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VIA EMAIL: *TC.natair-aernat.TC@tc.gc.ca*

Colin Stacey
Director General, Air Policy
Transport Canada

Dear Mr. Stacey:

Re: Flair Airlines' Request for a Temporary Exemption from Compliance with ss. 61(a)(i), 69(1)(a)(i), and 73(1)(a)(i) of the *Canada Transportation Act*

Please accept the following submissions with respect to Flair Airlines' [**Flair**] request for a temporary exemption from the "controlled-in-fact by Canadians" requirements.

I. Overview

Flair's possible failure to comply with the "controlled-in-fact by Canadians" requirements should not be allowed to go without serious consequences; however, it dwarfs in comparison with the reliability of service concerns affecting Flair's passengers daily.

Flair's presence in the market place offers a considerable benefit to consumers in terms of increased competition and lower prices. That benefit, however, does not offset the considerable risk created by Flair's lack of reliability and inability or unwillingness to rebook passengers in a timely manner in the event of flight cancellations. Flair's past conduct could arguably also be colloquially characterized as bait-and-switch and as creating an unfair disadvantage for Flair's competitors.

Nevertheless, it may not be in the public interest to use the blunt instrument of licence suspension or revocation, provided that passengers' financial risk arising from purchasing Flair tickets can be mitigated or eliminated altogether by attaching stringent conditions and monitoring mechanisms to Flair's temporary exemption.

Recommendation

Flair's request for an 18-month exemption from the "controlled-in-fact by Canadians" requirements should be granted only subject to the following conditions:

- (F1) irrespective of the number of passengers it transports, Flair shall comply with the obligations prescribed for **large carriers** under the *Air Passenger Protection Regulations* [**APPR**], including but not limited to the requirement under s. 17(1)(a) to purchase tickets on competitors' flights for passengers who are denied boarding, or whose flights are delayed or cancelled;
- (F2) Flair shall inform all existing and new ticket holders about their rights under item (F1);
- (F3) Flair shall post a substantial security bond in a Canadian financial institution or take out an insurance from an insurer ordinarily doing business in Canada, at its own expense, to cover Flair's obligations under item (F1), including but not limited to the situations where Flair stops operating a route or stops operating altogether for **any** reason whatsoever;
- (F4) Flair's unearned revenue (i.e., amounts paid by passengers before their flights took place) shall be held in trust in Canadian financial institutions and released to Flair only after the travel services were performed in full; and
- (F5) every 90 days, Flair shall submit a report on the flights on which at least one seat was sold and which did not operate as originally scheduled, as well as the alternative transportation Flair arranged for each of the passengers booked on these flights.

If Flair is unwilling or unable to comply with conditions (F1)-(F5), then Flair's request for a temporary exemption should be denied.

II. The Minister May Impose Conditions in the Public Interest to Mitigate Risks

It is important to recall from the outset that the Minister of Transport's exemption-granting powers under ss. 6.7(1) and 62(1) of the *Canada Transportation Act* [**Act**] are non-binary. "Granted" and "Denied" are not the only possible outcomes of a request for an exemption.

6.7 (1) The Minister may, by order, exempt, for a period of not more than five years and subject to any conditions that the Minister considers appropriate, any person or thing, or class of persons or things, from the application of any provision of an Act of Parliament that the Minister administers or enforces or any provision of an instrument made under that Act, if the Minister is of the opinion that the exemption, having regard to the purposes of that Act, is in the public interest and that the exemption promotes innovation in transportation through research, development or testing.

62 (1) Where the Minister considers it necessary or advisable in the public interest that a domestic licence be issued to a person who is not a Canadian, the Minister may, by order, on such terms and conditions as may be specified in the order, exempt the person from the application of subparagraph 61(a)(i) for the duration of the order.

[Emphasis added.]

The *Act* therefore directs the Minister to focus on the public interest in considering whether to grant an exemption, and provides the Minister with broad discretionary powers to attach terms and conditions to any exemption the Minister may grant.

In this case, the Minister should not only weigh the risks and benefits of Flair continuing operation in its present form; rather, the Minister should also consider whether the risks may be mitigated or eliminated by terms and conditions attached to the exemption so as to tip the balance in favour of the benefits and of granting the temporary exemption Flair seeks.

III. Flair’s Benefits: Increased Competition and Lower Airfares

There is overwhelming evidence that Canada is sorely wanting in competition in domestic and transborder air travel, and that the current situation can be characterized as largely a duopoly of Air Canada and WestJet. Air Canada’s Annual Information Forms provide valuable insights.

The market shares of Air Canada (including its contracted carriers that operate flights on behalf of Air Canada) and of WestJet with respect to air travel within Canada in the years 2014-2019, as well as the Herfindahl-Hirschman Index [**HHI**], are shown in Figure 1.

Year	Air Canada	WestJet	Air Canada and WestJet combined	HHI	Market Concentration
2014	55%	36%	91%	≥ 4321	High
2015	55%	37%	92%	≥ 4394	High
2016	56%	36 %	92%	≥ 4432	High
2017	54%	37%	91%	≥ 4285	High
2018	53%	37%	90%	≥ 4178	High
2019	54%	36%	90%	≥ 4212	High

Figure 1: Market Shares and Concentration – Air Travel within Canada (2014-2019)

The market shares of Air Canada (including its contracted carriers that operate flights on behalf of Air Canada) and of WestJet with respect to air travel between the USA and Canada in the years 2014-2019, as well as the Herfindahl-Hirschman Index [HHI], are shown in Figure 2.

Year	Air Canada	WestJet	Air Canada and WestJet combined	HHI	Market Concentration
2014	37%	21%	58%	≥ 1810	Moderate
2015	41%	21%	62%	≥ 2122	Moderate
2016	45%	21%	66%	≥ 2466	Moderate
2017	48%	21%	69%	≥ 2745	High
2018	49%	21%	70%	≥ 2842	High
2019	48%	20%	68%	≥ 2704	High

Figure 2: Market Shares and Concentration – Air Travel between the USA and Canada (2014-2019)

These figures leave no doubt Canada’s domestic and transborder air travel market have become highly concentrated. (Markets in which the HHI is over 2500 points are considered to be highly concentrated, while markets in which the HHI is between 1500 and 2500 points are considered to be moderately concentrated.¹)

The entry of a new competitor in such a highly concentrated market undoubtedly increases competition and lowers fares. For example, according to some reports, NewLeaf (Flair’s “predecessor”) caused a 23% drop in airfares on routes it was serving.²

In the case of Flair, the affidavit of Mr. Xavier Mercier, a Competition Law Officer with the Competition Bureau, affirmed on December 5, 2018, provides clearest evidence of significant lowering of airfares by WestJet and Swoop in response to Flair’s entry on the Edmonton-Hamilton, Edmonton-Winnipeg, and Edmonton-Abbotsford routes.³ This demonstrates that Flair’s presence in the Canadian market benefits consumers by increasing competition and lowering airfares.

The question is whether these benefits outweigh the risks associated with Flair.

¹ Section 5.3 of [Horizontal Merger Guidelines](#), U.S. Department of Justice and the Federal Trade Commission.

² [Flight prices in Canada down 23% on routes served by low-cost carrier NewLeaf](#), Global News (November 22, 2016).

³ Mr. Mercier’s affidavit was filed in Federal Court File No. T-2082-18 on an *ex parte* application by the Commissioner of Competition for a production order against WestJet and Swoop, and is on public record.

IV. Flair's Risks: Unreliable Service and Unfair Competition

A regulated entity's failure to comply with **any** statutory requirement is a serious matter going to the rule of law, and it should not be allowed to go without consequences; however, the nature and magnitude of the risk for the public created by such non-compliance should also be considered in deciding whether to grant a temporary exemption—if the entity has a *bona fide* intent to comply.

The purpose of the Canadian ownership requirement in general and the “controlled-in-fact by Canadians” requirement in particular is to protect Canada's strategically important air transportation sector from excessive and potentially dangerous foreign influence and dependence. Given Canada's geographic size and characteristics, Canada has a legitimate strategic interest in maintaining capacity that cannot be pulled at the whim of foreign investors or powers.

The temporary exemption sought by Flair poses no such strategic risks, bearing in mind Flair's current and planned fleet's limited size, and the relatively short duration of the exemption sought. (Section 6.7 of the *Act* permits exemptions of up to 5 years, plus a 5-year extension.) However, it could pose a serious strategic risk to Canada if the temporary exemption became a permanent one.

In the case of Flair, it is not the possible failure to comply with the “controlled-in-fact by Canadians” requirement that poses risk to the public, but rather the unreliability of Flair's service and the lack of a level playing field for all competitors flowing from Flair selling tickets on flights that it is subsequently unable or unwilling to operate.

The immediate risk for the public associated with permitting Flair to continue selling tickets in Canada stems from Flair's willingness and ability to operate the flights on which tickets are sold:

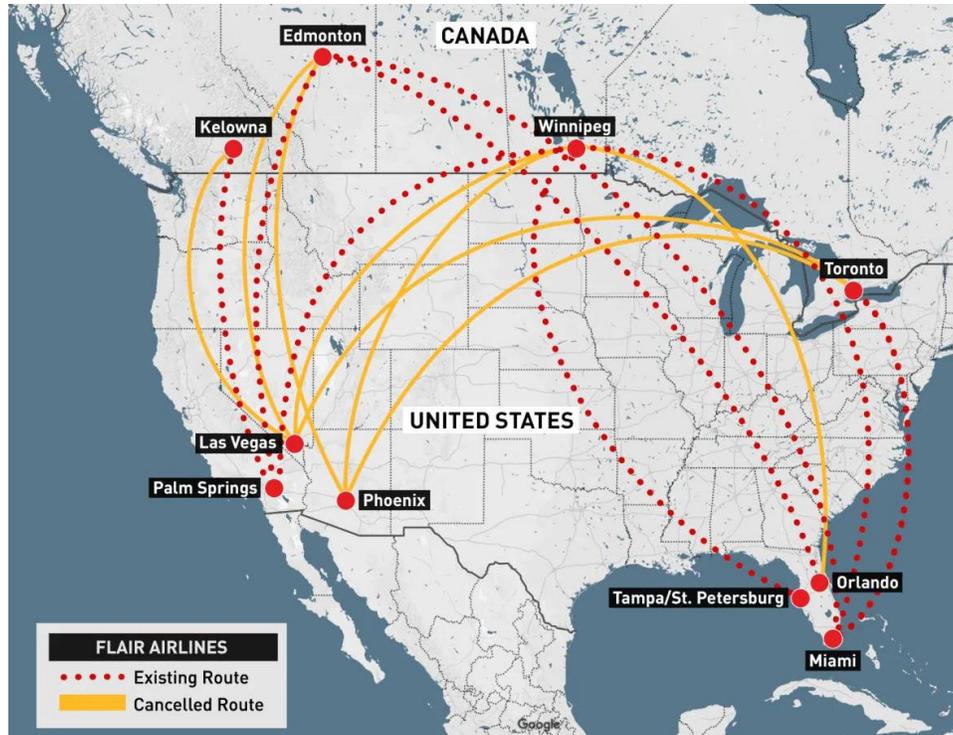
First, Flair already hinted that if its licence were suspended or revoked now, then existing ticket holders would be left without transportation. It is unclear how granting Flair an 18-month exemption and permitting Flair to sell even more tickets for future travel would mitigate this risk.

On the contrary, in the absence of financial guarantees in the form of a substantial security bond or an insurance, the public would likely find itself in an even worse situation in 18 months, with even more tickets sold for future flights. If Flair is unable to meet the “controlled-in-fact by Canadians” requirement in 18 months and its licence were suspended or revoked then, Flair would be even less likely to be able to indemnify passengers who purchased tickets on its flights in good faith, but whom Flair may be unable to transport.

Second, Flair has a history of advertising and selling tickets on routes only to cancel them later for lack of sufficient demand, and leaving passengers with substantial uncovered expenses for purchasing alternate transportation on other carriers at a significantly higher, last-minute price.

For example, in February 2019, Flair cancelled **all** flights on eight (8) transborder flights, leaving passengers to fend for themselves trying to arrange for alternate transportation at a higher price.⁴

⁴ [Flair Airlines suddenly stops flying to some U.S. destinations](#), CBC News (Feb. 21, 2019).



CBC NEWS
Figure 3: Flair Route Cancellations in February 2019 (source: CBC News)

In addition to such sweeping and broad route cancellations, Flair also has a troublesome track record of leaving passengers stranded for days and failing to provide them with reasonable alternate transportation arrangements. For example, as it was recently reported:⁵

Fabrice Papuli, his wife and their three children were supposed to fly home to Winnipeg on Sunday after vacationing in Ottawa.

Now, they say they're stranded for a week after Flair Airlines cancelled their return flight to Winnipeg at the last minute and presented them with a choice: either accept a refund for half of what they paid for their tickets, or wait seven days until the next available flight.

[Emphasis added.]

With all fairness to Flair, the *APPR*'s shortcomings are partly responsible for these unacceptable passenger experiences. Paragraph 17(1)(a) of the *APPR* requires "large" air carriers to buy stranded passengers seats on flights of competitor airlines if the original carrier cannot transport the passengers within nine (9) hours of the original departure date. Flair, being a "small" carrier, however, is not subject to this regulatory requirement.

⁵ [Manitobans stranded in Ottawa for a week after Flair Airlines cancels flight](#), CBC News (Apr. 4, 2022).

While passengers may sue Flair in a court of law for their additional expenses incurred as a result of such events (e.g., having to purchase tickets on WestJet or Air Canada at a last-minute price),⁶ most passengers lack the skills and resources to enforce their rights.

The combination of the *APPR*'s shortcomings and Flair's business model results in what, colloquially speaking, can be best characterized as a "bait-and-switch" experience for passengers, who purchase tickets in good faith just to be told that, after all, Flair would not deliver the services the passengers had paid for.

Permitting Flair to continue to operate in this manner is harmful not only for passengers who purchase tickets from Flair, but it also creates an unfair competitive disadvantage for Flair's competitors, such as WestJet (and to a lesser extent Air Canada), who are deprived of passengers' business without Flair actually delivering the services.

In order to eliminate these risks for the public, Flair must provide financial guarantees, in the form of a substantial security bond or an insurance, that Flair will actually operate the flights and deliver the services that it is contracted by passengers to operate and deliver, or will purchase passengers' alternative travel arrangements on competitor airlines at its own dime.

V. Conclusion: Striking the Balance

The risks associated with Flair's continued operation in the present form outweigh the benefits.

By imposing conditions (F1)-(F5) on Flair, the risks can be substantially mitigated or eliminated, thereby tipping the balance in favour of the benefits and of granting Flair a temporary, 18-month exemption from the "controlled-in-fact by Canadians" requirements.

If Flair is unwilling or unable to comply with conditions (F1)-(F5), then Flair's request for a temporary exemption should be denied.

Sincerely yours,

Dr. Gábor Lukács

⁶ Under contract law, tort law, or Article 19 of the *Montreal Convention* for international carriage.

Proactive Disclosure

In 2018, Dr. Lukács provide 2-day consultancy services with respect to passenger rights to Flair Airlines. Dr. Lukács did so in his individual capacity, and not on behalf of Air Passenger Rights.

Dr. Lukács and Flair had agreed that:

- the consultancy services provided did not create any conflict of interest or confidentiality issue;
- Dr. Lukács may bring any legal action against Flair and/or assist passengers and/or law firms in doing so;
- Flair would not share any confidential or commercially sensitive information with Dr. Lukács, and Dr. Lukács would not share any proprietary knowledge; and
- Dr. Lukács may offer consultancy services to other airlines, including but not limited to Flair's competitors, to improve their customer service.

Dr. Lukács's consultancy services do not constitute endorsement of Flair by Air Passenger Rights.

Dr. Lukács has provided no consultancy services to Flair (nor to its competitors) since 2018.