THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Regulatory Modernization for Air Transportation

CANADIAN BAR ASSOCIATION
AIR AND SPACE LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Air and Space Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Air and Space Law Section.

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Regulatory Modernization for Air Transportation

I. INTRODUCTION

The Canadian Bar Association Air and Space Law Section (CBA Section) is pleased to comment on Phase II of the Canadian Transportation Agency's (CTA) Discussion Paper on Regulatory Modernization for Air Transportation.[1]

The Canadian Bar Association is a national association of approximately 36,000 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers from across Canada who represent aircraft operators and financiers, aerospace companies, airports and aerodromes and equipment manufacturers.

Our comments focus on modernizing the *Air Transportation Regulations* made pursuant to the *Canada Transportation Act*, with a view to streamlining existing tariff and application requirements, and enhancing the certainty of legal obligations imposed on carriers.[2]

II. IMPROVING THE TARIFFS REGIME

Requiring air carriers to establish, publish and file tariffs protects passengers and establishes a level of certainty about passenger rights. However, the current tariff regime is outdated and does little to enhance passenger protection or certainty, even where tariff information is directly available to passengers. It is also not user-friendly, and compliance is costly for air carriers. Even seasoned lawyers have a difficult time navigating most tariffs due to their complexity and length.

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1 Canadian Transportation Agency, *Discussion Paper On Regulatory Modernization For Air Transportation* (December 2016), available online (http://ow.ly/zaGq30fFKx3).

2 *Air Transportation Regulations,* SOR/88-58, available online (http://ow.ly/pQoU30fFKyK). *Canada Transportation Act,* R.S.C. 1996, c. 10, available online (http://ow.ly/Uc2y30fFKzZ).

A. Content of Tariffs

Section 67 of the Act requires an air carrier operating a domestic service to maintain and make available for inspection its applicable tariffs. A carrier may not apply any fare, rate, charge, term or condition to the domestic service that is not in the tariff. Section 107 of the Regulations describes what must be included in every domestic tariff, including the tolls applicable to services between defined points.

Similarly, section 110 of the Regulations requires every carrier operating an international service to file a tariff with the CTA containing the applicable fares, rates, charges and terms and conditions. Section 122 of the Regulations describes what must be included in every international tariff, including the tolls applicable to services between defined points.

While certain provisions are required in both domestic and international tariffs, the Regulations do not prescribe standards for these provisions, other than they must be just, reasonable and non-discriminatory. CTA decisions have established certain expectations on the reasonability of the contents of tariffs – for example, denied boarding compensation – which are used as a benchmark to determine whether tariff provisions are reasonable. However, a CTA decision on the tariff of one carrier is not automatically applicable to the tariff provisions of another carrier, even if they are similar. This creates uncertainty for both carriers and passengers.

The CTA should either establish minimum standards for key tariff provisions, or create an advance ruling mechanism where a carrier can obtain approval for tariff provisions before implementation. Consideration should also be given to who can challenge a tariff established by a carrier. A tariff forms part of the contract of carriage between a passenger and carrier, and should be enforceable only by those with privity of contract in case of actual breach resulting in losses or damages to the party.

Additionally, the use of these terms in the Regulations needs to be simplified by using defined terms in a consistent manner. For example, prior to amendments in 2012, 'toll' was defined to mean, "any fare, rate or charge established by an air carrier in respect of the shipment, transportation, care, handling or delivery of passengers or goods, or in respect of any service incidental thereto." This definition has been deleted, but the Regulations continue to refer to filing tolls. In addition, section 111 of the Regulations requires all tolls established by the carrier to be just and reasonable, however section 113.1 requires every air carrier to *inter alia* apply fares, rates and charges set out in the tariff, and does not refer to tolls. Similarly,

subsection 122(b) requires a carrier to include tolls applicable to carriage between defined points in the tariff, but does not refer to fares.

B. Filing International Tariffs

The tariff filing process is fairly complex, and continues to be geared towards filing physical copies (e.g. the requirement for check sheets), when in fact all filings are done electronically. The process for filing tariffs, amendments or supplements should be replaced with a notification system or simplified.

Domestic carriers' tariffs need not be filed with the CTA – and while international tariffs must be filed with the CTA (in the manner and form established by the CTA, along with any amendment or supplements to the tariffs), the CTA does not review and approve them at the time of filing. Since filing an international tariff with the CTA does not constitute acceptance or approval of the tariff, filing serves no real purpose – the tariff is already required to be published on the carrier's website and be available for inspection on demand.

In the current environment, where fare buckets are constantly changing to optimize revenue and capitalize on demand, filing certain fares, rates and charges is unnecessary, and an avoidable administrative burden on air carriers. The CTA should consider a notification regime instead of a filing regime, where carriers confirm in writing that they maintain a tariff applicable to international services, which is published and available for inspection, and contains everything required in the tariff under the Regulations. Before implementing amendments or supplements to the tariff, the carrier would notify the CTA. If the filing requirement for tariffs is maintained, the requirement to file fares, tolls, rates and charges should be eliminated. The United States Department of Transportation has exempted US and foreign carriers from filing passenger fares, and carriers are required to file only general rules such as conditions of carriage, baggage allowances and liabilities.

RECOMMENDATIONS

1. **The CBA Section recommends either eliminating the tariff filing regime and replacing it with a notification regime or simplifying the tariff model.**
2. **The CBA Section recommends that if filing requirement for tariffs is maintained, the requirement to file fares, tolls, rates and charges should be eliminated.**

3. **The CBA Section recommends that the CTA establish basic minimum tariff allowances required using a schedule to the Regulations.**
4. **The CBA Section recommends that the CTA require a short form version of tariffs, setting out essentials for passengers.**
5. **The CBA Section recommends that the CTA eliminate the requirement for keeping tariff at each station, and instead require online access to tariffs for all air carrier operations.**

III. ENHANCING PASSENGER COMPLAINTS MECHANISMS

The CTA's current dispute resolution mechanism is unduly cumbersome and inefficient. While the CTA's ongoing process improvements to address the increased number of complaints are certainly steps in the right direction, there is still room for improvement. The current air travel complaints system has grown to be complex, inefficient and unclear. The lack of merit-based vetting of complaints creates a situation which is ripe for abuse. The system requires significant adjustments to be more effective, and consumer friendly for airline passengers.

Airline passengers can initiate a complaint through the informal facilitation or mediation processes. If they do not obtain a satisfactory resolution, they can proceed to the formal adjudication process. In the facilitation process, the CTA will first refer the complaint to the air carrier with a 30-day deadline to respond, if the carrier has not already had an opportunity to resolve the complaint. If the complainant remains dissatisfied, the complaint is then referred back to the CTA, which will attempt to achieve settlement through mediation. If these processes are not successful, the complainant can use the adjudicatory function of the CTA, where a panel will make a decision based on the evidence provided.

We understand that passenger complainants may have been solicited and encouraged by the CTA to seek out available dispute resolution avenues. If this were the case, it would be akin to Canadian superior courts advertising to encourage litigation. To illustrate, the CTA's 2016-2017 annual report shows 3,367 new air travel complaints filed in 2016–2017, which is nearly equal to the number of complaints in the previous five years combined, and a jump of over 300% from 2015- 2016. The report notes that this increase is due to the increasing awareness of the CTA's services, including its increased outreach and engagement efforts.

Unlike other administrative tribunals, there are no fees or cost implications for passengers to bring a complaint to adjudication to discourage frivolous, ineligible or vexatious complainants.

For example, to dispute the validity of a parking ticket in major Canadian jurisdictions, fees are often payable. Similarly, recourse through courts can result in the imposition of costs on unsuccessful litigants. Section 19 of the *Transportation Appeal Tribunal of Canada Act* explicitly contemplates similar powers for the Transportation Appeal Tribunal of Canada (TATC). While we are cognizant of the chilling effect that could result from the imposition of costs, TATC members should be empowered to awards costs in exceptional circumstances.

RECOMMENDATIONS

6. **The CBA Section recommends implementing a single document, code or official website, which lists airline consumer rules and rights applicable in Canada. Having one document clearly describing the consumer protections applicable to air travel would reduce the number of ineligible complaints filed by passengers.**
7. **The CBA Section recommends requiring major Canadian airlines to implement a formal complaints system that is clear and transparent for passengers. Carriers currently do not provide any information or details about their in-house complaints process. It is also not always easy to locate or contact airline staff at airports who are trained to receive and address complaints. Information on the in-house complaints process should be on the airline's websites.**
8. **The CBA Section recommends implementing mechanisms through which the CTA could conduct a preliminary vetting process before adjudication to allow for frivolous, ineligible or vexatious complaints to be dismissed *ab intio*.**
9. **The CBA Section recommends implementing a fee structure for complainants when accessing the adjudication process.**
10. **The CBA Section recommends implementing a cost award structure similar to the one in section 19 of the *Transportation Appeal Tribunal of Canada Act*.**
11. **The CBA Section recommends implementing a mechanism through which a repeat complainant can be identified as a vexatious litigant – where any claims the person seeks to bring will only be eligible to be heard on leave of the CTA.**

IV. SIMPLIFYING THE APPLICATION PROCESSES

A. Reducing Timelines for Filing Applications

The Regulations require that a licensee must file an application to the CTA no less than 45 days before the first flight in the case of a wet lease approval under subsection 8.2(2), or 30 days in the case of a charter permit application under subsections 34(1) or 73(2). While this timeframe may have been deemed reasonable for processing and analysis by the CTA, it is not reasonable in the current transportation environment. For example, a licensee is often unable to operate its aircraft, and needs to substitute another operator's aircraft on short notice, and business aircraft carriers usually only secure their charter contracts with short notice. Most, if not all, applications will not comply with the 45 day requirement – practitioners frequently request exemptions from the CTA, which are regularly granted.

The CTA should reduce the 45 day notice period to a more reasonable timeline, such as seven days or less. In the likely event that applications are made to the CTA with less notice than the period recommended above, the air carrier or their counsel would still have to seek an exemption from the updated timelines.

B. Code Share and Blocked Space Approvals

The current regime for arrangements for the use of aircraft and crew provided by another person should be simplified. This change would reflect the importance of these arrangements to carriers, both for long term operations as well as managing emergent situations, and the frequency of such arrangements.

Section 8.2 of the Regulations requires that a licensee must obtain prior approval of the CTA to operate a service using aircraft and crew provided by another person. This section governs several arrangements that are common in the commercial aviation industry such as code share arrangements, blocked space arrangements and wet leases. Air carriers routinely enter into these arrangements with other carriers and operators to expand or streamline their networks, respond to temporary increases in demand for services, or address unavailability of aircraft.

Section 8.2 requires a licensee to seek the CTA's approval at least 45 days in advance and sets out criteria for approval, including: (i) the person operating the aircraft holding a Canadian aviation document; and (ii) the licensee maintaining passenger and third party liability insurance coverage for the service, either through its own policy or by being named an additional insured on the policy of the person operating the aircraft.

Where both the operating carrier and the licensee hold the necessary licenses issued by the CTA, only prior notification should be necessary, instead of prior approval. Since a licensee is required to maintain passenger and third-party liability insurance as a condition of its license, the requirement to submit proof of insurance should be limited.

The Regulations should also create a codeshare licence category that does not rely on foreign operators possessing a Canadian aviation document (CAD). Currently, 'code-share only' licences are only issued by the CTA to non-Canadian carriers where the carrier holds a CAD. Usually, the CAD takes the form of a limited Foreign Air Operator Certificate (FAOC) that does not allow the foreign carrier to operate its own aircraft in Canada. By eliminating the requirement to hold a CAD, applicants for a code-share only licence would not be required to take the additional step of applying for and obtaining a limited FAOC – saving cost and time.

RECOMMENDATIONS

12. **The CBA Section recommends reducing timelines for filing applications under subsections 8.2(2), 34(1) and 73(2) of the Regulations to align with modern day commercial realities.**
13. **The CBA Section recommends eliminating duplicate and redundant insurance verifications.**
14. **The CBA Section recommends creating a codeshare-only license category, which does not require or rely on a CAD to be in place.**

V. APPLYING THE 'CANADIAN' TEST

The definition of 'Canadian' for the purposes of the Act is in section 55. The CTA is responsible for and administers a combination of a *de facto* and *de jure* tests in determining whether applicants are Canadian. The *Canadian Aviation Regulations* rely on the definition of 'Canadian' in the Act.[3]

However, the familiarity and expertise on this test that has been developed by the CTA is unavailable to Transport Canada in determining the Canadian qualification of applicants. Transport Canada determinations are limited to a *pro forma* analysis of the ownership of a company. This creates a situation where two different government bodies are applying the same section in a different and inconsistent manner.

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3 *Canadian Aviation Regulations,* SOR/96-433, available online (http://ow.ly/M6Z530fFKFA).

We understand that, while Transport Canada has sought the expertise of the CTA on Canadian ownership matters, CTA staff has advised Transport Canada that they are unable to provide an analysis because only determinations made by members of the CTA are binding on applicants. A mechanism should be created in the regulations through which other government bodies relying on section 55 of the Act could seek CTA guidance on a Canadian status determination.

RECOMMENDATION

15. The CBA Section recommends the creation of a mechanism through which government bodies that rely on section 55 of the Act can seek and rely on the expertise of the CTA in applying the 'Canadian' test.

VI. REGULATING AIRPORTS AND AIRFIELD ACCESS

Section 3 of the Act establishes the jurisdiction of the CTA, which includes transportation matters under the legislative authority of Parliament, and presumably, all matters relating to aeronautics. While the CTA has yet to publish specific regulations on airports and fair airfield access, it is our view that public airports should fall within the mandate of the CTA.

Airports are seldom, if ever, in competition with air carriers, and are not subject to any specific provisions of the *Competition Act*, as it relates to air carriers. However, their determinations can still have disastrous economic ramifications for them.

A recent case where the operator of one of Canada's largest airports unilaterally commenced runway rehabilitation projects, reducing access to the airfield, clearly illustrated the need for a regulatory body to oversee these types of decisions. In that case, there was no legal mechanism through which the airport's decision could be reviewed under competition law or induced breach of contract. A judicial review application, focusing on points of procedural fairness and the reasonableness of the airport's decision, would have been the only recourse available – and would have likely been heard by a judge with little background on the aviation industry. As a result, it took substantial pressure and resources to convince the airport to participate in discussions on the adverse impact that the airport's decision was having on the air carriers.

Section 37 of the Act empowers the CTA to inquire into complaints about matters related to the Act or to transportation undertakings in Canada. Regulations should be published to give effect to this inquiry mechanism, and to create a procedure through which a person or air carrier that

has been adversely affected by the decision of a transportation service provider, such as an airport, can challenge it.

RECOMMENDATION

16. The CBA Section recommends the creation of a mechanism through which a person or air carrier can seek redress for determinations made by Canadian airports that have adverse impacts.

VII. CONCLUSION

The CBA Section applauds the CTA's regulatory modernization initiative, and appreciates the opportunity to share our views on the modernization of Canadian air transportation. Given the complexities of some of the issues raised in this submission – including tariff regimes, the adjudication process, and prevailing commercial models – we recommend that the CTA establish an industry working group for ongoing feedback on these systems and processes. We would welcome the opportunity to meet with the CTA to discuss our comments further, and offer our experience in support of this initiative.

VIII. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends:

1. **either eliminating the tariff filing regime and replacing it with a notification regime or simplifying the tariff model.**
2. **that if filing requirement for tariffs is maintained, the requirement to file fares, tolls, rates and charges should be eliminated.**
3. **that the CTA establish basic minimum tariff allowances required using a schedule to the Regulations.**
4. **that the CTA require a short form version of tariffs, setting out essentials for passengers.**
5. **that the CTA eliminate the requirement for keeping tariff at each station, and instead require online access to tariffs for all air carrier operations.**
6. **implementing a single document, code or official website, which sets out the list of airline consumer rules, and rights applicable in Canada. Having one document clearly describing the consumer protections applicable to air travel would reduce the number of ineligible complaints filed by passengers.**
7. **requiring all major Canadian airlines to implement a formalized complaints system that is clear and transparent for passengers. Carriers currently do not provide any information or details related to their in-house complaints process. It is also not always easy to locate or contact airline staff at airports**

who are trained to receive and address complaints. Information on an airline's in-house complaints process should be provided on their websites.

8. **implementing mechanisms through which the CTA could conduct a preliminary vetting process before adjudication to allow for frivolous, ineligible or vexatious complaints to be dismissed *ab intio*.**
9. **implementing a fee structure for complainants when accessing the adjudication process.**
10. **implementing a cost award structure similar to the one in section 19 of the *Transportation Appeal Tribunal of Canada Act*.**
11. **implementing a mechanism through which a repeat complainant can be identified as a vexatious litigant – where any claims the person seeks to bring will only be eligible to be heard upon leave of the CTA.**
12. **reducing timelines for filing applications under subsections 8.2(2), 34(1) and 73(2) of the Regulations to align with modern day commercial realities.**
13. **the CBA Section recommends eliminating duplicitous and redundant insurance verifications.**
14. **the CBA Section recommends creating a codeshare-only license category, which does not require or rely upon a CAD to be in place.**
15. **the creation of a mechanism through which other government bodies that rely on Section 55 of the Act can seek out and rely upon the expertise of the CTA in applying the 'Canadian' test.**
16. **the creation of a mechanism through which a person or air carrier can seek redress for determinations made by Canadian airports that have adverse impacts.**