CLARK & COMPANY

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Canada Transportation Act Review Secretariat
350 Albert Street
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Ottawa, Ontario
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Dear Sirs:

Re: Canada Transportation Act Review

We hereby provide the CTA Review Committee with the submission of Clark & Company pertaining to primarily the aviation industry in Canada.

Yours very truly,

William F. Clark

WFC/jr
Enclosure

CANADIAN TRANSPORTATION AGENCY REVIEW
CLARK & COMPANY SUBMISSION

Clark & Company is a successor law firm to a practise that in the mid 1950's, commenced a focus on the aviation community in Canada. In the late 1950's, the senior member of the firm became a member of the Diefenbaker government for the riding in which the present Toronto airport now sits – York West. The firm moved its physical location to an office building they constructed immediately outside the entrance to the airport. In addition to the physical association with the airport, the senior partner, upon being retired from politics, was employed by Canadian Pacific to obtain transcontinental rights for their CP Air division. The senior partner eventually became Lead Director of the Board of CP Air.

The succeeding intermediate partner gained an aviation appreciation in the late 1960's, with his primary client being the Deluce family from White River, and their eventual growth through the Canadian aviation industry. William Clark joined the firm in 1971 for non-aviation assignments, but quickly moved over to an additional focus on both the international airlines commencing service to Toronto, but as well, the travel industry, primarily through the tour wholesale industry which was establishing significant operations out of Toronto, due to Toronto's lack of international airline access.

Clark & Company continues the aviation and travel industry focus, with the prime focus of the firm for the last several decades being the introduction of new international carriers to Canada. Over that period of time, over 100 foreign carriers have been authorized through the efforts of the firm to operate to Canada, with most of the scheduled carriers now operating out of YYZ having been processed through the firm, either as transfers from original Montreal operations, or in later years, new operations from countries with new Bilateral Air Service Agreements.

Clark has also been active in the executive aircraft industry, having served on the Board on the Canadian Aviation Business Association for a decade, and continues on several committees at the National Business Aviation Association in the U.S. He recently completed the maximum term on the Governing Council of the American Bar Association, Air & Space Law Forum and has been involved in the Legal Committee of the Air Transport Association of Canada throughout his career.

Clark & Company is the only Canadian law firm limited to, and devoted to, the aviation and travel industries in Canada. We have been informed on numerous occasions by CTA staff, that it is the law firm/agent with the greatest percentage of files being processed through the CTA at any one time.

Clark & Company is focusing on the prime operational difficulties with the present legislation, as follows:

1. **Barriers – Entry & Advancement**

   Entry

   Over the last three decades, from our firm's practise experience, we have been approached by at least three very successful aviation business models that have been developed in other parts of the world, all of which are still thriving in other parts of the world. None of these business models have been made available to the Canadian travelling consumer, or the Canadian shipping public, primarily due to the Canadian control requirements of Section 55

of the Act. Partially due to the lack of magnitude of our country's aviation demands, as well as the geographic spread of our population and industry, in order for all of these models to be effectively introduced to Canada, they require integration, both operationally and financially, with the successful models being operated in other countries, and principally those being operated by U.S. corporations up to our borders.

Canadian consumers at the present time, have no access to any ultra-low cost Canadian scheduled air carrier. Indeed, Canadians do not even have access to a carrier of the former low cost model. Based on our review of various proposals for a Canadian based ultra-low cost carrier (ULLC), which has been a very successful business model in many parts of the world, it is our opinion that the Canadian public is not likely to have access to that business model, unless the Canadian control provision is removed, or drastically reduced.

The Canadian travelling public does not have the advantage of fractional executive jets being available to them on a private operational basis. While admitting that the demand for this service is limited to high net worth individuals, those desiring this type of service have had to utilize U.S. operations, which then limits their ability to utilize these aircraft to a north/south basis only, and not between points in Canada. Transport Canada has reviewed the legislative requirements to allow for these operations to be licensed on a technical basis, but has deferred from proceeding on the premise that the demand is insufficient to warrant the legislative process necessary to allow Canadian controlled operators to provide this business model.

And the final business example we would provide is that of the integrated courier systems being conducted primarily on a transborder basis. FedEx and UPS primarily, but all U.S. based courier systems, are required to create extensive and expensive "relationships" with Canadian aviation operators, in order that the Canadian public has access to what we now consider as an everyday business necessity, of having our documents elsewhere in the world by noon tomorrow. In not being allowed to operate an international integrated system through or between Canadian points, increased costs are passed off to the Canadian consumer, as can be verified by the comparison between U.S. and Canadian shipping costs on these systems.

We acknowledge that the Minister in a certain few situations has, by exemption, increased the level of foreign ownership, but then only marginally. Without the Minister indicating that exemptions will be available well in excess of previous allowances, and in excess of 50% at a minimum, or the removal of the foreign control restriction completely, it is unlikely that the above business models will be made available to the Canadian consumer. Numerous Canadian industries have thrived with the removal of foreign control restrictions, while the transportation and communication industries continue to be thwarted by this antiquated protectionist policy.

Advancement

Section 8.1(2) of the Air Transport Regulations (ATR's) enacted under the Act, sets forth the financial requirements for new applicants, or applicants upgrading to medium or large aircraft. This Regulation requires audited financial statements in order to confirm the amendments to shareholder equity, only if additions to shareholder equity are required to meet the Financial Fitness Test, which is likely in all situations, due to the requirement that one half of projections be made by equity.

This 50% of the financing required for the new service estimates, being injected by equity, is required even if the resources to finance the entire new operation are presently available from retained earnings. Thus the 50% must be contributed by either increasing shareholder equity, or converting present retained earnings. The vast majority of 716 small aircraft operators with domestic licenses issued by the CTA to which this rule applies, do not go to the unwarranted expense of Audited Financial Statements on an annual basis, due to the fact that the majority of these small corporations are closely held corporations. Their related shareholders waive the necessity of Audited Financials.

This rule significantly affects either new operators, or operators increasing the scope of their operation when moving into medium or large aircraft. Many of the operators upgrading have retained earnings sufficient to cover the Financial Fitness Test, but even there, 50% of the estimated 90 day finances must be converted to shareholder equity, and then these conversions must be confirmed by Audited Financial statements.

Example

We have processed three western Canadian operators of DeHavilland DHC-8-100 aircraft, all of whom were upgrading to DHC-8-300 aircraft, over the last few years. This increased gauge of aircraft moves them from being the operators of small to medium aircraft, even though they are only moving only from 42 seats to 50 seat aircraft, which from a flight operation basis, are virtually identical.

Two of them were able to accomplish this move through internally generated funds, but all were required to convert some of their retained earnings to shareholder equity, and then prove the conversion and issuance of that equity, by providing audited statements. Both of these corporations had completed their annual statements on a review engagement basis, and were then required to expend considerable financial resources to have their accountants go back and prepared audited statements. These are much more expensive to prepare subsequent to the preparation of review engagement statements, which statements are prepared in accordance with Canadian Generally Accepted Accounting Principles.

In both cases the cost to the operator in obtaining those audited statements, were in excess to the actual net costs that the operator had in its estimates that would be incurred in commencing the actual commercial air service.

2. **Legislative Precision**

Three phrases in the present Regulations, give the industry considerable difficulty in being able to determine their business conduct in advance, and difficulty for the legal industry to provide advance advice to air operators.

These phrases, not in any order of importance, start with "optimum demand" in Section 8.1(2)(a) of the ATR's which requires the amount of revenue flying hours to be financed for the 90 day start-up in-service requirement in order to meet the Financial Fitness rules. The CTA has demanded those financings on their estimation of "optimum demand" rather than on the applicant's estimate of revenue flying hours that will be achieved. In all situations, those estimates of the CTA are significantly greater than those that can possibly be achieved by the industry in the applicant's particular segment of the aviation market.

The second would be the wording "undue obstacle" in Section 170 of the Act which gives the Agency powers over eliminating "undue obstacles" as they affect the mobility of persons with disabilities. This has the industry, as well as its advisors, unable to predict the CTA direction, from matter to matter, due to the fact that the CTA adjudicates strictly on a complaint basis, on its perception of the evidence submitted with each individual complaint, and not on a res judicata basis.

The regulatory authorities over aviation in other countries have worked with their operators to develop written and established guidelines for the government's desired policy in many areas, including the accessible transportation area.

The third phase is the latitude granted to the Agency in regard to tariff terms and conditions in Section 111 of the Air Transport Regulations, which allows the CTA to determine whether those terms and conditions filed are "just and reasonable". While the CTA is not seized of matters without a complaint being filed in most situations, this section is administered by the Agency on its own initiative. The CTA often mandates new policy based on its determination of what is just and reasonable for the Canadian travelling public.

The Agency has made extensive use of this wording latitude to establish Canadian policies on its own, in regard to many commercial practices of the air transport industry in Canada, including accessible transportation, service animals, refunds, denied boarding, overbooking, and flight delays, etc.

In the U.S. and European structures, none of these policies are imposed upon the air transport industry without the intervention of the legislative branch of those respective governments. However, all of these new policies in Canada are put into effect by the Agency without any legislative mandate other than these three words "just and reasonable", resulting in Canadian transportation policy being created by a bureaucracy, without any airline industry input, save and except the input of the individual carrier whose tariff has being questioned by the CTA.

3. **Complainant**

Numerous sections of the Act (and specifically Sections 65 through 67) do not utilize any reference to customers, but strictly utilize the verbiage "any person". While the legislative draftperson at the time of creation of these sections may have thought nobody but a customer would have any interest in being a complainant, and that there was no necessity to be more precise in the drafting, the history of these sections have proven the draftsperson totally wrong.

As pointed out previously, the CTA process is unfortunately based strictly upon a complaint factor. The difficulties that the industry and its advisors have with that process have already been detailed in a previous part of this submission, regarding ambiguous wording.

We would submit that the legislation be amended to require matters only be submitted to the Agency by a complainant who has been a customer. The party processing a complaint at taxpayer's expense should be a party of interest in the matter, and not merely a party of observation.

Therefore, we would submit that all of the above sections, as well as any other sections in the Act allowing "any person" status in Agency matters, be amended to require the

complainant to have been a customer of the operator against whom the complaint is being laid, before the Agency is seized of that complaint.

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