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October 13, 2016

Via email: TC.Transportationfuture-Lefuturedestransports.TC@tc.gc.ca

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport
Transport
330 Sparks Street
Ottawa, ON K1A 0N5

Dear Minister:

Re: *Canada Transportation Act* Review Report

I am writing on behalf of the Canadian Bar Association's Air and Space Law Section ("CBA Section") regarding the *Canada Transportation Act* (the "Act") Review Report ("Report"), tabled in Parliament by the Minister of Transport on February 25, 2016. In particular, our response is to recommendations made in Chapter 9 of the Report: Air Transport.

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

As a general comment, the CBA Section believes that economic policy related to transportation should be with the Canada Transportation Agency ("CTA"), and not with Transport Canada. To the extent of our knowledge, Canada is the only Chicago Convention signatory-nation that requires the safety and security regulator to also address matters of competition and economics, despite the fact that these matters are dealt with by the CTA on a daily basis.

In contrast, in the United States, the Department of Transportation, which oversees economic licences and bilateral negotiations, is responsible for making policy determinations and granting exemptions. The Federal Aviation Administration remains responsible for the technical regulation of safety and security services related to aeronautics. The benefit of this structure includes cost efficiencies through the elimination of duplication in expertise, as well as greater certainty within the industry as to the legal standards being applied to economic matters.

Our comments are organized under the specific recommendations found in the Report.

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Recommendation 4(a) – Increase foreign ownership limits to at least 49 percent for air carriers operating commercial passenger services

The Canadian ownership requirements provide for both a limit on the *de jure* control of air carriers operating commercial air services (excluding specialty air services) and a prohibition against *de facto* control by a non-Canadian. While the increase to 49% by way of legislation, as opposed to one-off exemptions, will provide certainty and a level playing field to all market participants, we question why investors would have a greater attraction to a 49% level of foreign investment, than they do at the present 25% level. There would be no change in the margin of return on their investment, and while one possible attraction would presumably be a greater degree of minority shareholder protection (providing greater comforts to foreign investors), this same protection would very likely offend the *de facto* control requirements under the Act.

Additionally, sophisticated investors do not traditionally make 49% investments in entities without elements of control being in their favor. Indeed, most major corporations are controlled with a significantly lower equity interest than even the 25% level presently allowed. All of the previous exemptions granted by the Minister to the 49% level have, notwithstanding regulatory decisions to the contrary, resulted in clear *de facto* control residing outside of the Canadian jurisdiction. For these reasons, should this recommendation be adopted, changes would also be necessary to the Act insofar as the *de facto* control provisions are concerned.

In discussing the definition of "Canadian", as set out under section 55 of the Act, it is important to note that the present approach taken by Transport Canada in applying this definition differs significantly from that adopted by the CTA. Namely, Transport Canada does not review applications for matters of *de facto* control, nor does it engage in a detailed review of the *de jure* control factors of a Canadian corporation. For example, a Canadian corporation, predominantly owned or controlled by a non-Canadian can apply for, and be approved, to provide specialty air services domestically. As well, given the surge of market demand for unmanned aerial vehicles, non-Canadian operators have been applying for, and receiving, Special Flight Operator Certificates simply by using a Canadian corporate vehicle for the delivery of their services. It is only when an operator is required to apply to the CTA, that these ownership matters can be uncovered. This creates uncertainty for the industry, and it is unreasonable for the same provision in the Act (s. 55) to be interpreted so differently by two government regulatory agencies.

We suggest that in the short term, the different approaches adopted by the CTA and Transport Canada in respect of s. 55, should be meaningfully addressed and reconciled. In the long term – and in considering an increase to foreign ownership restrictions to 49% of voting equity – a more in-depth review of the *de facto* control requirements is required. In this age of a globalized aviation industry, consideration must be given to whether:

i. *any* requirement of Canadian ownership and control is necessary for national interests; and
ii. such restriction serves or impairs the levels, choices and cost of air transportation for Canadians.

Recommendation 8(a) - Greater alignment between the regulatory and operational functions of aviation security

The Canadian Air Transport Security Authority ("CATSA") is currently responsible for operational service delivery, while Transport Canada Security is responsible for regulatory functions, including

overseeing whether the services provided by CATSA meet the regulatory guidelines. The operational and oversight functions related to aviation security should not be merged under a single, integrated security agency. This recommendation gives rise to substantial concerns related to self-policing and impartiality.

While this recommendation seems to relate to operational efficiencies, we question the ability of a single agency to provide meaningful oversight, and ensure the quality of aviation security services. For example, should there be a breakdown in the service delivery process or security standards are not met, what is likelihood of a report or review by the regulatory arm of the single-integrated security agency that will effectively lay blame on and propose meaningful changes to its own practices and procedures? Would the service providers that CATSA presently contracts with self-enforce their compliance with security regulations? Would the issuance of Restricted Area Identification Cards also be moved to be under the jurisdiction of this single-integrated security agency? These are all areas of serious concern that could result in lower levels of accountability and compliance.

If this recommendation were implemented, sufficient procedural protections would need to be put in place to ensure that independent and accessible recourse was available to complainants alleging improper exercise of authority by the agency. This is in keeping with the CBA's objective of promoting access to the justice.

We strongly urge that further consultations be undertaken on this recommendation, and that in any event, any such single-integrated security agency setup must provide for procedural protections for those who utilize the security services.

Recommendation 9 (c) - Amending the Canada Transportation Act to require complainants to have been a customer of the operator against whom a complaint is made

We strongly support the report's finding that only customers of an operator should be entitled to raise a complaint against the operator. The current language of the Act, which confers standing on "any person", is too broad and open to abuse. It could also hinder industry and regulatory progress by drawing CTA resources away from other pressing issues.

Generally speaking, while the CBA Section supports the use of ADR measures, the CTA complaint process can be both inefficient and unduly complicated for both air carriers and passengers. This is due to the fact that the CTA uses three stages of complaint resolution: **facilitation**, **mediation** and **adjudication**. The delays and uncertainty associated with these stages undermines the efficacy of the complaint system in promoting the timely and fair resolutions of complaints. Their necessity and value should be reviewed.

We hope our comments will assist you in revising the CTA to strengthen the safety, efficiency and competitiveness of Canada's transportation system. We would be pleased to discuss any of the above comments with you in more detail.

Yours truly,

(original letter signed by Kate Terroux for Patrick H. Floyd)

Patrick H. Floyd
Chair, CBA Air and Space Law Section