California Comeback: Ontario International Airport Is Again Independent and Thriving

By Roy Goldberg

On November 1, 2016, Ontario International Airport (ONT), which is located about 55 miles east of Los Angeles International Airport and two miles east of Ontario, California, commenced its new life as an airport no longer owned and operated by the City of Los Angeles. This transaction was years in the making, following a potentially fatal death spiral in passenger levels, intense state court litigation, years of stop-and-start negotiations between Ontario and Los Angeles, lobbying of municipal and state government officials, Federal Aviation Administration (FAA) approvals, and Congressional authorization. The transformation has been amazing. It has included new transcontinental and transpacific air service and dramatic year-over-year increases in annual passenger levels and cargo shipments. This retrospective offers a look back at the unique legal and regulatory hurdles to returning ownership of ONT to the City of Ontario and how ONT went from worst to first in air service development and improved passenger and cargo airline service.

Ontario International Airport

Ontario initially developed, owned, and operated ONT. In 1929, the City of Ontario purchased 30 acres, now in the southwest corner of the airport, for $12,000 and established the Ontario Municipal Airport. The airport was built by one of the first flying clubs in Southern California, the Friends of Ontario Airport. In 1941, the city bought 470 acres around the airport and approved construction of new runways, which were completed by 1942 with funds from the Works Progress Administration. In 1942, an Army Air Corps plane made the first landing at the new airport. By 1943, the airport was an Army Air Corps operating base. In 1946, Ontario Municipal Airport was renamed "Ontario International Airport" because of the transpacific cargo flights originating there. A Pacific Overseas Airlines flight from Shanghai arrived at ONT in 1946, which inaugurated regular round-trip air passenger service between the United States and Asia. In 1949, Western Airlines began scheduled flights, followed six years later by Bonanza Air Lines.

Federal funding shortfalls for airports due to the "guns and butter" economic demands of the United States during the 1960s (generated in large part by the Vietnam War and social welfare programs) prompted Ontario in 1967 to enter into a Joint Powers Agreement (JPA) with Los Angeles, which moved ONT into the Los Angeles airport network (eventually administered by Los Angeles World Airports (LAWA)) consisting of Los Angeles International Airport (LAX), Van Nuys Airport, and ultimately (but temporarily) Palmdale Airport. Ontario retained ownership of ONT during this period. At that time, ONT was primarily a reliever airport for LAX.

In 1968, ONT saw its first scheduled jet flights. In 1969, Continental Airlines started nonstop services to Denver and Chicago, Air California operated flights to San Jose, Pacific Southwest Airlines started San Francisco flights, and Western flew nonstop to Sacramento and Salt Lake City. In 1970, United commenced a nonstop flight to Chicago and American started flights to Dallas and Chicago.

Finally, in 1985, the cities entered into an acquisition agreement under which Ontario transferred ownership of ONT to Los Angeles. However, a key provision of the 1967 JPA between Ontario and Los Angeles survived the acquisition agreement. Specifically, this provision imposed an obligation on Los Angeles to use its "best efforts" to retain and promote air service at ONT. For several years after 1985, Los Angeles supported air service development at ONT, which culminated in the construction and opening in 1998 of two new passenger terminals (T2 and T4). ONT enjoyed a progression of good years with the high point being 7.2 million passengers flying in and out of the airport in the years 2005 through 2007. In 2006, ONT became "LA/Ontario International Airport." The "LA" portion was added to remind fliers of Los Angeles and to avoid confusion with the Canadian province of Ontario.

ONT's "Death Spiral"

Unfortunately, starting in 2008, the bottom quickly fell out for ONT, resulting in a substantial drop in passenger traffic—it was down to 3.9 million passengers per year by 2012. LAWA's failure to promote ONT and operate it efficiently caused a negative economic impact to Ontario and surrounding communities of at least $540

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million in 2012 alone, and an estimated loss of over 10,000 jobs. Ontario feared that ONT faced an existential threat from this death spiral and took action. That same year, Ontario and San Bernardino County, in which Ontario is located, entered into a joint powers agreement to form the Ontario International Airport Authority (OIAA), a new administrative body to provide overall direction for the management, operations, development, and marketing of ONT for the benefit of the Southern California economy and the residents of the airport's four-county catchment area.

LAWA's leadership at the time tried to blame the national economic recession for the passenger traffic falloff at ONT. This was of cold comfort to Ontario and the surrounding community, which faced the debilitating loss of both transcontinental and regional air service. In Ontario's view, the truth behind the downturn at ONT could not be attributed solely to the national economy. At the same time that ONT was suffering unprecedented declines in air service and passenger levels, other airports (such as LAX) continued to thrive. LAWA was undertaking a massive renovation of the Tom Bradley International Terminal (TBIT) and needed to focus all of its finances and energies on that project to make sure that air service at LAX continued to grow to pay for the TBIT renovations and other modernization projects at LAX.

LAWA also favored LAX over ONT when it came to assignment of U.S. Customs officials needed for handling arriving international flights. Ontario further maintained that LAWA had not been attentive to the management of ONT by pointing to the cost per enplaned passenger (CPE) of approximately $15.36 for 2010, which was among the highest in the country. The high CPE was the result of the high operational cost of ONT, which Ontario asserted was due to LAWA's mismanagement and resulted in the decline of airline service at ONT.

Ontario officials hailed from among those dedicated to public service (firefighters, police officers, teachers, etc.) in contrast to the Los Angeles Board of Airport Commissioners (BOAC), which was comprised largely of Hollywood agents and partners at major law firms. The Ontario leadership came to the difficult but obvious and necessary conclusion that, to save ONT, the airport needed to be moved out of the LAWA network. Preliminary negotiations between Ontario and Los Angeles went nowhere. In 2013, LAWA offered to return the airport to local control for a purchase price of $474 million, which was rejected. Ontario officials claimed that that price tag was at least $181 million too high. They contended that the facility had a negative value as a result of the severe passenger decline. Ontario also cited a study done for Los Angeles that put the airport's value at only $140 million.

With negotiations at an impasse, Ontario filed an administrative claim against Los Angeles under the California Tort Claims Act (which is a mandatory predicate to bringing a law suit against a city in California), alleging, among other things, that Los Angeles was in breach of its obligation to use "best efforts" to retain and promote air service at the airport.

Ontario Files State Court Complaint

After Los Angeles summarily denied the administrative claim, Ontario filed suit against Los Angeles in neutral Riverside County Superior Court (a venue with neither LAX nor ONT). The complaint asserted claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) rescission of the 1967 JPA and 1985 acquisition agreement, and (5) reformation of the JPA and acquisition agreement.[1] In addition to monetary damages, the action sought a transfer of ownership and the termination of the 1967 JPA in which the Los Angeles airport department became the operator of ONT on the condition that it improve the facility.

Ontario asserted that Los Angeles assumed ownership in 1985 at virtually no cost and that instead of exercising its best efforts to attract airlines and new service, Los Angeles squandered the asset by slashing Ontario's advertising and marketing budgets and failing to act fast enough to reduce the airport's high costs for carriers, a disincentive for providing service. The complaint also asserted, among other things, that ONT's survival was in jeopardy because Los Angeles for too long caused ONT's costs to skyrocket compared with other secondary airports in Southern California and nationwide, focused on developing LAX's capacity as an international airport, and refused to market ONT as a convenient alternative to LAX. Ontario stated that it had "no practical alternative but to pursue its judicial remedies to stop the hemorrhaging at ONT by restoring local control over its operations and thereby leveling the playing field so that ONT can better serve the Southern California region and once again be an engine for economic growth in the Inland Empire."[2]

The "Best Efforts" Clause

Years of litigation between Ontario and Los Angeles ensued, with extensive document discovery and depositions of LAWA and Ontario principals, including LAWA's then-executive director. The litigation also involved a battle of the experts on what "best efforts" for air service development requires and whether or not Los Angeles had failed to exercise best efforts in its treatment of ONT.

A model for Ontario's litigation strategy was the decision of the U.S. Court of Appeals for the Second Circuit in *Bloor v. Falstaff Brewing Corporation*.[3] There, the court affirmed a finding that a beer brewing company breached its contractual obligation to use best efforts to sell the beer of a company it had purchased. The court held that the brewery was not entitled to emphasize profits for its other businesses without fair consideration of effects on beer sales under the plaintiff company's

brand name. The evidence sustained the finding that, even taking into account the defendant's right to give reasonable consideration to its own interests in selling beer under its own label, the brewer breached its duty to use best efforts to sell the other brewery's brand of beer.

In applying the law and precedent for enforcing best efforts clauses to air service development, Ontario's retained experts focused on the nature and requirements of appropriate air service development for an airport and its community. Air service development refers to the organized activities that an airport and/or its affiliated communities undertake with the ultimate goal of retaining existing air service or improving air access and capacity in order to develop the economy of a community or region.[4] Air service development is "important for many communities, given the financial and risk realties of the commercial airline industry."[5] Good "air service—an array of flights appealing to travelers—doesn't just happen. In fact, market and industry forces . . . tend to discourage airlines from expanding air service. However, by taking an active, professional approach to air service development . . . smaller airports and communities can often provide the information and conditions to encourage airlines to retain or expand air service to that community."[6] Commercial air service is valuable as an economic driver in the community. Adequate air service is a prerequisite for attracting investment and generating employment. Air service is directly related to the amount of economic activity in an area, and additional flights contribute to a community's economic well-being.[7] Competition for air service increases during difficult economic times.[8]

The airport is the natural central stakeholder in any air service development effort. The airport is in the best position to understand passenger traffic, service levels, air fares, and industry costs, and can educate other community stakeholders on the benefits of the new services and demonstrate that their commitment is a sound investment. The airport manager or air service development officer thus becomes crucial for organizing the local effort and coordinating other stakeholders.[9]

The experts retained by Ontario (with more than 100 years of air service development experience between them) opined and testified in depositions that Los Angeles fundamentally failed in its obligation to use best efforts to maintain and pursue air service development for Ontario and were prepared to testify to this at the state court trial. And the facts bore this out completely. LAWA was too focused on building up LAX to devote the needed time, resources, energies, or finances to help ensure that ONT weathered the economic storm of the late 2000s; it failed to take advantage of all possible opportunities to use time-tested air service development tools and devices to pursue and maintain robust air service at ONT.

The Case Settles and the Airport is Transferred

In the Ontario litigation, after years of discovery and with an August 17, 2015, trial date approaching, an impasse in settlement negotiations received an important shot in the arm with the election of Los Angeles Mayor Eric Garcetti, and on August 6, 2015, a settlement was reached. Also significant, Riverside County Superior Court Judge Gloria Connor Trask denied a motion in July by Los Angeles to block an expert's testimony that would estimate Ontario suffered between $1.7 billion and nearly $4 billion in economic harm because of the airport's reduced air service.[10]

As part of the eve-of-trial settlement, the OIAA agreed to repay Los Angeles millions of dollars in funds expended on ONT in exchange for the airport being transferred to the OIAA. LAWA also received promises of job protection for the airport's 182 employees. In order to effect the settlement, OIAA needed to meet a number of regulatory requirements and obtain a change to federal law governing passenger facility charges (PFCs). Thereafter followed more than a year of deal negotiations, lobbying of Congress for language needed to allow the use of ONT PFCs to finance the payments owed to Los Angeles, and working with FAA to issue to OIAA the requisite certificate under 14 C.F.R. Part 139 to operate the airport. In January 2016, Rep. Ken Calvert introduced HR 4369, proposing to use passenger fees at ONT for 10 years to help pay for the two terminals, a condition of the 2015 deal but at that time not permissible. In July 2016, President Obama signed the bill, which was wrapped into the FAA Reauthorization Act. It was notable because federal law otherwise prohibits the transfer of PFCs between airports[11]

Ontario and the OIAA also galvanized both local and statewide support for the deal. The return of ONT to Ontario was endorsed by more than 130 cities, county governments in California, state and local elected officials, regional planning agencies, and aviation-related citizens groups in Los Angeles, Riverside, and San Bernardino counties. Thirty-eight mayors and two county supervisors from the Inland Empire sent a letter to Mayor Garcetti, thanking him for supporting the transfer of the airport back to Ontario.

The deal eventually came together, and on November 1, 2016, the transfer became official after final approval and issuance by the FAA of an airport operating certificate. The total value of the deal was approximately $250 million. This included Ontario's agreement to pay $30 million from its reserves, assume the airport's $60 million debt, make payments of $50 million over five years, and a $70 million payment in the final five years.[12]

The airport's operating name reverted to Ontario International Airport since the City of Los Angeles no longer oversaw operations of the airport. Mayor Garcetti—who has made regional collaboration a top priority for his administration—also celebrated the

milestone as a significant step forward for air travel, improving air quality, and connectivity across the region.

Ontario Reverses the "Death Spiral"

Fast forward three years to 2018, and this story has a true Hollywood ending: the new airport operators have reversed the death spiral, as demonstrated by several successes. The airport's continuing traffic decline reversed in early 2017, when the airport experienced faster growth than LAX for the first time since 2007. Initiating aggressive new air service development practices, including lowering landing fees and providing new amenities to passengers inside the current terminals, the airport has successfully attracted new airlines and service. As a result, China Airlines, Frontier, Delta, United, Southwest, and JetBlue decided to either begin, resume, or expand service to the airport. In December 2019, ONT announced that it was the fastest growing U.S. airport for the second consecutive year.[13]

On September 30, 2017, it was announced that China Airlines would begin nonstop flights from Ontario to Taipei, which started in Spring 2018.[14] In addition, new transcontinental service was introduced from ONT to JFK on JetBlue, and more recently, Frontier announced new nonstop service from ONT to Newark, Miami, and Las Vegas and international service to El Salvador and Guatemala.[15] China Airlines also decided to shift some capacity from LAX to ONT. The airport authority launched a marketing campaign in support of the carrier's new service—something that LAWA never would have done because of its inherent conflict of interest.

Like all good stories, this one has a moral, which is that local communities need not accept the poor hand that fate has delivered. Rather, communities who rely on good air service to support their local economies can take control of the air service development process and help ensure that air service development efforts are truly the "best efforts" of the airport management team.

Endnotes

1. Complaint, City of Ontario v. City of Los Angeles, No. RIC1306498, 2013 WL 11007177 (Cal. Super. Ct. June 3, 2013) (trial pleading).

2. *Id.* ¶ 8.

3. 601 F.2d 609 (2d Cir. 1979).

4. Steven C. Martin, Airport Cooperative Research Program, Transportation Research Board, Passenger Air Service Development Techniques 30 (2009).

5. *Id.* at 18.

6. *Id.* at 20.

7. *Id.* at 22–23.

8. *Id.* at 23.

9. *Id.* at 28.

10. Neil Nisperos & Liset Márquez, *Now the Work Takes Off at Ontario Airport*, Press-Enterprise (Jan. 15, 2017, 1:52 PM), |https://www.pe.com/2017/01/15/now-the-work-takes-off-at-ontario-airport/.

11. *Id.*

12. *L.A. Mayor Eric Garcetti: $250 Million Deal Reached to Transfer Ownership of Ontario Airport*, Inland Valley Daily Bulletin (Aug. 6, 2015, 4:37 PM), https://www.dailybulletin.com/2015/08/06/la-mayor-eric-garcetti-250-million-deal-reached-to-transfer-ownership-of-ontario-airport/.

13. Press Release, Ontario International Airport, Ontario International is Fastest Growing U.S. Airport for Second Straight Year, (Dec. 12, 2019, 8:44 AM), https://www.flyontario.com/corporate/news/ontario-international-fastest-growing-us-airport-second-straight-year.

14. *See* Liset Márquez, *China Airlines to Launch Ontario Service with Daily Flights—Up from the Earlier Planned 4 Per Week*," Inland Valley Daily Bulletin (Jan. 23, 2018, 7:49 PM, updated Jan. 24, 2018, 11:49 AM).

15. Press Release, Ontario International Airport, Frontier Airlines Adding Five Routes from Ontario Airport, (December 18, 2019, 10:35 AM), https://www.flyontario.com/corporate/news/frontier-airlines-adding-five-routes-ontario-airport.