

Bill C-20
CAC Six Issues Supplement

Briefing Document
September 2006



CANADIAN AIRPORTS COUNCIL
CONSEIL DES AÉROPORTS DU CANADA

Contents

Summary	3
1. Powers, Capacity and Activities of Airport Authorities and Subsidiaries - Sections 57 and 75	5
<i>Background</i>	5
<i>Legal Details – Section 57(1)</i>	6
<i>Recommendation</i>	6
<i>Legal Details – Subsection 57(2)</i>	6
<i>Recommendation</i>	7
<i>Legal Details – Subsection 57(3)</i>	7
<i>Recommendation</i>	7
<i>Legal Details – Subsection 57(3)</i>	7
<i>Recommendations</i>	7
<i>Legal Details – Subsection 75 (1)(a)</i>	8
<i>Recommendation</i>	8
2. Structural Constraints on Airport Activities - Sections 60, 74-76, 78 and 79	9
<i>Background</i>	9
<i>Legal Details</i>	10
<i>Recommendations</i>	11
3. Airport Improvement Fee Revenue Use - Subsection 157(3)	12
<i>Background</i>	12
<i>Legal Details</i>	12
<i>Recommendation</i>	13
4. Appeal of Fee Quantum – Sections 2 and 166	14
<i>Background</i>	14
<i>Legal Details</i>	14
<i>Recommendation</i>	15
5. Capital Markets, Delegation - Subsection 83(3)	16
<i>Background</i>	16
<i>Legal Details</i>	17
<i>Recommendation</i>	17
6. Director Liability - Section 114	18
<i>Background</i>	18
<i>Recommendation</i>	19

Summary

Bill C-20 represents a significant change in the relationship between Canada's airports and the federal government. As written, it has the potential to limit the ability of Canada's airports to conduct their operations in a commercial like manner.

Canada's airports believe the government's intent is to enshrine into law governance and accountability practices already legally binding on airports through the ground lease agreements signed between the federal government and Canada's airport authorities. Bill C-20, however, goes beyond this and proposes new restrictions that would negatively impact how Canada's airports conduct business.

In particular, the Canadian Airports Council has fundamental issues with six areas of the act, as it is currently written. These issues accompany a more extensive list of important technical changes that Canada's airports believe should be made to clarify the purpose and meaning of the act.

The six areas of the act with which Canada's airports are seeking fundamental change are:

- **1. Powers, Capacity and Activities of Airport Authorities and Subsidiaries** (Sections 57 and 75) - As currently drafted, Bill C-20 creates confusion and uncertainty about the activities an airport is allowed to conduct and narrowly defines these activities in such a way as to impede airport authorities from operating their airports in an efficient and financially viable manner for the benefit of their communities.
- **2. Structural Constraints on Airport Activities** (Sections 60, 74-76, 78 and 79) - If finalized as currently drafted, the severe restrictions on airport activities permitted under Bill C-20 would threaten the financial vitality of Canada's airports, potentially resulting in more expensive and less efficient airports for airport users.
- **3. Airport Improvement Fee Revenue Use** (Subsection 157(3)) - As currently drafted, Bill C-20 severely restricts the use by airports of revenue from Airport Improvement Fees (AIFs) in a manner that would interfere with an airport's ability to make essential capital improvements required for growth-related expansions or facility upgrades.

- **4. Appeal of Fee Quantum** (Sections 2 and 166) - While it has consistently been Transport Canada's stated intent that the "quantum of fees" should be determined by the airport authority and not subject to appeal, except as to process, provisions of Bill C-20 as it currently is drafted threaten this fundamental ability to determine quantum of fees.
- **5. Capital Markets, Delegation** (Subsection 83(3)) - As currently drafted, Bill C-20 prohibits Canada's ability to seek financing from the lending community in the event they wish to seek a new master trust indenture. If maintained, this limitation would effectively cut Canada's airports ability to seek cost-effective financing from the lending community to fund essential capital projects for growth and upgrades to Canada's aviation infrastructure.
- **6. Director Liability** (Section 114) - As currently drafted, Bill C-20 imposes a significant liability on directors of Canada's airports. In addition to placing an unwarranted burden on directors, this would create a perverse disincentive to attracting board leadership talent for Canada's airports.

Canada's airports believe they share a common goal with the federal government: Ensuring that Canada's airports are financially strong, able to grow to meet increased demand, competitive in the world and responsive to airport users and the community.

Unfortunately, without significant changes to resolve the six fundamental issues identified above, Canada's airports believe Bill C-20 would work counter to this objective and represent a major step backward in the evolution of Canada's airports from the stagnant government-run entities they were until the 1990s to the locally managed, commercially oriented hallmarks of Canadian aviation infrastructure they are today.

As not-for-profit corporations, Canada's airports are not traditional businesses with a focus on profits. But what has developed in Canada within the current legal framework is a business model that is creative and flexible, able to maximise revenue potential and efficiencies in a manner that contributes to the overall financial strength of the airport and community.

If airport legislation is to be passed in Canada, it must not threaten the continuation of this approach. To this end, Canada's airports urge the federal government to resolve the aforementioned six fundamental issues.

1. Powers, Capacity and Activities of Airport Authorities and Subsidiaries - Sections 57 and 75

As currently drafted, Bill C-20 creates confusion and uncertainty about the activities an airport is allowed to conduct and narrowly defines these activities in such a way as to impede airport authorities from operating their airports in an efficient and financially viable manner.

Background

Bill C-20 already contains considerable safeguards by way of corporate governance and accountability that should adequately ensure appropriate airport authority activities.

As drafted, the bill requires airport authorities to consider all proposed activities through the filter of the Canadian Airport Policy. This would result in additional uncertainty as to whether an airport's activities are in compliance and would leave an airport authority open to challenge by Transport Canada and the public.

Of particular concern is SubSection 8(b), which would require activities to be conducted in a way that is "efficient and economically sustainable and responds effectively to the needs of users". In addition to being very broad and uncertain, this wording not only restricts an airport's activities, it dictates *how* an authority must carry them out.

Some examples of activities that are being actively considered by airport authorities at this time but may not be permitted by Bill C-20 as it is currently drafted include:

- In Calgary – the establishment and operation of an aircraft certification centre sanctioned by Transport Canada.
- In Victoria – involvement in the funding of an off-airport road development.
- In Toronto – the operation of an electrical generation facility that results in the sale of electricity off the airport.
- In Vancouver – involvement in the funding of the Canada line transit rail link between the airport and the city.
- In Winnipeg – economic development work with the land owners to the west of the airport in marketing the area jointly as a business park.

- In Ottawa – proposed mining and sale of gravel located on airport.
- In Thunder Bay – several subsidiaries that provide marine billing to the Canadian Coast Guard, database and network support services to third parties and sales/leasing of maintenance vehicles for airport and (proposed) off-airport use.

Furthermore, the overall approach to limit activities to those specifically stated in the legislation is overly restrictive on the activities that complex airport operations entail. It neither captures all currently contemplated activities nor those that may be required in future but are not yet foreseen.

In addition, the effect of Section 57 is to constrain or restrict the activities conducted on airports other than the principal airport (i.e. column 3 airports), including those that are not on federal lands and are subject to leases with a municipality or province. It possible that an activity approved by a non-federal landlord may be prohibited by Section 57. For example the annual Edmonton Grand Prix (Champ Car race) is held at the Edmonton City Centre Airport, which is owned by the municipal government.

Legal Details – Section 57(1)

The cross reference in SubSection 57(1) to the Canadian Airport Policy in Section 8 requires airport authorities to consider all proposed activities through the filter of the Canadian Airport Policy. In our view, Section 8 should be a statement of government objectives for the legislation. Those objectives are reflected in the balance of this lengthy Act.

Recommendation

Delete the reference to Section 8 in Subsection 57(1). We note that the Canada Marine Act does not cross-reference the marine policy with the capacities and powers of port authorities.

Legal Details – Subsection 57(2)

Subsection 57(2) causes uncertainty in the interpretation of Subsection 57(1). The listing of certain specific activities in Paragraph 57(2)(a), (b) and (c) could be interpreted as limiting the broad objects described in Subsection 57(1). Each of the Paragraphs (a), (b) and (c) activities would reasonably be allowed by the Subsection 57(1) objects and, therefore, do not need to be

restated. A Court could determine that special consideration was given to the activities described in these Subsections to limit the Subsection 57(1) objects.

Recommendation

Subsection 57(2) should be deleted or, alternatively, wording should be inserted at the commencement of Subsection 57(2) such as: “without limiting the foregoing, the objects include”.

Legal Details – Subsection 57(3)

Paragraph 57(3)(b) says that an airport authority can undertake consulting and training, provided that those services are “provided by means of resources that are normally used in the operation ... of the principal airport”. This would preclude resources developed at an authority’s secondary airport.

Recommendation

Replace the words “the principal airport” at the end of Paragraph 57(3)(b) with the words “an airport operated by the airport authority”.

Aside from the above interpretation points, the overall approach to limit activities to those specifically stated in the legislation is overly restrictive on the activities that complex airport operations would likely entail and neither captures all currently contemplated activities nor those that may be required in future but are not yet foreseen.

Legal Details – Subsection 57(3)

The additional activities contained in Subsection 57(3), although somewhat broadening of the general objects in Subsection 57(1), are really quite narrow.

Recommendations

In addition to the recommendations noted above, SubSection 57(3)(a) should be amended as follows:

“(a) conduct any activity at the principal airport that is related to not incompatible with air transportation, if that activity benefits users of the principal airport or persons who provide goods or services to those users or contributes to the economic development of the principal airport or the region served by it;”

In addition, Paragraph 57(3)(d) would be amended to read:

“(d) operate, manage, maintain and develop the airports set out in column 3 of the schedule opposite the authority’s name and conduct any activity that is not incompatible with air transportation, if that activity benefits users of those airports or persons who provide goods or services to those users or contributes to the economic development of those airports or the regions served by them; and”

At a minimum, the draft Section should be amended to allow the Minister to approve any other activity he believes appropriate without the need to further amend the Act.

Legal Details – Subsection 75 (1)(a)

The current wording in Subsection 75(1)(a) could restrict airport subsidiaries from carrying on activities that the airport authority itself is permitted to conduct.

Recommendation

Subsection 75(1)(a) (respecting airport subsidiaries) should be amended to permit a subsidiary to carry on any activity that the airport authority itself is able to conduct.

2. Structural Constraints on Airport Activities - Sections 60, 74-76, 78 and 79

If finalized as currently drafted, the severe restrictions on airport activities permitted under Bill C-20 would threaten the financial vitality of Canada's airports, potentially resulting in more expensive and less efficient airports for airport users.

Background

Bill C-20 contains numerous structural constraints on the manner in which airport authorities and their subsidiaries are permitted to conduct business, creating uncertainty and hindering efficiency.

Canada's airports have developed complex structures, with subsidiaries that enable authorities to operate airports in a more efficient manner and generate additional revenue – all of this is reinvested in the airport for the benefit of airport users and the community.

Prohibitions on partnerships/joint ventures, corporations without policies for the paying of dividends, and ownership in non-corporation entities or corporations in which the airport's financial exposure exceeds 10% of its net assets for the previous year, as well as provisions requiring competitive bidding prior to procuring services from a subsidiary, all threaten the ability of Canada's airports to conduct their business in a commercial like manner.

As an example of a joint venture scenario that could be prohibited by the act as it currently is written, an airport authority may be interested in entering into a joint venture with the economic development corporation of its community that expires in favour of the airport upon expiration of the ground lease or under a buy-out agreement. Joint ventures of this type could involve the construction and operation of cargo facilities, R&O facilities, aerospace development, etc... The prohibition of such a joint venture with a community would run counter to the government's objectives in devolution of airports to local authorities and deny worthwhile airport/community partnership initiatives.

Moreover, Bill C-20 could be interpreted (Section 74) to preclude airport authorities' involvement in a variety of unincorporated associations, such as the Canadian Airports Council, the Alberta Capital Financing Authority, Aviation Alberta, regional chambers of commerce, the Canadian Airport Reciprocal Insurance Exchange, and pension plans. Surely this is not the government's intent.

The requirement (in Subsection 78(2)) for airports to publicly tender work that a subsidiary performs is misguided, as it fails to take into account the variety of reasons that a subsidiary may be established.

For example, YVR has a project management subsidiary, YVR Project Management Ltd., which oversees the design and management of major capital expansion programs. As the subsidiary was created for this specific purpose, there would be no value in engaging in a commercial bidding process, as third party proponents would perceive the process as meaningless.

Legal Details

Sections 60, 74-76, 78 and 79 unduly restrict the manner in which airport authorities are permitted to conduct their businesses and carry out their permitted activities.

- Section 60 prohibits an airport authority from carrying out its activities in a partnership or joint venture.
- Section 74 states that an airport authority may not have an interest or a right in any entity except as otherwise permitted under the Act.
- Paragraph 75(1)(c) prohibits an airport authority from having an ownership interest in any corporation that does not have a policy for the payment of dividends.
- Section 76 prohibits an airport authority's subsidiaries from having an ownership interest in any entity except a corporation.
- Subsection 78(2) requires that an airport authority engage in a "competitive bidding" process prior to procuring goods from a subsidiary.
- Section 79 prohibits an airport authority from acquiring an ownership interest in a corporation or increasing its ownership interest in a corporation if the total financial exposure of the airport authority in the corporations exceeds 10% of the authority's net assets at the end of the previous calendar year.

The difficulties with Sections 60 and 74 arise primarily from the vagueness of the language used: "partnership", "joint venture", "right" and "interest" are all undefined.

The term “partnership”, for example, has a common law definition (“the relation that subsists between persons carrying on business in common with a view to profit”) as well as statutory definitions under provincial partnership legislation.

Similarly, the concept of “joint venture” is unclear. Generally speaking, in a joint venture two or more persons agree to each provide his or her own property to perform a specific task and to receive a specific division of profits from such task. Based on this interpretation, a joint venture could potentially include an airport authority’s sharing of profits and losses with its concessionaires (i.e. collecting a percentage of revenue), a situation which is quite common.

Paragraph 75(1)(c) inappropriately prevents an airport authority from holding an interest in a not-for-profit corporation, a situation contemplated by Calgary Airport Authority’s recently announced involvement in the Canadian Centre for Aerospace Development.

Section 76 imposes the same unwarranted structural constraints on an authority’s subsidiaries.

In a similar vein, the 10% investment cap set out in Section 79 of the Act unnecessarily limits the ability of an airport authority’s board of directors to make commercial decisions that, in its judgment, benefit the community and involve acceptable business risks. Other provisions in the Act (including those restricting the activities of subsidiaries and setting out the duties of directors) are sufficient in circumscribing board of directors’ decision making abilities.

Recommendations

Delete Sections 60, 76, 78(2) and 79 in their entirety.

In the alternative, if the government is not prepared to delete 79, increase the 10% cap to 15%.

Amend Section 74 to delete the words “right” or “interest”, replacing the terms with “ownership interest”, while explicitly excluding ownership interests in pension plans.

Amend paragraph 75(1)(c) to exclude not-for-profit corporations from the dividend payment policy requirement.

3. Airport Improvement Fee Revenue Use - Subsection 157(3)

As currently drafted, Bill C-20 severely restricts the use by airports of revenue from Airport Improvement Fees (AIFs) in a manner that would interfere with an airport's ability to make essential capital improvements required for growth-related expansions or facility upgrades.

Background

As drafted, Bill C-20 would limit the use of AIF revenue to exclude debt servicing requirements and other contractual obligations related to the borrowing of money.

At the time of their transfer to local operating authorities, Canada's airports were badly in need of expansion and facility upgrades. Since 1991, traffic at Canadian airports has grown more than 50%, and Canada's airports have had to invest more than \$9 billion in capital improvements to ensure the nation's airports were able to handle this growth and continued growth projected for the years ahead.

All of these improvements were financed without the use of taxpayer funds, primarily through loans being reimbursed through AIF revenue. Canada's airports have depended upon AIF revenue to fund not only interest on debt incurred to fund capital developments, but also to fund principle payments, debt issuance costs, reserves required by the various master trust indentures and other debt-related costs. These costs are significant and help service the debt required to fund Canada's aviation infrastructure expansion. Airport authorities should be able to use AIF funds to refinance capital debt.

Legal Details

Subsection 157(1) of the *Canada Airports Act* lists a series of capital improvements for which AIF funds may be used as of right. Subsection 157(2) lists a series of other projects that may be funded using AIF revenues with the approval of the Minister of Transport. Subsection 157(3) provides as follows:

"The use of revenues from a passenger fee to pay interest on debt incurred for a purpose referred to in this Section is considered to be use of the revenues for that purpose."

The limitation that AIF revenues may only be applied to pay "interest on debt incurred" is too restrictive and must be broadened to include debt servicing

requirements, principal repayment and other contractual obligations related to the borrowing of money.

Recommendation

Subsection 157(3) should be amended as follows:

“The use of revenues from a passenger fee to pay debt servicing requirements and other contractual obligations related to the borrowing of money, including refinancing, on debt incurred for a purpose referred to in this Section is considered to be use of the revenues for that purpose.”

4. Appeal of Fee Quantum – Sections 2 and 166

While it has consistently been Transport Canada's stated intent that the "quantum of fees" would be entirely at the discretion of the airport authority and not subject to appeal, provisions of Bill C-20 as it currently is drafted threaten this discretion.

Background

Section 160 of the Act provides three grounds of appeal on the establishment or increase in a fee. They are, if the authority:

- Did not have a methodology for determining fees
- Did not comply with the charging principles
- Did not comply with the procedural requirements contained in Sections 144 to 156

Additionally, pursuant to Section 161, aircraft operators have an additional ground of appeal where an aeronautical fee does not comply with the charging principles during the interim period prior to the announcement of the authority's methodology.

It has consistently been Transport Canada's stated intent, as evidenced by the above limited grounds of appeal, that the "quantum of fees" would be entirely at the discretion of the Authority and not subject to appeal.

Legal Details

The definition of "financial requirements" in Section 2 includes the three "purposes" for which airport authorities can collect aeronautical fees. Only one of those categories (i.e. reserves for future expenditures) is stated to be "in the operator's opinion".

Similarly, Section 166 states that the Agency "shall accept the Authority's projections of reserves that are necessary for future expenditures as being reasonable and prudent".

By providing such special treatment to the establishment of reserves as being clearly within the airport authorities' complete discretion, Transport Canada or a member of the public could allege that the authority does not

have such complete discretion in the other two categories of financial requirements (i.e. operator's costs and debt servicing requirements).

As a result, an airport authority's determination of the amounts required to cover its costs and debt service requirements could be appealed to the Agency or alleged as a violation of the act subjecting the airport authority to sanction under Part 4.

Recommendation

The definition of "financial requirements" should be amended by deleting the words "in the Operator's opinion" from Subsection (c) and insert "in its opinion" in the second line of the definition after the word "airport operator".

Section 166 should be amended to read as follows:

"In deciding an appeal, the Agency shall accept the airport authority's methodology for determining fees and shall accept the authority's determination of its financial requirements as being reasonable and prudent."

5. Capital Markets, Delegation - Subsection 83(3)

As currently drafted, Bill C-20 prohibits Canada's ability to seek financing from the lending community in the event they wish to seek a new master trust indenture. If maintained, this prohibition would effectively cut Canada's airports ability to seek financing from the lending community to fund essential capital projects for growth and upgrades to Canada's aviation infrastructure.

Background

Several of Canada's airports that have entered into trust indentures as a vehicle to borrow funds have delegated to the trustee the right to set fees and charges in the event of a default by the airport. This is a fundamental pillar of airport infrastructure finance in Canada that is widely accepted in the borrowing and lending communities.

The delegation of the ability to set fees and charges as security for a loan is derived from two competing realities. The first is that the airport ground leases preclude the use of foreclosure and sale as a remedy for a lender: the traditional remedy is not available to a lender. The unique treatment of an "Airport Infrastructure Lender's" rights in the ground leases is evidence that Transport Canada has already accepted the challenges facing airport authorities when seeking financing in Canada.

The second reality is that lenders are reluctant to enter in and operate an airport, given the specialized skills that are necessary in operating a modern airport.

Therefore, the delegation of the right to set fees in the event of a default by an airport authority represents an efficient and effective balance between the two realities.

The delegation of the right to set fees also represents an appropriate remedy in the event of a default. Under such a scenario, default is most likely occurring because the Board of Directors has not set fees and charges at a sufficient level. It is entirely appropriate, therefore, that the lender be allowed to set fees and charges at such a level as to ensure that the loan obligations are honoured. To do otherwise would leave the lender without an effective remedy.

It is worth noting that this issue was raised in the discussions on Bill C-27. Transport Canada was prepared, at that time, to introduce a technical amendment that would have resolved this issue.

Legal Details

Section 83 of the Act describes the general duty of the Board to establish the airport authority's strategic direction and for overseeing the management of the airport authority's business and affairs. Subsection 83(2) provides that the Board may not delegate certain duties, including at Paragraph 83(2)(j), the duty to establish or revise fees. Subsection 83(3) attempts to grandfather any existing delegation of the right to set fees as security for the borrowing of funds by an airport authority.

The grandfathering of existing delegation of fees is inadequate and may preclude any future financing of airport infrastructure on a cost effective basis.

Recommendation

Section 83(3) should be revised as follows:

"In the case of default, airport authorities are expressly permitted to delegate to lenders, their trustees and agents, the right to establish or revise fees as security for the borrowing of money."

6. Director Liability - Section 114

As currently drafted, Bill C-20 imposes a significant liability on directors of Canada's airports. In addition to placing an unwarranted burden on directors, this would create a disincentive to attracting board leadership talent for Canada's airports.

Background

Section 114 expands the liabilities of directors of airport authorities by making them jointly and severally liable in three circumstances, requiring them to restore:

- (i) revenues that were applied to any purpose or undertaking that is not permitted by its objects;
- (ii) any distribution of a surplus; or
- (iii) or the payment of an indemnity contrary to Section 112

Significantly, Section 114 creates a penalty under the Act with no right to a due diligence defence.

The equivalent sections of the Canada Business Corporations Act ("CBCA") and other provincial statutes have a different role. Has Transport Canada considered the impact of these provisions in the context of Bill C-20? The significant expansion of director's liability may have the unintended effect of increasing the directors' involvement in the management of the airport authority beyond the "oversight" role for the Board envisaged by the Act.

In addition, as the director's liability exceeds that which may be expected in any other corporate entity in Canada, it may be difficult to recruit directors for the airport authority. Finally, it is questionable whether D&O insurance policies will extend coverage to this type of offence.

Section 118 of the CBCA makes directors jointly and severally liable to restore to the corporation certain funds under certain circumstances, such as the issuance of shares for less than the fair value of the shares or the making of payments which are prohibited by statute (for example dividends to shareholders or certain indemnities).

Significantly, each of the circumstances identified in Section 118, and the equivalent sections of provincial statutes, directly affect either the value of the shareholders shares or the rights that a shareholder may have. Therefore, at issue is the foundation of the relationship between the shareholder of a share capital corporation and the directors of that

corporation. As there is no other remedy available to the shareholders for the erosion of their rights, the statute must impose liability on the directors for the violation of these rights.

Therefore, the intent of Section 118, and the equivalent sections of provincial statutes, is to address certain matters that are internal to the corporation itself.

Section 114, however, is unique in that it creates additional liabilities for matters that are external to the corporation – i.e. contracts with third parties. These additional liabilities may be significant, and may only be determined by a Court “after the fact” and based upon the circumstances of the case itself.

It is important to note, moreover, that the additional liability created by Section 114 for actions that are *ultra vires* the airport authority is unnecessary. The significance of being found to have undertaken an activity that is *ultra vires* is that: (1) the airport authority is liable to damages from the third party; (2) the airport authority is liable to penalties by Transport Canada for violation of the Act; and (3) it is possible that the airport authority may lose its non-taxable status. As these consequences can only be determined “after the fact”, it seems unnecessary and unreasonable to impose further penalties upon the directors.

There are two additional matters worth noting with respect to Section 114. The concept of a “distribution of a surplus” is not relevant to the type of corporate structure envisaged by the Act. The prohibition against the “distribution of a surplus” is a concept that is applicable to non-share capital non-profit corporations that have members. As airport authorities will be continued under the Act without members, there can be no distribution of a surplus to them. Indeed, airport authorities do distribute surpluses as a result of reinvesting the surplus in the operations or finances of the airport itself.

In addition, it may be appropriate to impose liability where the directors vote for an indemnity contrary to the Act. This is entirely acceptable in corporate statutes in Canada and is appropriate.

Recommendation

Section 114 should be deleted or amended to concern only the voting for an illegal indemnity