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Modal Updates: COMPLIANCE WITH CANADA'S AIR CARGO SECURITY MEASURES



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Canada and the U.S. Mutually Recognize Air Cargo Security

One of the most significant developments in 2012 in air cargo occurred on May 31, 2012 when Canada and the United States announced that both governments agreed to the mutual recognition of and cooperation on air cargo security in both countries.

This development provides economic and practical benefits for air carriers since cargo shipped on passenger aircraft (a developing growth area in air cargo) will now be screened only once for transportation security reasons, at the point of origin, and will not need to be rescreened prior to upload on an aircraft in the other country.

This is just the first initiative in the Beyond the Border Perimeter Security and Economic Competitive Action plan announced by Prime Minister Stephen Harper and U.S. President Barack Obama.¹

In this paper we review generally, the Canadian Air Security Program, and the difficulties businesses encounter when they seek to determine the latest security regulations to ensure compliance, while maintaining a profitable air cargo program. We also address the recent changes to the rules

of air cargo programs in Canada, which seek to avoid and reduce the need for re-screening and additional paperwork generated by cargo moving between Canada and the United States. Given the secure nature of the security measures pertaining to air cargo security, this paper provides a general description only and its value lies in its references which are intended to enable the reader to pursue the information required, assuming one has the necessary security clearance.

1) Canadian Aviation Security

a) Governing Ministry

In Canada, almost half of all air cargo is shipped on passenger planes, which Transport Canada describes as the most effective shipping method, considering Canada's size and unique geography. In 2011, approximately 100 billion dollars of goods were imported and exported by air.

Here, air cargo security is the responsibility of a number of industries, federal departments and agencies. Although not itself responsible for the actual screening and securing of cargo, Transport Canada is the principal regulator of air cargo security and has the jurisdiction to create and enforce relevant rules and regulations pertaining to air cargo security.

b) The Air Cargo Security Program (ACPS)

The responsibility of screening and securing air cargo falls to air carriers.

Generally, air cargo is screened and secured by a known and registered shipper, or freight forwarder prior to being loaded onto an aircraft. In the event that the cargo arrives without being previously secured, the air carrier can secure the cargo utilizing physical or active technology search and screening methods.²

Transport Canada developed the Air Cargo Security Program (ACS Program) with the concurrent goals of improving aviation security in Canada while streamlining and increasing efficiencies within the Canadian aviation security sector. This program affects air carriers, freight forwarders, screening facilities, cargo handling agents, agents, warehouses, trucking companies, packing companies and shippers.³

The ACS Program tackled these goals with a two-pronged approach:

1. streamlining air cargo screening; and
2. ensuring security along the supply chain.⁴

One of the main reasons for targeting the supply chain was to eliminate delays or "bottlenecks" at Canadian airports by allowing shippers and freight forwarders to ensure that their cargo is secure prior to its transit to the airport thereby eliminating at-airport security screenings.⁵

Businesses and organizations which can form part of the supply chain are freight forwarders, screening

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facilities, cargo handling agents, agents, warehouses, trucking companies, packing companies and shippers.

Ultimately, the ACS Program is intended to ensure that supply chain security exists, that is, that the cargo will be screened and secured at origin, accepted as secured, and maintained/transported in a secure fashion as it moves along the supply chain from the shipper to the freight forwarder and finally to the air carrier.⁶

(i) Membership with the ACS Program

Any business intending to participate in handling and transporting of secured cargo departing from Canadian airports is required to be compliant with the ACS Program.⁷ However, the secrecy surrounding Canada's air cargo security makes it very difficult for businesses to ascertain whether their policy, paperwork and screening processes are compliant.

Understanding the program design, oversight and implementing practical compliance can assist companies in determining that they are and remain compliant and yet cost-effective.

Participation in the ACS Program for air carriers is mandatory.⁸ However, participation for air cargo operators such as entities which intend to accept, screen, transport and tender cargo as secure is voluntary.⁹ These latter entities such as shippers, freight forwarders, cargo handling agents, warehouses, trucking or parking companies¹⁰ may apply to be an "Approved Participant" of the ACS Program.¹¹ The ACS Program also provides for entities intending to present their cargo to approved participants without prior cargo screening. These shippers may apply to become a "Registered Shipper" under the program.¹²

(1) Requirements to become an Approved Participant of the ACS Program

Corporations seeking to become an Approved Participant must complete an online registration form (see "Relevant Websites" section) and provide information such as the corporation's legal business name, registered trade names, Canadian business number and the various physical and mailing addresses for the corporation.

In Canada: 1-800-959-5525 or consult CRA's Business Number (BN) registration¹³ page

Outside Canada: consult CRA's Non-resident GST/HST Registration and Security Enquiries¹⁴ page

Once online registration is completed and the corporation's identity and security is verified to the satisfaction of Transport Canada, relevant documentation containing security measures and regulations that Participants are required to meet may be forwarded to the company. This process can be onerous to complete, and the parameters of verification are not public.

Transport Canada has their own vetting system for shippers which is a separate process than that of Approved Participants. The registration requirements to be a "Registered Shipper" stipulate that one must meet an additional requirement which is to provide a referral who can confirm an existing business relationship with the company with respect to shipping air cargo.¹⁵

As set out above in this paper's introduction, by implementing the *Declaration on a Shared Vision for Perimeter Security and Economic Competitiveness*, Canada has reviewed and recognized the security practices of the United States. Additionally, Canada has worked together with the U.S. to ensure that each country's security concerns are mirrored and

provided for in the respective country's security practices. By being in compliance with the security requirements and measures of the US, parties shipping goods to Canada may be seen to be in valid compliance with those of Canada. However, foreign corporations, air carriers or air cargo operators must still be registered with the ACS Program in order to gain access to the confidential security measures which they must fulfill.

2) Security Measures

a) Distinction between regulations and security measures

It is important that a distinction is made between generally applicable regulations and security measures.

Regulations are subject to the *Statutory Instruments Act*¹⁶ which regulates the timing and format of their translation, transmittal and publication in the *Canada Gazette* (see "Glossary") for dissemination and public awareness. These are to be distinguished from security measures which are created to deal with security issues on an immediate and confidential basis and are exempt from the application of the *Statutory Instruments Act*.¹⁷

Security measures are created to deal with an immediate security matter which, if disclosed, could jeopardize aviation security, the security of an aircraft or aerodrome, the security of an aircraft facility or the safety of the public. As such, they are confidential and, as mentioned, exempt from publication. The *Aeronautics Act* provides that all security measures can only be disclosed by the individual who created them (i.e. The Minister or his deputy in some instances) and they are only to be disclosed if required by law, or if required to give effect to the measure itself.

b) Conflict between regulations and security measures

A security measure can apply in addition to or in lieu of an existing

regulation.¹⁸ In the event of a conflict between a confidential security measure and a published regulation, the security measure prevails.¹⁹

Therefore, in Canada, it is insufficient to simply abide by the applicable aviation security regulations. Individuals and corporations must ensure to align themselves with Canada's security measures which can be somewhat arduous since the security measures are not public.

c) *Creating and coming into force of security measures and regulations*

(i) Aviation Security Regulations

Aviation security regulations can come to be in two manners:

- 1) The Governor in Council may make a regulation under subsection 4.71(1) of the *Aeronautics Act*²⁰
- 2) The Minister of Transport may make a security measure under subsection 4.72(1) which will eventually either become published and repealed 1 year after publication, or be made an official aviation security regulation.²¹ Additionally, security measures are confidential and are not to be published or disclosed to the public.²²

(ii) Security Measures

Security measures can be made by the Minister of Transport if the subject that it concerns was liable to be covered by a regulation.²³ Furthermore, security measures are the appropriate mechanism with which to address matters whose disclosure by way of a public, published regulation would compromise aviation security, the security of an aircraft or aerodrome, the security of an aircraft facility or the safety of the public.²⁴

The Minister can implement and carry out the requirements of the security measure whenever he or she deems it necessary to do so. There is no statutory provision in place

which delays the security measures from coming into force.²⁵

The Minister is obligated by the *Aeronautics Act* to consult with any person or organization which the Minister deems appropriate prior to creating a security measure.²⁶ This is usually interpreted to mean the persons and organizations that would be affected by the particular security measure, required to carry it out, or may have relevant input into its creation. Note that this obligation can be set aside in the event that the security measure is immediately required to establish the security of the above-mentioned parties.²⁷

Security measures are not required to be published or made into regulations until Canadian security is no longer jeopardized by its disclosure. The Minister must publish the security measure in the *Canada Gazette* within 23 days of forming such an opinion.²⁸ The security measure must be repealed before the earlier of a) one year after the aforementioned notice is published or b) the day on which an aviation security regulation based on the security measure is made.²⁹

Therefore, the Regulations are not an accurate or up to date representation of Canada's most immediate and pressing aviation security needs. Furthermore, regulations can be superseded or built upon by active security measures. As such, simply being compliant with the published Regulations is not sufficient to be considered to be meeting current Canadian aviation safety requirements.

By being part of various professional, air cargo safety or transport organizations, an air carrier or air cargo operator increases its chance of being directly disclosed security measures under the *Aeronautics Act*³⁰ which are relevant and applicable to that organization, and by extension, themselves.

(1) Delegation of power to create security measures

The creation of security measures can be delegated to The Minister's deputy when the deputy is of the opinion that such measures are required immediately for the sake of aviation security, security of any aircraft or aerodrome, or the security of the public, passengers or crew members.³¹ An example of when the deputy would create a security measure would be when the Minister is overseas on official business. Security measures created by a deputy come into force immediately but are only valid and effective for 90 days unless they are repealed prior to that time by the Minister or his deputy.³²

There is no requirement to report to Parliament or to the Canadian public for security measures to be created by the Minister or his deputy.³³

3) Consequences of violating or failing to meet security measures

Inability to meet security measures can prohibit corporations from being able to do business and transport cargo to, from and through Canada. Furthermore, contravention of security measures can lead to criminal charges³⁴ and/or monetary penalties.³⁵

4) Compliance with security measures

In order to take part in the air cargo transportation business in Canada, individuals and corporations must ensure that they fulfill and meet not only the Aviation Security Regulations, but also the confidential security measures.

The confidential security measures are especially difficult to ascertain for air carriers and air cargo operators who are not already conducting business in Canada and are therefore not already a member of an organization which may be consulted prior to the creation of

the security measure or advised of its existence after implementation.

This requirement to fulfill the security measures is additionally applicable to all third party service providers (TPSP) working with air carriers or air cargo operators conducting business in or by way of transit through Canada. It is therefore imperative that contractual language between corporations and their TPSP reflect this requirement. Reference to the air cargo security regulations alone should be eliminated as they are dated and may be subject to overriding security measures. Appropriate language should ensure compliance of the TPSP with all air cargo security measures as well as the air cargo security regulations, the former being imperative and of utmost importance to ensure that they are appropriately meeting Canadian aviation security standards.

As mentioned, the ACS Program provides the opportunity for shippers who do not intend or are unable to screen cargo in accordance with security measures who wish to instead deliver the cargo directly to an Approved Participant to register with the Program as a “Registered Shipper.”

5) Sources for Regulations and Security Measures

a) Applicable Legislation

(i) Aeronautics Act (R.S.C., 1985, c. A-2)

(ii) Canadian Air Transport Security Authority Act (S.C. 200, C.9, s.2): an Act regulating the screening of persons who access aircrafts or restricted areas as well as their property in their possession or control and any baggage given to an air carrier for transport. This act requires that screenings be performed in a matter and under circumstances prescribed by, *inter alia*, aviation security regulations and security measures.

(iii) Canadian Aviation Security Regulations, 2012: allows for the Minister to prescribe security measures which are applicable to air carrier and aerodromes, but also to individuals and organizations which provide services to those groups.³⁶ (The Air Carrier Security Regulations and the Aerodrome Security Regulations were amalgamated into the Canadian Aviation Security Regulations).

(iv): Regulations Amending the Canadian Aviation Security Regulations, 2012

b) Relevant websites

(i) Canada Gazette: <http://www.gazette.gc.ca/>

(ii) Transport Canada's ACSP:

(1) General information: <http://www.tc.gc.ca/eng/aviationsecurity/asc-41.htm>

(2) Online Application: <https://wwwapps.tc.gc.ca/Saf-Sec-Sur/2/SSCIMS-SGICAS/reg/reg00.aspx?lang=eng>

(iii) Canada Revenue Agency – Business Number registration

(1) for Canadians: 1-800-959-5525; <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/bn-ne/menu-eng.html>

(2) for non-residents: <http://www.cra-arc.gc.ca/cntct/gsthstnrs/menu-eng.html>

6) Glossary


• **Aerodrome**: Defined in the Aeronautics Act as “any area of land, water (including the frozen surface thereof) or other supporting surface used, designed, prepared, equipped or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft and includes any buildings, installations and equipment situated thereon or associated therewith”

• **Air carrier**: “any person who operates a commercial air service.”³⁷

• **Aircraft**: “any machine capable of deriving support in the atmosphere from reactions of the air, and includes a rocket.”³⁸

• **Airport**: “an aerodrome in respect of which a Canadian aviation document is in force”³⁹ (i.e. a licence, permit, accreditation, certificate or other document issued by the Minister).⁴⁰

• **Canada Gazette**: Official publication by the government of Canada in which all laws and Orders in Council issued by the government are published. It serves as a means to communicate new laws, hearings and tribunals, or proposed changes to the public. Although the Gazette does not benefit from a wide readership in Canada it remains an important publication as, once a law or regulation is noted in the Gazette, ignorance of it is no longer a defence.⁴¹ Part I of the Gazette published every Saturday contains, *inter alia*, proposed regulations allowing for public comment. Part II of the Gazette is published every second Wednesday and contains all regulations that have been enacted as well as other documents such as orders in council, orders and proclamations. Part III is published with the text of any new laws immediately after they have received Royal Assent, that is, being formally approved by Parliament. Electronic copies of the Canada Gazette can be found on the Government of Canada's official website: <http://www.gazette.gc.ca/>. Note that PDF versions of Part III of the Gazette, containing official language of recently assented laws and regulations, are considered to be official, whereas HTML versions are not.

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15. Transport Canada. Secure Supply Chain Information Management System, Registration Form – Registered Shipper, online: <<https://wwwapps.tc.gc.ca/Saf-Sec-Sur/2/SSCIMS-SGICAS/reg/reginst.aspx?lang=eng>>
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