Court File No.: **A-102-20**

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener

RECORD OF THE INTERVENER
CANADIAN TRANSPORTATION AGENCY
Volume 1

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AFFIDAVIT OF MEREDITH DESNOYERS
AFFIRMED ON THE 13TH DAY OF OCTOBER, 2023

(Intervener's Affidavit)

I, Meredith Desnoyers, of the City of Ottawa, in the Province of Ontario, AFFIRM THAT:

1. I am a paralegal officer with the Canadian Transportation Agency ("Agency"), located at 60 Rue Laval, Gatineau, Quebec, K1A 0N9. As such, I have personal knowledge of the matters set out herein except where stated to be based on information and belief, in which case I believe such information to be true.

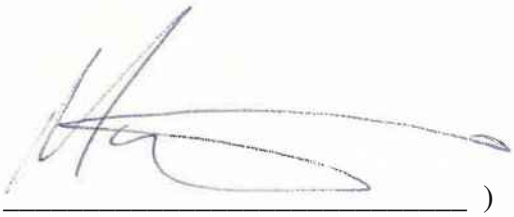
2. Attached and marked as Exhibit "A" is a copy of the Agency's *Interline Baggage Rules for Canada: Interpretation Note*, which I printed from the Agency's website on July 14, 2021.

3. Attached and marked as Exhibit "B" is a copy of the Agency's *Notice to Industry: Applications for Exemptions from Section 59 of the Canada Transportation Act*, which I printed from the Agency's website on July 14, 2021.

4. Attached and marked as Exhibit "C" is a copy of the Agency's *Guide to Canadian Ownership and Control in Fact for Air Transportation*, which I printed from the Agency's website on July 14, 2021.

5. I swear this affidavit pursuant to the Court's Order dated October 15, 2021, granting the Agency leave to intervene and to file an affidavit and a memorandum of fact and law, and for no other improper purpose.

AFFIRMED BEFORE me)
at the City of Gatineau,)
in the Province of Québec)
this 13th of October, 2023)



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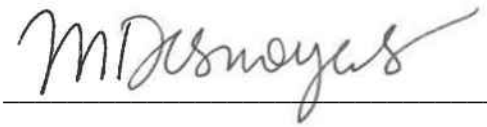
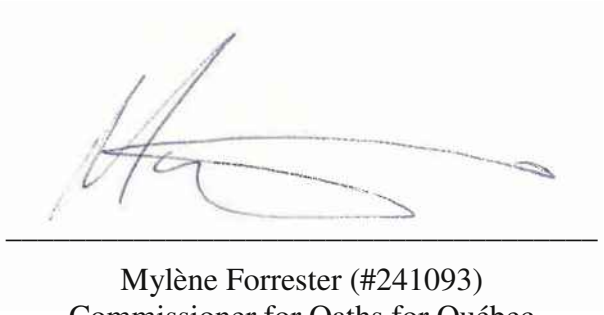
Mylène Forrester (#241093)
Commissioner for Oaths for Québec



_____
MEREDITH DESNOYERS

Exhibit A of the Affidavit of Meredith Desnoyers
affirmed on October 13, 2023



Mylène Forrester (#241093)
Commissioner for Oaths for Québec

CANADIAN TRANSPORTATION AGENCY

Interline Baggage Rules for Canada: Interpretation Note

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Effective for tickets issued on or after April 1, 2015.

Disclaimer

The Canadian Transportation Agency (Agency) is the economic regulator of Canada's federal transportation network. It publishes Interpretation Notes to provide information and guidance on provisions of the *Canada Transportation Act* (CTA) and associated regulations that it administers. Should there be any discrepancy between the content of this Interpretation Note and the Act and associated regulations, the latter prevail.

This Interpretation Note provides guidance to air carriers and their agents relating to interline baggage rules application. Unless the context otherwise dictates, the term "carrier" is meant to encompass licensees and non-licensees involved in interline itineraries issued on a single ticket whose origin or ultimate ticketed destination is a point in Canada.

Please note that the implementation date for the Agency's Interline Baggage Rules for Canada has been extended to April 1, 2015.

Purpose

On April 15, 2014, the Canadian Transportation Agency (Agency) issued Decision No. 144-A-2014[5] which specifies the rules that air carriers should be applying, effective for tickets issued on or after April 1, 2015, when participating in an interline itinerary issued on a single ticket whose origin or ultimate destination is a point in Canada. These rules call for:

- a single set of baggage rules being applied to the entire itinerary; and,
- the disclosure of these baggage rules to the passenger.

Furthermore, air carriers must file their policies with respect to interline baggage in their tariffs.

The Agency's Decision is consistent with the United States Department of Transportation's (U.S. DOT) baggage rules requirements, thereby providing for a harmonized North American approach to how baggage rules should be applied.

To support its Decision, the Agency issued this Interpretation Note (IN) - *Interline Baggage Rules for Canada* to clarify to air carriers and ticket sellers, and inform the travelling public how baggage rules should be applied (for both checked and unchecked baggage).

More specifically, this IN lays out an approach for interline and code-share baggage rules that, if accurately reflected in carriers' tariffs and applied by carriers and ticket sellers, the Agency finds to be clear, just and reasonable, and which does not impose upon passengers an undue prejudice or disadvantage consistent with the requirements of the *Air Transportation Regulations* (ATR).

This IN also addresses how air carriers and ticket sellers should disclose the applicable baggage rules to passengers by air carriers and ticket sellers. The aim is to ensure that the policies of carriers are clearly stated and are readily available to passengers so that they are made aware of the baggage rules that apply to their itinerary.

1. Context

Baggage rules [1] establish an air carrier's policies pertaining to the transportation of a passenger's bags, including, but not limited to the following:

- The maximum weight and dimensions of passenger bags, if applicable, both checked and unchecked;
- The number of checked and unchecked passenger bags that can be transported and the applicable charges;
- Excess and oversized baggage charges;
- Charges related to check in, collection and delivery of checked baggage;
- Acceptance and charges related to special items, e.g. surf boards, pets, bicycles, etc;
- Baggage provisions related to prohibited items, including embargoes;
- Terms or conditions that would alter or impact the baggage allowances and charges applicable to passengers (e.g. frequent flyer status, early check-in, pre-purchasing baggage allowances with a particular credit card);and,
- Other rules governing treatment of baggage at stopover points, including passengers subject to special baggage allowances or charges, etc.

For several decades, carriers' baggage allowances were either assessed on a piece or weight basis. Travel to, from or within North America was based on the piece system (i.e., two pieces of luggage, free of charge, per passenger). Travel between other parts of the world was governed by a system based on weight. Such policies were highly harmonized among carriers and from a passenger's perspective, unless complex itineraries were involved, they seldom resulted in incompatibility of baggage rules for passengers travelling on multiple air carriers or via different countries.

However, over time, this simplified, standard approach evolved due to new industry practices, including à la carte pricing, carrier desire to maximize revenue from baggage, and regulatory change. Carriers abandoned the simplified standard approach and began to apply their own rules to their own flight segments for trips involving multiple air carriers. This resulted in confusion as to which carrier's rules were applicable because passengers were subjected to differing and unexpected baggage allowances and charges while en-route on an interline itinerary.

To address this situation, different methodologies to determine the applicable baggage rules when travelling on multiple air carrier itineraries have emerged. The following section briefly describes two key approaches currently used by industry.

1.1 IATA baggage rules

The International Air Transport Association (IATA), the trade association for the world's air carriers representing some 240 carriers, has defined basic worldwide baggage standards including how carriers could apply baggage rules to a passenger's interline itinerary.

Recognizing the industry requirement for a more flexible approach to baggage allowances and fees application, on April 1, 2011, IATA Rule (IATA Resolution 302, Appendix 7.1) came into force providing a new methodology to determine which carrier's baggage rules would apply to an interline itinerary, including code-sharing arrangements. This new methodology created the Most Significant Carrier (MSC) concept.

IATA's approach uses a geographical-based selection process to determine which carrier(s) would be the MSC (see Appendix 7.1 for further details how an MSC is chosen).

Baggage rules of the MSC are applicable from the point of "baggage check-in" until the next stopover, or the next point of baggage collection. Each time baggage is re-checked by the passenger, the MSC is once again defined and its baggage rules are applied. The baggage rules of the new MSC may be the same or different than the previous MSC. There is potential for several different MSCs to be included in a passenger's interline itinerary if it involves multiple flights and stops.

As a result, passengers may encounter different and changing baggage rules throughout their itinerary. The more complex the itinerary, the more likely this will occur. This concern is exacerbated by the fact that IATA has not set rules regarding the disclosure of the applicable rules to the passengers, leaving passengers potentially exposed to differing and unexpected baggage rules in the course of a given itinerary.

1.2 U.S. DOT baggage rules

In January 2012, the U.S. DOT Rule 399.87 came into effect (Appendix 7.3). Under this Rule, all carriers selling transportation to passengers where the "ultimate ticketed origin or destination" is a point in the United States must apply the same baggage policy and fees throughout a passenger's itinerary, regardless of stopovers, when it is on the same ticket.

The U.S. DOT requirements stipulate that it is the first marketing carrier on the first flight segment of an interline itinerary that has the right to establish the baggage rules to apply for the entire interline itinerary. One set of baggage rules applies irrespective of stopovers or other carrier flights listed on the single ticket. More specifically, the first marketing carrier has the right to choose to apply its baggage rules or the rules of the MSC(as determined by the application of IATA Resolution 302, modified to be applicable in the U.S. context).

All carriers must reflect their baggage rules in their tariffs filed with the U.S. DOT.

1.3 Agency's practices

Prior to implementing its *Interline Baggage Rules for Canada*, the Agency had not issued an all-encompassing approach. Baggage rules for air travel to or from Canada were established by individual carriers by stipulating their baggage rules in their tariffs for application to their own traffic, even when part of an itinerary involved multiple air carriers. This approach was sufficient under the circumstances as essentially all carriers had similar tariff provisions which reflected a generous free baggage allowance based on the piece system that had existed at that time.

The Agency did however express a clear view with respect to baggage rules in code-sharing arrangements, whereby one air carrier (the marketing carrier) sells transportation in its name (and under its own two letter designator code) on flights operated by the partner air carrier (operating carrier). The Agency has always required the marketing carrier to apply its tariff (encompassing its baggage rules) to its own traffic in a code-sharing arrangement. Upon complaint, the Agency enforces the baggage rules of the marketing carrier in the code-sharing arrangement as reflected in its tariff.

Considering the emergence of both the IATA and U.S. DOT approaches to baggage rule application, to inform its considerations, the Agency sought views on the best approach to interline baggage rules for Canada via an industry workshop and an on-line public consultation. The consultations revealed significant consensus that the Agency should not develop a new approach but rather align with either IATA's Resolution 302 or the U.S. DOT's new regulations. In addition, a large majority expressed support for a harmonized North American approach (i.e., an approach consistent with U.S. DOT Rule 399.87).

2. Agency's authority

As the Canadian economic regulator of the air transport industry, pursuant to the ATR, the Agency is responsible for determining whether the international tariffs of air carriers are clear [ATR paragraph 122(*a*)], just and reasonable [ATR subsection 111(1)], and whether traffic has been subject to undue or unreasonable disadvantage or prejudice [ATR paragraph 111(2)(c)]. Furthermore, the Agency can on

complaint or on its own motion cancel, suspend or substitute an international tariff or portion of an international tariff. The Agency can also direct an air carrier offering an international service to take corrective measures and pay compensation to the passenger if the air carrier fails to apply its tariff.[8]

3. Principles of Agency's interline baggage rules for Canada

Based on the results of its consultations, the Agency's approach to interline baggage rules is guided by two fundamental principles:

a) A seamless and transparent baggage regime for passengers

- Passengers should have a seamless travel experience throughout their interline itinerary issued on a single ticket.
- Passengers should be informed of which carrier's baggage rules apply to their interline itinerary.

b) A harmonized and practical regime for industry

- The Canadian approach should avoid imposing unique requirements that conflict with other jurisdictions and particularly within the North American context.
- The Canadian approach should take into account the operational challenges faced by industry and not impose unnecessary burdens.

4. Agency's approach to interline baggage rules for Canada

4.1 Scope of the approach – affected traffic

4.1.1 International interline itineraries

Air carriers should, for interline transportation where the origin or ultimate ticketed destination is a point in Canada and where such transportation has been issued on a single ticket, apply a single set of baggage rules throughout a passenger's interline itinerary, regardless of stopovers. This includes domestic legs of an international itinerary, when transportation has been issued on a single ticket.

More specifically, the carrier whose designator code is identified on the first flight segment of the passenger's interline ticket [2] (i.e., the selecting carrier) can select to apply for the entire interline itinerary by all participating carriers, either:

- the selecting carrier's own baggage rules; or,
- the rules of the "Most Significant Carrier" (MSC), pursuant to the methodology of IATA Resolution 302, as conditioned by the Agency.

To enable the implementation of this approach, carriers are encouraged to use any automated baggage rules systems (e.g. databases, global distribution systems(GDS), Web pages, etc.) that enable them to publish their free baggage provisions, excess and special items, embargoes, and carry-on allowance and fees in all sales and distribution channels.

On April 16 2014, the Agency placed a Reservation against IATA Resolution 302 (see Appendix 7.2.1). The aim of this Reservation is to allow the selecting carrier to use the MSC methodology to determine which carrier's baggage rules apply to an international interline itinerary to or from Canada, while reinforcing the role of tariffs. This Reservation is also fully consistent with the Reservation filed by the U.S. DOT and thus promotes a harmonized North American approach. Appendix 7.2.1 provides further details on how IATA Resolution 302, as modified by the Agency, applies.

Resolution 302 is not binding on IATA or non-IATA carriers and has no legal standing in Canada. If carriers otherwise agree to amend or establish another approach to determine the applicable baggage rules as an alternative to Resolution 302, such an approach must also comply with the ATR and be expressed in tariffs filed with the Agency at least 45 days before they come into effect. An alternative approach should also respect the two fundamental principles of the Agency's approach.

4.1.2 Domestic interline itineraries

The Agency recognizes that the domestic marketplace may not generally utilize an automated baggage rules system (e.g. databases, GDS, Web pages, etc.) which would enable the Agency approach to be implemented in a manner similar to international transportation. Furthermore, the IATA's MSC concept is inapplicable to the domestic context.

Nevertheless, for interline transportation occurring wholly within Canada (not part of a multi-segment (or leg) international itinerary) and where such transportation has been issued on a single ticket, the Agency also expects air carriers to apply a single set of baggage rules throughout a passenger's interline itinerary, regardless of stopovers. The Agency is of the opinion that applying this approach to domestic interline itineraries would be beneficial to consumers.

Furthermore, the Agency expects the domestic carrier whose designator code is identified on the first flight segment of the passenger's interline ticket (i.e., the selecting carrier) to select and apply its own baggage rules to the entire interline itinerary. All downline carriers are expected to also apply those rules to their respective services.

Domestic carriers contemplating applying the Agency approach to domestic interline travel are encouraged to develop and use automated baggage rules systems.

4.1.3 Applicable to both domestic and international interline itineraries

Once the baggage rules have been chosen by the selecting carrier for either an international or domestic interline itinerary, carriers should:

- apply the rules to the passenger's entire interline itinerary issued on a single ticket; and,
- disclose the rules to the passenger on any summary page at the end of an online purchase and on e-tickets.

4.2 Applicable baggage rules

The Agency's *Interline Baggage Rules for Canada* apply to a carrier's baggage rules related to checked and unchecked (carry-on) items.

4.3 Tariffs

Canada's regulatory regime requires that carriers have tariffs and that those tariffs reflect their policies. Tariffs establish the contractual rights and responsibilities of passengers and the carrier. Consistent with the requirements of the ATR (subsections 110(1), (4) and (5), any carrier offering international transportation to or from Canada, including those carriers who are participating in interline travel (whether they hold a license to operate to and from Canada or not), must have a tariff and apply it. Furthermore, that tariff must clearly state the carrier's policy in respect of specific matters [per ATR paragraph 122.(*c*)], including baggage. Carriers must file their tariffs with the Agency that set out their baggage rules at least 45 days in advance.

To align with the Agency's approach, carriers involved in interline arrangements must reflect in their tariffs how they will:

- select the baggage rules applicable to an interline itinerary;
- apply the baggage rules selected by another carrier participating in an interline itinerary; and,
- disclose the applicable baggage rules to a passenger on any summary page at the end of an online purchase and on e-tickets. (refer to Part 3 of this IN).

The tariffs of carriers involved in interline arrangements (either as a selecting or down line carrier) should address the following four areas*:*

i. Carrier's own baggage rules

- Establish the carrier's own baggage rules with respect to such matters as free baggage allowances, limits on weight, size, number of bags allowed, conditions associated with the treatment of special items (e.g., pets, bicycles, skis, surf boards, embargoes), how baggage rules are applied at stopover points and any charges associated with the carriage of baggage;
- all carriers will already have their own baggage rule in their tariff currently filed with the Agency, however each carrier will need to assess the adequacy of their own baggage provisions in the context of this IN and its interline services; and,

ii. Baggage rule determination by selecting carrier

- Include a statement that the selecting carrier will choose either to:

i. the selecting carrier's own baggage rules; or,
ii. the rules of the "Most Significant Carrier" (MSC), pursuant to the methodology of IATA Resolution 302, as conditioned by the Agency; and,

iii. Participation as a down line carrier in an interline itinerary

- Have a statement that the carrier will apply, as its own, the rules chosen by the selecting carrier when it is a down line carrier and a passenger is travelling on one of its flights as part of an interline itinerary; and,

iv. Disclosure

- Provide for the carrier's disclosure undertakings consistent with the Agency's approach (refer to Part 3 of this IN).

Carriers may refer to the **Agency's Sample Tariff** [3] developed by Agency staff for assistance in establishing their interline baggage rules tariff information reflecting the Agency's approach. Carriers should ensure that they allow for the appropriate amount of time to file their revised tariff provisions with the Agency. The approach applies to tickets issued on or after April 1, 2015.

4.3.1 Tariffs must be on file with the Agency

4.3.1.1 International itineraries

For all other international itineraries, including domestic segments of an international itinerary, only carriers with baggage rules reflected in tariffs on file and in effect with the Agency, pursuant to ATR subsection 110(1), may act as the selecting carrier. The selecting carrier may choose to apply either their own baggage rules or determine who will be the MSC for the itinerary. Any chosen MSC carrier must also have its baggage rules reflected in tariffs on file and in effect with the Agency in order for them to apply to an interline itinerary.

Note: For transborder itineraries only, a tariff must be on file with both the Agency and the U.S. DOT in order for the appropriate baggage rules to apply to an itinerary and to meet both countries' regulatory requirements.

4.3.1.2 Domestic itineraries

For interline itineraries of Canadian domestic carriers involving travel taking place wholly within Canada, the domestic carrier whose designator code is identified on the first flight segment of the passenger's interline ticket (i.e., the selecting carrier) is expected to select and apply its own baggage rules to the entire interline itinerary in so far as the baggage rules are set out in its domestic tariff. All downline carriers are expected to also apply those rules to their respective services.

This ensures that the Agency can review the reasonability of these rules pursuant to subsection 67.2(1) of the CTA and that these rules are effective pursuant to subsection 67(3) of the CTA.

4.3.2 Carriers that do not file tariffs with the Agency

If a passenger's international interline itinerary begins at a foreign point (other than the U.S.) and the carrier whose designator code is identified on the first flight segment of the passenger's ticket at the beginning of the itinerary does not file tariffs with the Agency, that carrier must not be the selecting carrier on the interline itinerary. Furthermore, all other carriers must not apply that non-tariff filing carrier's baggage rules. The Agency has a list of carriers who file tariffs applicable for transportation to and from Canada.

Allowing a foreign carrier's baggage rules which are not filed with the Agency to be the rules applicable to an interline itinerary to or from Canada would result in the Agency not being able to deal with the reasonability of such rules. The Agency finds this unacceptable.

In these cases, the next carrier whose designator code appears on the passenger's international interline itinerary and who files a tariff with the Agency would be the carrier to determine which carrier's baggage rules will apply and thereby establishing the applicable baggage allowances and fees. All participating carriers should apply that alternative carrier's selection of baggage rules. This carrier, through its ongoing relationship and interline agreements, would be responsible for advising this first carrier (non-filing) of the established baggage rules for that passenger.

Carriers that do not file tariffs with the Agency but are participating in interline itineraries applicable to transportation to or from Canada and "feeding" passengers onto flights operated by a larger carrier, should ensure that they have the relevant baggage information and disclose which baggage rules apply to the itinerary.

4.4 Special issues affecting baggage rules

4.4.1 Unchecked (carry-on) baggage

The Agency recognizes that each operating carrier that is participating in an interline itinerary will for practical reasons apply their own unchecked carry-on baggage allowances to their respective flight segments. The Agency recognizes that due to the variety of aircraft sizes and types that may be used throughout an interline itinerary applying a single set of baggage allowances for carry-on baggage would not be practical. In particular, in the United States, each state has differing requirements and specifications regarding carry-on baggage that are applied to departing aircraft.

Nevertheless, it is possible for carriers to apply consistent charges for carry-on baggage, even if they cannot apply consistent baggage allowances. For example, once a carrier's baggage rules has been selected to apply to the passenger's entire itinerary, that carrier's baggage charges should not differ from flight to flight. Further, the passenger should not be charged an additional sum if the passenger's carry-on baggage cannot be accommodated in-cabin (due to weight, size, etc.) and it must be checked instead.

By providing carriers with this flexibility, this approach aligns with the U.S. DOT's approach.

Notwithstanding the foregoing, a carrier should disclose to passengers the carry-on baggage rules applicable to their interline itinerary.

4.4.2 Passenger special status

Some passengers may be eligible for an enhanced baggage allowance or for reduced fees based on the passenger's status or other factors. For example, a passenger's status may vary due to: their participation in a frequent flyer program, travel on immigrant fares, travel connecting to a cruise, representation as a courier, or membership in the military, etc. Likewise, a passenger may also be able to avail themselves of an enhanced baggage allowance or reduced fees by virtue of pre-purchasing a more advantageous baggage allowance or by using a specific credit card to pay for their travels.

A passenger's eligibility for these entitlements is determined by the terms and conditions that were established in the selected carrier's tariff. Carriers should ensure that accurate information is reflected in their respective tariffs and that consistent with existing practice, carriers should set out in their tariffs clear

information related to a passenger's eligibility for such entitlements. The carrier should also disclose information about these entitlements to those passengers who may have special status and ensure that applicable charges are applied.

If a participating carrier wishes to provide a passenger while enroute with a more generous baggage allowance or lower baggage fees than those which were initially established on the passenger's itinerary, the carrier has the discretion (but is under no obligation) to do so as a courtesy to its customer.

4.4.3 Stopovers

Carriers participating in an interline itinerary should consistently apply a single set of baggage rules throughout that itinerary, as chosen by the selecting carrier. Accordingly, the baggage allowances and charges chosen at the beginning of the itinerary should remain with the passenger throughout the itinerary.

The application of baggage rules at stopover points is governed by provisions of the tariff of the carrier whose rules were chosen by the selecting carrier to apply. Accordingly, carriers should specify in their tariffs their baggage policies applicable at stopover points. For example, the tariff should indicate whether it is the carrier's policy to charge baggage fees only one time in each direction on international interline itineraries or if it is the carrier's policy to charge baggage fees at each point where baggage is checked, e.g. each stopover point.

The selected carrier's baggage rules as they relate to how baggage allowances and charges are applied at stopover points should also be followed by down line carriers.

If a participating carrier wishes to forgo applying baggage charges at stopover points despite the fact that the selected carrier's baggage rules, which were initially established on the passenger's itinerary, indicate that baggage charges apply at subsequent stopover points, the carrier has the discretion (but is under no obligation) to do so as a courtesy to its customer.

For the purposes of the Agency's *Interline Baggage Rules for Canada*, the Agency considers a stopover to be more than 24 hours.

4.4.4 Embargoes or transportation of special items

The Agency recognizes that there may be certain circumstances which prevent or in some manner adversely affect the transport of baggage on an itinerary. This may be as a result of special circumstances, including baggage that requires an above normal degree of care or due to specific types of equipment (aircraft or handling equipment at airports) that may not be universally available to all carriers on an itinerary. There may also be instances where due to the time of year or particular weather conditions, a carrier may be prevented from carrying certain types of baggage, e.g. surf boards, pets, oversized, or overweight carry-on baggage, etc. Any carrier participating in the itinerary may apply these restrictions to the passenger's travel as long as they are reflected in that carrier's tariff under its own baggage rules. These restrictions would then be taken into account when the passenger's baggage rules are established by the selecting carrier at the time of purchase. The Agency encourages carriers to use automated baggage rules systems (e.g. databases, GDS, Web pages, etc.) to help ensure that embargoes and the transportation of special items are communicated amongst participating carriers and that this information is disclosed to passengers.

If a passenger is travelling on a particular itinerary in which a carrier is prevented from carrying their baggage due to the foregoing, the selecting carrier, whenever the circumstances are known to it, should disclose this information to the passenger on:

- any summary page at the end of an online purchase (i.e., the Web page that appears on the carrier's Web site at the end of the booking process once a form of payment has been provided to purchase the ticket); and,
- the passenger's e-ticket once the purchase has been completed.

4.4.5 Equipment changes, changes in the class of service of the passenger and irregular operations

In the case of equipment changes, changes in the class of service of the passenger and irregular operations or the like, where a carrier determines that a new ticket must be issued to the passenger reflecting any itinerary changes, the Agency's approach should be applied to the new itinerary, which may result in a new selected carrier with new baggage rules. The passenger should be advised of the revised baggage rules applicable to their itinerary.

If the nature of the changes does not result in the need to issue a new ticket, the original baggage rules continue to apply. The Agency recognizes that due to certain operational requirements (e.g. equipment changes) a carrier may not be able to accommodate a passenger's baggage in either the cabin or on a specific aircraft. In these instances, a carrier should not charge a passenger any additional fees, and it should make the necessary arrangements to ensure that the passenger's baggage is transported to its destination. This may necessitate the checking of cabin baggage or the transportation of checked baggage on another aircraft. Although a carrier in these cases should not charge additional baggage fees, a carrier may wish to provide a post-purchase notice regarding the possibility of revised size and weight restrictions, and that in some instances, the passenger's baggage may not accompany them on a specific flight. Such a notice would allow passengers to plan accordingly.

4.4.6 Passenger changes to baggage while enroute

The Agency's approach does not prevent a carrier from charging additional baggage fees if a passenger increases the number of his or her checked or carry-on bags or varies the weight of their baggage from one flight segment to another during the course of their ticketed itinerary. Nevertheless, the baggage rules chosen by the selecting carrier at the outset of the itinerary and disclosed to the passenger at time of purchase should apply.

4.4.7 Post purchase itinerary changes made by passengers

If a passenger requests a post-purchase interline itinerary change that affects the applicable baggage rules (i.e., the passenger requests an itinerary change that results in a new ticket being issued to the passenger), the baggage allowances and fees may be reselected by the applicable selecting carrier based on the new interline itinerary as this is a passenger-driven change in the itinerary.

Additionally, the passenger should be informed at the completion of the ticket reissuance transaction on any summary Web page at the end of the online purchase and on the new e-ticket/itinerary receipt about the change in baggage fees that will result from a voluntary change in itinerary. Conditions associated with voluntary changes to a passenger's itinerary must be reflected in a carrier's tariff.

4.4.8 Currency

Carriers will charge fees in Canadian dollars or local currency consistent with the applicable tariff as filed with the Agency.

5. What is not covered by the Approach

The Agency's *Interline Baggage Rules for Canada* do not extend to certain matters:

- The reasonability of the terms of each carrier's baggage rules, as distinct from their applicability to an interline journey. This IN does not address the reasonability of a tariff in accordance with ATR subsection 111(1) and the Montreal and Warsaw Conventions, other than as expressed in this IN. As per the ATR, the Agency requires all carriers to have reasonable baggage rules. In all circumstances where a carrier has established an unreasonable element in its baggage rules, that carrier will be held accountable to the Agency, not a participating carrier who applied the unreasonable rule to the itinerary.
- The applicability of terms and conditions other than baggage rules in an interline context (e.g. this approach does not address denied boarding, unaccompanied minors reservation requirements, etc.).
- Intra-line (online) travel (travel on the services of only one carrier excluding code share arrangements).
- Any itinerary involving charter carriers/operations (this type of operation is not typically involved in interline arrangements).
- Travel where the origin or ultimate ticketed destination is not Canada (e.g. only a connection or technical stop occurs in Canada).
- Travel conducted under a confidential contract between the carrier and the passenger.

6. Disclosure

Disclosure forms an important part of the Agency's *Interline Baggage Rules for Canada*. Due to the complexity of interline itineraries, the number of carriers potentially involved and the potential lack of information made available to passengers travelling to some destinations, consumers should be clearly informed of the baggage rules that apply to their travels. In the absence of disclosure, there may be confusion and misunderstanding, not only by passengers but also by carriers.

The Agency's approach with respect to disclosure ensures that passengers at the time of the ticket purchase and post ticket purchase, are made aware of the applicable baggage rules associated with their interline itinerary.

6.1 Who should disclose

There are important roles for most of the parties involved in the sale of an interline itinerary.

It begins with the selecting carrier who should make known or make sure arrangements are in place to make known to down line carriers which carrier's baggage rules apply. Down line carriers should be made aware that the passenger will be traveling with them and be familiar with and be prepared to respect the applicable baggage rules. Much of this information sharing is increasingly being achieved through automation and most carriers have access to or use automated baggage rules systems that are already in place.

Nevertheless, the ticketing carrier is ultimately responsible for the complete disclosure of the baggage rules applicable to a passenger's interline itinerary. Carriers should also ensure that their ticket sellers, as they are acting as agents of the carrier, can fulfill the disclosure obligations of the carrier by giving them access to the necessary tools and support.

6.2 When should disclosure to the consumer occur

There are disclosure expectations before, at the time of, and after purchase. However, the specificity of the information expected to be provided will vary from the general to the more specific depending on the stage of the purchase process.

Ultimately, full disclose of applicable baggage rules can only occur on any summary Web page at the end of an online purchase and on any e-ticket sold in Canada and will be largely dependent on the choices the consumer makes as to routes, stopovers, schedules (including aircraft used) and carriers.

6.3 Information to be disclosed

6.3.1 Disclosure related to carriers' standard baggage allowances and charges on any summary page at the end of an online purchase and e-tickets

For baggage rules provisions related to a passenger's 1st and 2nd checked bag and the passenger's carry-on baggage (i.e., the passenger's "standard" baggage allowance), carriers and ticket sellers acting on their behalf should disclose to the passenger the applicable carrier's baggage rules related to a passenger's "standard" baggage allowances and charges on any summary page at the end of an online purchase and on e-ticket confirmations that were sold in Canada.

The information to be disclosed to a passenger should include, the:

a. name of the carrier whose baggage rules apply;
b. passenger's free baggage allowance and/or applicable fees
c. size and weight limits of the baggage, if applicable;
d. terms or conditions that would alter or impact a passenger's standard baggage allowances and charges (e.g. frequent flyer status, early check-in, pre-purchasing baggage allowances with a particular credit card);
e. existence of any embargoes that may be applicable to the passenger's itinerary; and,
f. application of baggage allowances and charges (i.e., whether they are applied once per direction or if they are applicable at each stopover point).

Carriers should provide this information in text format on the passenger's e-ticket confirmation. Any fee information provided for carry-on bags and the first and second checked bag should be expressed as specific charges (i.e., not a range).

Carriers should also disclose in text format to the passenger any applicable terms or conditions that would alter or impact the standard baggage allowances and charges applicable to the passenger (e.g. frequent flyers status, early check-in, pre-purchasing baggage allowances with a particular credit card and so forth) so that the passenger can ascertain the charges that would apply to their itinerary.

Ticket sellers could communicate this information to the passenger via a hyperlink from the passenger's e-ticket to the specific location on a carrier's Web site or the ticket seller's Web site where such baggage information is available for review.

If the itinerary was purchased from a ticket seller in Canada, carriers should ensure that their ticket sellers are provided specific baggage information (i.e., the carrier whose baggage fees/rules apply) on the e-ticket confirmation.

Carriers are responsible for providing accurate and specific information regarding baggage allowances and fees on e-ticket confirmations sold in Canada, sufficient for passengers to determine the allowances and fees that apply to their travel. Carriers should also ensure that their tickets sellers have the necessary tools and support to meet their disclosure obligation.

In lieu of the standard baggage allowance information, carriers are encouraged to provide individualized information regarding baggage allowances and fees to passengers when possible.

6.3.2 Full disclosure of a carrier's baggage rules on its website

Disclosure of all of a carrier's baggage rules information on its Web site provides a means for consumers and other air carriers to verify the applicable interline itinerary baggage rules.

Carriers should disclose on their Web sites, in a convenient and prominent location, a complete and a comprehensive summary of **all** of their baggage rules. This information includes not only those baggage allowances and charges related to a passenger's "standard" baggage allowance as set out above in Section 6.3.1 but also any other baggage rule information that a carrier may apply beyond its "standard" baggage allowance and charges provisions. Carriers can organize the display of this information as they deem appropriate. For instance, carriers may choose to provide a primary rule/fee page that includes links or subpages to different categories of fees to ease consumer research.

Baggage rule information provided on carriers' Web sites should be clear and specific to ensure that consumers who are seeking details about any aspect of a carrier's baggage rules can readily obtain and understand the information provided.

Ticket sellers may offer hyperlinks to carriers' baggage rules information via their own Web sites or via their customers' e-tickets to ensure that passengers have access to all of the details regarding the applicable carrier's baggage rules.

6.3.3 Websites subject to the Agency's approach

Carriers and their ticket sellers with Web sites targeting Canadian consumers should disclose baggage rules on such Web sites. The Agency's Air Services Price Advertising: Interpretation Note, as amended from time to time, can be consulted to obtain further details on Web sites targeting Canadian consumers.

6.3.4 Additional information for consideration

Given that baggage charges are considered by the Agency to be optional charges pursuant to the ATR, Part V.1 - Advertising Prices, they are subject to certain price transparency and disclosure requirements. As a result, any price disclosed to the passenger must be the total amount inclusive of any third party charges (e.g. taxes, etc.). Foreign originating travel is not subject to the provisions of Part V.1. Nevertheless, the Agency encourages carriers to disclose the total amount, inclusive of all taxes, fees and charges, even in these situations.

6.4 Tariff provisions related to disclosure

Carriers should include their disclosure commitments in their filed tariffs.

6.5 Effective date, implementation and compliance

The Agency's *Interline Baggage Rules for Canada* will be enforced for tickets issued on or after April 1, 2015. In particular, air carriers should have on file with the Agency tariffs in effect that reflect their interline baggage rules.

The Agency may assess a carrier's tariff on a case by case basis to determine whether it meets the standards of the ATR, and may do so on its own motion [4] .

Under Canadian law, the Agency has the authority to suspend, disallow or substitute any term and condition of carriage that it deems unclear, unjust and unreasonable, or prejudicial.

6.6 Additional information

For additional information you may contact the Agency at:

Canadian Transportation Agency
Ottawa, Ontario K1A 0N9
Telephone: 1-888-222-2592
TTY: 1-800-669-5575
Facsimile: 819-997-6727

To seek feedback on any special circumstances or a particular situation, you may contact the Agency at:

E-mail: info@otc-cta.gc.ca

7. Appendices

7.1 Appendix A: IATA Resolution 302

- **Baggage Provisions Selection Criteria. IATA (International Air Transport Association) (International Air Transport Association) Resolution 302**

7.2 Appendix B: IATA Resolution 302 as modified by the Agency's Reservation

7.2.1 Canadian Transportation Agency Reservation:

Alignment with the Canadian Transportation Agency's (Agency) *Interline Baggage Rules for Canada*, effective for tickets issued on or after April 1, 2015, requires:

a. that a single set of baggage rules will be applied throughout a passenger's interline itinerary issued on a single ticket whose origin or ultimate ticketed destination is a point in Canada, regardless of stopovers.
b. the carrier whose designator code is identified on the first flight segment of the passenger's interline ticket (i.e. the selecting carrier) will select the baggage rules which will apply for the entire interline itinerary
c. for international itineraries, including domestic segments of an international itinerary, only the baggage rules of carriers with tariffs on file and in effect with the Agency are eligible to be selected for application per a) and b);
d. a carrier's filed tariff must include:
    i. i. The carrier's own baggage rules,
    ii. ii. The circumstances/methodology that the carrier applies when it selects per a) and b) the baggage rules of any other carrier,
    iii. iii. Have a statement that the carrier will apply, as its own, the rules chosen by the selecting carrier when the carrier is a down line carrier and a passenger is travelling on one of its flights as part of an interline itinerary; and,
    iv. iv. The carrier's baggage disclosure undertaking.

If per provisions of this Resolution carriers otherwise agree, in part or in whole, to another baggage regime as an amendment or as an alternative to Resolution 302, such regime shall be filed in tariffs with the Agency at least 45 days before effectiveness. Such alternative approach to Resolution 302 must comply with the *Air Transportation Regulations* and for certainty shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic. Any alternative regime should also respect the two fundamental principles of the Agency's *Interline Baggage Rules for Canada*, namely, 1) a seamless and transparent baggage regime for passengers and 2) a harmonized and practical regime for industry.

7.3 Appendix C: U.S. Rule 399.87 & U.S. DOT FAQs

- U.S. Rule 399.87: April 2011 Amendment Federal Register Version
- U.S. DOT FAQs: FAQ on Rule2 for Enhancing Airline Passenger Protections

7.4 Appendix D: Carriers who file tariffs with the Agency

The following is a **list of carriers that currently file tariffs with the Canadian Transportation Agency** applicable to scheduled international transportation to/from Canada. This list should be used for determining baggage rule selection as per the **Interline Baggage Rules for Canada** for transportation to/from Canada.

7.5 Appendix E: Agency approach examples

7.5.1 Domestic

7.5.1.1 Domestic interline - Simple

YOW – XX – x/YHZ – BB – x/YYT – CC – YDF

The passenger is flying with Carrier XX from Ottawa to Halifax, connecting in Halifax onto Carrier BB to St. John’s Nfld, connecting in St. John’s with carrier CC to Deer Lake, Newfoundland.

As Carrier XX is the first carrier whose designator code is identified on the itinerary (the selecting carrier), it will apply its rules(Carrier XX) to the entire itinerary. The MSC methodology does not apply to domestic interline transportation.

7.5.1.2 Domestic interline – code sharing

YOW – BB* – x/YHZ – BB – x/YYT – CC – YDF

Where carrier BB* is the marketing carrier, Carrier XX is the operating carrier

The passenger is flying with Carrier BB from Ottawa to Halifax, connecting in Halifax onto Carrier BB to St. John’s Nfld, connecting in St. John’s with carrier CC to Deer Lake, Newfoundland.

As Carrier BB is the first carrier whose designator code is identified on the itinerary (the selecting carrier), it will apply its rules (Carrier BB) to the entire itinerary. The MSC methodology does not apply to domestic interline transportation.

7.5.2 Transborder

> **Note:** A tariff must be on file with both the Agency and the U.S. DOT in order for the appropriate baggage rules to apply to an itinerary and to meet both countries’ regulatory requirements.

7.5.2.1 Transborder itinerary - Simple

YTZ – XX – BOS – BB – YOW

The passenger is flying with Carrier XX from Toronto to Boston.

The return flight, the passenger is flying with Carrier BB from Boston to Ottawa

✈ As Carrier XX is the selecting carrier it may choose to:

a. Apply its own rules (Carrier XX); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier XX rules applying to the entire itinerary since Carrier XX is the first carrier to cross an international boundary.

7.5.2.2 Transborder itinerary - more complex

YHM – XX – x/YTZ – BB – x/MCO – BB – PSP – CC – x/YYC – XX – YHM

The passenger is flying with Carrier XX from Hamilton to Toronto, connecting in Toronto and Orlando with Carrier BB to Palm Springs.

The return flight, the passenger is flying with Carrier CC from Palm Springs to Hamilton, connecting in Calgary

✈ As Carrier XX is the selecting carrier it may choose to:

a. Apply its own rules (Carrier XX); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier BB rules applying to the entire itinerary since Carrier BB is the first carrier to cross an international boundary.

7.5.2.3 Transborder itinerary- code-sharing

YVR – CC – SEA – DD - YVR

Where Carrier CC is the marketing carrier; Carrier DD is the operating carrier

Where Carrier DD is the marketing carrier; Carrier CC is the operating carrier

The passenger is flying with Carrier CC from Vancouver to Seattle.

The return flight, the passenger is flying with Carrier DD from Seattle to Vancouver

✈ As Carrier CC is the selecting carrier it may choose to:

a. Apply its own rules (Carrier CC); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier CC rules applying to the entire itinerary since Carrier CC is the first carrier to cross an international boundary.

7.5.3 International

7.5.3.1 International interline itineraries – origin Canada (simple)

YWG – CC – x/YYZ – CC – x/FRA – DD – GVA – DD – LON – CC – x/YYZ – CC – YWG

The passenger is flying with Carrier CC from Winnipeg to Geneva (connecting in Toronto with Carrier CC and Frankfurt with Carrier DD).

On the return, the passenger is flying with Carrier DD from Geneva to London (stopping in London), then with Carrier CC flying from London to Winnipeg (connecting in Toronto).

Carriers CC and DD have tariffs on file with Canada

As Carrier CC is the selecting carrier it may choose to:

a. Apply its own rules (Carrier CC); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier CC rules applying to the entire itinerary since Carrier CC is the first carrier to cross between IATA tariff conference areas.

YWG – XX – x/YYZ – BB – AMS – CC – MAD – CC – x/AMS – BB – x/YYZ – XX – YYC

The passenger is flying with Carrier XX from Winnipeg to Toronto, connecting in Toronto with Carrier BB to Amsterdam (stopping over in AMS).The Passenger then flies with Carrier CC from Amsterdam to Madrid (stopping in MAD)

On the return flights home the passenger flies with Carrier CC from Madrid to Amsterdam and then connecting in Amsterdam onto Carrier BB to Toronto, connecting in Toronto onto Carrier XX to Calgary.

Carriers XX, BB, CC have tariffs on file with Canada

As Carrier XX is the selecting carrier it may choose to:

a. Apply its own rules (Carrier XX); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier BB rules applying to the entire itinerary since Carrier BB is the first carrier to cross between IATA tariff conference areas.

7.5.3.2 International interline itinerary – origin international (simple)

SHA – XX – HKG – BB – x/TPE – BB – YVR – XX – SHA

The passenger is flying with Carrier XX from Shanghai to Hong Kong (stopping over in HKG).Then the passenger is flying with Carrier BB from Hong Kong connecting in Taipei to Vancouver (stopping in Vancouver).

The return flight is with Carrier XX from Vancouver to Shanghai.

Carriers XX and BB have tariffs on file with Canada.

As Carrier XX is the selecting carrier it may choose to:

a. Apply its own rules (Carrier XX); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier BB rules applying to the entire itinerary since Carrier BB is the first carrier to cross between IATA tariff conference areas.

7.5.3.3 International interline itinerary - code-sharing example

YWG – BB* – x/YYZ – BB – AMS – CC – MAD – CC** – x/AMS – BB – x/YYZ – BB* – YYC**

Where Carrier BB* is the marketing carrier; Carrier XX is the operating carrier.

Where Carrier CC** is the marketing carrier; Carrier DD is the operating carrier.

The passenger is flying with Carrier BB from Winnipeg to Toronto, connecting in Toronto with Carrier BB to Amsterdam (stopping over in AMS).The Passenger then flies with Carrier CC from Amsterdam to Madrid (stopping in MAD).

On the return flights home the passenger flies with Carrier CC from Madrid to Amsterdam and then connecting in Amsterdam onto Carrier BB to Toronto, connecting in Toronto onto Carrier BB to Calgary.

Carriers XX, BB, CC have tariffs on file with Canada

As Carrier BB is the selecting carrier it may choose to:

a. Apply its own rules (Carrier BB); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier BB rules applying to the entire itinerary since Carrier BB is the first carrier to cross between IATA tariff conference areas.

7.5.3.4 International interline itinerary – stopover example

YEG–XX–x/YYZ–XX–x/FRA–BB–BKG–CC–SYD–DD–MEL–DD–x/SYD–XX–x/YVR–XX–YEG

Passenger is flying on Carrier XX from Edmonton to Toronto, connecting in Toronto onto Carrier XX to Frankfurt, connecting in Frankfurt on Carrier BB to Bangkok, stopping over in Bangkok, flying on carrier CC from Bangkok to Sydney, stopping over in Sydney, and then flying on Carrier DD from Sydney to Melbourne, stopping over in Melbourne

On the return, passenger is flying on Carrier DD from Melbourne to Sydney, connecting in Sydney onto Carrier XX to Vancouver, and then connecting in Vancouver onto Carrier XX to Edmonton.

Carriers XX, BB, CC, and DD have tariffs on file with Canada.

As Carrier XX is the selecting carrier it may choose to:

a. Apply its own rules (Carrier XX); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier XX rules applying to the entire itinerary since Carrier XX is the first carrier to cross between IATA tariff conference areas.

7.5.3.5 International interline itinerary - ultimate ticketed point example

MOW – XX – x/FCO – BB – x/YUL – CC – YYZ – DD – EWR – EE – MOW

Passenger is flying with Carrier XX from Moscow to Rome, connecting in Rome onto Carrier BB to Montreal, connecting in Montreal onto Carrier CC to Toronto (stopping over in Toronto).The passenger then flies with Carrier DD from Toronto to Newark (stopping in Newark).

On the return flight, the passenger flies with Carrier EE from Newark to Moscow.

Carriers XX, BB, CC, DD and EE have tariffs on file with Canada.

✈ As Carrier XX is the selecting carrier it may choose to:

a. Apply its own rules (Carrier XX); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier BB rules applying to the entire itinerary since Carrier BB is the first carrier to cross between IATA tariff conference areas.

✈ In situations where a passenger's origin is a non-Canadian point and the itinerary includes at least one stop in Canada, as well as at least one stop outside of Canada. If the stop in Canada is the farthest ticketed point and the stop is more than 24 hours the Agency would consider the ultimate ticketed destination to be Canada. As a consequence, its *Interline Baggage Rules for Canada* applies.

7.5.3.6 International interline itinerary - no tariff filed for 1st carrier on itinerary

MVD – XX – x/EZE – BB –x/YYZ – CC - YVR

Passenger is flying with Carrier XX from Montevideo to Buenos Aires, connecting in Buenos Aires on Carrier BB to Toronto and then connecting in Toronto onto Carrier CC to Vancouver.

Carriers BB and CC have tariffs on file with Canada. Carrier XX does not have a tariff on file with Canada.

✈ Under the Agency's approach Carrier XX would normally be the selecting carrier on such an interline itinerary, however, Carrier XX does not have a tariff on file with the Agency and as a consequence may not be the selecting carrier.

✈ The selecting carrier becomes the next down line carrier who does have a tariff on file with the Agency. That carrier is Carrier BB. Carrier BB can choose to:

a. Apply its own rules (Carrier BB); or,
b. Apply the MSC methodology to the itinerary which would result in Carrier BB rules applying to the entire itinerary since Carrier BB is the first carrier to cross between IATA tariff sub- conference areas.

7.6 Appendix F: Terminology

Carrier definitions (various)

Carrier

For the purposes of the Agency's approach to interline baggage, a carrier includes Canadian and foreign carriers, licensed and unlicensed providing transportation by air to, from and within Canada where Canada is the origin or the ultimate ticketed destination.

Down line carrier

any carrier, other than the selecting carrier, who is identified as providing interline transportation to the passenger by virtue of the passenger's ticket

Marketing carrier

the carrier that sells flights under its code**.**

Most significant carrier (MSC)

is determined by a methodology, established by IATA (Resolution 302) (see Appendix 7.1.1), which establishes, for each portion of a passenger's itinerary where baggage is checked through to a new stopover point, which carrier will be performing the most significant part of the service. For travelers under the Resolution 302 system, the baggage rules of the MSC will apply. For complex itineraries involving multiple checked baggage points, there may be more than one MSC, resulting in the application of differing baggage rules through an itinerary.

Most significant carrier (MSC) – IATA Resolution 302 as conditioned by the Agency

In this instance, the MSC is determined by applying IATA's Resolution 302 methodology as conditioned by the Agency. The Agency's reservation has stipulated that only a single set of baggage rules may apply to any given interline itinerary. The aim of the Agency's reservation is to allow the selecting carrier to use the MSC methodology to determine which carrier's baggage rules apply to an international interline itinerary to or from Canada, while reinforcing the role of tariffs in the determination of which carrier's rules apply.

Operating carrier

the carrier that operates the actual flight

Participating carrier(s)

includes both the selecting carrier and down line carriers who have been identified as providing interline transportation to the passenger by virtue of the passenger's ticket.

Selected carrier

the carrier whose baggage rules apply to the entire interline itinerary.

Selecting carrier

the carrier whose designator code is identified on the first flight segment of the passenger's ticket at the beginning of an interline itinerary issued on a single ticket whose origin or ultimate destination is in Canada.

Other Terminology

Airline designator code

an identification code comprised of two-characters which is used for commercial and traffic purposes such as reservations, schedules , timetables, ticketing, tariffs and airport display systems. Airline designators are assigned by IATA. When this code appears on a ticket, it reflects the carrier that is marketing the flight, which might be different from the carrier operating the flight.

Baggage

includes both checked and carry-on baggage.

Baggage rules

the conditions associated with the acceptance of baggage, services incidental to the transportation of baggage, allowances and all related charges. For example, baggage rules should address the following topics:

- The maximum weight and dimensions of passenger bags, if applicable, both checked and unchecked;
- The number of checked and unchecked passenger bags that can be transported and the applicable charges;
- Excess and oversized baggage charges;
- Charges related to check-in, collection and delivery of checked baggage;
- Acceptance and charges related to special items, e.g. surf boards, pets bicycles, etc.
- Baggage provisions related to prohibited or unacceptable items, including embargoes
- Terms or conditions that would alter or impact the baggage allowances and charges applicable to passengers (e.g. frequent flyer status, early check in, pre-purchasing baggage allowances with a particular credit card);and,
- Other rules governing treatment of baggage at stopover points, including passengers subject to special baggage allowances or charges, etc.

Code share

an arrangement between air carriers in which one air carrier (marketing carrier) sells transportation in its name (under its code) on flights operated by the partner air carrier (operating carrier). Transportation involving a code share is considered interline travel.

Conference areas

divisions of the world by the International Air Transportation Association (IATA) used to establish fares. There are three Conference areas, which roughly correspond as follows:

1. North and South America;
2. Europe Africa and the Middle East; and
3. Asia and the Pacific.

Interline agreement

an agreement between two or more carriers to co-ordinate the transportation of passengers and their baggage from the flight of one air carrier to the flight of another air carrier (through to the next point of stopover).

Interline itinerary

all flights reflected on a single ticket involving multiple air carriers. Only travel on a single ticket is subject to the Agency's approach provided the origin or the ultimate ticketed destination is a point in Canada.

Interline travel

travel involving multiple air carriers listed on a single ticket that is purchased via a single transaction.

Single ticket

a document that permits travel from origin to destination. It may include interline/code-share and intra-line segments. It may also include end-to-end combinations (i.e. stand alone fares that can be bought separately but combined together to form one price).

Summary page at the end of an online purchase

any page on a carrier's Web site which summarizes the details of a ticket purchase transaction just after the passenger has agreed to purchase the ticket from the carrier and has provided a form of payment

Tariff

a tariff is the contract of carriage between an air carrier and its passengers. It contains enforceable provisions respecting passengers' rights and obligations, as well as the air carrier's rights and responsibilities towards the passenger. It must include the applicable baggage rules and charges of the air carrier.

Ticket seller

any person that sells air transportation and issues tickets on behalf of a carrier. This excludes an employee of an air carrier.

Ultimate ticketed destination

In situations where a passenger's origin is a non-Canadian point and the itinerary includes at least one stop in Canada, as well as at least one stop outside of Canada. If the stop in Canada is the farthest checked point and the stop is more than 24 hours, the Agency would consider the ultimate ticketed destination to be Canada.

7.7 Appendix G : Legislative reference

Air carriers are required to set their policies in their tariff, including provisions respecting interline baggage rules and these policies must be clear, reasonable, not unduly discriminatory and not prejudicial.

The Agency's jurisdiction in matters respecting international tariffs is set out, in part, in Part V, Tariffs, of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR).

Section 110 of the *ATR provides, in part*, that:

110(1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, before commencing the operation of an international service, an air carrier or its agent shall file with the Agency a tariff for that service, including the terms and conditions of free and reduced rate transportation for that service, in the style, and containing the information, required by this Division

…

110(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

110(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

Section 111 of the ATR provides, in part, that:

111(1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

...

(2)(c) No air carrier shall, in respect of tolls or the terms and conditions of carriage, subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

...

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

In addition, paragraph 122(*a*) of the ATR provides, in part, that:

Every tariff shall contain:

(*a*) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

[...]

(*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

[...]

(ix) method of calculation of charges not specifically set out in the tariff

7.8 Appendix H: Sample Tariff Provisions developed by Agency staff

- Rule 54: Interline Baggage Acceptance
- Rule 55: Baggage Acceptance

Notes

1 Matters related to liability regarding baggage matters are addressed in the Montreal Convention and any other applicable Conventions. This IN does not address nor does it affect matters related to liability.

2 With one exception, as laid out in section 4.3.2.

3 The Sample Tariff does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR. The Agency, upon investigating a complaint or on its own motion, could find a carrier's tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier's tariff reflects the wording of the Sample Tariff.

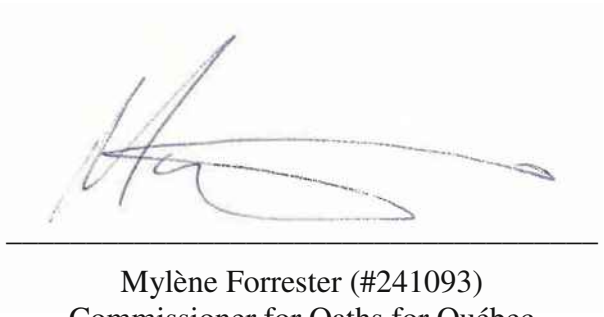
4 The Agency's jurisdiction with respect to own motion authority is only applicable to international services

Publication information

Available in multiple formats.

Date modified:
2015-10-02

Exhibit B of the Affidavit of Meredith Desnoyers
affirmed on October 13, 2023



Mylène Forrester (#241093)
Commissioner for Oaths for Québec

CANADIAN TRANSPORTATION AGENCY

Notice to Industry: Applications for Exemptions from Section 59 of the Canada Transportation Act, S.C., 1996, c. 10, as amended (CTA)

Table of contents

⚠ The Canadian Transportation Agency (Agency) is the economic regulator of Canada's federal transportation network. It publishes guidance material advising of changes to or clarifications of Agency processes or requirements. Should there be any discrepancy between the content of this Notice and the CTA and associated regulations, the latter prevail.

1. Purpose

This notice to industry outlines the Agency's approach to considering applications for exemptions from section 59 of the CTA.

This notice is not intended to address exemption requests related to temporary licences issued under subsection 78(2) of the CTA, where an exemption from section 59 is required in order to continue selling the service beyond the expiry date of the licence. For any questions in this regard, you may contact the Manager of Air Licensing and Charters.

2. Legislative references to the CTA

Section 59 states:

> No person shall sell, cause to be sold or publicly offer for sale in Canada an air service unless, if required under this Part, a person holds a licence issued under this Part in respect of that service and that licence is not suspended.

Subsection 80(1) states:

> The Agency may, by order, on such terms and conditions as it deems appropriate, exempt a person from the application of any of the provisions of this Part or of a regulation or order made under this Part where the Agency is of the opinion that
>
> a. the person has substantially complied with the provision;
> b. an action taken by the person is as effective as actual compliance with the provision; or
> c. compliance with the provision by the person is unnecessary, undesirable or impractical.

3. Exemptions from section 59

Section 59 of the CTA was introduced in 1996 to protect consumers by prohibiting the sale of an air service by any person who does not hold a licence for that service. Therefore, if an air carrier is ultimately not licensed, or licensed in time, the consumer will not be left out of pocket or experience inconvenience or undue hardship because the carrier cannot operate the service. This prohibition is broad and applies to air carriers and any other persons, including Canadians and foreigners, for passenger and cargo transportation services, as well as scheduled and non-scheduled services.

However, the Agency recognizes that there are circumstances where the interests of consumers would not be adversely affected by allowing an air carrier to sell an air service before it obtains the necessary licence(s). Therefore, Canadian and foreign carriers proposing to operate publicly available air services can apply to the Agency for an exemption from section 59 of the CTA.

3.1 Criteria for granting exemption

The Agency deals with section 59 exemption requests using a risk-based approach that gives primary consideration to the consumer protection intent of the provision, taking into account the facts and circumstances of each application.

Before granting an exemption, the Agency must be satisfied that the applicant has demonstrated a high probability of obtaining the required licence(s) prior to the commencement of a service. In the event that the applicant does not obtain the appropriate licence(s), it must provide:

1. alternative air transportation at no additional cost to the passengers; or
2. a full refund if alternative arrangements are not possible or acceptable to the passengers.

3.2 Burden of proof

An exemption to a legislative requirement is not an entitlement.

The onus is on the applicant to demonstrate that compliance with section 59 is unnecessary based on the criteria laid out in 3.1 above and to provide the Agency with the information in support of its application.

4. Agency's considerations

4.1 Considerations applicable to Canadian and foreign applicants

Does the applicant already hold a licence issued by the Agency?

The Agency's position is that established carriers that already hold a similar licence with the Agency pose a minimal risk and are likely to obtain a licence for the proposed air service as they already meet the requirements to hold a licence, albeit for another air service.

The Agency will consider the nature of the licensing requirements already met by the carrier in the past. If the requirements to obtain the licence for the proposed air service are similar, there is less risk for passengers that the carrier will not meet the requirements.

Does the applicant have an air operator certificate issued by Transport Canada?

In many instances, carriers that apply for section 59 exemptions do not yet hold the necessary Canadian aviation document from Transport Canada – the air operator certificate (AOC) – that is required to obtain a licence. The process of obtaining an AOC can be time consuming, in particular if a base inspection and subsequent follow-ups are required. There are no guarantees that a carrier will obtain an AOC in a timely manner.

The Agency may consider what steps the carrier has taken to obtain its AOC and the likelihood of the AOC being obtained in time for the Agency to issue a licence before the proposed start date.

Specific issues that the Agency might consider include:

- Has the applicant submitted its application to Transport Canada?
- If Transport Canada has considered that a base inspection is necessary, has it been scheduled?
- If a base inspection has been completed, what type of follow-up is necessary?
- What are the anticipated timelines for Transport Canada to conclude?
- Has Transport Canada expressed any concerns in issuing an AOC by these anticipated timelines?
- Will the issuance of the AOC within these timelines provide sufficient time for the Agency to issue the licence (provided all the other requirements are met) before the proposed start date?

In some cases, a carrier may have already received an AOC for an operation of a similar nature and is simply seeking to expand this authority. In this situation, there would be less risk of a lengthy approval process.

While the onus is on the applicant to provide evidence and assurances that the AOC will be issued in time, the Agency may validate any information with Transport Canada. If there are inconsistencies between the applicant's submission and the information from Transport Canada, the Agency will inform the applicant and provide an opportunity to respond.

Does the applicant have liability insurance coverage?

If an applicant does not already hold a licence with the Agency, assurance must be provided that the insurance requirement will be met.

The applicant must either file a certificate of insurance or, at minimum, provide a written confirmation from its insurer that it already holds the prescribed liability insurance coverage or that it has secured such coverage.

How far in advance of the anticipated start date of the air service does the applicant intend to sell the service before receiving a licence?

If an applicant intends to sell an air service long before the proposed start date (and before receiving a licence), it may pose an increased risk to consumers as more tickets may be sold before the carrier is licensed.

However, if an applicant provides strong assurances that the licensing requirements will be met well in advance of the proposed start date, a long period of advance sales would likely pose less concern.

For a scheduled international air service, is there an agreement in place between Canada and the foreign country?

If there is an agreement between Canada and a foreign country, it indicates a national policy objective to encourage expanded air services between Canada and that country. As a result, there is less risk that a licence will not be issued.

What measures does the carrier have (or will have) in place to accommodate passengers if the licence is not issued (or not issued in time)?

If the carrier is likely to obtain the required licence before the proposed start of operations, the risk to consumers is negligible and compliance with section 59 is not necessary.

While the Agency will seek assurances that this is the case, the Agency also recognizes that it is not possible to get absolute assurance. The Agency will also consider what measures the carrier has (or will) put in place to accommodate passengers if the licence is not obtained. This could include offering timely alterative transportation with another carrier or reimbursement.

4.2 Additional considerations for Canadian applicants

Has the applicant met the Canadian status requirement?

Before issuing a licence, the Agency is responsible for determining whether an applicant is Canadian.

This process must be completed before a section 59 exemption application can be approved, as it will have a direct impact on if and when the licence requirements are met.

If a Canadian applicant already holds an Agency licence, this determination has already been made and is not a consideration.

Has the applicant met all financial requirements (if applicable)?

Under certain circumstances, an applicant must meet financial requirements when applying for a licence that authorizes the operation of an air service using medium or large aircraft.

The purpose of this requirement is essentially the same as section 59 – to ensure that air passengers are not being left out of pocket (in this case, as a result of an air carrier not being financially solvent in the critical first months of operation).

If an applicant has to meet financial requirements, this part of the process must be completed before a section 59 exemption application can be approved, as it will have a direct impact on if and when the licence requirements are met.

For an international air service, has the applicant been designated by the Government of Canada to operate the service?

In its application, the applicant must provide evidence that it is designated by the Minister of Transport, Infrastructure and Communities as eligible to hold a scheduled international licence.

Non-designated carriers cannot obtain a scheduled international licence.

4.3 Additional considerations for foreign applicants

For a scheduled international air service, has the applicant been designated by the government of its home country to operate the service?

A foreign applicant for a scheduled international licence must be designated by the government of its state, or an agent of that government, to operate an air service under the terms of an agreement or arrangement.

This designation is part of the basic requirements for a licence – a scheduled international licence will not be issued unless the carrier is designated.

Does the applicant hold the equivalent licence issued by its home country?

When applying for a licence, foreign carriers must provide the Agency with a copy of the equivalent licence issued by their home country.

This is another basic licence requirement which will be taken into account when reviewing section 59 exemption applications.

4.4 Increased risks associated with non-scheduled international services

Carriers that are designated and authorized in accordance with the terms of an Agreement are typically established in the air transportation industry and have demonstrated, to the satisfaction of their government, the capacity to operate the scheduled international air service. These carriers would likely

have the means to reimburse passengers or coordinate alternative travel arrangements if a licence was not issued.

However, if a carrier proposes to offer only non-scheduled international air services, there is a greater chance the carrier may not be as well established in the industry. It is also likely that the carrier has not been subjected to the same level of scrutiny by its government, compared to a carrier proposing to obtain a designation for scheduled international services. Therefore, in the event a licence is not issued (or not issued in time), there are fewer assurances that the carrier could offer a refund or alternative arrangements.

This added risk factor needs to be addressed in the application and will be taken into consideration by the Agency when assessing the applicant's submission.

5. Conditions normally attached to section 59 exemptions

When granting section 59 exemptions, the Agency has the power under subsection 80(1) to impose conditions.

The Agency will normally subject the carrier to the following conditions:

- All advertising in any media, whether written, electronic or telecommunications, shall include a statement that the air service is subject to government approval, unless and until the section 59 exemption expires following the issuance of a licence. All prospective passengers shall be made aware, before a reservation is made or a ticket issued, that the air service is subject to government approval;
- The applicant shall apply its published tariffs, on file with the Agency and in effect, to sales of transportation for each scheduled point;
- The exemption does not relieve the applicant from the requirement to hold a licence in respect of the service to be provided and, accordingly, no flights shall be operated until the appropriate licence authority has been granted;
- Should the licence not be issued or not issue by the time an air service sold to a passenger is to be used, the applicant shall arrange to provide alternative air transportation by an appropriately licensed air carrier, at no additional cost for all passengers who have made reservations with the applicant. If such arrangements are not possible or acceptable to the passenger, the applicant shall arrange to provide a full refund of all monies paid by the passenger.

The Agency could also, at its own discretion, attach other conditions that it deems appropriate in the circumstances.

6. Exercise of discretion

While guided by the above general principles, the Agency will retain full discretion to address the facts and circumstances of each application as it sees appropriate.

The Agency reserves the rights to remove an exemption when a carrier does not comply with the conditions of the exemption, or when the Agency deems it otherwise necessary.

Publication information

Available in multiple formats.

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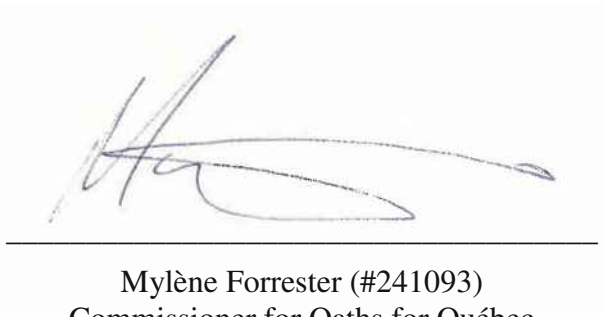
Date modified:

2013-03-27

Exhibit C of the Affidavit of Meredith Desnoyers
affirmed on October 13, 2023



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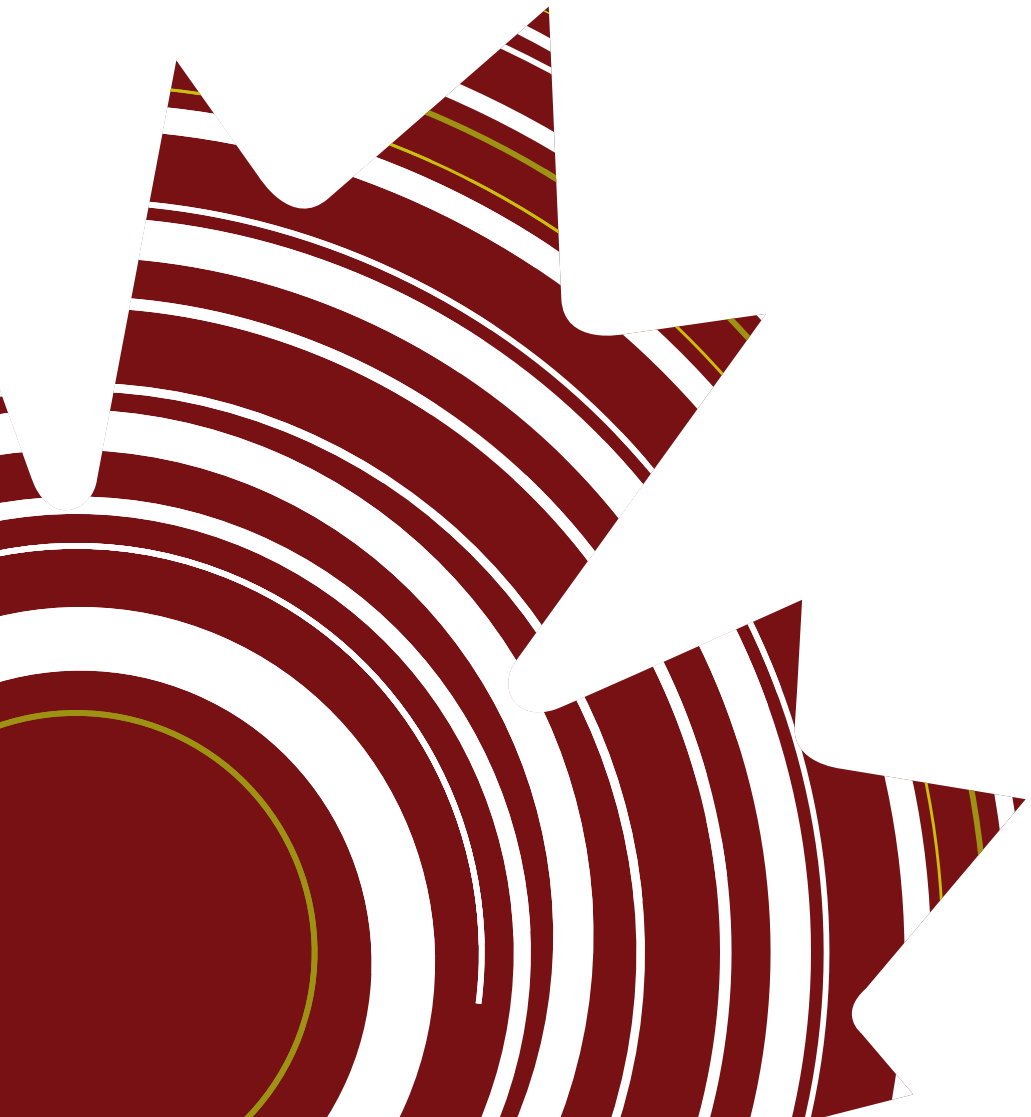
Office des transports du Canada
Canadian Transportation Agency

Guide to Canadian Ownership and Control in Fact for Air Transportation



Canada

Table of Contents

Introduction

This Guide explains the Canadian ownership requirement for obtaining a licence to operate an air service from the Canadian Transportation Agency (Agency), and for maintaining such a licence.

It explains how the Agency interprets and applies the legal requirement for an air licence holder to be "Canadian" as defined in the *Canada Transportation Act* (Act).

This document is intended to support the Act, which is the definitive source for licence applicants and licence holders regarding the Canadian ownership requirement. Using this document and the examples it provides is not mandatory and nothing in this document supersedes the Act.

Legislative Authority

The Agency is an independent, quasi-judicial tribunal and regulator that has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a superior court.

The Agency oversees the very large and complex Canadian transportation system, which is essential to the economic and social well-being of Canadians.

The Agency is responsible for ensuring all air carriers licensed to provide domestic air services meet the Canadian ownership requirements set out in the Act. These requirements state that air service licensees must be owned and controlled "in fact" by Canadians. The Agency uses business and other information to determine whether a licence holder or applicant is "in fact" Canadian. Those who wish to apply for a determination should also consult the Application Process for Canadian Ownership Determinations.

The Agency conducts monitoring and enforcement activities to ensure ongoing compliance with licensing requirements.

Definition of Canadian

As of June 27, 2018, "Canadian" is defined within subsection 55(1) of the Act.

Refer to the Act for the complete definition, which includes:

(a) a Canadian citizen or a permanent resident;
(b) a government in Canada; and
(c) a corporation;
(d) limited partnership, partnership, proprietorship or other legal form of business enterprise where the following apply:

- It must be incorporated or formed under the laws of Canada or a province (corporate entities only);
- At least 51 percent of its voting interests must be owned and controlled by Canadians;
    - No single non-Canadian owns or controls, directly or indirectly, more than 25 percent of the voting interests in that corporation (either individually or in affiliation with another person). In addition, no more than 25 percent of the voting interest in a Canadian carrier is owned by foreign air carriers (either individually or in affiliation); and
- It must be controlled in fact by Canadians.

Failure to meet these criteria will result in being considered non-Canadian.

Note: Where the ownership of an entity resides with one or more corporations or other entities, the definition of Canadian will also be applied to those entities. If they are, in turn, owned by other entities, the Agency must determine who controls the company up to the top of the ownership chain, applying the definition of Canadian at each step.

Consequences of Failing to Demonstrate Canadian Status

If the Agency determines that a new licence applicant doesn't meet the Canadian ownership requirement, the licence application will be denied. If the Agency determines that an existing licensee no longer meets the requirement, the Agency must suspend or cancel the licence.

Further Details

See Annex A for additional information about demonstrating that your corporation or other business enterprise is owned by Canadians.

See Annex B for the principles that guide the Agency's determination of "control in fact."

See Annex C for the factors the Agency considers when determining "control in fact."

See Annex D for examples of the Agency's previous Canadian ownership determinations.

Annex A: Canadian Ownership Requirements

There are three requirements that must be met to be considered Canadian and therefore to obtain or maintain an air service licence:

1. Incorporation or Formation Requirement;
2. Voting Interest Requirement; and
3. Control in Fact Requirement.

These three requirements are detailed below.

Requirement No. 1: Incorporation or Formation Requirement

For a corporation, partnership, proprietorship or other form of business enterprise to be Canadian, it must be incorporated or formed under the laws of Canada or one of its provinces.

Requirement No. 2: Voting Interest Requirement

For an enterprise to be considered Canadian, at least 51 percent of the voting interests need to be both owned and controlled by Canadians.

- "Voting interests" means voting securities and the votes assigned to those securities.
- "Owned by Canadians" means the securities are owned on a beneficial ownership basis by Canadians; it is not enough for them to be registered to Canadians.
- "Controlled by Canadians" means the votes attached to the securities should be exercisable by their Canadian beneficial owners.

No single non-Canadian may hold more than 25 percent of the voting interests, directly or indirectly, whether individually or in affiliation with another person. In addition, for any non-Canadian shareholders that have the authority to provide an air service in any jurisdiction (i.e. whether in Canada or abroad), the sum total of their voting interests cannot exceed 25 percent, either individually or in affiliation with another person.

Affiliation

The term "affiliation" as it concerns two or more persons who may act together to exercise their voting interests, is defined in subsection 55(2) of the Act. Refer to the Act to see the complete list of circumstances in which corporations, partnerships, or sole proprietorships are considered "affiliated," which includes:

- one of them is a subsidiary of the other,
- both are subsidiaries of the same corporation, or
- both are controlled by the same person, corporation, or subsidiary of a corporation.

Also, if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other.

Note that the Act provides extensive detail on "affiliation," including the circumstances in which a corporation is controlled by a person other than Her Majesty in right of Canada or a province. Refer to the Act for the complete information.

Publicly traded corporations

For an entity that lists its securities on a publicly-traded stock exchange, the percentage of voting interests owned by Canadians can be subject to constant fluctuations. To ensure that the entity continues to meet the ongoing requirements to be Canadian, the Agency may require the entity to put in place one of the following:

- a security constraint and control system, which is a system that restricts any purchase or transfer of the corporation's securities if it would result in a breach of the voting interest requirement; or
- a variable voting system. This is when non-Canadians are allowed to hold only variable voting shares. This results in the voting interest requirement being respected, because when the percentage of the variable voting shared exceeds the maximum allowable percentage of the total voting shares, the vote attached to each variable voting share automatically decreases to ensure that the maximum allowable threshold isn't exceeded.

Requirement No. 3: Control In Fact Requirement

Overview

To be Canadian, the company needs to be "controlled in fact" by Canadians.

Control in fact (also known as *de facto* control) differs from control in law (also known as *de jure* or legal control). Control in law is generally shown by owning enough shares to carry the right to a majority of votes. Control in fact goes beyond control in law as it includes the ability to exert control by any direct or indirect influence.

Although the term is not defined in the Act, the Agency considers control in fact to be:

- the power, whether exercised or not, to control the strategic decision-making activities of an enterprise and to manage and run its day-to-day operations.

Those who may have the power to influence a company's decisions can include minority owners, designated representatives, financial institutions, employees and others. They may use their influence either positively or negatively. For example, they may demonstrate a *positive* influence by requiring positive approval when a decision needs to be made. Conversely, *negative* influence could be the ability to veto a decision. Either way, the influence needs to be dominant or determining to be considered "control in fact."

Determining who has "control in fact" is a question of fact. The Agency evaluates this on a case-by-case basis, as each case is unique. The principles that the Agency follows when determining "control in fact" are listed at Annex B. The factors that the Agency considers are shown at Annex C. All managerial, financial and operational air carrier relationships (or proposed relationships) must be considered before making a determination.

Ownership structures with little or no involvement from non-Canadians do not normally require extensive analysis. Nevertheless, licence applicants and existing licence holders should take note of the "control in fact" issues concerning joint ventures and ownership by proxy.

Joint Ventures

Applicants and licensees who enter into arrangements or joint ventures with non-Canadian air carriers should carefully consider whether this could result in joint or entire control by the non-Canadian. Such arrangements typically involve collaboration or strategic business decisions around matters like:

- prices,
- routes,
- schedules,
- capacity,
- ancillary services, and
- revenue and cost sharing.

The Canadian licensee must always be in a position to control its decision-making. They must be free of any dominant and determining influence from the non-Canadians participating in the joint venture. Otherwise, the non-Canadian could be found to be in a position of control, thereby resulting in the Canadian licensee no longer complying with the requirement to be Canadian.

For additional information regarding joint ventures, please contact:

National Air Services Policy Directorate
Air Policy Group
Transport Canada
Place de Ville, Tower C
Ottawa, Ontario
K1A 0N5

Telephone: 613-993-7284 or 1-800-305-2059
Fax: 613-991-6445
Website: www.tc.gc.ca
Email: TC.natair-aernat.TC@tc.gc.ca

Ownership by Proxy

When a non-Canadian shareholder who makes a monetary investment transfers its corresponding voting interest to a Canadian who otherwise has only a nominal

investment in the applicant, the Agency will consider the substance over the form of the proposal. Business structures that violate the spirit of the control in fact requirement by using a Canadian proxy to hold the voting interests of a non-Canadian investor will likely not meet the requirement.

Annex B: General Principles for Determining "Control in Fact"

All the facts are weighed together

Normally, no single factor dictates whether control in fact is held by Canadians. The Agency considers and weighs all facts together to make a determination. There is no single objective test that can be relied upon to determine where control in fact lies. Judgment is required to evaluate the facts of each case.

Control does not need to be exercised

Control does not need to be exercised for a person to have control in fact. When the individual has the ability to control, whether they use it or not, they are considered to have control in fact.

Control can reside with different individuals

Control in law and control in fact can reside in the hands of different individuals or groups of individuals. Control in fact may exist even without ownership of any voting securities.

Joint Control

Where an air carrier is controlled jointly by Canadians and non-Canadians, it is not considered to be Canadian.

Annex C: Factors Considered in Determining "Control in Fact"

To determine who has "control in fact," the Agency assesses every applicable factor. This includes whether that factor, individually or in combination with others, provides any non-Canadians with:

- direct means to control the company (e.g., formal voting or other rights), and/or
- indirect means to control the company (e.g., ability to exert influence through their investment in the company or through any other means).

The Agency also considers the intent and ability of the non-Canadian(s) to exercise control over the company, particularly where control is obtained through indirect means.

Below is a list of factors considered by the Agency. This list is not exhaustive and is not ranked in any particular order of priority. There may be other factors depending on the situation.

Following the list there is more information about each factor. This includes information about risky situations that can emerge, and how licence applicants and licence holders can reduce the risk of receiving a negative "control in fact" determination.

Note: Importance of Risk Mitigation

Unless an applicant or licence holder takes steps to mitigate risks, situations identified as "high risk" will likely result in a negative determination. Situations identified as "medium risk" may result in a negative determination on Canadian ownership if they cause a non-Canadian's influence to be dominant and determining, whether on their own or in combination with other factors.

A situation identified as being risky when combined with other factors will not necessarily result in a negative Canadian ownership determination, but may be a contributing factor to a negative determination.

LIST OF FACTORS:

Corporate Governance Factors

1. Board of Directors
2. Officers
3. Shareholder and Board of Directors' meetings

Shareholder Rights Factors

1. Veto rights
2. Security rights, options, and warrants
3. Rights of first refusal/Pre-emptive rights
4. Power to wind up the company

Risks and Rewards Factors

1. Risks and benefits
2. Concentration of voting interests

Business Affairs and Activities Factors

1. Debt
2. Guarantees
3. Lease of assets
4. Financial strength and business activity
5. Management agreements
6. Operational or service agreements
7. Charterer/air carrier relationship

ADDITIONAL INFORMATION AND RISK-REDUCTION STRATEGIES:

Corporate Governance Factors

1. Board of Directors

The board of directors is elected by the shareholders to govern and manage the affairs of the corporation. The following conditions must be met for control in fact to reside with Canadians:

- Canadian shareholders must have the right to appoint no less than half of the board of directors.
- No less than half of the board members must be Canadian.

Generally, the same principle applies to board members sitting on individual board committees.

The Agency recognizes major investors will normally expect to have board representation reflective of their voting interest. Given that non-Canadians can hold up to 49 percent of voting interests (subject to the conditions prescribed in subsection 55(1) of the Act), the number of board members representing Canadians and non-Canadians could be equal.

Risk Condition (Risk Level: High)

Non-Canadian control in fact is indicated when:

- The board representation of the non-Canadian investors is disproportionately high compared to the voting interests held; or,
- The majority of board members are non-Canadians, regardless of who nominated them.

Risk Mitigation

If there are an equal number of Canadian and non-Canadian board members, there must be tie-breaker provisions in favour of the Canadian board members for control in fact to reside with Canadians.

2. Officers

Officers of a corporation serve at the pleasure of the board of directors. They are entrusted with the day-to-day responsibility of running the corporation. Officers normally do not have the ability to exercise control in fact. Officers do not need to be Canadian for the corporation to be considered Canadian by the Agency. However, control in fact implications could arise if officers have a relationship with non-Canadian shareholders that provides a means for the non-Canadians to exert influence over the operations of the air carrier.

Risk Condition (Risk Level: High)

When the officers of the company have a fiduciary duty to, or are otherwise beholden to, the non-Canadian board members and/or the non-Canadian shareholders, this will be interpreted as indicating non-Canadian control in fact.

Risk Mitigation

Officers must not be in a position to exercise control in fact. To avoid any ambiguity in this regard, they should be at arms' length from any non-Canadian shareholders of the business.

3. Shareholder and Board of Directors' Meetings

A quorum indicates the minimum number of members that must be present at a meeting for the meeting to be considered valid. The Agency generally expects a corporation's quorum provisions to require:

- no less than half of the shareholders or directors present at a shareholder or board of directors meeting be Canadian; and
- no less than half of the members at a board of directors meeting have been appointed by Canadian shareholders.

Risk Conditions (Risk Level: High)

Non-Canadian control in fact is indicated when:

- Less than 50 percent of the shareholders or directors present at a meeting are Canadian;
- Less than 50 percent of the members at a board of directors meeting have been appointed by Canadian shareholders; and/or
- Non-Canadians can cast the deciding vote in a tie-breaker situation.

Risk Mitigation

For shareholder meetings, when there is an equal number of Canadian and non-Canadian shareholders present, there must be a provision to ensure the Canadian shareholders always have the ability to cast the deciding vote.

For board of directors' meetings, when there is an equal number of Canadian and non-Canadian board members present, there must be a tie-breaker provision to ensure the director allowed to cast the deciding vote is a Canadian appointed by Canadian shareholders.

Shareholder Rights Factors

1. Veto Rights

Veto rights allow a shareholder or director to reject or veto a resolution in spite of having majority assent. Veto rights come in many different forms. For example, the affirmative vote required of a specific shareholder or director for a resolution to pass is a type of veto right. The requirement for unanimous shareholder or director approval is another.

Generally, there are no Canadian ownership implications associated with non-Canadian shareholders and their designated directors having veto rights to protect minority shareholder investment.

Risk Conditions (Risk Level: High)

A significant accumulation of restrictions could indicate that control in fact resides with non-Canadians. The risk increases when these restrictions are combined with other means of exercising influence.

Veto rights which are comprehensive and broad could indicate that control in fact resides with non-Canadians. This includes veto rights regarding:

- the selection, removal and remuneration of the company's officers and executives;
- the approval of the annual business plan; and
- changes to airline operations of the carrier.

Risk Mitigation

As a general rule, veto rights that do not pose any control in fact implications are limited to matters outside the scope of the day-to-day operations of the air carrier. Veto rights that do not pose control in fact concerns must not have any impact on the operational, marketing and financial decisions made on an ongoing basis. For example, matters not normally considered to show control in fact include veto rights regarding:

- the payment of dividends;
- the sale or transfer of major assets;
- the incursion of large capital expenditures;
- entry into large and significant agreements, mergers, amalgamations and large business purchases;
- amendments to incorporation documents; and
- the issuance or redemption of capital stock.

The above kinds of veto rights could represent normal and acceptable provisions to protect the minority shareholders' investment.

The Agency will view control in fact as not residing with Canadians when the non-Canadian shareholders have the ability to veto matters that could be viewed as being related to day-to-day operations, or matters that do not pose a significant and demonstrable risk to the non-Canadian shareholder.

2. Security Rights, Options and Warrants

The individual rights, privileges, restrictions and conditions attached to each class of security are relevant when evaluating control in fact. In addition to voting rights, there are other rights that could influence where control in fact lies. These include:

- redemption rights (right to force the corporation to buy back securities);
- conversion rights (right to exchange one security for another); and
- buy-out rights (right to acquire another person's interest in a security).

The same applies to rights associated with warrants and options that provide the right of conversion or the right to purchase securities of the corporation at specified prices. This particularly applies in cases where the holder has the right to convert from a non-voting to a voting interest.

Risk Conditions (Risk Level: Risky When Combined With Other Factors)

When a non-Canadian investor is the sole holder of the right or of a disproportionate amount of the rights, it indicates control in fact resides with non-Canadians, particularly when the rights can be exercised at prices below the market price.

Risk Mitigation

To ensure that control in fact resides with Canadians, the aforementioned rights must be exercisable at fair market value and be reciprocal to all of the shareholders.

3. Rights of First Refusal/Pre-emptive Rights

Rights of first refusal and pre-emptive rights are contractual rights. These exist when a person has an opportunity to purchase securities or other assets from the owner on specified terms prior to their being offered for sale to a third party. All shareholders would normally have these rights in proportion to holdings for specific securities purchases.

If the potential purchase of securities or other assets could result in the air carrier no longer being Canadian, the proposed transaction will generally be considered to cause the loss of Canadian status. An additional provision would need to be inserted to ensure that no purchase of this type can proceed and be completed unless the air carrier remains Canadian.

Risk Conditions (Risk Level: Risky When Combined With Other Factors)

The Agency will view control in fact as not residing with Canadians when:

- rights of first refusal or pre-emptive rights are exercisable below fair market value and reflect terminology that unilaterally benefits the non-Canadian shareholder;
- rights concerning the purchase of specific securities are not reciprocal between the Canadian and the non-Canadian shareholder(s) and/or are disproportionate with the shareholdings in favour of the non-Canadian, or
- rights are not reciprocal to both Canadian and non-Canadian shareholders (i.e., are in favour of the non-Canadian shareholders only).

Risk Mitigation

If rights of first refusal or pre-emptive rights reflect typical terms and are exercisable at fair market value, the Agency will generally view such rights as a means to protect shareholders from situations such as undesirable takeovers.

Rights concerning the purchase of specific securities should be held by all shareholders and be commensurate with the shareholdings.

4. Power to Wind Up the Company

An individual shareholder or lender with the power to close down the company by calling loans payable on demand may be in a position to exercise control in fact over the affairs of an air carrier. This is because loans may contain standard covenants that:

- restrict how the funds may be used (e.g., the funds can only be used for a specific business purpose);
- restrict how the business may disburse funds (e.g., restrict the payment of dividends when the business is not profitable); and
- require that certain conditions be maintained (e.g., ensuring the business remains solvent and complying with any applicable legislation).

The breach of such covenants typically provides the lender with the right to call a loan payable and/or force the winding up of the business. This winding up may be carried out through sale, liquidation or otherwise. If loans contain standard

commercial loan covenants that are reflective of an arm's length lending relationship, where a lender is reasonably protecting itself from default, this is not indicative of control in fact over the company's affairs. For example, a bank does not normally control a company, even though it might have the ability to call a demand loan, due to a material breach of covenants leading to the winding up of the company.

Risk Conditions (Risk Level: High)

If a non-Canadian's ability to influence the winding up of a company is so great that it poses an ongoing threat that effectively forces the Canadian board members to comply with the ongoing strategic business decisions of the non-Canadian board members, the Agency will consider this to be dominant and determining influence by the non-Canadian. This will result in the Agency finding that control in fact does not reside with Canadians.

For example, the breach of any covenant (within a very exhaustive list of items that encompass day-to-day strategic decision-making matters) that could trigger the wind-up process would be viewed as a condition that poses an ongoing threat.

Risk Mitigation

To ensure that a loan does not create a control in fact concern, the loan agreement should:

- only contain standard commercial terms and covenants that protect the lender from the usual lending risks, and
- not interfere with typical day-to-day operations or strategic business decisions.

Risks and Rewards Factors

1. Risks and Benefits

The Agency generally expects that the parties that assume the majority of the risks and are entitled to the majority of benefits related to the air carrier's operation are also the parties with the ability to exercise control in fact. Risks are generally tied to the level of economic interest in the air carrier, including:

- investment in its voting, non-voting and debt securities;
- commitments for future investment; and
- any guarantees that may have been provided.

Benefits generally come from an entitlement to share in the expected profit of the company. They can also come from revenues that result from aircraft lease, managerial services, royalty and other similar agreements. However, as this is not always the case, the evaluation of other factors specific to each case is critical to a determination.

Risk Conditions (Risk Level: Medium)

Non-Canadian control in fact may be indicated if the disparity between the proportion of voting interests and the level of capital investment by the non-Canadian investor increases. The non-Canadian investor will be expected to ensure it has levers in place to minimize its risk while maximizing its return on investment. Consequently, applicants should expect applications of this nature to receive a high degree of scrutiny.

Non-Canadians whose commitments for future investment are necessary for the ongoing survival of the business raise control in fact concerns. This is because the business is dependent upon the non-Canadian investor, who is assuming the greatest risk. The higher the level of risk, the higher the expected reward. This can lead to situations where the non-Canadian gains dominant and determining influence.

A similar situation arises when the business is dependent upon the guarantee of the non-Canadian investor to finance the business. The reliance on non-Canadians for normal business financing activities strongly indicates non-Canadian control in fact.

Risk Mitigation

There may be situations where a non-Canadian invests a significantly higher proportion of capital than the Canadian shareholders, but accepts a disproportionately lower voting share in order to comply with the maximum permitted voting interest for non-Canadians under the Act. In these situations, applicants should ensure any agreements are structured

to limit the non-Canadian to a more passive role in the business and to have only those rights necessary to protect its investment in a minority voting situation.

To avoid raising control in fact concerns, the long-term viability of the business should not be entirely dependent on receiving future investment by the non-Canadian investor.

With respect to guarantees, applicants should ensure they are not dependent upon a non-Canadian investor to guarantee their debt. This is to avoid any concerns that the non-Canadian is assuming the majority of the investment risk.

2. Concentration of Voting Interests

The concentration of voting interests owned and controlled by Canadians versus non-Canadians can show where control in fact lies. Situations can arise where the majority of the voting interests—while owned and controlled by Canadians—are dispersed among a large number of unrelated individuals each holding a small interest. In this situation, if a non-Canadian or a group of non-Canadians holds a concentration of the voting interests, it could indicate Canadian shareholders are not able to exercise control in fact.

As defined in the Act, the voting interest requirement contains restrictions to ensure that affiliated non-Canadians collectively do not hold more than 25 percent of the total voting interests. The Agency will verify that this restriction is being respected. It will also scrutinize the ownership structure to see whether a relatively small number of unaffiliated non-Canadians hold a disproportionate amount of the voting interests (versus a large number of unrelated Canadian shareholders with relatively small shareholdings).

Risk Conditions (Risk Level: Medium)

Non-Canadian control in fact may be indicated when there are multiple Canadian shareholders and only one or two non-Canadian shareholders exist. In these situations, the non-Canadian shareholder(s) may try to create a strategic voting bloc. By aligning themselves with one or more of the Canadian shareholders, the non-Canadian shareholder(s) could instruct votes. While not necessarily indicating control in fact by the non-Canadian

shareholder(s), the Agency will consider whether the non-Canadian shareholder(s) could be in a position to influence the votes of a Canadian shareholder to vote.

Risk Mitigation

Applicants should ensure that the ownership structure is designed in such a way to avoid situations where a small group of affiliated and/or unaffiliated shareholders could form a voting bloc.

Business Affairs and Activities Factors

1. Debt

Debt transactions executed in the normal course of business activity do not normally raise any control in fact concerns. However, there could be control in fact implications in cases where the monetary size of the debt is significant to the other sources of financing. Concerns may be raised if there is reason to believe the intent for the transaction extends beyond typical financing. In these cases, the specific terms of the agreements would be of particular significance. The Agency would scrutinize the following in particular:

- Provisions that provide for the debt to be converted into voting securities of the company; and
- Restrictions or veto rights that go beyond what would normally be expected from a passive lender.

The nature of the debt holders and their relationship to the air carrier would be equally important. A non-Canadian financial or lending institution would not normally have an interest in managing or influencing the direction of an air carrier. This would not raise concerns regarding control in fact. However, a non-Canadian air carrier or other non-Canadian investor might have different intentions. These could magnify indicators of control in fact.

Risk Conditions (Risk Level: Medium)

Non-Canadian control in fact may be indicated when the applicant relies on substantial debt financing provided by a non-Canadian who is not at arm's length from the non-Canadian shareholder.

Risk Mitigation

Commercial loans that are not guaranteed by non-Canadians and that are obtained from arm's length lenders such as financial institutions for the purpose of financing business operations do not raise control in fact concerns.

Loans obtained from non-Canadian lenders who have a relationship with the applicant, such as a shareholder of the business, should be based on commercial lending terms that reflect an arm's length relationship to avoid raising control in fact concerns.

Any restrictive covenants must be strictly limited to standard commercial lending clauses limited to the protection of a creditor. These covenants cannot interfere in any way with the normal day to day operations of the business.

2. Guarantees

A debt or loan guarantee is a promise by a person or an entity to assume a debt obligation in the event of non-payment by the borrower. When a non-Canadian provides the guarantee, control in fact considerations will include:

- the monetary size,
- the terms,
- the borrower's level of dependence, and
- the guarantor's intent.

Risk Conditions (Risk Level: Medium)

Non-Canadian control in fact is indicated when an applicant is dependent upon a guarantee from a non-Canadian (e.g., a non-Canadian shareholder) to obtain or secure debt financing.

Risk Mitigation

To avoid raising control in fact concerns, lending agreements must not contain any means for a non-Canadian guarantor to exercise its influence over the direction of the air carrier.

3. Lease of Assets

The operation of an air service is a capital-intensive business. It often involves the purchase or lease of aircraft, hanger space and other key assets.

An agreement with arm's length parties for the use of assets at market terms would not normally indicate control in fact. Control in fact is not normally indicated even in cases where a high concentration of assets is being provided by one or more parties.

Control in fact may be indicated when an air carrier is dependent on a specific party to provide assets that cannot be obtained practically or financially elsewhere. In these cases, the Agency would consider the following:

- The nature of the relationship;
- The terms of the agreement; and
- The intent or ability of the lessor party to influence the affairs of the air carrier.

Risk Conditions (Risk Level: Medium)

Control in fact concerns are raised when an applicant is dependent upon a non-Canadian who is not at arm's length from the non-Canadian shareholder to provide the aircraft. Control in fact concerns are also arranged when the terms of the arrangement contain provisions that allow the non-Canadian to exercise dominant and determining influence. An example of such influence would include any provision that covers day-to-day business decisions such as aircraft routes and flight frequency.

Risk Mitigation

To avoid raising control in fact concerns, asset lease agreements involving non-Canadians should reflect standard terms associated with an arm's

length business relationship. If the lease agreement contains any standard restrictive covenants, they must be limited to provisions that are intended to protect the assets and credit risk to the lessor. Covenants cannot infringe upon the normal day-to-day or strategic business operations of the applicant.

4. Financial Strength and Business Activity

The comparative financial strength, business activity and relevant expertise of individual shareholders can indicate which shareholders exercise influence and control in fact over an air carrier. This is especially true when dealing with shareholders who are non-Canadian air carriers. In these situations, the nature of the non-Canadian shareholders equity investment is important. This could be a passive investment from a private equity investment firm, or an investment from a business with extensive knowledge and experience in the aviation sector that intends to be active in the business operations. Also important is the ability or the need for the non-Canadian shareholders to offer financial, managerial and operational assistance to the air carrier.

The greater the financial ability and airline business acumen of the individual Canadian shareholders, the less likely a large, non-Canadian investor would be viewed as raising any control in fact concerns.

Risk Conditions (Risk Level: Risky When Combined With Other Factors)

Control in fact concerns are raised when non-Canadian shareholders have the ability to exercise dominant and determining influence through their greater experience and business knowledge in the aviation sector.

Risk Mitigation

If an applicant can show that the Canadian shareholders have the aviation sector experience and expertise necessary for the operation of the business, this reduces concerns that the non-Canadian investors may use their business experience as a means to exercise control in fact.

5. Management Agreements

Management services can be an essential component of an air carrier's business strategy. However, some management agreements could result in an independent entity managing the affairs of the air carrier. Payment should be based on services rendered. Any incentive bonus should represent a small percentage of the overall fee and the overall corporate profit.

Risk Conditions (Risk Level: Medium)

Control in fact concerns are raised when the person providing management services is a non-Canadian shareholder or is affiliated with a non-Canadian shareholder.

Non-Canadian control in fact is indicated when an agreement does not allow the board of directors of the applicant to have:

- the unilateral right to accept or reject any advice given by the manager; or
- the right to terminate the agreement.

Risk Mitigation

When management services are provided by a non-Canadian, the following terms should be met to avoid any control in fact concerns:

- The manager should be an independent contractor in the airline management business rather than an employee of a carrier or an affiliate of any non-Canadian shareholders;
- The board of directors should have the authority for all major decisions; and
- The board of directors should have the right to terminate the management agreement (on reasonable notice and terms) if they are not satisfied with the manager's performance.

6. Operational or Service Agreements

Operational or service agreements for the provision of services to the air carrier can sometimes include the provision of an aircraft with flight crew, maintenance

activities, ground-handling services, and reservations and other computer-based services.

Non-Canadian control in fact is indicated when:

- the service provider handles operations of the air carrier; or
- the service provider fee is based directly or indirectly on the profit or loss of the air service.

  Risk Conditions (Risk Level: Medium)

  Control in fact concerns are raised when a non-Canadian management services provider performs many or all of the major operational activities of the air service business on its behalf. This includes:

  - managers who are not at arm's length from a non-Canadian shareholder; and
  - any non-Canadian shareholders or their affiliates acting in the capacity of a management services provider.

  Risk Mitigation

  When an air carrier contracts a non-Canadian service provider to perform the day-to-day operational functions of the air carrier, or enters into an arrangement (such as a joint venture) with a non-Canadian air carrier, all major decisions (such as approval of the business plan, incursion of large debt and operational expansion) should remain with the air carrier's board of directors in order to avoid any control in fact implications. The air carrier must also be entitled to the profit and be responsible for any loss associated with the operation of the air service.

7. Charterer/Air Carrier Relationship

A charterer leases the full aircraft capacity from the air carrier, which it then sells to the public, typically through a travel agent. Charterers fall under provincial jurisdiction. They are not subject to the Canadian ownership and control requirement of the Act. Charterers have the ability to enter into contracts with air carriers that dictate items such as the level of service, routes and schedules.

Normally, these charterer/air carrier relationships do not pose any federal control in fact implications.

Risk Conditions (Risk Level: Medium)

Control in fact concerns are raised when:

- a non-Canadian charterer assumes the role and responsibility of the air carrier, as shown by the assumption of the risks and entitlement to the benefits relating to the air carrier's operations;
- the air carrier intends to conduct business with only one charterer; or
- the air carrier does not have an arms' length relationship with the non-Canadian charterer.

Risk Mitigation

Charterer/air carrier relationships do not pose control in fact concerns on the air carrier if:

- the air carrier assumes the risks and benefits relating to the air carrier's operations; and/or
- the charterer, if non-Canadian, is in an arm's length relationship with the carrier.

Annex D: Examples of Previous Canadian Ownership Determinations

Below are links to some of the Agency's previous public decisions that specifically address the requirement to be Canadian. There is particular emphasis in this list on decisions discussing the voting interest and control in fact requirements.

This list is not exhaustive, and is not presented in any particular order of priority. This list will be updated periodically.

- Decision No. 297-A-1993 (Canadian Airlines Decision)
- Decision No. 299-A-2000 (Air Canada Decision)
- Decision No. 511-A-2004 (ACE Decision)
- Decision No. 10-A-2010 (Sunwing Airlines Decision)
- Public redacted version of October 6, 2010 Confidential Decision (CHC Helicopters Canada Decision)
- Decision No. 32-A-2012 (Thunderhook Air Charter Services Decision)
- Decision No. 359-A-2012 (Cougar Helicopters Decision)
- Decision No. 423-A-2012 (Sunwing Airlines Inquiry)
- Decision No. 493-A-2012 (Alpine Helicopters Decision)

Court File No.: **A-102-20**

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CANADIAN TRANSPORTATION AGENCY

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MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CANADIAN TRANSPORTATION AGENCY

PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. The applicant, Air Passenger Rights, seeks judicial review of the Statement on Vouchers, which was published by the Canadian Transportation Agency (Agency) on March 25, 2020, in response to widespread domestic and international flight cancellations prompted by the outbreak of the COVID pandemic.

2. The purpose of the Agency's submissions is to provide the relevant background and to explain the scope of the Agency's jurisdiction in adjudicative and regulatory matters, including its

practice of publishing guidance materials on its website.[1]

B. Statement of Facts

The Agency

3. The Agency is made up of up to five full-time members appointed by the Governor in Council, including the Chairperson, and up to three temporary members. The Chairperson is the chief executive officer of the Agency and has the supervision over and direction of the work of the members and the Agency's staff.[2]

4. The Agency has two roles under its enabling legislation, the *Canada Transportation Act* [3] (CTA): it is at once a quasi-judicial tribunal and regulator. It has a broad mandate in respect of transportation matters under the legislative authority of Parliament.

5. As a quasi-judicial tribunal, the Agency is tasked with resolving commercial and consumer transportation-related disputes, in the air, marine and rail sectors, as well as adjudicating accessibility issues for persons with disabilities. As a regulator, the Agency develops and applies ground rules that establish the rights and responsibilities of transportation service providers and users, and that level the playing field among competitors. In both roles, the Agency may be called upon to deal with matters of significant complexity.[4]

6. With respect to the CTA, the Supreme Court of Canada has stated that "[t]he scheme and object of the Act are the oxygen the Agency breathes".[5]

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[1] *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201 at paras 35-38.
[2] *Canada Transportation Act*, S.C. 1996, c 10 [*CTA*], ss. 7, 13.
[3] For the purposes of this Memorandum, all references to the CTA reflect the provisions as they existed at the time the Statement on Vouchers was published.
[4] *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at paras 50-52.
[5] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.,* 2007 SCC 15 at para 98.

7. The CTA is highly specialized regulatory legislation with a strong policy focus.[6] Canada's National Transportation Policy is set out in section 5 of the CTA. It highlights the objectives of ensuring a competitive, economic and efficient transportation system. It provides that, among other things, the lowest total cost is essential to serve the needs of users. It calls for a transportation system that is accessible without undue obstacle to the mobility of all persons. It also calls for regulation and strategic public intervention to achieve economic or social outcomes that cannot be achieved satisfactorily by competition and market forces alone.

8. The Supreme Court of Canada has stated that "the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate."[7] The Federal Court of Appeal has also confirmed that the Agency legitimately draws upon its regulatory experience, its knowledge of the industry and its expertise in the transportation sector when interpreting legislation within its mandate.[8]

9. The Agency exercises both regulatory and adjudicative functions in the area of air passenger protection. In both functions, its jurisdiction is largely centered on the air carrier's tariff, which is the carrier's contract with passengers. The Agency has a longstanding power to render case-by-case decisions about whether the terms and conditions of a particular tariff are reasonable, not unjustly discriminatory and clear. If it makes such a decision, the Agency may suspend or disallow the carrier's tariff and order its amendment.[9]

10. Following amendments to the CTA in 2018, the Agency made the *Air Passenger Protection*

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[6] *Ibid.*
[7] *Ibid.*
[8] *Canadian National Railway Company v. Emerson Milling Inc. et al.,* 2017 FCA 79 at para 73.
[9] *Supra note 2* [*CTA*], ss. 67.2; *Air Transportation Regulations* (for domestic), SOR/88-58 [*ATR*], s. 107; *Air Transportation Regulations* (for international), SOR/88-58 [*ATR*], s. 111, 122.

Regulations (APPR), which established standardized, minimum carrier obligations on matters such as compensation for flight disruptions and lost or damaged baggage and refund entitlements.[10] These obligations are deemed to form part of carrier tariffs, both domestic and international.[11]

11. Finally, the Agency can hear passenger complaints about whether a carrier has applied its tariff, including the obligations in the APPR. If it finds the carrier has not applied its tariff, the Agency may order that it be applied, award compensation for expenses to the passenger and take appropriate corrective measures.

PART II - POINTS IN ISSUE

12. The Agency takes no position on the issues and accepts them as formulated by the parties.

PART III - STATEMENT OF SUBMISSIONS

A. Adjudicative Function

13. When exercising its adjudicative function, the Agency acts like a court.

14. As such, the Agency has adopted a number of measures to ensure its impartiality and independence when acting in this role. This includes: the adoption of the *Canadian Transportation Agency Rules* (Rules);[12] the adoption of a *Code of Conduct for Members*;[13] and the creation of the Registrar's position.

15. Adopted pursuant to section 17 of the CTA, the Rules set out the process to be followed when adjudicating complaints. This Court has confirmed that the Rules set out procedures that

[10] *Air Passenger Protection Regulations*, SOR/2019-150 [*APPR*].
[11] *Supra note 2* [*CTA*], ss. 86.11(4).
[12] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104.
[13] Code of Conduct for Members of the Agency, Exhibit 40, Affidavit of Gabor Lukacs, affirmed Sept 7, 2023.

"provide sufficient flexibility to the [Agency] to allow it to adjudicate disputes in a manner that fulfils the requirements of procedural fairness."[14]

16. Pursuant to the Rules, any document filed must be filed with the Secretary of the Agency and be communicated to the parties.[15] All filed documents are placed on the Agency's public record, unless a request for confidentiality has been filed and granted by the Agency.[16]

17. Only information officially entered into the record of the proceedings will be considered by the Agency in rendering its decision.

18. In addition to the Rules, the Agency has adopted a mandatory *Code of Conduct for Members* (Code). The Code requires that members refrain from communicating directly or indirectly with any party, counsel, witness, or other non-Agency participants appearing before them, except in the presence of all parties.[17] Pursuant to the Code, members must also refrain from communicating with the news media or political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.[18]

19. As with a court, the Agency has a Registrar. The Registrar provides general information and answers inquiries from the parties with respect to the Agency's processes and procedures. These communications are not placed on the record or shared with the members who eventually decide the case.

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[14] *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 200.
[15] *Supra note 12*, Rules 7(1) and 8.
[16] *Supra note 12*, Rule 7(2).
[17] Para. 30 of the Code of Conduct for Members of the Agency, Exhibit 40, Affidavit of Gabor Lukacs, affirmed Sept 7, 2023.
[18] Paras. 38 and 39 of the Code of Conduct for Members of the Agency, Exhibit 40, Affidavit of Gabor Lukacs, affirmed Sept 7, 2023.

B. Regulatory Functions

20. As a regulator, the Agency exercises four main functions within the authority granted to it by Parliament:

    1) It makes determinations relating to matters such as the issuance of licences and permits, makes rail economic determinations, and grants exemptions where appropriate;
    2) It is empowered to subject any provisions of the CTA and regulations made under it to administrative monetary penalties, and to take enforcement action through designated enforcement officers;
    3) It exercises delegated legislative power in making regulations;
    4) It develops and publishes guidance material to provide information to the public and regulated entities.

21. In contrast to when it is exercising its adjudicative function, to fully and properly fulfill some of these regulatory functions, the Agency must consult and engage with government officials and other external parties, including regulated industry and other interested groups, such as consumer and disability rights organizations. The extent to which the Agency consults and engages with external parties will depend on the regulatory function at issue.

Determinations and Exemptions

22. The Agency has the power under the CTA to issue different types of regulatory authorities, which it does by issuing determinations. Applications for these authorities typically involve a single applicant who comes to the Agency for an authority to perform an activity, for instance a licence to operate an air service,[19] or an authorization to construct a railway.[20] The Agency

[19] *Supra note 2* [*CTA*], ss. 61, 69, 73, and 75.1.
[20] *Supra note 2* [*CTA*], ss. 98.

will issue the authority once satisfied that the conditions under the CTA have been met.

23. This often involves coordination with other government officials when the regulatory authority requested can only be approved by the Agency if another body has given its own regulatory authorization. For example, a license to operate an air service can only be issued by the Agency once a Canadian Aviation Document has been issued by the Minister of Transport.[21]

24. The Agency may also make regulatory determinations to exempt a person from any obligation contained in Part II of the CTA (Air Transportation) or any regulation made thereunder, when appropriate.[22] The CTA gives the Agency a broad discretion to issue exemptions "on such terms and conditions as it deems appropriate".[23]

Compliance and Enforcement

25. The Agency is empowered under subsection 177(1) of the CTA to designate any provisions of the CTA or any regulation as a provision the contravention of which may be proceeded with as a violation. Administrative monetary penalties are issued by designated enforcement officers designated under the CTA.[24]

26. Compliance assurance activities include education and promotion, and the Agency's enforcement officers, like those of all other regulators, engage regulated entities on a proactive basis for this purpose, in line with Cabinet Directive requirements.[25]

Regulation Making

[21] *Supra note 2* [*CTA*], ss. 61, 69, 73.
[22] *Supra note 2* [*CTA*], ss. 80.
[23] *Lukács v. Swoop Inc.*, 2022 FCA 71 at para. 4; see also Exhibit 32, Affidavit of Gabor Lukacs, affirmed Sept 7, 2023 (Determination No. A-2020-42); and Exhibit 33, Affidavit of Gabor Lukacs, affirmed Sept 7, 2023 (Determination No. A-2020-47).
[24] *Supra note 2* [*CTA*], ss. 178.
[25] *Cabinet Directive on Regulation,* s 6.2.

27. The CTA contains several provisions delegating to the Agency the authority to make regulations on a number of topics in the air sector,[26] the rail sector,[27] and for the purpose of eliminating barriers to the mobility of persons with disabilities.[28]

28. When making regulations, the Agency must involve other parts of the government.[29] The Agency must consult with the Minister of Transport when making the APPR[30] and regulations for the purpose of eliminating barriers to the mobility of persons with disabilities.[31] The Agency must give the Minister of Transport notice of any regulation it proposes to make.[32] Like other regulators, the Agency works with the Department of Justice when drafting the proposed text of regulations. Finally, any regulation made by the Agency is subject to the approval of the Governor in Council.[33] For this reason, the Agency engages with Treasury Board Secretariat and the Minister of Transport, who present the regulations to Cabinet for approval.

29. Regulated entities and interested persons or organizations are given the opportunity to provide their input into the proposed regulations by various means after consultation papers and draft regulations have been published by the Agency.

Guidance Material

30. Like other organizations with a dual role, the Agency develops and publishes guidance material on a broad range of topics that engage its regulatory and decision-making functions to provide

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[26] *Supra note 2* [*CTA*], ss. 86(1), 86.1(1), 86.11(1).
[27] *Supra note 2* [*CTA*], ss. 92(3), 117(2), 128(1), 137(3), 157(1), 169.31(1.1).
[28] *Supra note 2* [*CTA*], ss.170(1).
[29] *Open and Accountable Government (2015); Cabinet Directive on Regulation,* s 4.0. See also the *Policy on Regulatory Development*, s 7.1.2.
[30] *Supra note 2* [*CTA*], ss. 86.11(1).
[31] *Supra note 2* [*CTA*], ss. 170(1).
[32] *Supra note 2* [*CTA*], ss. 36(2).
[33] *Supra note 2* [*CTA*], ss. 36(1).

information to the public and industry stakeholders about legislative and regulatory requirements, the Agency's services, its processes, and the manner in which it makes decisions.[34] Guidance material is generally prepared by Agency staff with the oversight of the Agency's Chairperson and Chief Executive Officer and, as appropriate, members.

31. The Agency often consults Transport Canada when developing these materials to inform them of regulatory actions being undertaken but also to ensure policy alignment, where appropriate.

32. The Agency sometimes engages with industry stakeholders when developing this material, to educate and inform them about their obligations, and to take into account, as appropriate, the realities of their operations, with regard to the Agency's policy objectives.

33. Guidance material is, by its nature, not a legally binding instrument.[35] The Agency balances the need to provide guidance to industry and the public on their rights and responsibilities under the law with the requirement that each case be decided on its own merit, in light of the applicable legislation and regulations.

34. This balance is achieved by publishing guidance material that is expressly drafted as non-binding, which means that parties can always make the case that such guideline should be set aside by the decision-maker.[36] The material indicates that while its purpose is to provide information, guidance or clarifications of regulatory requirements, in the event of discrepancies between the guidance and the provisions of the CTA or associated regulations,

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[34] *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, at para 22.
[35] *Thamotharem v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*, 2007 FCA 198, at para 56.
[36] See for example: *Interline Baggage Rules for Canada: Interpretation Note*, Exhibit A, Affidavit of Meredith Desnoyers, affirmed Oct 13, 2023 (Pages 4 and 18, Intervener Record); *Notice to Industry: Applications for Exemptions from Section 59 of the Canada Transportation Act*, Exhibit B, Affidavit of Meredith Desnoyers, affirmed Oct 13, 2023(Pages 31 and 36, Intervener Record); *Guide to Canadian Ownership and Control in Fact for Air Transportation*, Exhibit C, Affidavit of Meredith Desnoyers, affirmed Oct 13, 2023(Page 41, Intervener Record).

the latter prevails.

C. Costs

35. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs.[37]

36. It is submitted that the Agency has acted in good faith. The Agency does not seek costs and submits that in the circumstances it should not be ordered to pay costs.

PART IV - ORDER SOUGHT

37. The Agency respectfully defers to the Court as to the outcome of the judicial review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 21st day of December, 2023.

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[37] *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para 47 citing Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998).

PART V - LIST OF AUTHORITIES

Statutes and Regulations

Canada Transportation Act, SC 1996, c 10, ss. 7, 13, 36(1), 36(2), 61, 67.2, 69, 73, 75.1, 80, 86(1), 86.1(1), 86.11(1), 86.11(4), 92(3), 98, 117(2), 128(1), 137(3), 157(1), 169.31(1.1), 170(1), 178.

Air Transportation Regulations, SOR/88-58, ss. 107, 111, 122.

Air Passenger Protection Regulations, SOR/2019-150.

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104, Rules 7(1)(2), 8.

Case Law

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