TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Chrono Aviation Inc. v. Canadian Transportation Agency*, 2021 TATCE 26 (Review)

TATC File No.: Q-4497-80

Sector: Aviation

BETWEEN:

Chrono Aviation Inc., Applicant

- and -

Canadian Transportation Agency, Respondent

Heard by: Videoconference on March 18, 2021

Before: Andrew Wilson, Member

Rendered: July 29, 2021

REVIEW DETERMINATION AND REASONS

Held: The Canadian Transportation Agency has, on a balance of probabilities, proven that the applicant committed both of the alleged violations. The monetary penalty for the two violations combined is reduced to $5,000.

The total amount of $5,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

A. Introduction

[1] The applicant, Chrono Aviation Inc. (Chrono Aviation), requests that the Transportation Appeal Tribunal of Canada (Tribunal) review a monetary penalty assessed against it by the Canada Transportation Agency (Agency), pursuant to the *Canada Transportation Act (Act)*.

[2] The Notice of Violation under review, dated March 22, 2019, alleges two violations of the *Act*:

> **(A)** On or about October 2, 2018, Chrono Aviation inc publicly offered for sale, in Canada, by way of its website, an air service without holding the required licence issued under the *Canada Transportation Act* in respect of that service, contravening section 59 of the *Canada Transportation Act, S.C., 1996, c. 10, as amended*.
>
> **(B)** On or about October 25, 2018, Chrono Aviation inc publicly offered for sale, in Canada, via an advertisement placed in the 2018/2019 edition of the Quebec Mining Review magazine, an air service without holding the required licence issued under the *Canada Transportation Act* in respect of that service, contravening section 59 of the *Canada Transportation Act, S.C., 1996, c. 10, as amended*.

[3] A combined monetary penalty of $10,000 was assessed against the applicant with respect to these two alleged violations.

[4] These allegations are with respect to a domestic charter air service using a Boeing 737 (B737) aircraft. It is undisputed that this aircraft falls within the definition of a "large" aircraft for licensing purposes. It is also undisputed that at the time of the alleged violations, the applicant had applied for, but had not yet been issued, a licence for the operation of an air service using large aircraft.

[5] On December 19, 2017, the Agency issued Order No. 2017 A-220 (the exemption), in which it exempted Chrono Jet Inc. (Chrono Jet), apparently an affiliate of the applicant, from the application of section 59 of the *Act* with respect to the B737 aircraft. One condition of the exemption was that:

1. All advertising in any media, whether written, electronic or telecommunications, shall include a statement that the air services are subject to government approval, unless and until the section 59 exemption expires following the issuance of a licence. All prospective clients shall be made aware, before the signature of any charter contract, that the air services are subject to government approval;

B. Count 1 – The website

[6] The first alleged violation relates to the content of the Chrono Aviation website (the website). Printouts of the website, dated October 10, 2018, were entered into evidence as Agency Exhibit 2.

[7] The applicant argued that it had included the words required by the exemption, and even without the words required by the exemption, the website was at most an "invitation to treat", which does not constitute an "offer" within the meaning of the *Act*.

C. Count 2 – The magazine article

[8] The second alleged violation relates to a two-page magazine spread which appeared in the 2018/19 edition of the *Quebec Mining Review* (the magazine article), admitted into evidence as Agency Exhibit 7. On the left-hand page, there was an article describing Chrono Aviation's new acquisition of a B737 and its plans for its use. It is written in the third person. The right-hand page is, on its face, an advertisement, comprising a large picture of a B737 in Chrono Aviation livery, the words "120 Passengers", "Combi or Cargo Offered", "Available for Charter", "Gravel Equipped", "Our New Boeing 737" and the contact telephone number for Chrono Aviation. The statement required by the exemption does not appear on either page.

[9] The applicant argued that the left-hand page was an editorial, not an advertisement, and, as in the first count, argued that the right-hand page was not a true "offer", but an invitation to treat. The Agency argued that the right-hand page was, or contained, an "offer" within the meaning of the *Act*.

II. LEGAL FRAMEWORK

[10] Part II of the *Canada Transportation Act* deals with air transportation. The key provisions of the *Act* for the purposes of this matter are:

1. The definition of "air service" from subsection 55(1):

> ***air service*** means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both;

2. Section 57:

> **57** No person shall operate an air service unless, in respect of that service, the person
>
> **(a)** holds a licence issued under this Part;
>
> **(b)** holds a Canadian aviation document; and
>
> **(c)** has the prescribed liability insurance coverage.

3. Section 59:

> **59** No person shall sell, cause to be sold or publicly offer for sale in Canada an air service unless, if required under this Part, a person holds a licence issued under this Part in respect of that service and that licence is not suspended.

III. ANALYSIS

A. Legal issues

[11] As can be seen from the introduction, this case turns primarily on the legal issue of the proper construction of section 59 of the *Canada Transportation Act*.

[12] More particularly, I must decide whether "publicly offer for sale" does or does not include the public holding out of a service for sale, as in an advertisement.

[13] Since it was raised in argument by the applicant, I must also decide whether "publicly" as used in the *Act* is limited to personal purchasers of services, or whether it also includes purchases by business users.

[14] The question of whether the terms of the exemption had in fact been met, is dealt with below under "Factual issues". The legal issue of whether the exemption applied for the benefit of the applicant, Chrono Aviation, rather than to Chrono Jet, was not raised by either party. In view of this and my factual determination with respect to the exemption, I need not explore this question.

(1) Overview

[15] The proper construction of the term "publicly offer for sale" under section 59 of the *Act* was the focus of the submissions of both parties. This core legal issue underlies both counts.

[16] In a nutshell, the applicant contends that the words "publicly offer for sale" must be taken to mean that the section is only breached if an "offer" of an unlicensed service is made in accordance with the law of contract.

[17] It is trite contract law that a binding contract is formed through offer, acceptance, consideration and an intention to create legal relations. Simply put, in contract law, an advertisement is not an "offer" because it does not contain such essential elements as price, time, and manner of acceptance. Instead, it is considered an "invitation to treat", which is "legalese" for an invitation to discuss terms. Those later discussions may or may not result in a binding agreement or contract. I accept that, if the applicant's interpretation is correct, then there has been no "offer", either on the website or in the magazine article, and therefore no violation was committed.

[18] The Agency argues that the phrase "publicly offer for sale" as used in the *Act* has a broader meaning than the term "offer" under contract law. It argues that when the modern approach to statutory interpretation is applied, the words "offer for sale" also capture a holding out for sale. Under this interpretation, the advertisement of an unlicensed service would amount to a breach of section 59 of the *Act*.

[19] There appears to be no prior binding case law on this point, although there is some Agency jurisprudence, which I will consider later.

(2) The Modern Principle of Statutory Interpretation

[20] In the past, an assortment of "canons" or rules of construction were used by courts to interpret the meaning of a statute – primarily, the "literal rule", the "mischief rule", and the "golden rule".

[21] Since at least 1980, these canons have been synthesized into what is known as the "Modern Principle of Statutory Interpretation". In 1998, in *Rizzo & Rizzo Shoes Ltd.*,[1] it was formally adopted by the Supreme Court of Canada as its preferred approach. It is perhaps best summarized by the often-cited words of its original author, Elmer Driedger:[2]

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[22] In general, this formulation reinforces the need to read the words of any statute in context, rather than in an isolated literal manner. It is worth noting that this formulation is largely in harmony with the federal *Interpretation Act*,[3] which provides:

> **Enactments deemed remedial**
>
> **12** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

(3) Object and scheme of the Canada Transportation Act

[23] Section 5 of the *Canada Transportation Act* provides, in part:

> **Declaration**
>
> **5** It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when
>
> > **(a)** competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;
> >
> > **(b)** regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;
> >
> > […]
> >
> > **(e)** governments and the private sector work together for an integrated transportation system.

[24] In my view the Declaration provides some useful guidance in this matter. Notably, the *Act* takes a systemic approach to fostering a healthy transportation system, for the benefit of both "users" and the Canadian economy and Canadians as a whole. It recognizes that competition and market forces are a primary means to achieving the central goal, but not goals unto themselves.

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[1] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41.

[2] Elmer Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), p. 67.

[3] *Interpretation Act*, R.S.C., 1985, c. I-21.

The *Act* itself places limits on unfettered competition, at least to the extent that it imposes licensing requirements and conditions.

[25] The *Act* certainly contains some sections that are clearly aimed at protecting the end user, such as the Passenger Rights section. However, the Declaration makes it clear that the *Act* as a whole cannot be fairly characterized as "consumer protection" legislation. It is instead a multifaceted statute which deals with the transportation ecosystem as a whole, including its competitive, economic, safety, efficiency and social aspects, for the general benefit of Canada.

(4) Grammatical and ordinary sense

[26] The phrase "grammatical and ordinary sense" is not without difficulty. What may appear grammatical and ordinary to one person may not so appear to another.

[27] Nonetheless, I observe that the magazine article itself uses the phrase "Combi or Cargo Offered". Here, according to the applicant, the term "offer" is not being used in a contractual sense. Rather, it is a simple representation by the applicant that this aircraft is available for lease to the public in two different configurations. The fact that the applicant itself would use the word "offer" in this non-contractual sense is merely an illustration of the obvious, namely that holding something out as being available, as in an advertisement, is at least one possible "grammatical and ordinary" meaning of the term.

[28] The applicant argued that a plain reading of the section required that the term "offer" be considered synonymous with the term as it is used in contract law. He appeared to be arguing that this is the only possible meaning, and actually suggested that Lord Denning, the renowned English jurist, would be appalled if it were used in any other way.

[29] There is some precedent for importing the contractual definition. For example, in *Fisher v. Bell*,[4] a shop keeper was charged under the U.K. *Restriction of Offensive Weapons Act 1952* with "offer[ing] for sale" flick knives by displaying them in the shop window. The Court interpreted the term as having a technical contractual meaning and acquitted the shop keeper.

[30] This very old case has since been subject to academic criticism as being an example of an excessively literal interpretation of a statutory provision.[5] Commenting on this case, Professor Stephen Waddams,[6] a noted Canadian authority on contract law, states:

> **These cases have no necessary connection with the law of contracts**. The display of a switchblade knife in a shop window, for example, may not be an offer for contract purposes; the shopkeeper is perhaps free to decline to sell if he wishes. **However, the policy considerations that determine that result (reasonableness of the buyer's expectation) are quite different from the considerations that underlie the penal statute (preventing distribution of dangerous weapons)**. Taking into account this policy **it is inconceivable that Parliament did not intend to prohibit the display of knives in shop windows**. … Parliament presumably knows the law, and if it says "offer" it presumably means offer. But words do not have fixed and constant meanings;

[4] [1961] 1 Q.B. 394

[5] The Law Commission and The Scottish Law Commission, *The Interpretation of Statutes,* 1969, at footnote 66.

[6] Stephen Waddams, *The Law of Contracts,* 2nd ed. (Toronto: Canada Law Book Inc., 1984) at 42-43.

> they take their meaning from their context. **There is no reason why "offer" as used in the statute should bear the same meaning as "offer" in a contractual context**. The court could, surely, have convicted under the statute without implying that a shop keeper is contractually bound to sell goods in his window display to all comers. **The questions are rationally unconnected**. [emphasis added]

[31] I find this logic to be persuasive and do not accept that I am bound to the contractual definition of "offer". As illustrated by this passage from Professor Waddams, its meaning depends on the legislative context in which it is used.

[32] Lord Denning apparently agreed with this principle. In *Allen v. Thorn Electrical Industries Ltd.*,[7] in a remarkable anticipation of the Modern Principle of Statutory Interpretation, he famously stated:

> The draftsman of the Act of 1966 was, it was suggested, a learned pedant who used words with meticulous accuracy. I decline to accept this invitation. We are not the slaves of words but their masters. We sit here to give them their natural and ordinary meaning in the context in which we find them.

[33] Cases such as *Fisher v. Bell* were decided over half a century ago, before the ascendancy of the Modern Principle of Statutory Interpretation. They are not binding, and I do not find their line of reasoning to be persuasive in this case.

[34] In summary, the applicant and the Agency have both advanced interpretations of the phrase "publicly offer for sale" which could be said to be grammatical. I would say that the Agency's sense is the more "ordinary", whereas the applicant's sense is the more technical and legalistic. This of course does not end the matter. I will now consider whether these interpretations are harmonious with the scheme and object of the *Act* and the intention of Parliament.

(5) Object of section 59

[35] I have already discussed in a general sense the object and scheme of the *Act*. I will now consider which of these two possible meanings is the more harmonious with that object and scheme.

[36] Both parties argued, each for their own purposes, that section 59 is "consumer protection legislation". I note that "consumer protection legislation" is not a precise legal term, but more of a loose descriptor.

[37] The Agency argued that section 59 was a "consumer protection" section in order to promote a large and liberal interpretation. That rubric is unnecessary, given the modern approach to statutory interpretation and section 12 of the *Interpretation Act*.

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[7] *Allen v. Thorn Electrical Industries Ltd.*, [1967] 2 All E.R. 1137 at p. 1141.

[38] The applicant argued that section 59 was a "consumer protection" section in support of the proposition that it, like other "consumer protection" statutes (for instance the Ontario *Consumer Protection Act*[8]) is only aimed at private end users and was not intended to deal with transactions between corporations.

[39] In my view the comparison with the Ontario *Consumer Protection Act* is inapt. I have found that the *Canada Transportation Act* is **only partly** aimed at serving the **user** of transportation services, whereas the Ontario *Consumer Protection Act*, by its very name, proclaims itself to be "consumer protection" legislation.

[40] Section 1 of the Ontario *Consumer Protection Act* expressly removes inter-business transactions from its ambit:

> **1** In this Act,
>
> […]
>
> "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

There is no similar provision in the *Canada Transportation Act*. The term "consumer" is not found in the *Act* (except in reference to the "Consumer Price Index"). In short, there is no language or implication in the *Act* that differentiates between commercial and personal users of transportation services. Moreover, I see few other parallels between the two statutes.

[41] I am therefore not persuaded, either taxonomically or logically, that it is reasonable to import an express provision of one statute, in one jurisdiction, into a completely different statute in another jurisdiction, simply by attempting to attach the same label to each.

[42] In short, I can find no support in either the purpose and scheme of the *Act* or in the plain words of section 59 itself for the contention that the public includes only individual buyers of air transportation services for personal, family or household purposes. The word "publicly" is not qualified, and there are no words indicating that the purpose of the purchase is relevant. Surely if such a drastic narrowing of the ordinary term "publicly" had been intended, it would have been a simple matter to draft section 59 accordingly.

[43] Counsel for the applicant related his own recollection of how section 59 came into being. By his account, several decades ago a series of bankruptcies of yet-unlicensed carriers left passengers out of pocket. This incident, he says, led to section 59.

[44] Firstly, although I have no reason to doubt his narrative, I observe that submissions by counsel are not evidence. The applicant tendered no evidence of these events, or the legislative history of the section, or any extrinsic evidence of parliamentary intent.

[45] More importantly, however, this narrative does not shed light on the proper interpretation of section 59. Even if Parliament enacted section 59 in response to these events, it could have responded in any number of ways, including a highly targeted way (such as only banning sales of

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[8] *Consumer Protection Act*, 2002, S.O. 2002, c. 30

unlicensed tickets to personal use travellers), or a more comprehensive way (such as preventing the sale or holding out for sale of an unlicensed service to the public generally). The narrative leaves me no further ahead in understanding the intention of Parliament.

[46] Let us pursue the applicant's contention further. It is obvious that a loss only becomes potential at the point of sale, that is, when the purchaser pays, or becomes obliged to pay, the money for the service. No jeopardy is incurred at the point of the offer. If the sole purpose of section 59 were to prevent monetary losses, and since the section already expressly prohibits the sale of unlicensed services, then there would seem to be no point in **also** prohibiting the mere making of an offer in the contractual sense. Such a prohibition would not materially advance the legislative purpose proposed by the applicant.

[47] There is a rebuttable presumption that the preferred interpretation of a statute is one that gives meaning to all of its words. This is referred to variously as the "presumption against surplusage", or the "presumption against tautology". The leading Canadian legal academic, Professor Ruth Sullivan,[9] provides this explanation:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.

[48] In addition, as Professor Waddams alludes to, the function of the narrow definition of "offer" in contract law is to limit the circumstances under which the offeror will be contractually bound if that "offer" is accepted. In other words, the narrowness of the contractual definition of the term "offer" is for the protection of the offeror, not the offeree. This concern would seem to be contrary, or at least superfluous, to the purpose of section 59 advocated by the applicant.

[49] If on the other hand the phrase "publicly offer for sale" is understood in the ordinary way to be the equivalent of "hold out for sale to the public", then we can make sense of all of the words of section 59, and each word has a specific role to play in advancing the legislative purpose. The *Act* is concerned with competition and the market for transportation services. Section 59 is intended to deal with some of the problems that may arise if unlicensed services are sold, advertised or otherwise held out. These problems may include such things as confusion in the marketplace, possible misrepresentation, and unfair competition with licensed carriers. This reading is both grammatical and ordinary and is harmonious with the object and scheme of the *Act*. However, before reaching a final conclusion, a review of the prior Agency jurisprudence is in order.

(6) Agency jurisprudence

[50] The Agency case law on the meaning of section 59 is not binding on this Tribunal. However, both parties argued the persuasive value of these precedents, and I would be remiss if I did not mention them here.

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[9] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), §8.23.

[51] The Agency argued that there was a consensus to be found in Agency decisions, and that based on the reasoning of *Communications, Energy and Paperworkers Union* [10] and in the interest of consistency and predictability, the Agency administrative consensus should be given considerable deference by this Tribunal.

[52] *Communications, Energy and Paperworkers Union* is not directly on point. That case involved a judicial review of an arbitral decision, where there was a broad consensus amongst labour arbitrators on the particular point. The present case is not a review of a quasi-judicial decision, where deference is owed to the original decision maker. Rather, it is a statutory review of an administrative monetary penalty, and therefore more in the nature of a trial *de novo*, with the Agency bearing the onus of proof.

[53] Given this difficulty, I will not consider these Agency cases in terms of "deference". Rather, I adopt the more guarded view that these Agency decisions may be persuasive to the extent that I find them to be reasonable.

[54] I will now set out, in chronological order, the key passages from the Agency case law presented by counsel.

(a) Decision No. 222-A-2007

> The Agency has considered the particular facts of this application for review **and finds that Eagle Flight Centre, in fact, contravened section 59 of the CTA [Canada Transportation Act] at the time of the notice of violation by posting an advertisement in the Yellow Pages** of several telephone directories across Ontario, as well as on its Web site and on its business cards, offering "Aircraft Charter, Executive Charters, Air Cargo" to the public without holding a valid licence issued by the Agency in respect of that service. [emphasis added]

(b) Decision No. 571-A-2008

> WestJet argued that the phrase "publicly offer for sale", as contained in section 59 of the CTA, cannot be interpreted as including fare information posted on its Web site as this type of advertising merely constitutes an "invitation to treat" under contract law and is not an offer to contract. However, the Agency notes the modern principle of statutory interpretation, as set out in *Sullivan and Driedger on the Construction of Statutes*, which requires that the "words of a legislative text must be read in their ordinary sense harmoniously with the scheme and objects of the Act and the intention of the legislature." In absence of a reason to reject the ordinary meaning of the legislation, this is the intended meaning and is binding.
>
> The Agency finds the ordinary meaning of "publicly offer for sale" as used in section 59 of the CTA **would include the advertising of air services, including fares, on the Internet and this would be consistent with the intent of section 59 to prohibit air carriers from holding themselves out as authorized to provide services for which they hold no licence**. To reject the ordinary meaning of these words in favour of a specialized definition of "offer" derived from principles of contract law would render the phrase meaningless in the context of section 59, as this would permit carriers to advertise air services which are purported to be available for purchase, in the absence of a licence and, thus, the legal authority to operate the service. [emphasis added]

(c) Decision No. 344-A-2009

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[10] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34

In this case, the Agency notes that an enforcement officer designated pursuant to subsection 178(1) of the CTA issued a warning letter on March 13, 2009. This was in response to an alleged violation of section 59 of the CTA as the applicant had advertised through the Abbotsford and CanPages Yellow Pages a publicly available air service to conduct flights between various points in British Columbia.

Therefore, the applicant is not in a position to attest that it did not contravene section 59 of the CTA within the preceding 12 months. Subsequently, on August 5, 2009, the applicant filed an affidavit attesting that since the formal warning letter of March 13, 2009, it did not contravene section 59 of the CTA.

(d) Decision No. 400-A-2009

The purpose of section 59 of the CTA is to prohibit persons from holding themselves out as authorized to provide air services for which they do not hold a licence. [emphasis added]

(e) Decision No. 220-A-2010

In Decision No. 571-A-2008, the Agency found that the ordinary meaning of "publicly available" as used in section 59 of the CTA would include the advertising of an air service, including rates, on the Internet. **This would be consistent with the intent of section 59 to prohibit persons from holding themselves out as authorized to provide services for which they hold no licence.**

[…]

The Agency has considered the particular facts of this application for review and finds that Air Liaison, in fact, contravened section 59 of the CTA at the time of the notice of violation by holding itself out as offering air services on the Société Radio-Canada Web site and by identifying itself as an air service on its own Web site. [emphasis added]

(f) Order No. 2017-A-220

The Agency deals with applications for exemptions from the application of section 59 of the CTA on a case by case basis. The Agency recognizes that section 59 is a consumer protection measure. It is intended to prevent situations in which consumers in Canada pay for a service to an entity that does not hold an Agency licence and are left out of pocket or experience any manner of inconvenience or hardship that may result if that entity does not commence operations on schedule.

[…]

Accordingly, the Agency, pursuant to paragraph 80(1)(c) of the CTA, exempts the applicant from the application of section 59 of the CTA, effective from the date of this Order, permitting it to sell, cause to be sold or publicly offer for sale in Canada, a domestic service, large aircraft, and a non scheduled international service, large aircraft, between Canada and any other country without holding the required licence, **subject to the following conditions**:

1. All advertising in any media, whether written, electronic or telecommunications, shall include a statement that the air services are subject to government approval, …. [emphasis added]

(g) Determination No. A-2020-12

The Agency, in Decision No. 290 C A 2014, explains what constitutes an offer:

An offer is defined in Swan, A., *Canadian Contract Law*, (2d), at page 218, LexisNexis, 2009 as "[…] a complete statement of the terms on which one party is prepared to deal, made with the intention that it be open for acceptance by the person (persons) to whom it is addressed…."

On that basis, the proposed activities by the applicant do not constitute an offer to sell publicly an air service.

(7) Discussion of Agency cases

[55] We can see that, except for the last-cited case, the Agency has consistently, either explicitly or implicitly, held that an advertisement qualifies as a "publicly offer for sale" within the meaning of section 59.

[56] The interpretation here offered by the applicant, that an advertisement is merely an invitation to treat, was explored and explicitly rejected in Decision No. 571-A-2008, on the basis that "the intent of section 59 [is] to prohibit air carriers from holding themselves out as authorized to provide services for which they hold no licence". This same purpose is expressed in Decision No. 400-A-2009 and Decision No. 220-A-2010, with the same result. In my view, these decisions take a reasonable view of the "ordinary meaning" of the phrase "publicly offer for sale" within the context of the section, and their expression of the purpose of section 59 is both reasonable and in accordance with the purposes of the *Act* as a whole. I find these decisions to be helpful and persuasive.

[57] Order No. 2017-A-220 explains that the purpose of section 59 is aimed not only at preventing financial losses to buyers, but "any manner of inconvenience or hardship that may result" if an unlicensed service does not commence. In crafting a remedy, the same decision requires a public disclaimer, in advertisements and all other communications, that the service is not yet licensed. In other words, the means by which the aim of preventing "any manner of inconvenience or hardship that may result" includes restrictions on advertising. This is the same condition that was contained in the section 59 waiver granted to Chrono Jet by the Agency. This condition implies that advertising is a proper concern of section 59, and that the advertising of a proposed service would be unlawful under section 59, but for the exemption. I do not believe that this decision is of assistance to the applicant's interpretation.

[58] The outlier is Determination No. A-2020-12, which purports to rely on Decision No. 290-C-A 2014 for the proposition that the term "offer" must be understood in the contractual sense.

[59] Decision No. 290-C-A 2014 was a decision on a complaint made under subsection 110(4) of the *Air Transportation Regulations*. Under subsection 110(1), international air carriers are required to file with the Agency a "tariff", containing detailed terms and conditions of carriage. The carrier must then "apply" those terms and conditions of carriage to any ticket. The first question the panel asked itself was "Were valid contracts of carriage entered into between the complainants and [the carrier]". This is sensible, because if no ticket had been bought, then there is no contract to which the tariff terms and conditions can be "applied". **In deciding whether a contract had been formed**, that panel referred to the elements of contract law, as it should. **That panel was not engaging in an exercise of interpreting the regulatory meaning of the term "offer"**, which does not appear in subsection 110(4).

[60] Unfortunately, the panel in Determination No. A-2020-12 ignored this context entirely. Instead, it simply extracted the quoted passage from this earlier decision and mechanically applied it in conclusory fashion to an unrelated section in a different statutory instrument for the entirely different purpose of statutory interpretation. The panel provided no analysis or explanation for its unique interpretation of the term "offer" in section 59 of the *Act*, contrary to the consistent previous Agency jurisprudence. With the greatest respect, to my mind this was an

unreasonable and wholly unexplained leap in logic. I find that Determination No. A-2020-12 has no persuasive value.

[61] In conclusion, except for the last case (which I discount), I find the jurisprudence of the Agency to be either neutral or helpful in interpreting section 59, and supportive of the interpretation that the phrase in question means, or includes, the holding out of an unlicensed air service for sale to the public by means of an advertisement.

(8) Conclusion regarding the interpretation of section 59

[62] In summary, one grammatical and ordinary meaning of the phrase "publicly offer for sale" is that it is equivalent to "hold out for sale to the public". It gives meaning to all of the words of the section and is harmonious with the object and scheme of the *Act*. On the other hand, the strict contractual definition is grammatical, but technical rather than ordinary, makes no real sense in the context of any plausible purpose of the section, and offends the presumption against surplusage.

[63] For all of the above reasons, I interpret the phrase "publicly offer for sale" to include the holding out for sale of the service to the public. Under this interpretation, section 59 captures the advertisement of unlicensed services.

[64] Further, for the reasons expressed above, I interpret the word "publicly" to refer to an offer for sale made to the public generally, including offers to businesses, and is not limited to offers to individuals who might desire the services for personal, non-business purposes.

B. Factual issues

[65] It was admitted that, at the time of the alleged offences, the applicant had applied for, but had not yet received, a licence for the charter of large aircraft, such as the B737.

[66] The factual issues before me are as follows:

1. Did the applicant offer the sale of B737 charter services on the website?
2. Did the website contain the words required by the exemption?
3. Did the applicant offer the sale of B737 charter services in the magazine article?

(1) Count 1 – The website

[67] The only witness for the Agency was the enforcement officer who had investigated a complaint that the applicant was in breach of section 59. With respect to the first count, he collected screenshots from the applicant's website, and they were entered into evidence as Agency Exhibit 2.

[68] It is clear from Agency Exhibit 2 that the applicant's website was advertising the availability of various aircraft for charter, and that one of those aircraft was the B737. This is evidenced by the words "Jusqu'à 120 passagers" ["Up to 120 passengers"] and "Chrono Aviation dévoile ses premiers Boeing 737-200 et entre dans les ligues majeures de l'aviation au Canada" ["Chrono Aviation unveils its first Boeing 737-200, joins the big leagues of Canadian

aviation"]. There follows a detailed description of the B737, its layout, capacity and performance characteristics, followed by the words "Nolisez le Boeing 737-200" ["Charter the Boeing 737-200"]. Under the heading "Nos avions" ["Our Fleet"] are pictures of various aircraft types, one of which is the Boeing 737-200. The same is found at page 20, under the header "Flotte" ["Fleet"].

[69] I therefore find on a balance of probabilities that, on its website, the applicant advertised or held out for sale, and therefore offered for sale, unlicensed B737 charter air services to the public, contrary to section 59 of the *Act*.

(2) Count 1 – The exemption

[70] Nowhere in Agency Exhibit 2 are found the words expressly required by the exemption, or any words similar thereto.

[71] The witness for the applicant, an officer of Chrono Aviation, testified that the website had in fact complied with the exemption, although not on the pages captured in Agency Exhibit 2. He claimed that if the enforcement officer had clicked deeper into the website, he would have found the exempting words. He claimed that he had brought this to the attention of the enforcement officer. On redirect, the enforcement officer testified that, following this encounter, he had indeed clicked everywhere on the site and had not found any such language.

[72] Both witnesses appeared to be forthright. However, the testimony of the Agency was corroborated by its screenshots. No contrary corroborating evidence was provided by the applicant. In the face of an active investigation, it would have been both simple and prudent for the applicant to substantiate its claim with screenshots or other evidence, such as from the webmaster. On the preponderance of evidence before me, I find on a balance of probabilities that the exempting words were absent from the website, perhaps despite the best intentions of the applicant.

[73] I therefore find on a balance of probabilities that the contravention of section 59 by the applicant is not saved by the exemption.

(3) Count 2 – The magazine article

[74] The applicant characterizes the left-hand page as a journalistic informational article, not an offer, and not even an advertisement. The Agency did not argue that the left-hand page was an "offer", but instead focussed on the right-hand page. In my view, the left-hand page is akin to an "advertorial", that is, it purports to be the work of a third party, mimics the style of objective journalism, and describes the product in glowing terms, but falls short of containing an explicit "offer" or holding out by the applicant. I agree that the left-hand page is not an "offer".

[75] I do, however, find that the right-hand page did contain an offer for sale to the public of B737 charter services. By the background picture of the B737, and the plain words "Available for Charter", "Gravel Equipped", "Our New Boeing 737" and the contact telephone number for Chrono Aviation, the applicant is clearly holding out to the public that the B737 is available for charter, and this advertisement is aimed at least at a segment of the public. As I have said, I reject the argument that the "public" does not include purchasers of a service for business purposes.

[76] I therefore find on a balance of probabilities that in the magazine article the applicant advertised or held out for sale, and therefore offered for sale, unlicensed B737 charter air services to the public, contrary to section 59 of the *Act*.

C. Monetary penalty

[77] I would not normally interfere with the monetary penalty in circumstances such as these. The penalty was substantially below the maximum amount for the contravention and does not appear to be disproportionate to the facts alleged.

[78] However, in this case, one of the aggravating factors identified by the Agency was an alleged prior violation. The Agency normally issues a warning letter for a first violation, and only elevates the sanction to a monetary penalty for a second or subsequent violation. This is what occurred in the case of the alleged prior violation.

[79] The prior warning letter, issued on September 28, 2017 and entered into evidence as Applicant Exhibit 1, was for operating a Dash-8 aircraft without the appropriate Agency licence. At that time, the applicant had a licence for small (up to 39 seats) aircraft, but not for medium aircraft. The Dash-8 type is certified for 40 seats. But the applicant had obtained a supplementary type certificate from Transport Canada which limited the aircraft to a maximum of 37 seats, and this was the configuration of the aircraft in question. It therefore qualified as a small aircraft, for which the applicant was licensed.

[80] The witness for the Agency, an enforcement officer, was cross-examined regarding this first violation. He flatly admitted that the warning letter had been issued in error and that no violation had actually been committed.

[81] The Agency argued that, regardless, the applicant had not followed the internal Agency appeal process, and therefore the earlier violation remains on the record. The Agency argued that it was too late to argue innocence since the time limit for such an appeal had lapsed.

[82] I disagree. This very question was canvassed in *Air Canada v. Canadian Transportation Agency*, 2019 TATCE 36 (Ruling). In that case, the Agency had issued a warning letter and the applicant appealed to this Tribunal. By way of preliminary motion, the Agency objected that a warning letter was not a monetary penalty and that therefore no appeal lay to the Tribunal. In agreeing, the panel stated:

> [64] If the Letter of Warning has no legal consequences, as stated by the Agency, then it also seems to me that the same could also be said of the Agency's own internal contestation process. The lack of express authority for such a process no less calls into question whether this process can have any legal consequences, such as the "establishment" of the commission of a violation. Further, the process lacks the independence required by the *CAT Reference* and *Skyward Aviation Ltd*.
>
> […]
>
> [68] Since no administrative monetary penalty was assessed, the Letter is not a notice of violation as defined in section 180, and therefore the review process provided for by section 180.1 of the *Act* is not engaged. As such, the Tribunal has no jurisdiction to hear a review of the matter.

> [69] However, this decision is without prejudice to the right of the applicant to require strict proof by the Agency of the allegations contained in the Letter, should the Agency ever raise these allegations against the applicant in any subsequent proceeding before this Tribunal.

[83] The prior violation was considered an aggravating factor by the Agency in assessing the monetary penalty in the present case. It would be unfair of me not to also take into account the fact, as admitted by the witness for the Agency, that the alleged prior violation had not in fact been committed.

[84] Therefore, in my view, all things considered, a fair penalty for the two violations combined is $5,000.

IV. DETERMINATION

[85] The Canadian Transportation Agency has, on a balance of probabilities, proven that the applicant committed both of the alleged violations. The monetary penalty for the two violations combined is reduced to $5,000.

[86] The total amount of $5,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

July 29, 2021

(Original signed)

Andrew Wilson
Member

Appearances

For the Agency:	Kevin Shaar
For the Applicant:	William Clark