Federal Court  Cour fédérale

Date: 20130718

Docket: T-324-12

Citation: 2013 FC 800

Ottawa, Ontario, July 18, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MARINA DISTRICT DEVELOPMENT COMPANY D.B.A. BORGATA HOTEL CASINO & SPA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of a decision by the Appeal Panel of the Transportation Appeal Tribunal of Canada (the panel) dated January 10, 2012, upholding the Canadian Transportation Agency's (the Agency) administrative monetary penalty against the applicant for contravening subsection 57(a) of the *Canada Transportation Act*, SC 1996, c 10 (the Act) by operating an air service without a license.

[2] The applicant seeks an order quashing the order of the Appeal Panel, reinstating the order of the review member of the Transportation Appeal Tribunal (the member) and its costs on the application. The respondent also seeks costs.

Background

[3] The applicant is a hotel casino and spa located in New Jersey. The parties filed an agreed statement of facts used in the administrative proceedings leading to this judicial review.

[4] Between July 9, 2008 and March 1, 2009, two aircraft owned and operated by the applicant made ten flights between Atlantic City, New Jersey and Montreal or Toronto. All of these flights had the purpose of conveying Canadian customers of the applicant either from or to a Canadian point to or from Atlantic City.

The Notice of Violation

[5] On April 15, 2009, the Agency issued a notice of violation to the applicant finding it in violation of subsection 57(a) of the Act for offering the services described above without a license. A penalty of $25,000 was issued.

[6] On May 22, 2009, the applicant filed a request for a review hearing with the Transportation Appeal Tribunal of Canada.

The Review Decision

[7] On February 8 and 9, 2010, a hearing was held before the member. The member released his reasons on May 31, 2010, determining that the applicant had not contravened subsection 57(a).

[8] The disputed issue between the parties was whether the flights described above constituted a "publicly available" service, as the term is used in subsection 55(1) of the Act, which provides the definition for the term "air service" used in subsection 57(a).

[9] In addition to the agreed statement of facts, both parties provided affidavit evidence.

[10] The Agency submitted affidavits of three passengers from the flights, an enforcement officer from within the Agency, a manager from within the Agency and an expert witness on the Agency's jurisdiction. The passengers indicated the applicant had provided them with complimentary flight services for their trips to the applicant's casino. The officer described the investigation in the applicant's flights and correspondence with the applicant's general counsel. The manager described the lack of statutory definition of the term "publicly available", and the Agency's position that a corporate jet used to transport employees for a specific business purpose is not publicly available. The expert described her understanding that an American operator that flies to Canada must comply with the Act.

[11] The applicant submitted affidavits from the vice-president of the National Business Aviation Association (NBAA), the president of the Canadian Business Aviation Association (CBAA) and an expert witness on the mandate of Transport Canada.

[12] The vice-president of the NBAA indicated that under American aviation law, an operator certificate was not needed for transporting guests of a company on an airplane. The applicant's vice-president stated complimentary perks to high-level customers are a key ingredient of the applicant's marketing strategy and that the free flights are at the sole discretion of the applicant with no entitlement to such service, or requirement due to receiving such service, based on a certain amount spent at the casino. The president of the CBAA indicated the CBAA had been delegated the authority to grant operator certificates from Transport Canada and spoke to the requirements of the *Canadian Aviation Regulations*, SOR/06-433, but admitted under cross-examination that the CBAA had no authority to issue licenses as opposed to operator certificates. The expert witness gave evidence that private businesses using their own aircraft to pursue business objectives are not commercial operators and does not constitute a choice available to an individual in the public domain.

[13] The member summarized the arguments of the parties.

[14] The Agency argued that the Saskatchewan Court of Appeal previously held that the fact that passengers must be guests in order to use a flight service does not mean the service is not publicly available, as the guests are simply a subset of the public using the service. It is sufficient for a segment of the public to have access to a service or facility for it to be publicly available. The

Agency distinguished its previous decisions determining that transporting employees or the owners of aircraft was not a publicly available service.

[15] The applicant relied on a legal dictionary's definition that "available" means open for all to use and distinguished the case law relied on by the applicant on the basis that the applicant's customers had no right to use the service and booking flights with the applicant was not available to the public.

[16] Based upon the language of the Act and the case law, the member determined the following test to determine whether a service was publicly available:

> Any member of the public who is interested in obtaining the service can, of his own initiative, contact the service provider to enquire about the availability of flights and reasonably expect to be able to book a flight. Should the conditions be to his satisfaction including price and schedule and they meet certain conditions, if any exist, the service provider is offering an air service that is publicly available. If any member of the public cannot do so, the service is not publicly available and section 57 of the *CTA* [the Act] does not apply.

[17] The member noted the evidence established that the applicant did not publicize or promote the free flights and that members of the public could not contact the applicant to enquire about the availability of flights and reasonably expect to book a flight. He found that the availability of the flight was at the applicant's discretion and no member of the public and no customer of the applicant could have a reasonable expectation to call the applicant and arrange for a flight. The fact that the applicant's casino is open to all does not mean every person who visits the casino has a reasonable expectation of being able to arrange free flights if that person gambles at a sufficient level.

[18] The member found the flights were only open to specific clients at the applicant's discretion. There was no evidence the applicant made available to the public or its customers information regarding the schedule, conditions, pricing or other details related to the offered flights. In order to contact a service provider about the availability of the service, one must be aware it exists.

[19] The applicant's customers cannot reasonably expect to book a flight with the applicant and the fact that the group receiving flights represents one-tenth of one percent of the applicant's customers makes it more akin to private than public.

[20] Members of the public or general customers of the applicant, cannot of their own initiative, contact the applicant and reasonably expect to book a flight. The member therefore found the applicant was not offering a publicly available air service and not in contravention of section 57 of the Act.

The Appeal Decision

[21] The Agency requested an appeal on June 30, 2010. The panel held a hearing on May 11, 2011 and its reasons for decision are dated January 10, 2012, reversing the member's decision.

[22] After summarizing the submissions of the parties, the panel first turned to the standard of review it would apply to the review decision. The panel indicated it would use a standard of correctness to determine whether the member exceeded his jurisdiction in creating a legal test for determining whether an air service is publicly available under the Act, the first ground of appeal. On

the second ground of appeal, whether the member erred in creating a flawed test, the panel would also apply a correctness standard. On the third ground of appeal, the member's application of its test to the facts, the panel determined a reasonableness standard was appropriate.

[23] On the first ground of appeal, the panel found that the member had jurisdiction to determine the legal test, relying on case law interpreting the *Aeronautics Act*, RSC 1985, c A-2. The Agency was not acting in a quasi-judicial capacity in this case, but rather in an enforcement capacity.

[24] On the second ground of appeal, the panel disagreed with the member's interpretation of subsection 57(a) of the Act. While the member focused on the Agency's role in economic regulation as set out in subsections 5(a), (b) and (c) of the Act, the panel interpreted the term "publicly available" in the context of its ordinary meaning. Parliament chose to use an economically neutral term that was not concerned with payment, unlike the *Aeronautics Act*'s distinction between services provided for hire and those not. While an operator must meet economic requirements in order to get a license from the Agency, the obligation to do so rests on whether the service is publicly available.

[25] The panel determined that it is the nature of the service provided that determines whether it is publicly available: "How it is made known to the affected public and whether the initial contact is made by a member of that public is irrelevant. If the flight is made available to a segment of the public, even at the initiative of the operator, then it is 'publicly available'."

[26] On the third ground of appeal, the panel found the member erred on his application of his test. The panel pointed to the applicant's vice-president's testimony that a customer who received the free flight and continued to spend at his current level would likely continue to receive that complimentary service and one of the customer's evidence was that he is regularly offered free flights whether he initiates contact with the applicant or vice versa. The member's finding that the premium clients would not have a reasonable expectation of booking a complimentary flight was therefore in error. Consequently, the panel found that the applicant was operating a publicly available service.

[27] The panel reduced the penalty to $12,500 given that it was a first offence.

Issues

[28] The applicant's memorandum raises the following issues:

1. What is the applicable standard of review to apply to:

   (i) the panel's interpretation of "publicly available" air service under subsection 55(1) of the Act and

   (ii) the application of that interpretation to the facts?

2. Did the panel adopt an unreasonable interpretation of the meaning "publicly available" air service under subsection 55(1) of the Act?

3. Did the panel unreasonably find that the applicant operated a "publicly available" air service under subsection 55(1) of the Act with respect to the flights at issue in the notice?

[29] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the panel err in its decision?

Applicant's Written Submissions

[30] The applicant argues the applicable standard of review is reasonableness and that the panel's interpretation of subsection 55(1) is unreasonable.

[31] The panel articulated no intelligible standard by which flight operators can determine whether they are providing a publicly available service within the meaning of the Act. The panel's interpretation (quoted above) is tautological, as its definition of publicly available flights are those available to a segment of the public. How a service is made known and whether the operator initiates contact, are relevant factors in determining whether the service is publicly available and it was unreasonable for the panel to exclude these considerations.

[32] In their ordinary sense, the words "publicly available" mean capable of being used, accessed or obtained by people generally. The panel gave no reason for preferring one dictionary definition over another or preferring a dictionary definition over that of the member.

[33] The panel's interpretation does not fall within the range of acceptable outcomes because it is contrary to the scheme and purpose of the Act. The Agency's mandate under Part II of the Act is

limited to economic responsibility, while technical responsibility is allocated to Transport Canada. The member properly made this distinction.

[34] The National Transportation Policy, issued under section 5 of the Act, makes clear that the Agency's responsibility for licensing and regulation making is primarily economic and financial in nature. This is confirmed by the Agency's own statement of its mandate, while Transport Canada is the designated authority responsible for aviation security. Air safety is administered by the Minister of Transport and the Minister's department under the *Aeronautics Act*.

[35] The Agency's duties include ensuring publicly available air services have appropriate liability insurance and are financially fit when they start operations, have a reasonable chance of success and minimizing disruptions in service. The applicant argues that when an air service is not publicly available, there is no public policy reason to enforce these requirements. There are no consumers to protect. This statutory context was elaborated by the applicant's expert witness before the member. Expert evidence is properly admissible to assist a court in understanding statutory language in the context of a regulated sector.

[36] The panel provided no consideration of how its interpretation advances Parliament's goal of ensuring that air service meets the criteria described above. This failure renders its interpretation unreasonable.

[37] Neither *R v Biller*, [1990] FCJ No 1104 (CA), nor *Canada (Attorney General) v Rosin*, [1999] SJ No 202 (CA), consider whether an air service is publicly available under subsection 55(1)

and the panel's reliance on them is unreasonable. *Biller* above, is concerned with a statutory definition of "commercial air service", which means any use of an aircraft for hire or reward. This has no application to the Act.

[38] *Rosin* above, is concerned with whether a service is available to the public in a human rights context. In that context, the definition of services available to the public is interpreted widely in order to ensure that they are scrutinized for human rights violations. It was unreasonable for the panel to import this reading into the Act, which has the purpose of financial and economic regulation of civil aviation.

[39] The panel's decision is a fundamental shift in what the private business aviation sector understood as the settled meaning of a publicly available air service.

[40] The member formulated a reasonable test, an objective reasonable expectations standard. As the operator exercises an absolute discretion, the public cannot reasonably expect to access or avail themselves of the flight.

[41] On the factual findings, the panel unreasonably interfered with the member's factual findings. It showed no deference, as it relied on a single statement from the applicant's vice-president's affidavit, taken out of context and a gloss on the affidavit of the customer. This selective reading of the evidence was unreasonable.

Respondent's Written Submissions

[42] The respondent agrees that reasonableness is the standard of review for the panel's decision, although it argues that correctness is the standard of review for questions of law.

[43] On the standard of review the panel applied to the member's decision, there is no statutory limitation on the panel's ability to review the findings and it may substitute its decision for the decision appealed against. The panel properly determined that the findings of fact made by the member are entitled to deference, but that questions of law were to be reviewed on a correctness standard.

[44] The respondent argues the panel correctly rejected the member's test for "publicly available" as losing sight of the ordinary meaning of the words and placing too great an emphasis on the Agency's regulatory function in economic matters. The panel noted there is jurisprudence formulating a definition of "publicly available" and that the member had no basis for elaborating on that test. The segment of the public that the air service was available to was a small restrictive group, but that does not mean that the air service ceased to be offered to the public.

[45] The panel properly relied on the precedents of *Biller* above and *Rosin* above. The panel's adoption of the common law test is not inconsistent with the Agency's past rulings interpreting the meaning of the phrase "publicly available".

[46] The broad definition of "publicly available" ensures that the enumerated exemptions for particular air services in section 56 of the Act and section 3 of the *Air Transportation Regulations*, are not deprived of meaning. Even a small segment of the public are entitled to the protections of Part II of the Act. The public remains the public, no matter how small the segment of the public may be that participates in the offered air service.

[47] The Appeal Panel was correct to disregard the applicant's expert witness. Experts must not be permitted to usurp the function of the trier of fact. This witness' evidence was on the ultimate issue of this judicial review, the question of statutory interpretation. Legislative intent cannot be discerned after the fact by a current or past bureaucrat. This evidence should be given no weight.

[48] The Agency has a practice of issuing advance rulings on matters, including whether a licence is required for a given service. The applicant did not avail itself of this service and therefore the applicant's expectations regarding the law on this point were unreasonable.

Analysis and Decision

[49] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[50] In defining "publicly available", the panel was interpreting the Act, its home statute. Such interpretations are subject to deference from reviewing courts and should be reviewed on a reasonableness standard (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paragraph 39). Given the Supreme Court's comments in that decision at paragraph 39 regarding the rarity of questions of true jurisdiction, I do not consider the statutory interpretation question at issue to be in that category. Factual findings other than the issue of statutory interpretation are, of course, also subject to a reasonableness standard.

[51] In reviewing the panel's decision on the standard of reasonableness, the Court should not intervene unless the panel came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 4). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[52] **Issue 2**

Did the panel err in its decision?

The parties appear to be in agreement that the central issue in this judicial review is the interpretation of subsection 57(a) of the Act. The panel's reasons on this point are contained in ten paragraphs of its decision (at paragraphs 54 to 63).

[53] The panel interpreted the decisions in *Biller and Rosin* above, to mean that "a service available only to a segment of the public is 'publicly available'" (at paragraph 59) and found that the member had no basis for elaborating on that formulation. With respect, it was clear why the member needed to elaborate a more fine-grained definition: he needed a standard by which he could evaluate whether the applicant's customers did indeed constitute a "segment of the public".

[54] I agree with the applicant that this test, also articulated by the panel in paragraph 62, borders on tautological: it provides no insight into what a "segment of the public" is. It merely establishes that a service need not be available to the universal public. The member's test provided a helpful tool for analyzing whether a given group of air service users are indeed a segment of the public.

[55] While the panel may have been able to review the member's decision on a correctness standard (although I will not rule on that standard of review issue as it was not argued by the applicant), its review is still required to meet the requirements from *Dunsmuir* above, of intelligibility, justification and transparency and being within the range of acceptable outcomes.

[56] Although the panel provided cogent reasons for the negative element of its decision, rejecting the member's test (at paragraphs 56 to 58), the same cannot be said for the positive element, the legal test the panel substituted in the place of the member's. The test is unintelligible, as it is a near-tautology. The panel's decision to use this vague test is also not properly justified, as there is no explanation of why a less clearly defined test is preferable to a more clearly defined test such as that provided by the member, or an analysis of why such ambiguity is preferable or required

by the statute. The panel simply repeated the holding from case law interpreting different statutes without any further insight.

[57] The panel was confronted with a need to resolve a question of law relating to its home statute and in response offered little. The panel's decision is unreasonable and should be set aside. Given my decision on that issue, I need not address the factual findings as the panel must apply its redetermined test to the facts anew regardless.

[58] The applicant urges me to restore the member's decision, presumably giving the member's statutory interpretation the approval of this Court. Given the Supreme Court's comments in *Alberta Teachers'* above, regarding the expertise of tribunals in interpreting their home statutes, I do not believe it would be appropriate at this stage for this Court to articulate a test on the application of subsection 57(a) on this judicial review.

[59] It is important for a reviewing court to have the benefit of the tribunal's views on interpreting its home statute (see *Alberta Teachers'* above, at paragraph 25). In this case, the panel's interpretation was sufficiently unintelligible that this Court has been denied the opportunity to consider such views. I appreciate that this is the third round of litigation between the parties and redetermination followed by a potential subsequent judicial review may entail a fourth and fifth round with all the associated costs. Yet I cannot let this concern trump the proper relationship between courts and specialized tribunals.

[60] The judicial review is therefore granted, the appeal is quashed and the matter is returned to the Transportation Appeal Tribunal of Canada for redetermination.

[61] The applicant shall have its costs of the application.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred back to the Transportation Appeal Tribunal of Canada for redetermination and the applicant shall have its costs of the application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Canada Transportation Act,* SC 1996, c 10**

55. (1) In this Part,	55. (1) Les définitions qui suivent s'appliquent à la présente partie.
…	…
"air service" means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both;	« service aérien » Service offert, par aéronef, au public pour le transport des passagers, des marchandises, ou des deux.
57. No person shall operate an air service unless, in respect of that service, the person	57. L'exploitation d'un service aérien est subordonnée à la détention, pour celui-ci, de la licence prévue par la présente partie, d'un document d'aviation canadien et de la police d'assurance responsabilité réglementaire.
(a) holds a licence issued under this Part;	
(b) holds a Canadian aviation document; and	
(c) has the prescribed liability insurance coverage.	

FEDERAL COURT

SOLICITORS OF RECORD

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