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Decision No. 390-A-2013

October 7, 2013

IN THE MATTER OF determinations of what constitutes an “air service” and the criteria to be applied by the Canadian Transportation Agency.

File No.: M4161-9 PRO

INTRODUCTION

[1] The purpose of this Determination is to inform the air industry of the criteria the Canadian Transportation Agency (Agency) will apply to determine what constitutes an “air service” within the meaning of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA).

[2] The Agency is mandated by Parliament to administer, interpret and enforce the CTA and associated regulations. The Agency is not bound by its past determinations and the interpretation of the CTA by the Agency can evolve in light of its own experience and the evolution of the air transportation industry.

[3] Part II of the CTA applies in respect of air transportation matters and details, among other matters, the applicable licensing requirements that are administered by the Agency. The licensing requirements of the CTA apply to any person who operates or proposes to operate an “air service” in Canada. An “air service” is defined in subsection 55(1) of the CTA as “a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.”

[4] The key element to any Agency determination as to whether a person is operating an air service is determining if the service is publicly available. While the CTA refers to the phrase “publicly available” within its definition of an air service, the term “publicly available” is not defined in the CTA. The Agency has interpreted this expression through its decisions which are rendered on a case-by-case basis, based on the specific facts in each application. The determination as to whether a service involves the transportation by means of an aircraft does not pose the same interpretation issues.

[5] It is clearly within the Agency's jurisdiction to determine, according to the CTA, the basis upon which an air carrier will require a licence for the provision of air services. This necessarily includes the interpretation of the expression "publicly available" which is not defined in the legislation. The Agency has developed an expertise in such interpretations. Pursuant to subsection 41(1) of the CTA, an appeal lies from the Agency to the Federal Court of Appeal on leave on questions of law or questions of jurisdiction. This statutory scheme clearly indicates Parliament's intention that the Agency is responsible for interpreting the provisions of the CTA, subject only to appeal to the Federal Court of Appeal. Furthermore, superior courts have consistently provided deference to the Agency in its interpretation of the CTA. The Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650, 2007 SCC 15 at paras. 98, 100 stated:

[...] The *Canada Transportation Act* is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate: *Pushpanathan*, at para. 26.

[...] The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.

[6] Under its current 3-year Strategic Plan, the Agency has committed to modernize its regulatory framework, including by improving the transparency and clarity of the legislation and regulations that it administers pertaining to the air transportation sector. The Agency has also indicated that it will engage stakeholders in this process and take their views into account. This Determination is consistent with this commitment.

[7] While the Agency has rendered numerous decisions on the subject of whether a person is operating an "air service" and specifically, if a "publicly available" service is being operated, the requirement to respect confidentiality has normally precluded the Agency from disclosing pertinent information and providing detailed reasons in its "public" decisions. This has resulted in little information being provided in the public domain on the Agency's interpretation of what constitutes a publicly available air transportation service.

[8] In addition, the continually evolving nature of the air transportation sector, including the introduction into the market of non-traditional service delivery models, has led the Agency to review the concept of "publicly available" and how it should be interpreted in the context of the objectives of the CTA, in particular of the air licensing regime administered by the Agency.

[9] The Agency, as a result, undertook a review with the intention of articulating a comprehensive set of criteria to assist in the interpretation of what constitutes an air service and, in particular, the concept of "publicly available", that could be shared with interested stakeholders.

[10] The Agency, after completing its initial review, developed a draft Interpretation Note on the "Requirement to Hold an Air Service Licence", which was circulated to a targeted group of stakeholders for their comments.

[11] Three industry stakeholders provided comments to the Agency. In summary, two of the stakeholders stressed that the requirement to hold a licence is subject to a number of consumer and industry economic protection provisions, which are focused on commercial air services. They conclude that a contractual requirement with an “offer, acceptance, and consideration” are all required components of a publicly available service. They contend that case law on the term “publicly available” indicates that the availability need not be utilized, nor be attractive to the entire public body, but only that it is available to the entire public body. Any reservation by the operator of the aircraft regarding access to the operation negates entirely any public factor. They also submit that the operation of corporate aircraft for the transportation of “clients, customers, and guests” is not a publicly available service, as the service is not available to the general public and is entirely at the discretion of the corporate aircraft owner.

[12] One of the stakeholders submits that “the reasonable expectations of the individual and their ability to influence or control their transportation circumstances are central to the consideration of publically available.” Where an individual has very little control over the type of transportation, it would be similar to a commercial operation for which a licence should be required. This would apply to corporate aircraft utilized to transport general employees of a company, including sports teams, as well as government aircraft that are used to transport members of the public, such as within a police helicopter or forest firefighters. They also submit that, if there is some form of direct or indirect compensation for the flight, the use of personal aircraft to transport family, friends, and other personal acquaintances should be considered a publicly available service as should the transportation by one Government of another Government’s employees.

[13] The Agency, after considering all of the stakeholders’ comments, has decided to inform the air industry through this Determination of the criteria that the Agency will apply in interpreting what constitutes an “air service” and, more specifically, when an air service is considered to be “publicly available”.

LEGISLATION

[14] Paragraph 57(a) of the CTA provides that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

[15] Subsection 55(1) of the CTA defines “air service” as a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

[16] Paragraph 86(1)(k) of the CTA provides the Agency with the authority to make regulations for the purposes of defining words and expressions for the purposes of Part II of the CTA.

[17] Section 2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR) defines:

- “passenger” as a person, other than a member of the air crew, who uses an air carrier’s domestic service or international service by boarding the air carrier’s aircraft pursuant to a valid contract or arrangement; and
- “goods” as anything that can be transported by air, including animals.

AGENCY DETERMINATION

[18] In summary, under the CTA, a person is required to hold an Agency licence to operate an air service that is:

- i. provided by means of an aircraft;
- ii. for the transportation of passengers and/or goods; and
- iii. publicly available.

[19] What constitutes an air service for the purpose of Part II of the CTA and, in particular, when that service is considered to be publicly available are addressed in this Determination.

Purpose of the air licensing requirement

[20] The Agency finds that any interpretation of the expression “publicly available” should be consistent with the purpose behind the CTA requirement for a person to hold an Agency licence.

[21] In this regard, the Agency notes that the requirement to hold a licence subjects the licensee to a number of consumer and industry economic protection provisions of the CTA. The purpose of the air licensing requirement is identified through these consumer and industry economic protection provisions.

[22] For example, the CTA’s ownership provisions ensure that only Canadians or Canadian owned and controlled enterprises can operate domestic services, thereby restricting foreign access to the domestic marketplace. Similarly, only Canadians designated by the Minister of Transport as eligible may operate scheduled international services using rights granted to Canada in an air transport agreement or arrangement with another government.

[23] Canadian licence applicants that propose to operate certain air services using aircraft having a certified maximum capacity of 40 or more passengers must also meet the prescribed financial requirements set out in section 8.1 of the ATR, before a licence can be issued, which is intended to reduce the risk that underfunded applicants enter the marketplace.

[24] Licensees must also:

- have, display and apply a clear tariff that addresses certain prescribed matters and is reasonable and not unduly discriminatory;
- notify the public when discontinuing certain domestic services; and
- provide for the protection of monies paid in advance by Canadian-originating passengers for certain international charter flights.

[25] The consumer and industry economic protection provisions referred to above are set out in Part II of the CTA. These requirements are “economic” and/or “consumer protectionist” in nature, as they serve to:

- limit access to the domestic market to Canadians;

- ensure compliance with international air agreements;
- limit the risk of underfunded applicants from entering the marketplace;
- require that a clear tariff be in place and be disclosed to clarify the terms and conditions of carriage;
- provide any person with access to complaint-based remedies against unreasonable terms and conditions of carriage and certain specified matters relating to fares;
- provide for public notification where the discontinuance of certain scheduled services eliminates or significantly reduces the availability of air services within that market; and,
- provide for the protection of monies paid in advance for certain international charter flights.

[26] In addition to the consumer and industry economic protection provisions referred to above, licensees must also meet the CTA's prescribed liability insurance requirements to hold an air service licence. The requirement to hold insurance, however, is not exclusive to the CTA as the *Aeronautics Act*, R.S.C., 1985, c. A-2 (AA) also requires all persons operating aircraft to meet the prescribed insurance requirements under the AA, if such persons are not already subject to the CTA's air licensing requirements. The CTA's insurance requirements therefore apply only to persons who operate or propose to operate a publicly available air transportation service. Should a person not operate or propose to operate a publicly available air transportation service, this person would nevertheless be subject to the insurance requirements that are otherwise applicable to "all" other aircraft operators. The prescribed insurance requirements of the two acts for commercial operations are essentially identical, with the only noteworthy difference being that the supporting regulations to the CTA, the ATR, address the insurance requirements for situations where a licensee utilizes the aircraft and crew of another person in the operation of its own air service.

[27] Additionally, the Agency cannot issue a licence unless the applicant holds a Canadian aviation document (CAD) issued pursuant to the AA and the *Canadian Aviation Regulations*, SOR/96-433 (CAR), which ensure that the operation of an aircraft in Canada is subject to the safety and security requirements that are administered by Transport Canada. The AA and the CAR establish the requirement to hold a CAD for all persons that operate aircraft in Canada irrespective of whether such persons are required to hold an Agency licence.

[28] Finally, it is noted that Part V of the CTA provides the Agency with the authority to create regulations and adjudicate complaints for the purpose of eliminating from the transportation network undue obstacles to the mobility of persons with disabilities. This authority, however, extends to the transportation network under the legislative authority of Parliament and is not limited or tied to the licensing regime.

[29] As such, the Agency's interpretation of the expression "publicly available" must be aligned with the objectives of the air licensing regime that it administers, which are "economic" and/or "consumer protection" in nature.

[30] In considering the prescribed consumer and industry economic protection provisions, the Agency interprets the CTA's air licensing requirements as intending to apply to the operation of a "commercial" air transportation service that is offered to the public. If a

person is not operating a “commercial” air transportation service that is offered to the public, there would be little, if any, need for the CTA’s consumer and industry economic protection provisions, such as the requirement to protect the domestic market from foreign competition; to hold additional insurance to that required under the AA; to hold and apply a tariff; to notify the public when discontinuing a service; or to protect advanced payments by passengers. In these cases, the safety and security requirements associated with aircraft operations would continue to be regulated by the AA, as would the requirement for the aircraft operator to hold the prescribed insurance.

[31] The Agency’s interpretation of an air service that is publicly available therefore takes into consideration whether the person who provides the service is engaged in the business of transporting persons and/or goods, as part of a commercial undertaking, on a consideration for service basis.

What is an air service?

[32] The Agency finds that in determining what constitutes an air service, all of its components, as defined in the CTA and the ATR, need to be considered together to achieve the intended purpose of the air licensing regime. Specifically, is the service:

- i. offered and made available to the public?
- ii. provided by means of an aircraft?
- iii. provided pursuant to a contract or arrangement for the transportation of passengers or goods?
- iv. offered for consideration?

[33] Each of these four criteria are discussed below:

(i) Is the service offered and made available to the public?

[34] A publicly available service is one that is offered to the public.

[35] This is the means through which members of the public can become aware of the air service’s existence and availability and thereby decide if they would like to utilize the service.

[36] A person who offers an air service to the public may accomplish this through some form of promotion, advertisement or solicitation. The public can be informed by any means, including by voice, print, electronic media, or word of mouth. Promotional material, known routes, schedules, fares, terms and conditions of carriage, or a ticket distribution system are each indicative of a service that is offered to the public.

[37] It is not necessary for a person to extensively or aggressively promote an air service nor is it necessary for all members of the public to be made aware of an air service’s existence to meet this requirement. The Agency is of the opinion that the existence of a restriction regarding who may access the air service does not necessarily make it private. All that is required is for a person to offer an air service to a segment or a portion of the general public.

[38] In addition, the person to whom the service is being offered should be able to avail themselves of the service.

[39] The person should be able to contact the air service provider and arrange for air transportation. The method used to obtain the air service could be by telephone, Internet, travel agent, broker, sales agent, sales office or any other means available to the public.

[40] To ensure that an air service reaches an intended user group, the person who operates the service may impose eligibility conditions on the user. While these conditions may be restrictive, the service could still be considered to be offered and made available to the public if a person, who meets the terms and conditions of carriage, including payment of the appropriate consideration, can access the air service.

(ii) Is the service provided by means of an aircraft?

[41] The determination as to whether a service involves the transportation by means of an aircraft is a straight forward matter that does not pose interpretation issues and, therefore, does not need to be further elaborated on.

(iii) Is the service provided pursuant to a contract or arrangement for the transportation of passengers or goods?

[42] A key component of a publicly available service is that there be a contractual or other arrangement that authorizes the use of the air service. The contract or arrangement creates an obligation on the person who operates the service to provide the air service in return for payment of an agreed consideration.

[43] The requirement that there be a contractual obligation or other arrangement between parties is consistent with the ATR's definition of a passenger, which is defined as a person that boards the aircraft pursuant to a valid contract or arrangement.

[44] When members of the public do not have a contractual or other right to be transported or have their goods transported by aircraft, then the service would not be a publicly available service and an Agency licence would not be required.

(iv) Is the service offered for consideration?

[45] The commercial nature of the arrangement, on a consideration for service basis, is also a key component of a publicly available service and is consistent with the requirement for the economic and consumer protection provisions of the CTA.

[46] A person's right to use an air service is generally established when such person agrees to provide consideration (including airfare, charge, or other consideration) established by the person that is providing the air service. When the service is provided to a person and there is no contractual obligation to provide the service for consideration, it would not be considered to be an air service and an Agency licence would not be required.

[47] The purchase of a bundled service that includes air transportation would meet the requirement that there be consideration for the air service, irrespective of whether the air service component is advertised as being free (e.g. lodge operator that includes an air service as part of a bundled package).

Private carriage

[48] Having considered the criteria that are required for the operation of an air service, the Agency will now consider private carriage, including the personal use of aircraft and the operation of corporate aircraft.

[49] It is important to distinguish between transporting members of the public and/or goods, and offering and making an air service available to the public. The transportation of a member of the public and/or their goods does not, on its own, necessarily result in the service being publicly available, as everyone is notionally part of the public. A person that is not engaged in the business of transporting passengers and/or goods by aircraft would not be operating a publicly available service only by agreeing to transport a person and/or their goods in a specific instance, whether or not as a one-time only event. For an air service to be publicly available, a person must offer the service to the public, including to a segment or a portion of the general public; in addition, members of the public must be able to enter into a contractual or other arrangement to acquire a right to such air service.

Personal use of aircraft

[50] The operation of an aircraft for personal use, including the transportation of family, friends and other personal acquaintances, is considered to be private carriage and not a publicly available service and, therefore, an Agency licence would not be required to operate this service.

Corporate aircraft

[51] The operation of corporate aircraft by an organization for the use and transportation of its officials, directors, employees, contractors, suppliers, and goods (or those of any parent, affiliated or subsidiary companies) in the conduct of the organization's business is generally also considered to be private carriage and not a publicly available service and, therefore, an Agency licence would not be required to operate this service. The same would apply to the transportation of the organization's clients and customers where the travel is not pursuant to a contract or arrangement for consideration.

DETERMINATION

[52] The Agency finds that an air service includes all of the following four criteria where the service is:

- i. offered and made available to the public;
- ii. provided by means of an aircraft;
- iii. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and
- iv. offered for consideration.

[53] Every case is unique and accordingly the Agency will make its determinations based on the merits of each case. The Agency will apply these approved criteria when determining whether a person operates an air service that requires that person to hold an Agency licence.

[54] If a person believes that the criteria set out in this Determination may impact a previous determination of their requirement to hold an Agency licence, they may request the Agency to reconsider the matter.

Member(s)

Geoffrey C. Hare

J. Mark MacKeigan

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[Top of Page](#)

[Important Notices](#)