 (Saskatchewan); *Consumer Protection Act*, CCSM c C200, s. 96 (Manitoba); *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s. 7 (Ontario); *Consumer Protection Act*, CQLR c P-40.1, ss. 261-262 (Québec); *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1, s. 2(3) (New Brunswick); *Consumer Protection Act*, RSNS 1989, c 92, s. 21 (Nova Scotia); *Consumer Protection Act*, RSPEI 1988, c C-19, s. 21 (Prince Edward Island); *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s. 3 (Newfoundland and Labrador).

¹⁶⁷ *Consumer Protection Act*, CQLR c P-40.1, s. 12.

¹⁶⁸ *General*, Ontario Regulation 26/05, ss 36(c), 38(d). See also: <https://www.tico.ca/news/registrar-bulletins/415-registrar-bulletin-reminder-about-credit-vouchers-and-notice-to-registrants-charging-fees-or-penalties.html>.

5. Outside Canada

As viruses ignore borders, every country in the world faced a wave of business closures and service cancellations during the Covid-19 pandemic. Our analysis shows that foreign governments have been significantly more interventionist than Canada in relations between consumers and merchants.

In the United States, the federal authorities have been particularly proactive in the air travel domain (Section 5.1). Within the European Union, governments have also intervened directly in contractual relations, both in defending the consumers' right to reimbursement and in limiting it (Section 5.2).

5.1. The United States

As in Canada, the American airline industry is overseen by the federal government. Since the beginning of the pandemic, the US Department of Transportation has adopted a strong stand in support of travellers' right to obtain a refund when their flights are cancelled.

According to this government agency, a carrier's refusal to offer the option of a refund would amount to an unfair or deceptive practice within the meaning of the law.¹⁶⁹ Once a consumer asks for a refund, the money must be remitted to them within 7 days if they paid by credit card, or within 20 days if they paid by other means.¹⁷⁰ The clear position established by the U.S. Department of Transport contrasts with that of Canada, where the public authorities have been more accommodating towards air carriers—and where consumers have had to be very patient about recovering their money under the terms of piecemeal agreements (see Section 1.2).

In addition, the United States has been proactive in other areas of consumer protection. For instance, the Centers for Disease Control adopted a temporary order aimed at protecting tenants experiencing financial difficulty from eviction, in order to limit the spread of the virus.¹⁷¹ A temporary law also prohibited misleading representations with regard to the treatment and prevention of Covid-19.¹⁷²

For certain types of transactions, consumers have also been helped to obtain reimbursement through scattered provisions of the law. For example, in New York State, the law requires ticket resellers to reimburse consumers whenever an event is cancelled.¹⁷³ In Massachusetts, the

¹⁶⁹ Blane A. Workie, "Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel," U.S. Department of Transportation, April 3, 2020; *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23110-01, p. 23129 (April 25, 2011); 49 USC 41712 (unfair or deceptive practices).

¹⁷⁰ 14 CFR § 259.5(b)(5). Interestingly, US regulations permit cancellation of ticket purchases within 24 hours of the transaction: 14 CFR § 259.5 (b) (4). We have identified certain clauses in Canadian air carrier contracts that grant this possibility. See: Section 3.2.1.

¹⁷¹ Centers for Disease Control and Prevention and Department of Health and Human Services, *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19*, Order Under Section 361 of the *Public Health Service Act* (42 USC 264) and 42 CFR 70.2, 85 FR 55292, September 4, 2020.

¹⁷² *COVID-19 Consumer Protection Act*, Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

¹⁷³ NY Arts & Cult. Aff. Law § 25.07. See also: "Attorney General James Secures \$4.4 Million in Refunds for Customers Who Had Events Cancelled Due to COVID-19," New York State Attorney General Press Release, October 29, 2021, <https://ag.ny.gov/press-release/2021/attorney-general-james-secures-44-million-refunds-customers-who-had-events>

Attorney General has taken legal action against travel intermediaries in order to recover amounts that had not been refunded, based in particular on state regulations applicable to travel agencies.¹⁷⁴ Similarly, as in Canada, the laws on false representation have been invoked to induce merchants to respect their commitments with regard to compensating consumers.¹⁷⁵

In addition to these specific situations, the general principles of American law are similar to the applicable law in Canadian common law provinces. Court decisions have thus given preponderance to the content of the contract when a “force majeure” clause stipulates the terms applicable in the event of a fortuitous occurrence.¹⁷⁶ In the absence of such a clause, common law doctrines may apply when an event beyond the control of the parties has made performance of the contract either impossible, excessively onerous or of no value for one of the parties.¹⁷⁷ However, although many lawsuits were brought against merchants in the wake of the Covid-19 pandemic, several authors expect that these doctrines will be interpreted narrowly and that the courts will support the stability of contracts.¹⁷⁸

5.2. Europe

5.2.1. In the European Union

The European Union (EU) has a supranational regulatory framework governing travel and transport. Other types of enterprises affected by closures during the Covid-19 pandemic are governed mainly by national laws.

European law is clear when it comes to reimbursing air passengers. Under an EU regulation, an air carrier must reimburse the consumer when their flight is delayed by more than five hours or, if necessary, return them to their point of origin.¹⁷⁹ The refund must be paid within 7 days, in cash; in order to issue a credit or other form of compensation, the consumer must provide a

¹⁷⁴ *The sale of travel services*, 940 CMR 15.00; “AG Healey Secures More Than \$500,000 From Online Travel Agency That Took Money From Consumers and Refused to Pay Refunds,” Office of Attorney General Maura Healey, December 9, 2020, <https://www.mass.gov/news/ag-healey-secures-more-than-500000-from-online-travel-agency-that-took-money-from-consumers-and-refused-to-pay-refunds>

¹⁷⁵ For example, the Attorney General for the District of Columbia sued a fitness center for breaking its promise to “freeze” memberships. See: <https://oag.dc.gov/release/ag-racine-sues-washington-sports-club-charging-gym>. Similarly, the Stubhub platform was the subject of legal proceedings because it had not respected its money-back guarantee: https://www.ag.state.mn.us/Office/Communications/2021/09/16_StubHub.asp

¹⁷⁶ Brian H. Bix, “COVID Concerns: Some Realism About Equitable Relief,” (2022) 85 *Law and Contemporary Problems* 37, p. 38.

¹⁷⁷ Collectively referred to as “changed circumstances doctrines,” these doctrines include impossibility, impracticality, and frustration of purpose. See: Danielle Kie Hart, “If Past Is Prologue, Then the Future Is Bleak: Contracts, COVID-19, and the Changed Circumstances Doctrines,” (2022) 9 *Tex. A&M L. Rev.* 347, pp. 357-361.

¹⁷⁸ Andrew A. Schwartz, “Frustration, the MAC Clause, and COVID-19,” (2022) 55 *UC Davis L. Rev.* 1771; Xuan-Thao Nguyen, “Contract Impossibility from the Spanish Flu of 1918 to the COVID-19 Pandemic”, (2021) 76 *N.Y.U. ANN. SURV. AM. L.* 779, pp. 813-817; Danielle Kie Hart, “If Past Is Prologue, Then the Future Is Bleak: Contracts, COVID-19, and the Changed Circumstances Doctrines,” (2022) 9 *Tex. A&M L. Rev.* 347, pp. 357-380.

¹⁷⁹ *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91/91*, OJ L 46, 17.2.2004, pp. 1–8 (hereinafter “*Regulation (EC) No 261/2004*”), arts. 5(1)(c) and 8.

signed agreement.¹⁸⁰ In addition, the regulation stipulates that additional compensation must be paid to the consumer, “except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”¹⁸¹

In addition to the air travel domain, the EU has adopted regulations on transport by rail,¹⁸² by bus¹⁸³ and by sea,¹⁸⁴ which similarly provide for a right to reimbursement in the event of cancellation.¹⁸⁵ In addition, a European directive on package travel¹⁸⁶ states that if the travel organizer “is prevented from performing the contract because of unavoidable and extraordinary circumstances,” he can cancel the service and reimburse the traveller in full within 14 days.¹⁸⁷ This same directive adds that the consumer can terminate the contract and obtain a refund if “exceptional and unavoidable circumstances, occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination.”¹⁸⁸

Apart from these domains, European legislation does not regulate the consequences of cancelling a service for unforeseen reasons. Each EU Member State remains free to decide on the applicable rules in situations of force majeure, for instance by requiring consumers to accept a voucher. However, the general EU consumer protection law continues to apply to these situations. For example, a merchant who obliges consumers to pay full price for services that cannot be provided might be in contravention of the EU law, which prohibits abusive clauses.¹⁸⁹

5.2.2. In three Member States: France, Italy and Belgium

In the course of this study, we studied the national laws of three EU Member States: France, Italy and Belgium. In matters of consumer reimbursement due to catastrophic events, the laws of these three countries, all of which follow the civil law tradition, have provisions similar to those in Québec civil law.

¹⁸⁰ *Ibid.*, arts. 8 (1) and 7 (3).

¹⁸¹ *Ibid.*, art. 5 (3).

¹⁸² *Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations*, OJ L 315 of 3.12.2007, art. 16.

¹⁸³ *Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 on passenger rights in bus and coach transport and amending Regulation (EC) No 2006/2004*, OJ L 55 of 28.2.2011, art. 19.

¹⁸⁴ *Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 on the rights of passengers traveling by sea or by inland waterway and amending Regulation (EC) No 2006/2004*, OJ L 334 of 17.12.2010, art. 18.

¹⁸⁵ *Commission Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 2020/C 89 I/01*. pp. 4-7.

¹⁸⁶ Travel packages consist of a combination of several travel services (e.g. flight and accommodation) for the same stay.

¹⁸⁷ *Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC*, art. 12.

¹⁸⁸ *Ibid.*, art. 12 (2).

¹⁸⁹ *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, OJ L 95, April 21, 1993.

Indeed, according to the general principles of the laws of these countries, debtors may be released from an obligation in the event of force majeure or, in Italy, if performance becomes impossible.¹⁹⁰ If applicable, this will lead to the restitution of payment, namely the reimbursement of the consumer.¹⁹¹ If the force majeure is only temporary, performance of the service could simply be suspended; for example, the time lost from a sports subscription could validly be postponed.¹⁹² In addition, if performance of the service becomes “excessively onerous” due to a change in circumstances that was unforeseeable at the time the contract was concluded, the affected party may require the contract to be renegotiated.¹⁹³

In order to avoid companies having to reimburse all their customers, the governments of these States were far more interventionist than Canada in relations between merchants and consumers during the Covid-19 pandemic.¹⁹⁴ They all passed ordinances that temporarily excluded the application of civil law provisions on reimbursement, allowing merchants in the travel¹⁹⁵ and events (sport, theatre, festivals)¹⁹⁶ sectors to issue credit to consumers. It was only upon the expiry of the validity period of the credit, which was sometimes more than a year, that consumers could demand a refund.

Several of these ordinances, however, were challenged by the European Commission, which considered that they did not comply with the reimbursement requirements under the *Air Transport Regulation* or the *Package Travel Directive*. The supranational authority therefore

¹⁹⁰ *Civil Code*, art. 1218 (France); *Civil Code*, art. 1256 (Italy); *Civil Code*, arts. 5.99, 5.225, 5.226 (Belgium).

¹⁹¹ *Civil Code*, arts. 1351, 1351-1 (France); *Civil Code*, arts. 1463, 1464 (Italy); *Civil Code*, arts. 5.101, 5.119 (Belgium).

¹⁹² Constance Verroust-Valliot and Serge Pelletier, “L’impact du covid-19 sur les contrats de droit privé,” *Dalloz News*, June 9, 2020, <https://www.dalloz-actualite.fr/node/l-impact-du-covid-19-sur-contrats-de-droit-privé> (France); Gianluigi Delle Cave, “Coronavirus e inadempimento contrattuale,” *Altalex*, February 28, 2020, <https://www.altalex.com/documents/news/2020/02/28/coronavirus-e-inadempimento-contrattuale> (Italy); Jean Van Zuylen, “Coronavirus et force majeure : questions choisies,” (2020) 7 *Revue générale de droit civil belge* 382, pp. 390-391 (Belgium).

¹⁹³ *Civil Code*, art. 1195 (France); *Civil Code*, arts. 1467-1468 (Italy); *Civil Code*, art. 5.74 (Belgium). However, according to several authors, the scope of these provisions in the context of Covid-19 remains uncertain. See: Olivier Gout, “Covid-19 et responsabilité contractuelle,” Conference proceedings “Covid-19 et droit de l’indemnisation,” July 28, 2022; Jean Van Zuylen, “Coronavirus and force majeure: selected questions”, (2020) 7 *Revue générale de droit civil belge* 382, pp. 397-398. In Québec, this “hardship doctrine” has not been accepted in civil law: *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, para. 93.

¹⁹⁴ For example, France adopted *Emergency Law No. 2020-290 of March 23, 2020 aimed at dealing with the Covid-19 epidemic*, which provides in particular that the government may modify the reciprocal obligations of the parties to contracts. See: *Emergency Law No. 2020-290 of March 23, 2020 aimed at dealing with the Covid-19 epidemic* (1), art. 11. In Belgium, the *Code de droit économique* provides that the Minister for the Economy can regulate the provision of services “when exceptional events jeopardize or are likely to jeopardize all or part of the proper functioning of the economy.” [TRANSLATION] See: *Code de droit économique*, art. XVIII.1.

¹⁹⁵ *Ordinance n° 2020-315 of March 25, 2020 relating to the financial conditions for the termination of certain tourist travel and holiday package contracts in the event of exceptional and unavoidable circumstances or force majeure*, JORF n°0074 of March 26, 2020 (France); *Decreto-Legge* (2 Mar. 2020) no 9, “Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all’emergenza epidemiologica da COVID-19,” GU 161, no 53, art. 28 (Italy); *Ministerial decree relating to the reimbursement of cancelled package holidays*, 19 March 2020 (Belgium).

¹⁹⁶ *Ordinance No. 2020-538 of May 7, 2020 relating to the financial conditions for the termination of certain contracts in the event of force majeure in the culture and sport sectors*, JORF No. 0113 of May 8, 2020 (France); *Decreto-Legge* (17 Mar. 2020) no 18, “Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all’emergenza epidemiologica da COVID-19,” GU Serie Generale, no 70, art. 88 (Italy); “*Arrêté ministériel relatif aux activités à caractère privé ou public, de nature culturelle, sociale, festive, folklorique, sportive et récréative*, 19 mars 2020” (Belgium).

intervened to ensure the EU law was applied, both by taking action against Member States in which the protection framework had not been respected and against companies that were slow to reimburse consumers.¹⁹⁷ The EU was the scene of noticeable tensions between, on the one hand, the Member States, which were attempting to soften the economic impacts of the law on businesses, and the European Commission, which wanted to ensure consumers were protected.

¹⁹⁷ EUROPEAN COMMISSION, *July Infringements package: key decisions*, 2 July 2020, https://ec.europa.eu/commission/presscorner/detail/en/inf_22_3768; EUROPEAN COMMISSION, Air travel, https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/air-travel_en.

Conclusion and recommendations

More than ever, Canada needs to plan for the unexpected. In the future, catastrophic events are likely to occur more frequently and with greater intensity (Section 1.1). The Covid-19 pandemic therefore provides an opportunity to learn lessons in anticipation of this tumultuous future, particularly with regard to consumers receiving adequate protection during such events.

Our study shows that Canadian consumers encountered numerous difficulties in obtaining reimbursement following the mass cancellations of services that occurred during the Covid-19 pandemic. Many merchants, especially air carriers, left consumers empty-handed for years (Section 1.2). Although the majority of consumers were finally able to obtain satisfactory compensation for services not rendered, they generally report having had to deal with interminable delays, a chronic lack of information from companies and communication difficulties (Section 2). Consumers are unanimous about wanting to have the choice to be reimbursed. While they have shown themselves sympathetic to the difficulties faced by the companies, they may be less patient if a similar crisis occurs in future.

In the aftermath of the crisis, merchants' compensation policies still need to be improved. Their terms of purchase are sometimes unclear about what happens in the case of a catastrophic event and vary from one sector to the next. In particular, online platforms for the purchase of travel services or tickets tend to exclude their responsibility in the transaction and rely on the end service providers to determine the consumer's rights. Several companies also include clauses that could make it difficult for consumers to be fully compensated in the case of a catastrophic event, in particular by authorizing themselves to withhold fees from the amount remitted, by offering insurance that is riddled with exclusions, by prohibiting consumers from transferring their right of access to the service or by prohibiting them from using some of their legal remedies to get their money back (Section 3).

In the face of such difficulties, Canadian law has definite shortcomings when it comes to adequately protecting the public. Even though the law does require consumers to be reimbursed when a service is impossible to perform, it nevertheless tends to promote the stability of contracts and the maintenance of services even if these have to be performed in a very different way due to the catastrophic situation (Section 4). Consumer laws do offer mechanisms here and there that can be helpful to the consumer in cases when the merchant does not provide a service as agreed, but these disparate provisions are fragmented from one jurisdiction to the next and according to the type of transaction, in the absence of a truly comprehensive regime.

In addition, the law does not provide a solution to specific situations that arose in the wake of the pandemic (Section 4.3). These shortcomings include the difficulty for consumers to request cancellation of a service (and to obtain a refund) when the merchant is able to provide the service, but the consumer does not wish to benefit from it for legitimate reasons such as fears for their health. By depriving consumers of the ability to obtain cancellation of the service, the law had the paradoxical effect, during the pandemic, of creating an economic incentive to expose themselves to risk and to contribute to the transmission of virus.

Canada stands out among other countries during the Covid-19 pandemic for being slow to intervene in merchant-consumer relations (Section 5). Rather than determining the compensation merchants should offer, as many States have done, Canada has generally adopted a laissez-faire approach that has given rise to great uncertainty as to the rights and obligations of each party. In order to ensure the predictability of the law and to avoid a great deal of hardship for all the parties involved, it would have been wiser to determine equitable solutions in contractual matters beforehand.

In order to correct these deficiencies in the consumer protection safety net, we recommend broadening the consumer's right to reimbursement in the case of catastrophic events and better regulating the applicable terms and conditions.

Recommendations to federal and provincial governments:

- **Establish a consumer protection regime applicable during catastrophic events that includes the following:**
 - **a compulsory refund option for consumers in cases when the merchant is unable to deliver the service or when an irresistible event has a significant impact on the performance of the service;**
 - **the consumer's right to cancel a service and obtain a refund if they do not wish to benefit from it for reasons related to the occurrence of an irresistible event, such as risks to their health or safety;**
 - **the imposition of specific deadlines for compensating consumers, taking into account both the needs of consumers and the financial difficulties that merchants may experience;**
 - **the prohibition on imposing additional costs on consumers when issuing a refund;**
 - **the obligation for companies to provide information on a continuous basis, especially via their websites;**
 - **mechanisms to protect the sums paid by consumers, such as trust accounts and securities provided by merchants.**
- **Adopt legal provisions limiting clauses prohibiting the transfer or resale of access rights to a service, in order to permit consumers to avoid financial loss if they no longer wish to benefit from a service.**
- **Clarify consumer protection laws to ensure that an online intermediary is jointly and severally liable with the final service provider for reimbursing the consumer.**
- **Investigate the contractual terms of service of companies doing business in Canada in order to remove clauses that do not comply with prevailing consumer protection laws.**

Recommendation to the Federal Government:

- **Amend the *Air Passenger Protection Regulations* in order to allow passengers whose flight has been disrupted for a reason beyond the carrier's control to choose an immediate refund if the delay has the effect of compromising the reason for their trip.**

Recommendations to merchants:

- **Improve customer service and transparency toward consumers during catastrophic events.**
- **Establish clear policies on catastrophic events, giving consumers the option of obtaining a refund.**
- **Write contracts for the use of services in clear, accessible language, so that consumers can easily understand their obligations.**

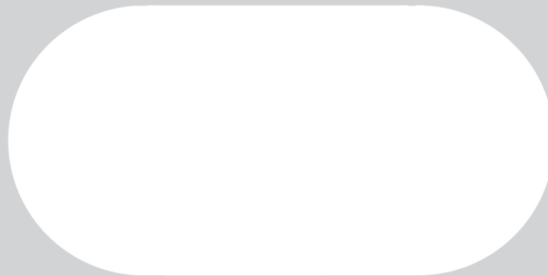
Recommendations to consumers:

- **Learn about the companies' policies in the case of catastrophic events before purchasing a service, in particular with regard to their reimbursement policies and exclusions applicable to the insurance offered by the merchant.**
- **Be wary of "cheap" online travel intermediaries, whose terms of purchase and customer service may be disadvantageous.**

Appendix 1 – Discussion guide (French version)



*Perception sur les offres
d'indemnisation suite aux
annulations d'achat de service
engendrées par la pandémie*



GUIDE DE DISCUSSION



INTRODUCTION ET PRÉSENTATION DES PARTICIPANTS

10 MIN.

- ▶ Mot de bienvenue
- ▶ **Sujet** de ce soir : Les annulations d'achats que de nombreuses entreprises ont dû faire pendant la pandémie car les règles sanitaires les empêchaient de fournir le service.
 - Ont touché différents secteurs : transport aérien, hôtels, gyms, spectacles, événements, etc.
 - Ont été gérées de différentes façons par les commerçants : remboursements, crédits ou bons d'achat différés, prolongation d'abonnement ou autres
 - Discussion sur vos expériences et votre point de vue sur la façon dont les commerçants ont géré cette vague d'annulations
- ▶ Discussion **d'exploration** :
 - pas de **bonnes** ou **mauvaises** réponses; ce qu'on attend de vous : une discussion la plus **authentique** possible sur votre **expérience**, votre **ressenti** et vos **perceptions** personnelles reliées à cette situation
 - **pas de recherche de consensus** : existence d'éléments différents dans toutes vos situations d'achat; n'hésitez pas à dire quelque chose même si vous avez l'impression d'être seul(e) à l'avoir vécu ou le penser
 - ouverture à la **diversité des opinions dans le respect** de celles des autres (pas de jugement)
- ▶ **Rôle** de l'animatrice :
 - Passer à travers un ensemble de **questionnements préétablis**
 - Bien **comprendre vos réponses** et ce qui les motive
 - **Donner la parole à tous** de façon équitable, tout en respectant le style de chacun
 - **Gérer le temps** pour rester dans l'heure et demie prévues
- ▶ Pour assurer un **bon déroulement** de la discussion et éviter les interférences :
 - Évacuer les **distractions** autour de vous (téléphone, courriel, notifications, famille)
 - **Micros** fermés sauf quand vous avez la parole
 - Alternance de tours de « table » dirigés et de discussions plus spontanées : utilisation de la **fonction main levée** pour vous exprimer dans les discussions spontanées ou ajouter quelque chose/réagir aux propos de quelqu'un

- ▶ Rencontre **enregistrée** : permet de me concentrer sur discussion sans avoir à prendre des notes
+ enregistrement seulement utilisé pour pouvoir écrire le rapport et effacé ensuite et **rapport anonyme**
- ▶ Des **questions** avant de commencer?
- ▶ Brève **présentation** des participants :
 - Région/Ville de résidence?
 - Occupation?
 - Situation familiale?

DESCRIPTION DES ACHATS ANNULÉS

10 MIN.

Tour de « table » où chacun explique la nature de son/ses achats annulés

Demander de rester assez descriptif pour qu'on comprenne bien les situations dans un premier temps.

Dire qu'on va se concentrer dans un premier temps sur les achats annulés par un fournisseur et non les cas où le client ne pouvait/voulait pas le service ou ceux où les services ont été fournis d'une façon différente : ces cas seront couverts plus tard dans la discussion

- ▶ **Type de service** pour lequel (ou lesquels) vous avez vécu une expérience d'annulation en raison de la pandémie?
- ▶ **Quand** aviez-vous fait l'achat? (année + avant/pendant pandémie)?
- ▶ **Comment** aviez-vous fait l'achat : directement auprès du fournisseur de services ou par l'entremise d'un intermédiaire? (ex. agence de voyages ou site transactionnel comme Expedia)
- ▶ **Importance/signification** de cet achat pour vous?
- ▶ Si achats effectués pendant la pandémie : quand vous avez fait l'achat aviez-vous une **Crainte** ou aviez-vous **anticipé** que celui-ci **puisse être annulé** en raison des restrictions sanitaires?

PROCESSUS D'INDEMNISATION

30 MIN.

Tours de « table » où chacun explique le processus d'indemnisation vécu

Si plusieurs achats se concentrent chacun son tour sur celui considéré comme le principal (au choix du participant montant \$, importance émotive, etc.) puis on fera un tour pour les autres achats selon le temps qu'il reste

Demander de nouveau de rester assez descriptif sur le processus dans un premier temps, les réactions et perception des mesures d'indemnisation seront discutées ensuite

- ▶ **Comment** les choses se sont-elles **passées** au moment de l'annulation ou du report?
 - Quand en avez-vous été informé?
 - Qui a initié le contact : vous ou le commerçant?
 - Si le commerçant : par quel moyen vous a-t-il contacté?
 - Courriel, appel, autre?
 - Personnalisé ou de masse? En personne ou robotisé?
- ▶ Quel type **d'indemnisation** vous a-t-on **proposé initialement**? Remboursement, crédit échangeable contre un achat ultérieur, report, service fourni différemment de ce qui avait été prévu, autre, rien?
 - Vous a-t-on offert **une seule ou plusieurs options** d'indemnisation?
 - À ceux qui avaient fait l'achat par un intermédiaire : ceci vous a-t-il été offert **directement** par le commerçant ou par **l'intermédiaire** avec qui vous aviez fait l'achat?
 - Si remboursement : **plein montant** ou non? Pourquoi?
 - Si autre solution que remboursement : y avait-il des **conditions** ou des **restrictions** applicables à l'offre du commerçant? (par exemple : date d'expiration sur le crédit)
- ▶ Avez-vous **tenté d'obtenir un autre type d'indemnisation** que celui qu'on vous offrait initialement ou **d'assouplir des conditions ou restrictions** imposées?

Si oui : quelles **démarches** avez-vous faites pour cela? Sonder au besoin, selon le type d'achat :

- Contacter le service à la clientèle de l'entreprise?
- S'adresser à vos assurances?
- Essayer d'obtenir un remboursement via la carte de crédit utilisée pour l'achat (ex. assurances, rétro-facturation)?
- Faire arrêter des paiements préautorisés?
- Billet d'avion : signer la pétition présentée par Option consommateurs à la Chambre des communes pour exiger le remboursement du billet plutôt qu'un crédit
- Québec : réclamation au FICAV (Fonds d'indemnisation des clients des agents de voyage)
- Autres : plaintes à des organismes, contacter votre député, tribunaux, etc.?

- ▶ Qu'avez-vous **obtenu finalement**?
 - Si remboursement : montant total ou une partie seulement?
 - Si report ou crédit : avez-vous pu utiliser le crédit ou le report / pensez-vous que vous allez pouvoir le faire? Si non : pourquoi?
 - Si choix parmi plusieurs options : qu'est-ce qui a motivé votre choix final?

NIVEAU DE SATISFACTION À L'ÉGARD DE L'OFFRE ET DU PROCESSUS 30 MIN.

- ▶ Dans quelle mesure avez-vous été **satisfait(e)** de l'**indemnisation obtenue** ?
 - Sur le moment? Pourquoi?
 - En rétrospective? Pourquoi?
- ▶ Comment **qualifieriez-vous** le **processus général** pour obtenir cette indemnisation? (sonder au besoin : simple ou complexe?)
 - **Pourquoi?**
 - **Bonnes pratiques** ou **manques** identifiés?

Sonder si non spontané :

- **Difficultés** rencontrées : lesquelles et comment les avez-vous surmontées?
- **Communication** :
 - Quels étaient les **moyens de communication demandés** par le fournisseur? Était-ce adéquat? Pourquoi?
 - Le **service à la clientèle** était-il adéquat? Pourquoi?
 - Considérez-vous avoir été **adéquatement informé** sur les **modalités** de remboursement ou d'émission de crédit/report suite à l'annulation? Pourquoi?
- **Délais** :
 - **Combien de temps** le processus a-t-il **duré** en tout?
 - a) Entre prise de connaissance de l'annulation et pouvoir parler à quelqu'un pour connaître offre
 - b) Entre connaître offre initiale et obtenir l'offre finale
 - Trouvez-vous que ce sont des **délais raisonnables ou longs**? Pourquoi? À partir de quand s'agit-il d'un délai non-raisonnable?
- Avez-vous eu des **frais à payer**? Pourquoi? Qu'en pensez-vous?

DISCUSSION SUR LES SOLUTIONS

10 MIN.

- ▶ Selon vous, quel est **l'avantage d'avoir un crédit ou un report**, plutôt qu'un remboursement en argent?
 - Dans quels cas croyez-vous qu'offrir un crédit ou un report est préférable?
 - Lorsque le commerçant n'offre **pas de remboursement** en argent, estimez-vous qu'il devrait offrir une **indemnité supplémentaire**? (par exemple, donner des mois gratuits pour un abonnement au gym)
- ▶ Pensez-vous que le **gouvernement en a suffisamment fait** pour permettre aux consommateurs d'obtenir un **remboursement en argent**? Si non : qu'aurait-il dû faire de plus?
- ▶ Quelles sont vos **suggestions pour améliorer la situation que vous avez vécue** dans l'éventualité d'une nouvelle pandémie?

CAS PARTICULIERS

10 MIN.

- ▶ Depuis que la pandémie a commencé avez-vous vécu une situation où **le commerçant pouvait** fournir le service, mais que **vous ne vouliez pas ou ne pouviez pas** l'obtenir? (crainte d'attraper le virus, impossibilité de sortir de la région, maladie, refus des règles sanitaires ou règles sanitaires nuisant à la qualité d'un événement – ex. mariage - etc.)
 - De **quel service** parle-t-on et quelles étaient les **raisons** pour lesquelles vous n'avez pas pu/voulu bénéficier du service?
 - Le commerçant vous a-t-il offert une **solution**?
 - Si oui : **Laquelle**? Dans quelle mesure l'avez-vous jugée **satisfaisante**?
- ▶ Toujours depuis le début de la pandémie, avez-vous vécu une situation où le commerçant a **fourni le service**, mais **d'une façon différente** (ex. en ligne)?
 - **Décrire** la situation et la façon alternative dont le service a été offert
 - Trouvez-vous que cette offre est **équivalente**? Est-ce que cela a la **même valeur** selon vous?
 - Selon vous que devrait faire un commerçant s'il ne peut pas fournir le service exactement comme prévu? (par exemple s'il le fournit à distance plutôt qu'en personne)

NOTIONS JURIDIQUES

10 MIN.

- ▶ Que **pensez-vous que la loi dit** pour les situations où un commerçant ne peut **pas fournir un service en raison d'un cas de force majeure**?
- ▶ Pensez-vous qu'une entreprise peut mettre une **clause dans le contrat** (ou les conditions d'utilisation) qui lui **permet de refuser de vous rembourser**?
- ▶ Selon vous, **les lois ont-elles bien protégé les consommateurs** lors de la pandémie?
 - Pourquoi?
 - Si non : qu'est-ce que vous proposeriez comme changement à la loi?

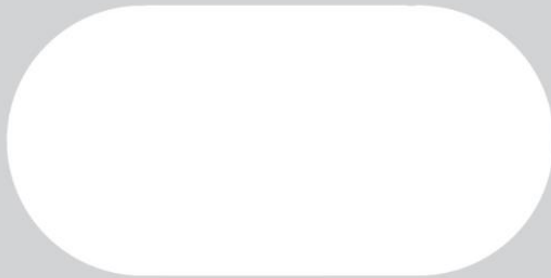
CONCLUSION

- ▶ Des choses à **ajouter** suite à notre discussion?

Appendix 2 – Discussion guide (English version)



Perceptions about the compensation process following purchase cancellation caused by the pandemic.



DISCUSSION OUTLINE

INTRODUCTION 10 MIN.

- ▶ Welcome
- ▶ **Tonight's topic:** Purchase cancellations made by businesses during the pandemic because health rules did not allow them to provide the service.
 - Different sectors were affected: transportations, hotels, gyms, shows, events...
 - Cancellations were managed in various ways by businesses: repayment, credits, extended subscriptions
 - We want to know about your experience and your perceptions as to how the cancellations were managed.
- ▶ **Discussion**
 - No wrong answer, right answer, just your honest opinion based on your experiences, feelings and perceptions.
 - **No consensus needed.** We want to hear a variety of experiences and perceptions. Don't hesitate to say something even if you think you are the only one to think or experience it.
 - Respect of each other's opinions (no judgements)
- ▶ **Moderator's role:**
 - Go through a series of pre-established questions
 - Understand well your answers
 - Insure everyone's participation
 - Manage time
- ▶ **To ensure a smooth process**
 - Avoid distractions
 - Close off your mics when you do not speak
 - There will be turns for each one to talk, other forms of spontaneous conversation and you can also use the "hand raise" function to speak.
- ▶ **Recordings and confidentiality**
- ▶ **Participants' presentation**
 - City
 - Occupation?
 - Personal situation?

DESCRIPTION OF CANCELLED PURCHASES

10 MIN.

Turns to explain the nature of the cancelled purchase.

What were the purchase **cancellations** that you experienced? We want to talk about purchases that were cancellation by the provider or the seller.

Tell respondents to be very descriptive so that we understand their situation at first.

Tell respondents that we will focus on purchases that have been cancelled by the merchant and not those cancelled by the participant (because he could not use the service, did not use the service or because the service was supplied differently.) We will talk about those situations later during the group.

Type of services which were cancelled)

- ▶ **When did you do it?** Before or during the pandemic (were you concerned?)
- ▶ **How did you buy the service?** Directly from the company or through an intermediary (e.g.: Air Canada vs Expedia) If plane ticket, travel agency and airline.
- ▶ **How important** was this purchase for you?
- ▶ If purchase made during the pandemic: were you **concerned** when you bought your service or did you anticipate that your purchase could be cancelled?

COMPENSATION PROCESS

30 MIN.

Turns to explain the compensation process.

We will talk about the most important cancellation purchase that you experience

Can you please explain how your compensation process occurred?

If there were many purchases, focus on the most important (in terms of amount or sentimental value, depending on the choice of the participant). If we have time, we will talk about the other purchases.

Tell respondents to remain descriptive about the process, reactions and perceptions about the compensation process will be discussed later.

How did it go at the time of the cancellation/postponement?

- When were you informed?
- Who initiated the contact, the merchant or you?
- How did the merchant contact you?

E-mail, call, other...

- Personalized, mass communication, robotized?

▶ **What type of compensation** were you offered? Refund, credit, postponement, another service, other, nothing?

- Were you offered several solutions or only one?
- Purchase made through an intermediary: was the compensation offered by the merchant or the intermediary?
- If refund: full amount or not?
- If other compensation than refund: Were there conditions or restrictions applicable to the offer?

▶ Did you try to **obtain another type of compensation** than the one offered, or did you try to modify the conditions or restrictions?

If so, what steps did you take?

- Contacted customer service?
- Contacted your insurance?
- Tried to get refund via your credit card?
- Stopped preauthorized payments?
- Plane ticket: signed the petition presented by Option consommateurs to request a refund for your ticket rather than a credit?
- Other: complaints to associations, contacted your representative, went to court?

▶ **What did you eventually get?**

- Total or partial refund
- If credit or postponement, have you use dit ? Will you be able to use it? If not why?
- If multiple options: what did you choose and why?

▶ **Other cancellations?**

LEVEL OF SATISFACTION WITH REGARDS TO THE OFFER AND THE PROCESS 30 MIN.

- ▶ How satisfied were with the compensation that you got?
 - At the time? Why?
 - In hindsight? Why?
- ▶ How would you describe the overall compensation process? Was it complicated or smooth?
 - **Why?**
 - **What was good about it and what could be improved?**

Sonder si non spontané :

- **Was there any issues? How did you deal with them?**
- **Communication:**
 - What communication means did the provider choose? Was it appropriate? Why?
 - How was the customer service?
 - Do you consider that you were correctly informed about the refund/credit conditions?
- **Timeline:**
 - **How long did the process take altogether?**
 - c) Between the moment when you found out about the cancellation and the moment you spoke with someone about a given offer.
 - d) Between finding out about the initial offer and the final offer?
 - Do you feel that the delays were reasonable or too long? What is too long?
- Did you have to pay any fees? What did you think about that?

DISCUSSION ABOUT SOLUTIONS

10 MIN.

- ▶ According to you, what is **the advantage of a credit/postponement** vs a refund?
 - In which case is a credit preferable?
- ▶ When a merchant offer does not offer a refund, do you think he should offer a **greater credit**?
- ▶ Do you think **the government** did enough to allow consumers to get refunds...? What else should they have done? Should government have sanctioned businesses who did not comply?
- ▶ Would you have **suggestions** to improve the experience you had in the event of another pandemic?

OTHER PARTICULAR SITUATIONS

10 MIN.

- ▶ Since the pandemic started, have you ever experienced a situation where a merchant **could provide a service**, but **YOU** did not want it Because you worried about the sanitary conditions?
 - For what kind of service was it and what were the reasons for which you did not want to use the service?
 - Did the merchant offer a solution?
 - If so, was it satisfactory?
- ▶ Since the pandemic started, did you experience a situation where the **merchant had to modify the way** he offered the service? Example: online
 - **How so?**
 - Was this offer **equivalent** to the initial one? Did it have the same value for you?
 - According to you, **what should a merchant do** if he can't offer the **initial version** of the service?

LEGAL ASPECTS

10 MIN.

- ▶ What do you think the **law says** when a merchant can deliver a service in the event of **force majeure**?
- ▶ According to you, has **the law protected consumers well** during the pandemic?
 - Why?
 - If not, **what legal changes would need to be made?**
- ▶ Did you change your behavior following your experience during the pandemic?

CONCLUSION

Anything else you would like to add?