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This letter is the consolidated response of The Canadian Association of Instrument Procedure Designers (CAIPD). CAIPD represents the majority of the independent commercial design organizations and are represented by the Canadian Business Aircraft Association (CBAA).

Both the original Level of Service Policy (LOS Policy) dated February 2014 and the proposed policy dated March 2015 have devastating effects upon External Design Organizations (EDO's) including those represented by CAIPD. Airports that have the means to pay for commercial instrument procedure design are provided this service at no cost by NAV CANADA while those that do not have the means to pay (i.e. traffic and revenue) are available to the EDO community. The EDO community works on a commercially viable basis and must charge for their services. As result, the domain of potential opportunities being offered by NAV CANADA is practically meaningless.

The fundamental principle that NAV CANADA must respect is that it has no special rights or privileges conferred upon it to design instrument procedures. Neither its enabling legislation – Civil Air Navigation Services Commercialization Act (CANSICA) – nor the Canadian Air Regulations (CARs) confer any exclusivity to NAV CANADA. According to these laws and those who were involved with their creation and their subsequent implementation, it was never the intention of the Government of Canada to provide NAV CANADA with any special privileges as it pertains to the design of instrument procedures.

CANSICA defines NAV CANADA's roles as the provider of *inter alia* Aeronautical Information Services (AIS) which CANSICA further defines as "services necessary to meet those requirements of Annexes 4 and 15 to Chicago Convention that relate to aeronautical information". Designing instrument procedures is neither an Annex 4 nor 15 activity.

CARs 803.01 reinforce the notion of exclusive Annex 4 and 15 privileges:

**803.01** (1) In this Subpart, “*aeronautical information services*” means the services necessary to meet the requirements of Annexes 4 and 15 to the Convention that relate to aeronautical information.

- (2) No person shall provide aeronautical information services except in accordance with the standards set out in Annexes 4 and 15 to the Convention.

CARs 803.02 govern the development and publication of instrument procedures and define who may publish and submit for publishing instrument procedures.

**803.02** No person shall publish or submit for publishing in the *Canada Air Pilot* an instrument procedure unless the procedure has been developed

- (a) in accordance with the standards and criteria specified in the manual entitled *Criteria for the Development of Instrument Procedures*; and
- (b) by a person who has successfully completed training in the interpretation and application of the standards and criteria specified in the manual entitled *Criteria for the Development of Instrument Procedures*, which training has been accepted by the Minister.

Anyone that has training to satisfaction of the Minister and who designs in accordance with the Criteria for the Development of Instrument Procedures may exercise this right. There is no specific mention of NAV CANADA and indeed NAV CANADA may choose not to perform this role. And even if it does, CANSCA and CARs does not provide NAV CANADA with any special rights or monopoly privileges.

NAV CANADA, during its consultative process in 2012, confirmed these concepts in its presentation wherein it stated that NAV CANADA is not obligated to develop/design an instrument approach procedure (IAP) to an aerodrome and that NAV CANADA does not have a monopoly on developing IAP's.<sup>1</sup>

This principle of NAV CANADA not being afforded any special privileges, exclusive rights or monopoly of instrument procedure design is reinforced by those that were directly involved in the development of the policy while at Transport Canada and, in some cases, where those same individuals transferred to NAV CANADA upon its inception in 1996.

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<sup>1</sup> Source: Marcel Pinon's Level of Service Policy Briefing – Slide 5 (available upon request)

In light of the law and the opinion of the authors of CANSCA and CARs, the notion that NAV CANADA can provide these services for free is therefore contrary to the Competition Act and CANSCA. In order to satisfy the Competition Act – Abuse of Dominant Power, NAV CANADA, should it chose to participate in instrument procedure design business, must do so on an equal competitive footing as any other organization that satisfies CARs 803.02. This means that NAV CANADA cannot provide these services for free and must on a commercially viable basis, i.e. not only recover their fully allocated costs but also generate a profit.

In order to satisfy CANSCA and its charging principles, NAV CANADA can only charge the “user” community for services that CANSCA grants it rights to charge; instrument procedure design is not a bona fide CANSCA activity therefore using NAV CANADA fees to perform a non-CANSCA activity is contrary to the Act.

In order for NAV CANADA to be in compliance with CANSCA, CARs and the Competition Act, a small change to the March 2015 LOS policy is required. This is found in **2. Instrument Procedure Design**.

The first paragraph, which currently reads:

NAV CANADA designs and maintains instrument approach and departure procedures at civil aerodromes in Canada **without specific charge** to those civil aerodromes that meet the eligibility criteria defined in section 3, subject to the qualifications identified in section 4.

Should be changed to:

NAV CANADA **may** design and maintain instrument approach and departure procedures at civil aerodromes in Canada **on a commercially viable (profitable) basis** to those civil aerodromes that meet the eligibility criteria defined in section 3, subject to the qualifications identified in section 4.

This change of providing “free” instrument procedure design to a commercially competitive one would satisfy the demands of CAIPD for a level playing field as well as satisfying Canadian law.

Should NAV CANADA elect to not make these changes to be in compliance with what we believe to be the law, CAIPD would welcome the opportunity to place the question of what was intended by CANSCA and CARs before an independent tribunal for a mediation/arbitration. This tribunal would be charged with determining the question of whether NAV CANADA has any exclusive rights or privileges stemming from the enabling legislation of CANSCA and its adjunct CARs.

In concept and subject to a definitive Terms of Reference, we would propose the following for this tribunal:

- This would be a mediation to find a mutually agreeable solution
- Should the mediation fail, the panel would issue a binding arbitration award
- The panel would consist of three members – one appointed by CAIPD, one appointed by NAV CANADA and a third member chosen by the two appointees
- Costs of the arbitrators would be borne by NAV CANADA or as decided by the panel
- Each party is responsible for its own cost for preparation and presentation or as decided by the panel
- The mediation/arbitration would take place in Ottawa and at the earliest opportunity once the panel is formed
- It is anticipated that the hearing would take two days to present evidence and witnesses
- Witnesses may provide evidence by letter, affidavit or video conferencing

While it is the desire of the CAIPD to avoid a mediation/arbitration effort, should NAV CANADA elect not compete on an equal commercial basis, a mediation/arbitration is a fair way to have an independent, third party review the law, the history of instrument procedure design and the intention of the Government of Canada when NAV CANADA was formed and Transport Canada exited the instrument procedure design role.

The External Design Organization sincerely wishes to work with NAV CANADA and not at odds with it however the Level of Service Policy is both devastating to our businesses and contrary to the competitive nature of our economy and laws. EDO's have the experience, training and capability to help NAV CANADA deploy instrument procedures in a safe, rapid and financially beneficial method for NAV CANADA. Our proposed change to the Level of Service Policy would achieve these desirable objectives however should that not be agreeable we would welcome the opportunity to have an independent body make that determination.