TATC File No. W-3595-27
MoT File No. 5258-1

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Independence Air Ambulance Corporation, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:
section 19 of the Transportation Appeal Tribunal of Canada Act, S.C. 2001, c. 29
section 6.71 of the Aeronautics Act, R.S.C., 1985, c. A-2

Interlocutory Decision
Patrick T. Dowd

Decision: November 20, 2013

Citation: *Independence Air Ambulance Corporation v. Canada (Minister of Transport)*, 2013 TATCE 35 (Ruling)

RULING ON APPLICANT'S REQUEST FOR COSTS

Held: I find that the Tribunal became seized of this matter for reasons that are frivolous and vexatious within the meaning of paragraph 19(1)(*a*) of the *Transportation Appeal Tribunal of Canada Act*. As such, the Applicant's Request for Costs is granted.

A payment of costs totalling $54 200 is due to the Applicant within thirty-five (35) days of service of this Ruling.

I. BACKGROUND

[1] On June 24, 2009, the Minister of Transport (Minister) issued a Notice of Refusal (NOR) to the Applicant, Independence Air Ambulance Corporation (IAA), denying it an Air Operator Certificate (AOC) because of the aviation record of the Applicant, but more specifically due to the aviation record of Jeffrey Alan McIntosh, who was described as a principal at IAA.

[2] On June 25, 2009, the Applicant requested a review of the Minister's decision with the Transportation Appeal Tribunal of Canada (Tribunal). The Review Hearing was scheduled to occur from December 7 to 10, 2010. However, on November 26, 2010, the Minister requested an adjournment of the Review Hearing for the Minister to fulfill its ongoing disclosure obligation, and the adjournment was granted.

[3] It appears that the period of the adjournment was used by the Minister to prepare an Application to Amend the NOR, which was presented to the Tribunal on February 23, 2011. In the amended NOR, the Minister cited 31 incidents, enforcement actions, and problems in general, which occurred during the existence of Canadian Global Air Ambulance Ltd. (CGAA). The Minister proposed that these events could be attributed to Mr. McIntosh. To accomplish this, the Minister's officials relied on their interpretation of paragraph 6.71(*c*) of the *Aeronautics Act*, R.S.C., 1985, c. A-2 (*Act*), as well as section 103.12 of the *Canadian Aviation Regulations*, SOR/97-433 (*CARs*).

[4] In the Review Determination, I found that the Minister had not proven that the record of CGAA was attributable to Mr. McIntosh. As such, I sent the Minister's decision to deny an AOC to IAA back to the Minister for reconsideration.

[5] Following the Review Determination, the Applicant requested, on June 25, 2013, that an order be made against the Minister for costs, as well as a reimbursement of expenses for a number of reasons relating to the Minister's conduct, which were elaborated in his written submissions described below.

II. STATUTES AND REGULATIONS

[6] Subsection 19(1) of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29 (*Tribunal Act*), reads as follows:

> **19.** (1) The Tribunal may award any costs, and may require the reimbursement of any expenses incurred in connection with a hearing, that it considers reasonable if
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> (*a*) it is seized of the matter for reasons that are frivolous or vexatious;
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> (*b*) a party that files a request for a review or an appeal and does not appear at the hearing does not establish that there was sufficient reason to justify their absence; or
>
> (*c*) a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal.

[7] Subsection 6.71(1) of the *Act* reads as follows:

> **6.71.** (1) The Minister may refuse to issue or amend a Canadian aviation document on the grounds that
>
> (*a*) the applicant is incompetent;
>
> (*b*) the applicant or any aircraft, aerodrome, airport or other facility in respect of which the application is made does not meet the qualifications or fulfil the conditions necessary for the issuance or amendment of the document; or
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> (*c*) the Minister is of the opinion that the public interest and, in particular, the aviation record of the applicant or of any principal of the applicant, as defined in regulations made under paragraph (3)(*a*), warrant the refusal.

[8] Paragraphs 103.12(*a*) to (*d*) of the *CARs* read as follows:

> **103.12.** For the purposes of subsection 6.71(1) and paragraph 7.1(1)(*c*) of the Act, "principal" means
>
> (*a*) in respect of an air operator,
>
> (i) any person who is employed or contracted by the air operator on a full- or part-time basis as the operations manager, the chief pilot or the person responsible for the maintenance control system, or any person who occupies an equivalent position,
>
> (ii) any person who exercises control over the air operator as an owner; and
>
> (iii) the accountable executive appointed by the air operator under section 106.02;
>
> (*b*) in respect of a private operator,
>
> (i) any person who is employed or contracted by the private operator on a full- or part-time basis as the operations manager, the chief pilot or the person responsible for the maintenance control system, or any person who occupies an equivalent position, and
>
> (ii) any person who exercises control over the private operator as an owner;
>
> (*c*) in respect of an approved maintenance organization,
>
> (i) any person who is employed or contracted by the approved maintenance organization on a full- or part-time basis as the person responsible for maintenance,
>
> (ii) any person who exercises control over the approved maintenance organization as an owner; and
>
> (iii) the accountable executive appointed by the approved maintenance organization under section 106.02;
>
> (*d*) in respect of an approved training organization,
>
> (i) any person who is responsible for the quality control system, or any person who occupies an equivalent position, and
>
> (ii) any person who exercises control over the approved training organization as an owner;

III. ARGUMENTS

A. Applicant

[9] The Applicant's Representative submits that by giving the Tribunal jurisdiction to award costs, Parliament must have intended that the Tribunal would exercise this authority. The Applicant's Representative submits that costs in this instance are appropriate under paragraphs 19(1)(*a*) and (*c*) of the *Tribunal Act*. The Applicant's Representative submits that costs are not the indemnification of a successful party, but are rather intended to penalize a party for the institution of a matter for an improper purpose.

[10] The Applicant's Representative submits that there are a number of factors in this instance, which indicate that the Minister's conduct may be considered frivolous or vexatious, including the following:

1. Serious or egregious conduct, perhaps even malice on the part of the Minister's officials;
2. The actions of the Minister lacked merit and were intended to embarrass or annoy the Applicant;

3. The Minister's interpretation is so unreasonable as to be frivolous or vexatious;
4. The Minister's notice had no legal merit or was instituted for an improper purpose, such as the harassment or oppression of the Applicant;
5. It is obvious that the action of denying the Applicant an AOC cannot succeed;
6. The whole history of the matter needs to be examined, not simply whether there was originally a good cause of action;
7. There are insufficient grounds for action; as such the charge is futile.

[11] However, the Applicant's Representative acknowledges that there are factors that may overcome a situation that is otherwise considered frivolous or vexatious, including simple errors of judgment; that the charge deals with a substantive issue; and/or if the Minister's interpretation is reasonable from an operational or safety perspective.

[12] The Applicant's Representative notes that, prior to the Review Hearing, the Minister provided the Applicant with disclosure which included 22 binders of documents, as well as electronic documents comprising 74.6 megabytes (mb) of data on a compact disc (CD). The Applicant's Representative states that "determining what was relevant was like trying to fish a gold coin from a barrel of mud".

[13] Furthermore, the Applicant's Representative notes that the original NOR provided no grounds for refusal, and that the 31 grounds for refusal listed on the amended NOR were not found by the Review Member to be attributable to Mr. McIntosh. In fact, the Applicant's Representative notes that "both the Applicant and Mr. McIntosh personally have clean records".

[14] The Applicant's Representative argues that the Minister was institutionally blind to the evidence before him that Mr. McIntosh was trying to operate CGAA safely, and alleges that there was a bias against Mr. McIntosh in this case that spread across Transport Canada. Moreover, the Applicant's Representative submits that there were many actions taken by the Minister in a frivolous and vexatious manner in this case, including the following:

1. Requesting an adjournment the week before the case was set to be heard, and rather than using the adjournment to provide additional disclosure, making a motion to alter the case by rewriting the NOR to include 31 grounds for the refusal. This demonstrates a lack of candor, created inordinate delays, and caused prejudice to the Applicant;
2. Objecting to the Applicant's questioning of CGAA's record, even when it was directed at Mr. McIntosh. This attempt to prevent the Applicant from defending himself is contrary to the principles of Canadian justice, and is clearly frivolous and vexatious;
3. Embellishing evidence on the part of the Minister's witnesses and Representatives. For example, Inspector Davis refers to "numerous" incidents of Mr. McIntosh interfering with pilots, which he acknowledged to be an exaggeration on cross-examination. Similarly, Inspector Gaudry spoke in his testimony about an incident involving a "strong" smell of smoke in the cockpit, which he later conceded was an embellishment;
4. The Minister's Representative making inflammatory comments during the Review Hearing and in his written submissions, including the following: "Jeff McIntosh's negligence toward his responsibility as both Operations Manager and Accountable

Executive of Canadian Global Air Ambulance"; the description of Mr. McIntosh as being "a person who might get a document to start an aviation company and have a big accident and problems repeating again and we don't want that. We're lucky nobody died"; as well as the Minister's suggestion that "the standard for the responsibility of the Minister's decision should not be the number of casualties caused by a negligent air operator";

5. Criticizing Mr. McIntosh for not interfering in the operations of CGAA after he was removed as Accountable Executive of the company;
6. Assigning CGAA administrative penalties when it self-reported the safety failures of its staff, while those directly involved in the incidents were ignored;
7. Undertaking a biased risk assessment that was designed to justify an adverse outcome for the Applicant;
8. Suspending CGAA's AOC following the November 2007 audit on the basis that CGAA did not provide adequate resources for maintenance, while not asking management about the issue;
9. Suggesting that the Minister's actions in this case did not affect Mr. McIntosh's livelihood because he was still working in the industry; and
10. Approaching this issue with an attitude of malice, spite, harassment, and oppression towards Mr. McIntosh, as evidenced by Robert Winston Clarke's testimony.

[15] The Applicant's Representative argues that the unreasonableness and lack of logic or fairness in the Minister's arguments preclude a finding that this was simply an error of judgment. The Minister's theory regarding guilt through association is not a serious issue to be tried, and is not a policy that the Minister has advanced before or since. Such a policy would effectively disqualify anyone in the industry who held a management position in an air carrier that had a safety or enforcement record.

[16] The Applicant's Representative submits that while individually these incidents may not establish malice or spite, when considered together, they create a clear pattern of acting without reasonable grounds or legal merit. This behaviour undoubtedly rose to the level of harassing and oppressing Mr. McIntosh.

[17] The Applicant's Representative argues that this is an exceptional case where costs are necessary to deter the Minister from such actions in the future. The Applicant's Representative submits that the Minister's 2012 budget was close to $1.8 billion. As such, a nominal awarding of costs and expenses would not have any effect of deterrence on the Minister.

[18] In quantifying costs, the Applicant's Representative cited total costs of $108 485.97, including legal fees, preparation fees, and travel expenses. Furthermore, the Applicant's Representative suggests that the Applicant had to dedicate over 64 days to prepare for and participate in the Review Hearing process. The Applicant's Representative argues that Mr. McIntosh will never get full compensation for his financial losses or for the damage incurred to his reputation.

B. Minister

[19] The Minister submits that the factual circumstances leading to the issuance of the NOR are important in this case, including the chronology of events prior to the NOR's issuance. The Minister notes that CGAA started its operations in 2003 and had a history of contraventions and multiple findings during audits and Program Validation Inspections (PVIs). CGAA was a poorly managed company, and this fact was admitted by the Applicant's Representative as well as Mr. McIntosh himself.

[20] The Minister submits that CGAA went bankrupt in October 2008. Six months later, Mr. McIntosh attempted to obtain a new AOC under a new company name, IAA. The Minister submits that his officials acted prudently in determining that the denial of an AOC to IAA was a reasonable course of action.

[21] Moreover, while the Applicant alleges that the Minister did not prove the 31 grounds contained in the NOR, the Minister submits that this is a wrong interpretation of the Review Determination. Rather, the Review Member found that for the first eleven grounds of the amended NOR, the aviation record of CGAA was proven, as was the fact that Mr. McIntosh was the Accountable Executive and Operations Manager at that time. Indeed, it was only the link between the incidents described in the aviation record of CGAA and Mr. McIntosh's responsibility that the Review Member determined were not proven. The Review Determination is clear that the first eleven counts were proven but were not enough to justify denying the Applicant's request for an AOC. For the last twenty grounds, the Review Member found that there was not enough evidence to prove that Mr. McIntosh had major involvement in these incidents.

[22] The Minister submits that there were many relevant and substantive questions raised in this case that were not necessarily directed towards Mr. McIntosh himself, but were of general significance, including the following: who the principal is for the purposes of paragraph 6.71(1)(*c*); whether a principal could be accountable for the actions of a company; whether a principal could be accountable for the actions of a company even though he did not have an official position in the company; and if a person could be considered a principal if they have great influence in the company, even if they do not hold any official position in the company.

[23] The Minister submits that his actions were not frivolous and vexatious in this case, and that costs should not be awarded pursuant to section 19 of the *Tribunal Act*. The Minister submits that the term “frivolous and vexatious” has been defined by other reviewing bodies to apply when a party brings an action to determine an issue that has already been determined, or when a party brings an action which cannot succeed. The British Columbia case of *Croll v. Brown*, 2002 BCCA 522 (*Croll*) lists relevant criteria for determining if a matter is frivolous or vexatious, including the following:

1. The action is being brought to determine an issue which had already been determined;
2. It is obvious that the action cannot succeed, or that no reasonable person can reasonably expect to obtain relief;
3. An action is brought for an improper purpose, including the harassment and oppression of other parties;

4. That a reviewing body must examine the whole history of the matter and not just whether there was originally a good cause of action;
5. The failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings;
6. The respondent's conduct in persistently making unsuccessful appeals of judicial decisions.

[24] The Minister submits that given the criteria listed in *Croll*, it is clear that the term "frivolous and vexatious" is limited to situations where there is an egregious abuse of the legal process, and where a litigant attempts to use a reviewing body to create havoc and annoyance rather than to resolve a legal dispute.

[25] The Minister argues that it is not frivolous and vexatious to exercise a legislative duty. As such, no costs should be awarded against the Minister when he is acting within his mandate and no special circumstances justify an awarding of costs.

[26] The Minister submits that the Tribunal determined in *Kipke v. Canada (Minister of Transport)*, 2013 TATCE 13, TATC file no.:C-3449-33 (Appeal) (*Kipke*), that the matter in *Kipke* could not be considered frivolous or vexatious because it was an area of law that had been previously unsettled. Similarly, the questions before the Review Member in this case had not previously been determined. Moreover, the Minister and his officials acted in good faith, and the measures taken were a result of the facts of the case before them.

C. Applicant's Reply

[27] While the Minister suggests that the Tribunal had to consider the question of who is a principal in a company, the Applicant submits that this is defined in the *CARs*. The Minister is not entitled to replace the definition in the *CARs*with his own definition, although this is what he sought to do in the case at hand. According to the Applicant, "these are not 'very relevant and substantial questions to ask'; they are a blatant over-stepping of jurisdiction".

[28] Indeed, section 8.4 of the *Act* determines when vicarious liability can be imposed, in that an aircraft owner or operator may be liable for the actions of others in respect of the aircraft. However, it does not make a principal liable for an air carrier's transgressions, nor that of its employees. The Review Member described such a proposition as "an illogical leap" and "both counter-intuitive and unfair".

[29] While the Minister argued that the notion of frivolous and vexatious is limited to situations where a litigant is using a reviewing body to create havoc and annoyance through the legal process, the Applicant submits that the Minister is confusing jurisprudence related to vexatious litigants with the context and intent of frivolous and vexatious pursuant to paragraph 19(1)(*a*) of the *Tribunal Act*.

[30] Furthermore, the Applicant submits that Transport Canada has publicly stated on its website that there is no personal liability associated with the position of an Accountable Executive, and that "although CAR 106.02(1)(a) stipulates that the Accountable Executive is accountable on behalf of the certificate holder for meeting the requirements of the regulations …

the certificate holder is ultimately responsible …" Moreover, Transport Canada has also publicly stated on its website that "the Aeronautics Act does not assign any personal liability to the Accountable Executive for the actions of others", and that "if an Accountable Executive is not performing his or her duties satisfactorily, this may be grounds for suspension of one or more of the organization's certificates".

[31] The Tribunal has determined that costs with respect to Tribunal hearings should be used to dissuade any future inappropriate behaviour. In this case, the Minister's actions defy the following: the law; the facts of the case; reason and logic; as well as belie the Minister's commitments to the industry on the point in question.

[32] Accordingly, the Applicant requests that an order of costs be granted to ensure that this decision is meaningful for both Mr. McIntosh and the Minister.

IV. DISCUSSION AND ANALYSIS

[33] I have reviewed my Determination, the parties' submissions, and the case law submitted by the parties. I am mindful that my decision must be reasonable and objective, and may be guided by Tribunal jurisprudence.

A. Tribunal Jurisdiction Regarding Costs

[34] Under section 19 of the *Tribunal Act*, the Tribunal may award any costs, and may require the reimbursement of any reasonable expenses incurred in connection with a hearing if the Tribunal is seized of the matter for reasons that are frivolous or vexatious.

[35] Tribunal jurisprudence to date concerning costs demonstrates a reluctance to use section 19 of the *Tribunal Act*. Indeed, Members have used expressions such as "exceptional," "rarest of circumstances", and "errors in judgement" to describe when an awarding of costs and/or expenses might be appropriate. While individually these decisions are understandable, collectively they have the effect of giving the impression that the Tribunal will never apply this section of the *Tribunal Act*. However, I do not believe that section 19 of the *Tribunal Act* was meant to be ineffective.

B. Whether Costs Are Appropriate

[36] The Applicant in this case is seeking costs under paragraphs 19(1)(*a*) and (*c*) of the *Act*, which contemplate an awarding of costs if the Tribunal is seized of a matter for reasons that are frivolous and vexatious, and if a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal, respectively.

[37] The basis for the Minister's actions in this case was a novel interpretation of paragraph 6.71(1)(*c*) of the *Act* and section 103.12 of the *CARs*. However, I believe that a simple review of paragraph 6.71(1)(*c*) of the *Act*, using the plain language rule of statutory interpretation, defeats the Minister's interpretation of this section in the case at hand. As such, I do not believe that there was a reasonable cause of action in this instance; rather, I believe that the Minister's action lacked legal merit. This is not a case of a simple error in judgment on the

part of the Minister; rather, it appears to be an attempted manipulation of the *Act*. Indeed, neither IAA nor Mr. McIntosh has an aviation history of enforcement actions. Consequently, it is puzzling to me that the Minister has categorized Mr. McIntosh as a threat to public safety and has argued that granting an application to IAA would be contrary to public interest.

[38] It is also interesting to note that the Minister has already determined and publicly stated that the Accountable Executive will not be held personally liable for the conduct of the company (see, for example, Transport Canada's description of the AE on its website under Safety Management Systems). I find it improbable that the two counsel for the Minister and his nine witnesses, most of whom held very senior positions within Transport Canada, would be unaware of this publicly-stated policy. Not only was the amended NOR an egregious breach of the Minister's policy, but using these grounds to justify a denial of an AOC is without merit and could not possibly succeed.

[39] The Ontario Court of Appeal held in *Foy v. Foy*, 26 O.R. (2d) 220 (*Foy*), that a case is frivolous if it has no reasonable chance of succeeding or would lead to no possible good, and is vexatious if it would bring hardship on the opposite party to defend something which cannot succeed, or which has already been determined. I am of the opinion that the Tribunal was seized of this matter for reasons that were frivolous or vexatious, as I find that the conduct of the Minister in this instance can be described in the manner found in *Foy*.

[40] Mr. Clarke's testimony is important in describing the Minister's conduct in this instance. In particular, Mr. Clarke credibly described the unprofessional and subjective conduct of the Minister's officials during a March 2008 meeting. Mr. Clarke's evidence on the tone and atmosphere of this meeting, as well as the fact that he was taken aside by Transport Canada personnel for the purpose of negatively discussing Mr. McIntosh, convinces me there was vexatious conduct on the part of some of the Minister's officials present at the meeting.

[41] The Minister's officials overreached in their use of section 103.12 of the *CARs*. In the Minister's novel interpretation and application of the *CARs*, the Minister attempted to convince me that a very minor ownership in CGAA, as well as Mr. McIntosh's mere presence, could be used as *de facto* proof of Mr. McIntosh's position as a principal in the company. This, in turn, was done so that the Minister could arbitrarily attribute CGAA's record to Mr. McIntosh.

[42] Furthermore, I believe that some of the 31 counts the Minister attempted to use to justify the denial of an AOC to IAA were completely unreasonable. For instance, the accident described in Count 1 was caused by a pilot who had not been hired, trained, or checked as a captain by Mr. McIntosh. Furthermore, Mr. McIntosh objected to this pilot being hired by the Chief Pilot as a direct entry captain. Most importantly, however, there was no evidence presented to show that any enforcement action was taken against CGAA. Consequently, it is clearly frivolous to attempt to use this non-existent record against Mr. McIntosh, who had no immediate connection to this accident.

[43] While I could continue dissecting the grounds the Minister's officials used to deny an AOC to IAA, to do so would not be productive. Suffice it to say that the Minister's attempt to transfer blame for many of these instances onto Mr. McIntosh was an illogical leap and suggests these decisions were made with little objective basis. Based on my previous interactions with

Transport Canada, I hold the Minister's officials and their legal representatives in the highest possible regard; I can only assume their actions in this instance were very atypical.

C. Amount of Costs

[44] Mr. McIntosh's career has been put on hold for approximately three years. This period of time can never be returned to him. He has been deprived of time and money in order to defend himself against a legal action that, from an objective standpoint, never should have been started. As well, his reputation and credibility have been tarnished within the aviation community. Consequently, I believe an awarding of costs is appropriate under paragraph 19(1)(*a*) of the *Tribunal Act*.

[45] The next issue to be determined is the specific amount of costs that is appropriate in this instance. The Tribunal held in *Drader v. Canada (Minister of Transport)*, 2007 TATCE 7, TATC file no.: P-3203-33 (Review) (*Drader*), that paragraph 19(1)(*a*) does not contemplate the indemnification of a successful party; rather, it contemplates the penalization of a party for the institution of a matter for an improper purpose. As such, *Drader* found that the tariff pursuant to the *Federal Courts Rules*, SOR/98-106, would not be helpful in determining costs owing at the Tribunal.

[46] When costs are required to reflect inappropriate behaviour in the Federal Court, they may be determined on a substantial indemnity basis. Indeed, as stated in *Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health)*, 2011 FC 1345, an awarding of substantial indemnity costs may be ordered in the Federal Court when there has been "reprehensible, scandalous or outrageous conduct". One such example of this occurred in *Air Canada v. Toronto Port Authority*, 2010 FC 1335, where Hughes J. awarded 50 per cent of the costs claimed.

[47] In order to award costs, the *Tribunal Act* requires a finding that the Tribunal was seized with a matter for reasons that are frivolous or vexatious. I have determined that this has been demonstrated in this instance, and also that the conduct of some of the Minister's officials reached the level of being frivolous and vexatious. However, it is important to note that I am not making a finding that the conduct of any party in this instance reached the level of being reprehensible, scandalous, or outrageous. Nevertheless, I believe that awarding costs on a substantial indemnity basis is appropriate in this case, as the Tribunal was seized with this matter for reasons that are frivolous and vexatious.

[48] As I have determined that the threshold for costs pursuant to paragraph 19(1)(*a*) has been met, I have calculated the resulting costs on a substantial indemnity basis. The Applicant has stated that his expenses to date total $108 485.97. I am awarding the Applicant approximately 50 per cent of this sum, for a total of $54 200.

V. RULING

[49] I find that the Tribunal became seized of this matter for reasons that are frivolous and vexatious within the meaning of paragraph 19(1)(*a*) of the *Transportation Appeal Tribunal of Canada Act*. As such, the Applicant's Request for Costs is granted.

November 20, 2013

(Original signed)

Patrick T. Dowd

Member