

Response to Canadian Transportation Agency Consultation

Overview

Bill C-52 proposes valuable changes in support of an improved passenger experience for air travellers, supported by the additional \$2 Billion in funding provided to CATSA in Budget 2023 in order improve passenger wait time.

We welcome the focus that Bill C-52 places on improving the passenger experience generally; however, given the important role that competition plays in ensuring reasonable prices and a superior passenger experience, we believe that this Bill, with slight adjustments, could have an even larger beneficial impact to all Canadians by encouraging and protecting competition within the sector, which will directly lead to lower airfares. Additionally, competition within the passenger airline industry should result in increased service on some remote routes, increased economic benefits for the population centers benefiting from additional service, and more high-quality jobs for middle class Canadians. For this reason, our submission today will focus on measures designed to foster additional competition in Canadian aviation, and the benefits that competition brings to all Canadians who use air travel, or who would like to travel but are prevented from doing so by high prices. Below we will discuss the following three suggestions:

1. Include suspected anti-competitive behavior as grounds for seizing data that can be used in prosecutions for this behavior;
2. Create a streamlined process for considering anti-competitive behavior so that it is dealt with before the targeted competitor or consumer is irreparably harmed; and
3. Enable competition by protecting new aviation entrants by updating the definition of what is considered a Small Airline for purposes of penalties under the Air Passenger Protection Regulations.

Additionally, we ask that the development of the regulations to support Bill C-52 consider the practicalities of what it is to be a smaller airline, both in terms of the operational practicalities and the potential overhead created in order to comply with new regulations.

About Flair

As Canada's leading ultra-low fare airline, Flair Airlines forecasts that the additional competition created by their low fares will collectively save Canadian travelers at least \$300 million in 2023. This number includes both the savings customers make on Flair's own flights, as well as the impact Flair's presence has on the entire market as competitors attempt to match Flair. Flair estimates that Canadians saved over \$256 million in air fares in 2022 – because of Flair.

Based in Edmonton, Flair Airlines is now flying to 23 destinations across Canada, the U.S. and Mexico. For the year ended December 2022, Flair's activities resulted in approximately 3,450 full-time employees across the country.

Using an economic impact study methodology developed by InterVISTAS Consulting, an independent aviation consultancy, Flair Airlines estimates that it has created more than 5,800 jobs, and over \$890 million in economic output through direct employment and tourism visitor spending in Canadian communities. InterVISTAS is called on globally by tourism authorities, airlines, airports, and governments to independently assess the magnitude of their economic activity. InterVISTAS utilizes input-output multipliers and visitor spending data from Statistics Canada to calculate Flair's impact on direct employment, labour income, GDP contribution and economic output.

Benefits to Canadian Travellers Resulting from Competition

A paper prepared by Library of Parliament researcher Jed Chong in 2018 titled “Airfares and Ultra-Low-Cost Carriers in Canada” looked at the impact of Ultra-Low Cost Carriers (“ULCC”) in other markets and found that in the U.S. for example, the presence of a ULCC generally lowered the average market fares paid by passengers by 20.5%. The paper noted that the entrance of a ULCC on a route not only significantly increased the number of passengers travelling on that route, it also created a significant decrease in the average airfares that passengers paid.¹

Similarly, a 2023 paper prepared by Clifford Winston, a Senior Fellow of Economic Studies from the Brookings Institution concluded:

The state of airline competition is important because it affects travelers’ fares, the availability and convenience of service, and many amenities including but not limited to carry-on luggage space, meal service, seat comfort and spacing, and the like. It is straightforward to show that airline competition has disciplined air fares given that inflation-adjusted airfares were 60 percent lower in 2020 than in 1980, according to Airlines for America. In addition, fare levels are low enough to allow most Americans to fly—by 2020, 87 percent of the US population had taken a commercial airline trip.²

Given the clear value of a competitive aviation sector, it is also important to point out that currently the Canadian passenger air market is ripe for potential competitive abuses. Widely accepted indicators of an industry with a high potential for anti-competitive behaviour include:

a. Extremely high market concentration

Canada’s air carrier market is dominated by the duopoly of Air Canada and WestJet. Currently Air Canada and Westjet together control 70 percent of the Canadian passenger market, with Air Canada having a 43 percent market share, and Westjet 27 percent³. By comparison, Flair currently has 5.5 percent market share.

The effect of this market dominance is clear. For example, on October 25, 2022, the Canadian Competition Bureau reporting to the Minister of Transport, indicated that the WestJet and Sunwing business combination was likely to result in substantial competitive effects, such as increased prices, reduced choice, decreased services, and a significant reduction in travel by Canadians.

Similarly, in a 2015 Submission to the Canada Transportation Act Review Panel, the Commissioner of Competition indicated that Market concentration within Air Canada and Westjet remains high in most Canadian domestic markets indicating that almost half of the domestic city-pair routes in the top 100 markets can be characterized as duopolies serviced by Air Canada and WestJet, and certain domestic city-pair routes remain monopoly routes serviced by only one of either Air Canada or WestJet.

¹ https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201827E

² Clifford Winston, “Strengthening Airline Operations and Consumer Protections”, February 9, 2023, The Brookings Institute, <https://www.commerce.senate.gov/services/files/44952D94-56B4-4432-BE6B-A3632C8FA334>

³ Note that this number includes Sunwing.

b. High barriers to entry

Aviation is both a highly regulated and extremely capital-intensive industry requiring massive upfront investment. This, along with the high rate of failure for new entrants, is a powerful disincentive to entering the industry. And while the rules limiting foreign investment in a Canadian air carrier under the Canada Transportation Act were adjusted as recently as 2018 through the Transportation Modernization Act, they remain restrictive, making it difficult for a new airline to be adequately capitalized as they attempt to compete against the Canadian duopoly. Currently the ceiling for total foreign ownership of a Canadian airline is set at 49%, with rules which preclude a single foreigner from owning or controlling over 25% of the voting interests in a Canadian air carrier and prevents foreign carriers from owning more than 25% of the voting interest in a Canadian carrier.

c. Potential for coordinated conduct

It appears that the Canadian aviation duopoly recently divided up the Canadian market, with Air Canada in some measure ceding frequency on some routes within the smaller western Canadian market to Westjet, and vice versa, with Westjet reducing service in parts of eastern Canada. A comprehensive study would be needed to conclude whether this is evidence of coordinated conduct, but regardless, with a duopoly market the potential for coordinated conduct can only be viewed as high.

How can the Government Support Additional Competition in the Aviation Sector

Therefore, to increase competition and enable cost savings for all Canadians, we respectfully offer three high level recommendations for your consideration.

- 1. Include suspected anti-competitive behavior as grounds for seizing data that can be used in prosecutions for this behavior; and,**
- 2. Create a streamlined process for investigating and prosecuting anti-competitive behavior so that it is dealt with before the targeted competitor or consumer is irreparably harmed.**

In Canada we frequently hear, through reliable channels, anecdotes, and examples of what most would consider to be anti-competitive behavior. The following are just a few of the recent examples that have come to our attention:

- one airline interfering with another's leasing arrangements in order to procure a competitor's planes,
- incumbent carriers overbooking constrained assets (for example, slots and service counters) at airports so that those assets aren't available to smaller competitors.
- Targeted website attacks, booking and later releasing inventory (seats) on a competitor's website in a programmatic way to drive prices up temporarily and thereby making the competitor less attractive to consumers,
- Incumbents destroying profitability for competitors by adding high frequency service onto previously underserved routes once a ULCC begins to fly the route, and then dropping the route once the ULCC stops flying it. This behavior not only destroys competition, it is also damaging economically to the underserved regions who need reasonable levels of service.

- Incumbent carriers preventing a smaller carrier's baggage handling contractors from being re-certified to provide service at airports where the baggage handlers have flawlessly provided service for years.

In the United States the Federal government actively monitors the potential for anti-trust violations. In Canada while this can occur under the Competition Act, it is unclear that this does occur with any regularity within the aviation industry in the absence of a business combination or investment activity. We recommend that the Competition Bureau work with Transport Canada to establish a more rigorous process for ongoing operational monitoring.

Further, recognizing that it is extremely difficult to gather data to prove allegations of anti-competitive behavior, we believe a slightly expanded vision for Bill C-52 could provide at least a partial solution.

Currently Bill C-52 provides the Agency with enforcement officers who will have sweeping powers to administer and enforce the Act. We believe it would be in the public interest to expand the scope of these enforcement officers to enable them to develop expertise in respect of common anti-competitive practices within the industry, and allow them to collect information that relates to suspected non-competitive actions, and to develop a process whereby these inspectors can work with the Competition Bureau to investigate suspected anti-competitive activities and ensure prosecution can occur in a timely manner.

We acknowledge that the Canadian Competition Bureau already has wide-ranging powers to investigate businesses, collect documents and data, interview management and employees, and bring public legal actions in respect of both the civil and criminal provisions of Canada's Competition Act; however currently in the absence of a complaint - which is difficult to make without access to data, the Competition Bureau does not seem to always aggressively pursue investigations within the aviation industry.

3. Enable competition by protecting new aviation entrants by updating the definition of what is considered a Small Airline for purposes of penalties under the Air Passenger Protection Regulations.

Within the documents provided in the context of this consultation, it is clear that the intent is to retain the Small Airline designation; however, we would like to suggest that currently the difference between the size of the dominant incumbent carriers relative to a Small Airlines such as Flair is substantial. Effectively the current definition requires an airline to be not just small, but exceedingly small, in order to qualify as a Small Airline for purposes of the Act, transporting no more than two million passengers during each of the last two calendar years.

We would like to recommend that in recognition of the overall growth of the aviation market and the need to foster competition, it would be in the public interest to update the definition of a Small Airline. Rather than using a fixed number of passengers, potentially the definition should be tied to the size of the market, so the definition of a Small Airline will grow as the market grows.

According to [Statistics Canada](#) the total number of passengers enplaned and deplaned in Canada pre pandemic 2019 was 162 million, and the domestic sector passengers were equal to 93 million.⁴ Potentially the Small Airline definition should be equal to 10 percent of total passenger traffic or market share over the prior two years of normal activity (i.e. adjusted to discount the effects of COVID).⁵ Updating this definition would allow Small Airlines a little more runway from which to take flight.

⁴ Statistics Canada Table: 23-10-0253-01, Release Date 2023-07-28 <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2310025301>

⁵ To give some measure of perspective, while Air Canada did not explicitly report the number of passengers carried in just the first 3 months of 2023, they report: Seats Dispatched - a measure which refers to the number of seats on non-stop flights, as equal to 12,293,000 and Passenger load factor - a measure of passenger capacity utilization derived by expressing Revenue Passenger Miles as a percentage of Available Seat Miles, as equal to 84.8%. So given that 84.8% of their seats were full we estimate the number of passengers during just the first quarter of the year at 10.4 million. Ignoring any seasonality that might exist, the number of Air Canada passengers in 2023 is likely to be around 40 million, making the current Small Airline definition equal to around 5 percent of Air Canada's total passengers.

Conclusion

We appreciate the opportunity to contribute to this important Consultation. We note that many of the provisions of Bill C-52 will be enacted through regulatory measures, and we would appreciate the ability to provide additional insights as the regulations are drafted. We are concerned both about the nature of the regulations themselves, as well as the potential overhead costs that may be created in order to comply.

Further, from our prior conversations we know that you have an understanding and sensitivity as to what it means to be a small airline and the operational constraints that this entails; however, we would appreciate the opportunity to provide further input into draft regulations as they evolve to ensure that they are not prohibitive to smaller, developing Canadian airlines.

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