

Friendly Skies No More: The Effort to Combat Coronavirus and Air Rage



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There have been few more polarizing issues arising from the COVID-19 pandemic than the enforcement of mask wearing as a mechanism to prevent the transmission of the virus.

While there has been no shortage of reported incidents involving arguments or violence between those trying to enforce a mask mandate and consumers unwilling to comply, there are unique risks when these incidents occur in the context of air travel. The confined nature of an aircraft in flight poses an extreme safety risk to passengers and crew if a passenger becomes unruly or is unable/unwilling to behave or follow the instructions of the flight crew.

Below, we attempt to highlight some of the legal and monetary ramifications a passenger may face due to failure to comply with flight crew and airline directions to follow COVID-19 mask mandates.

As was aptly noted by Justice Brown in a 2016 decision of the United States Court of Appeals for the District of Columbia Circuit, "In the catalog of human endeavors, few activities are as fragile as flight. The air offers no mercy for mistakes and no second chances. In that unforgiving environment, otherwise minor disruptions may threaten major damage".¹

Mask Requirements in Canada

In Canada, the Federal government

implemented a mask mandate for airlines shortly after the announcement by the World Health Organization of COVID-19 as a worldwide pandemic in March 2020.² On April 20, 2020, the Minister of Transport, pursuant to its authority under the *Aeronautics Act*³, made Interim Order to Prevent Certain Persons from Boarding Flights in Canada due to COVID-19, No. 3⁴ and Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19, No. 6.⁵

The respective Interim Orders apply to airlines operating flights leaving Canadian aerodromes and airlines operating flights destined for Canada, respectively. The Interim Orders include the requirement that air carriers notify every person boarding a flight that they must be in possession of a face mask, that they must wear it at all times, and that they must comply with instructions given by flight crew members regarding wearing a face mask. The flight crew must also visually verify that each passenger is in possession of a face mask and must require passengers to wear a face mask at all times during the flight with some specific exceptions.⁶

If any passenger refuses to comply with instructions, the air carrier is required to keep a record of that passenger's information and inform the Minister of Transport as soon as feasible. The Interim Orders also make certain sections "designated provisions", the violation of which is punishable by \$5,000 for an individual and \$25,000 for a corporation.⁷

It is possible that the broadly worded exceptions contained in the Interim Orders could make them difficult to observe and enforce. The current Interim Order No. 35 contains exceptions for when a passenger

must wear a mask during boarding or while in-flight. These exceptions include when a person is drinking or eating, unless a crew member instructs the person to wear a face mask.⁸ There have been news reports noting incidents where passengers have abused this exception by eating food constantly over the duration of the flight or pantomiming drinking from an empty plastic cup.⁹

Incidents in Canada

In September 2020, Transport Canada announced that it had issued its first fines in Canada for contraventions of the Interim Orders. Two individuals were fined \$1,000 each for refusing to follow the directions of flight crew to wear face coverings during domestic flights in June and July 2020. Transport Canada reported that in both incidents, the individuals were asked repeatedly by the flight crew to wear masks and refused.¹⁰

On December 22, 2020, the Canadian Broadcasting Corporation reported that Transport Canada had issued warning letters or administrative monetary penalties with respect to 72 incidents related to passenger refusals to wear masks onboard flights. Transport Canada issued two fines between \$100 and \$500, five fines between \$500 and \$1000, and two fines between \$1000 and \$2000. Transport Canada also sent warning letters to another 63 passengers. Through these letters, Transport Canada warned that

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a second offence could result in higher fines.¹¹

Other Canadian Legislation

While the available administrative monetary penalties under the Interim Orders are relatively small, further regulatory punishments are available for more serious incidents.

Section 7.41 of the *Aeronautics Act* provides that no person shall engage in any behaviour that endangers the safety or security of an aircraft in flight, or of persons onboard an aircraft in flight, by intentionally interfering with the performance of the duties of any crew member, lessening the ability of any crew member to perform duties, or interfering with any person who is following the instructions of a crew member.¹²

The provision further provides that a person who commits an offence under this section is liable on indictable conviction to a fine of not more than \$100,000 or to imprisonment for a term of not more than five years (or both). A person is liable under summary conviction to a fine of not more than \$25,000 or to imprisonment for a term of not more than eighteen months (or both).¹³

In a few reported decisions involving individuals charged under section 7.41 of the *Aeronautics Act*, courts have emphasized the vulnerable nature of an in-flight aircraft and the risk to both passengers and crew in the face of non-compliant, abusive, or aggressive conduct.¹⁴ In both cases, flights had to be diverted from their original destinations.¹⁵

Courts have determined that for an offense under this section of the *Aeronautics Act*, it is not necessary for the Crown to prove that a flight was actually endangered. It is sufficient for the Crown to only prove deliberate conduct which created a situation that had the potential to endanger the safety and security of an aircraft.¹⁶

In one case, the passenger was sentenced to time served and a \$10,000 fine. He was also ordered to pay restitution to the airline in recognition of the additional

cost of the diversion.¹⁷

The deliberate refusal of a passenger to wear a mask while onboard an aircraft or aggressive and non-compliant conduct towards flight crew or other passengers could constitute an offence under this section of the *Aeronautics Act*.

Mask Requirements in the US

Mask mandates were initially implemented by many major US airlines in Spring 2020 before any Federal rules were in place.

In December 2020, the Federal Aviation Administration ("FAA") proposed penalties of \$7,500 to \$15,000 to two airline passengers who allegedly assaulted and interfered with flight attendants who instructed them to wear face coverings.¹⁸ The FAA noted that while the failure to wear a face covering was not in itself a Federal violation, civil penalties for interference with flight crew members were available under Federal law.¹⁹

The Federal Aviation Regulations prohibit interfering with aircraft crew or physically assaulting or threatening crew on an aircraft. Passengers are subject to civil penalties for misconduct, which can threaten the safety of the flight by distracting cabin crew from their safety-related duties. Additionally, Federal law provides for fines and imprisonment of passengers who interfere with the performance of a crewmember's duties by assaulting or intimidating a crewmember or passenger.²⁰

On January 13, 2021, the FAA signed an Order effecting a "Zero Tolerance" enforcement policy against unruly airline passengers in light of recent incidents stemming, in part, from passengers' refusal to wear masks and threatening or violent behaviour.²¹ On January 21, 2021, President Biden signed the Executive Order on Promoting COVID-19 Safety in Domestic and International Travel, requiring masks to be worn in compliance with CDC guidelines in airports or on commercial aircraft.²² On January 29, 2021, the CDC made an Order effective February 1, 2021, requiring persons to wear masks over their mouth and nose when travelling

on aircraft into and within the United States, and at airports.²³ The Order also obligated airlines to use best efforts to ensure that all persons travelling on aircraft wear a mask by only allowing those passengers wearing masks to board, instructing passengers that failure to comply constitutes a violation of Federal law, monitoring passengers while onboard, and disembarking those passengers who refuse to comply.²⁴

The face mask requirement currently remains in place across all transportation networks in the United States until September 13, 2021.²⁵

Incidents in the US

In tracking unruly passenger incidents, the FAA has reported that such incidents are on the rise.²⁶ As of August 1, 2021, the FAA had received 3,715 unruly passenger reports in 2021, 2,729 of which were mask-related incidents.²⁷

The FAA initiated 146 investigations into unruly passenger incidents in 2019 and 183 in 2020. In 2021, just over half-way through the year, the FAA has already initiated 628 investigations, 99 of which have resulted in enforcement action being taken.²⁸

As of July 6, 2021 the FAA, had fined unruly passengers \$682,000.²⁹

The Burden of Measures on Airline Employees

A variety of measures have been taken by, and are available to, airlines aside from the penalties imposed by regulation. Airlines can suspend the travel privileges of a passenger for a period of time or indeterminately. Several US airlines have taken the step of suspending alcohol sales on flights.³⁰

It remains to be seen whether fines, penalties, or other punishments handed out by government authorities and airlines will slow the increase in passenger incidents and lighten the burden on an already burdened industry

In Canada, one complicating factor is the fact that the Interim Orders and other recent regulations increase and prolong the potential interactions between airline employees and passengers.

Interim Order No. 35 requires airlines to notify every person boarding an aircraft that they may be subject to various measures to prevent the spread of COVID-19 that have been imposed by the Provincial or Territorial government of the destination airport in Canada. The Interim Order also requires any air carrier operating a flight to Canada to notify passengers before boarding that they may be required to produce evidence prior to entry into Canada of COVID-19 vaccination status and inform passengers of the potential monetary penalties for providing false or misleading information.³¹

Airlines are also required to conduct a health check of every passenger before boarding and must review documentation provided by passengers of a negative COVID-19 molecular test performed no more than 72 hours prior to scheduled departure.³²

Further, the *Air Passenger Protection Regulations*, which came into force in 2019, mandate a number of additional informational obligations that airlines and their employees must meet in dealing with passengers at the gate and onboard the aircraft.³³

All of these obligations are being imposed on customer service agents and other personnel who are already responsible for a number of significant duties.

This would include customer service agents who are required to verify that passengers are in possession of the correct identification or other documentation that will permit travel to a foreign country, or the documentation required for domestic travel pursuant to the *Secure Air Travel Act and Regulations*.³⁴ They are also often responsible for screening passengers who may not be suitable for transportation for safety purposes on account of intoxication or other condition. Flight attendants, who are already responsible for a number of safety and consumer related duties while onboard the aircraft including safety briefings, stowage of baggage, food and beverage service, and cabin checks, are now also required to monitor every passenger on the aircraft for mask compliance or risk exposing their employer to an administrative monetary penalty.

As noted above, these additional obligations on agents and flight crew members not only increase the risk to airline staff by lengthening the time spent dealing with passengers, they further increase the potential for negative interactions with unruly and/or unhappy passengers who may be opposed to current mask mandates.

Moving Forward

The rise of the COVID-19 Delta variant, which has now become the dominant

strain worldwide³⁵, suggests that measures including the mask mandate could remain in place for the foreseeable future.

In the meantime, the current regulatory regime means that airlines and their employees will be obligated to continue to enforce these measures. The recent incidents reported by both Transport Canada and the FAA suggest that flight crew members and other personnel continue to be at risk of interactions or altercations with passengers who refuse to comply.

With the heightened risk presented by unruly behaviour or noncompliance in the context of air travel, we can only hope that the fines and other penalties imposed by our regulators will have a chilling effect on this behaviour. We certainly hope that passengers will continue to respect customer service agents, flight crew members, and other airline employees in the performance of their job duties.

Perhaps air passengers who take issue with the mask requirement can take a lesson from British Columbia's Provincial Health Officer Bonnie Henry, who has encouraged throughout this pandemic to "be calm, be kind, and be safe". Your airline staff and fellow passengers will appreciate it. 🍁

Endnotes

¹ *Wallaesa v. Federal Aviation Administration*, 824 F.3d 1071 (D.C. Cir. 2016)

² WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020, online: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

³ *Aeronautics Act*, R.S.C. 1985, c. A-2

⁴ Interim Order to Prevent Certain Persons from Boarding Flights in Canada due to COVID-19, No. 3 (2020), C Gaz I, 1229.

⁵ Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19, No. 6 (2020), C Gaz I, 1246.

⁶ *Supra* notes iv and v

⁷ *Ibid.*

⁸ Transport Canada, "Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 35" (29 July 2021), online: <<https://tc.canada.ca/en/ministerial-orders-interim-orders-directives-directions-response-letters/interim-order-respecting-certain-requirements-civil-aviation-due-covid-19-no-35>>

⁹ "Sneezed on, cussed at, ignored: Airline workers battle mask resistance with scant government backup", *Washington Post* (1 January 2021), online: <[washingtonpost.com](https://www.washingtonpost.com/local/trafficandcommuting/coronavirus-mask-airplanes/2020/12/31/09c12d52-4565-11eb-975c-d17b8815a66d_story.html)> [https://www.washingtonpost.com/local/trafficandcommuting/coronavirus-mask-airplanes/2020/12/31/09c12d52-4565-11eb-975c-d17b8815a66d_story.html]

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¹¹ "Dozens of airline passengers in Canada hit with fines, warning letters for refusing to wear a mask", CBC (22 December 2020), online: <[cbc.ca](https://www.cbc.ca/news/politics/airline-passengers-masks-fines-covid-1.5850825)> [<https://www.cbc.ca/news/politics/airline-passengers-masks-fines-covid-1.5850825>].

¹² *Supra* note iii

¹³ *Supra* note iii.

¹⁴ *Minot v. Canada (Attorney General)*, 2011 NLCA 7, R. v. Moustakas, 2018 NSPC 80

¹⁵ *Ibid.*

¹⁶ *Minot v. Canada (Attorney General)*, 2011 NLCA 7

¹⁷ *Ibid.*

¹⁸ Federal Aviation Administration, Press Release, "FAA Proposes Civil Penalties Against Passengers for Allegedly Interfering with and Assaulting Flight Attendants" (18 December 2020), online: <https://www.faa.gov/news/press_releases/news_story.cfm?newsId=25500>.

¹⁹ *Ibid.*

²⁰ Eg. 14 C.F.R. § 91.11, 14 C.F.R. § 121.580, 14 C.F.R. § 135.120, 14 C.F.R. § 13.14, 49 U.S.C. § 46504, 49 U.S.C. § 46318

²¹ Federal Aviation Administration, Press Release, "Federal Aviation Administration Adopts Stricter Unruly Passenger Policy" (13 January 2021), online: <https://www.faa.gov/news/press_releases/news_story.cfm?newsId=25621>.

²² The White House, Briefing Room, "Executive Order on Promoting COVID-19 Safety in Domestic and International Travel" (21 January 2021), online: <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-promoting-covid-19-safety-in-domestic-and-international-travel/>>.

²³ Centers for Disease Control and Prevention, "Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs" (29 January 2021), online: <https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf>.

²⁴ *Ibid.*

²⁵ Transportation Security Administration, National Press Release, "TSA extends face mask requirement at airports and throughout the transportation network" (30 April 2021), online: <<https://www.tsa.gov/news/press/releases/2021/04/30/tsa-extends-face-mask-requirement-airports-and-throughout>>.

²⁶ *Supra* note xxi

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³⁰ CNBC, "AIRLINES American, Southwest put off plans to serve alcohol after passenger disruptions, assault on board" (29 May 2021), online: <[cnbc.com](https://www.cnb.com/2021/05/29/southwest-pauses-plan-to-resume-alcohol-sales-after-flight-attendant-assault.html)> [<https://www.cnb.com/2021/05/29/southwest-pauses-plan-to-resume-alcohol-sales-after-flight-attendant-assault.html>].

³¹ *Supra* note viii

³² *Ibid.*

³³ Air Passenger Protection Regulations, SOR/2019-150

³⁴ *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11, Secure Air Travel Regulations, SOR/2015-181

³⁵ CTV News, "Delta COVID-19 variant now dominant strain worldwide; U.S. deaths surge" (16 July 2021), online: <[ctvnews.ca](https://www.ctvnews.ca/health/coronavirus/delta-covid-19-variant-now-dominant-strain-worldwide-u-s-deaths-surge-1.5512008)> [<https://www.ctvnews.ca/health/coronavirus/delta-covid-19-variant-now-dominant-strain-worldwide-u-s-deaths-surge-1.5512008>].