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January 22, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Consultation on the requirement to hold a licence

Please accept the following submissions concerning the Agency's "Approach under consideration" with respect to the licensing requirements of Indirect Air Service Providers (IASPs). These submissions are made without prejudice to the position that may be taken by the undersigned in any legal proceeding, including but not limited to the application for judicial review currently before the Federal Court of Appeal under File No. A-39-16.

Summary of submissions

1. The circumstances surrounding the consultation create the appearance of an institutional bias and that the consultation serves the purpose of legitimizing a foregone conclusion.

2. The "Approach under consideration" will expose the public to significant risks.

3. Air passengers are entitled to same level of protection regardless of how the various entities participating in providing air service structure their business relationship among themselves.

4. For licensing purposes, the operating of an air service must include any entity who makes a contract of carriage with the public as a principal (i.e., not as an agent).

I. Concerns about the integrity of the consultation

(a) Commenced for the benefit of a specific business

The email of the Secretary of the Agency, dated January 19, 2016, shows that the present consultation was initiated for the sake of a specific Indirect Air Service Provider:

> [...] in the context of the emergence of this new business model and a discussion between the Panel assigned to the NewLeaf matter and Agency staff, the Panel instructed staff to conduct broad consultations with industry as expeditiously as possible to inform the Agency's consideration of this new model.

(b) Not a new business model

The reference to a "new business model" is disingenuous. As the Agency's own announcement concerning the consultation confirms, Indirect Air Service Providers have existed and been regulated in Canada for at least 20 years, since 1996:

> The Agency's current approach to determining which person is operating a domestic air service originated from its 1996 Greyhound Decision and requires the person with commercial control to hold the licence, irrespective of whether the person operates any aircraft. As of December 1, 2015, 16 persons that did not operate any aircraft held licences providing them the authority to operate domestic air services.

(c) Foregone conclusion

The January 19, 2016 email of the Secretary of the Agency goes on to confirm that:

> At this same meeting, the Agency Chair, acting in his capacity as CEO, also instructed staff to not seek a licence application from NewLeaf and other companies like it pending the completion of this consultation and the issuance of an Agency decision on the issue, provided they met three criteria.

Subsequent emails dated January 20-21, 2016 from the Secretary of the Agency also confirm that:

- the meeting in question took place on October 29, 2015, some two months before the present consultation was announced;
- the Agency Chair gave his instructions verbally, without making any order or decision, or any documentation, such as minutes.

These circumstances have created the appearance of an institutional bias and that the consultation serves the purpose of giving an air of legitimacy to a foregone conclusion to unlawfully exclude a specific business from the statutory requirement of holding a licence.

II. Licensing and tariff requirements are to protect consumers

In enacting the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), Parliament imposed a scheme for the economic regulation of air service, which is defined in s. 55 as:

> "air service" means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both;

This regulatory scheme establishes commercial standards and consumer protection measures that regulate the contractual relationship between the consumer and the air service provider. The commercial standards and consumer protection measures are implemented through the statutory requirement that operating an air service requires a licence issued under the *CTA* (s. 57(a)) and the conditions for obtaining and maintaining such a licence (ss. 61 and 69).

(a) Financial fitness (s. 61(a)(iv)): SkyGreece problem

Everyone who seeks to obtain a licence to operate domestic air service (i.e., within Canada) must prove that they have the funds necessary to cover the start-up costs and the operating and overhead costs for a 90-day period of operation of the air service (s. 8.1 of the *Air Transportation Regulations*).

The purpose of this requirement is to prevent a SkyGreece-like scenario, where flights are cancelled due to insolvency of the airline, and passengers who already paid for their tickets are left stranded and fending on their own to get to their destinations.

(b) Liability insurance coverage (s. 57(c)): Lac-Mégantic insurance issue

The holder of a licence must obtain and maintain a liability insurance that covers injury to or death of passengers in the amount of CAD$300,000 times the number of seats on its aircraft used for the air service.

The purpose of this requirement is to prevent a situation similar to what happened following the Lac-Mégantic railway disaster, where the claims arising from a disaster force the company into bankruptcy, leaving passengers or their estates without a remedy.

It is worth noting that Parliament considered this requirement so important that it chose to explicitly withhold from the Agency the power to give an exemption from it (s. 80(2) of the *CTA*).

(c) Establishing and publishing a tariff (ss. 67, 67.1, and 67.2)

The holder of a licence for domestic air service is required to establish and publish a tariff setting out the terms and conditions of the service with respect to a prescribed list of core issues, including overbooking, delay, and cancellation of flights (s. 107 of the *ATR*). The tariff is the contract of carriage between the consumers and the licence holder. The terms and conditions in the tariff must be just and reasonable, and can be reviewed and enforced by the Agency.

These measures recognize the imbalance in the bargaining powers of consumers and air service providers, and that the contract of carriage is by its nature a contract of adhesion. The purpose of these measures is to ensure that air service providers do not unilaterally impose on passengers unfair terms and conditions, and to eliminate any doubt as to the rights of the passengers vis-à-vis the air service provider.

III. The "Approach under consideration" will expose the public to significant risks

As the Agency correctly acknowledged in its consultation announcement, not requiring IASPs to hold a licence removes all the protection that Parliament gave and intended to give to passengers:

> Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.
>
> [Emphasis added.]

The main source of the risks identified below is that in the case of an IASP, the contract of carriage is between the IASP and the passenger. The entity who provides the aircraft and the crew is not a party to the contact, and has no contractual obligations to the passengers; the operator of the aircraft and crew has contractual obligations only to the IASP.

1. Without the financial fitness requirements, there is a risk that the IASP lacks the financial means necessary to operate the flights on which tickets were sold (i.e., to pay for the rental of the aircraft and crew).

   If the IASP becomes insolvent, the operator of the aircraft and crew can and will refuse to provide its services to the IASP. The passengers have no recourse against the aircraft operator, because they have no contract with it—their contract is with the IASP.

   Thus, in such a scenario, passengers would be left stranded and would have to pay again for transportation to their respective destinations.

2. Without the insurance coverage requirements, there is a risk that the IASP is unable to meet its liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster).

   While the IASP may be liable to the passengers for damages based on the contract of carriage, the aircraft operator's liability is limited to tort law (negligence). Consequently, the liability insurance that the aircraft operator is required to hold as a licence holder is of no help to the passengers or their estates, who may have valid claims only against the IASP.

3. Without the minimal protection that the terms of a tariff may offer, there is a risk that passengers are left with no effective remedy if their flight is overbooked, delayed, or cancelled, or if their baggage is damaged.

   As the Agency correctly noted, the contractual relationship between the IASP and the passengers would not be subject to the protection that the tariff system offers, and the fact that the aircraft operator has a tariff will be of no assistance to passengers in asserting any rights for overbooked, delayed, or cancelled flights, or for baggage-related claims.

These examples demonstrate that requiring only the entity that operates the aircraft and provides the crew to hold a licence defeats the consumer protection measures that Parliament chose to put in place, and thus defeats the purpose of the regulatory scheme.

Higher risk in domestic air service

In the context of liability and recourse of passengers, there is a crucial difference between domestic and international air service in that the vast majority of international carriage is subject to the *Montreal Convention*, which has the force of law in Canada by virtue of the *Carriage by Air Act*.

The entire Chapter V of the *Montreal Convention*, entitled "Carriage by Air Performed by a Person other than the Contracting Carrier," is dedicated to addressing and eliminating issues of the above-noted nature. Notably, Article 41 provides that the contracting carrier and the actual carrier are mutually liable for each other's acts and omissions. Thus, the operator of the aircraft and crew may well be liable to the passengers travelling internationally under the *Montreal Convention* without an actual contract between them.

In sharp contrast, the *Montreal Convention* does not apply to domestic carriage by air (although it has been recognized by the Agency as a persuasive source for determining the reasonableness of terms and conditions).

This difference underscores the need for the full protection of the licensing and tariff requirements for passengers who travel within Canada.

IV. The entity that makes a contract of carriage with the public as a principal must hold a licence

Passengers make a contract of carriage with one air service provider acting as a principal. They cannot reasonably know nor should they be required to inform themselves about the details of the financial structure and business relationship among the various entities that may participate in the air service that they purchased. Parliament intended passengers to have the same level of protection, regardless of the business model chosen by the air service provider.

As the foregoing analysis shows, the objective of the regulatory regime set out in the *CTA* is to establish commercial standards and consumer protection measures, and its subject is the economic relationship between the air service provider and the passengers. Thus, it would defeat the purpose of the *CTA* and it would be unreasonable to interpret "operate an air service" in s. 57 of the *CTA* as excluding IASPs who sell air services as a principal. (It is worth noting that this interpretation is consistent with the terminology of Article 39 of the *Montreal Convention*.)

It is important to stress that none of these affect genuine travel agents, who sell air services of licence holders and are authorized to act as their agents and bind them, provided that the agents do not become or purport to become a party to the contract of carriage.

Therefore, it is submitted that "operate an air service" in s. 57 of the *CTA* includes making a contract of carriage with the public as a principal. Hence, any person, including an IASP, who sells air services to the public in a capacity other than as an agent for a licence holder, is required to hold a licence on its own.

All of which is most respectfully submitted.

Dr. Gábor Lukács