

**TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

BETWEEN:

**0782855 B.C. Ltd.**, Appellant

- and -

**Minister of Transport**, Respondent

**LEGISLATION:**

*Canada Shipping Act*, 2001, S.C. 2001, c. 26, ss 57(1) , para. 106(1)(a), 106(1)(c), 106(2)(a)

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**Appeal decision**

**J. Richard W. Hall, David G. Henley, Mark A.M. Gauthier**

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**Decision: December 20, 2012**

Citation: *0782855 B.C. Ltd. v. Canada (Minister of Transport)*, 2012 TATCE 44 (Appeal)

Appeal conducted by written submissions

**Held:** The Appellant has not demonstrated that an award of costs is appropriate in this instance. As such, the Appeal is dismissed.

**BACKGROUND**

[1] The Minister of Transport (Minister) sent the Appellant, 0782855 B.C. Ltd., d.b.a. Just Chillin' Charters Ltd. (Just Chillin'), a Notice of Violation (Notice) dated October 19, 2009, alleging that the Appellant had committed several violations of the *Canada Shipping Act, 2001*, S.C. 2001, c. 26.

[2] The Appellant requested a Review Hearing with the Transportation Appeal Tribunal of Canada (Tribunal), which occurred on October 18, 2011, in Vancouver, B.C. In a Determination dated January 23, 2012, the Review Member determined that the Minister had not proven the violations on a balance of probabilities, and dismissed the penalty for each alleged violation.

[3] Nevertheless, the Appellant wishes to appeal the Determination with regard to the matter of costs. The Appellant requested the Appeal by way of a letter dated January 25, 2012.

## **I. STATUTE**

Sub-section 19(1) of the *Transportation Appeal Tribunal of Canada Act (TATC 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

- (a) it is seized of the matter for reasons that are frivolous or vexatious;
- (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.

## **II. REVIEW DETERMINATION**

### **A. Costs**

[4] As the only matter at issue is that of costs, we will only summarize the Review Member's findings on this issue, which is as follows:

At the end of the Hearing, the Applicant's Representative expressed his desire to reserve the issue of costs. The Member does not regard this matter as one where costs would be allowable under subsection 19(1) of the *TATC Act*.

## **III. ARGUMENTS**

### **A. Appellant**

#### **(1) *Justification for Costs***

[5] The Appellant submits that section 19 of the *TATC Act* allows for the Tribunal to grant costs, and that it is a breach of the rules of natural justice and procedural fairness for a decision-maker to render a decision on costs without first hearing submissions from the party entitled to argue for costs.

[6] In requesting costs on this matter, the Appellant relies on paragraph 19(1)(a) of the *TATC Act* and submits that the actions of Transport Canada were frivolous and vexatious. In support of this argument, the Appellant submits that:

- 1) The issue considered at the Review Hearing was a longstanding one of interest to Transport Canada, and that Transport Canada was simply looking for a test case;
- 2) The Notice of Violation was a result of a "sting operation" directed towards this specific operator in order to put it through a test case;
- 3) The Appellant had previously notified the Minister of his intention to request costs if the Minister chose to put the Appellant through a test case rather than requesting a legal opinion on this matter;

4) Transport Canada's own witness, Jane McIvor, provided evidence that Transport Canada's position was without foundation in this case.

**(2) Frivolous and Vexatious**

[7] The Appellant considers the definitions of frivolous and vexatious as found in the *Oxford English Dictionary* and submits that the dictionary defines vexatious, in part, as "law not having sufficient grounds for action" while frivolous is defined, in part, as "futile".

[8] The Appellant submits that the position of Transport Canada in this case was simply that the actions of the operator did not conform to its policy. The position of the Appellant is that the situation is properly governed by law, not policy. The Appellant contends that the actions of Transport Canada were clearly directed at the particular company in question, asserting that the department conducted a "sting operation" rather than observed violations.

[9] The Appellant notes that the issue in this case was a matter of law that could have been determined prior to the "sting operation", by receiving appropriate advice from the Minister's counsel.

[10] While the Appellant concedes that Transport Canada's actions were without malice, it notes that malice is not required to obtain costs under the *Act*. What is required is proof that the actions of Transport Canada were without sufficient foundation and could have been avoided by the exercise of due diligence. The Appellant asserts that Transport Canada ignored the Appellant's advice to request a legal opinion and chose instead to impose great cost on the Appellant by way of the test case.

[11] Under the circumstances, the Appellant requests that the Tribunal set costs on a lump sum basis at \$15,000.

**B. Minister**

[12] The Minister takes no issue with the Appellant's right to argue for costs, but submits that costs are nevertheless inappropriate in this instance.

[13] The Minister contends that the circumstances surrounding the decision to pursue this case, and any discussions that occurred between legal counsel, do not detract from the fact that there was a serious legal issue to be determined by the Tribunal. At the Review Hearing, the Tribunal sought to consider under what circumstances a "bare boat charter" of a pleasure craft constitutes a sham arrangement to avoid the legal requirements applicable to commercial passenger operations.

[14] The Minister submits that the fact that these circumstances were not established in this case is irrelevant, and does not in and of itself mean that the Tribunal was "seized of the matter for reasons that are frivolous or vexatious", pursuant to the *TATC Act*.

[15] Finally, the Minister submits that the Review Member agreed with the Minister by stating in the Review Determination that he "does not regard this matter as one where costs would be allowable under subsection 19(1) of the TATC Act."

### C. Appellant's Response

[16] The Appellant submits that the Member's opinion regarding costs not being allowable in this case can be of no relevance to the Appeal Panel, since the Review Member did not receive or consider submissions on this point.

[17] The Appellant suggests that the matter at hand is whether there was a significant legal or factual issue to be determined and whether Transport Canada had sufficient foundation to bring about the issue by way of the Notice in this case.

[18] The Appellant submits that whether a citizen's actions ought to be governed by law or by the policies of Transport Canada does not constitute a serious issue. Rather, the fact that citizens' actions are governed by law (and not policy) is a very basic legal concept on which Transport Canada should have sought advice rather than taking the Appellant through an expensive hearing process. The Appellant submits that having to undergo this process is punitive in and of itself, even where the violation again fails him.

[19] Furthermore, the Minister's submission as to whether this arrangement constituted a "sham arrangement" was not raised during the proceedings. No evidence was called by Transport Canada to demonstrate that any of the transactions involved were invalid, conducted without consideration, or functioned other than in accordance with their terms. Indeed, the Appellant submits that the "sham" referred to by the Minister refers to a sham arrangement to avoid Transport Canada's *policies*, rather than a sham arrangement to avoid the *legal requirements* applicable to commercial passenger operations.

[20] Finally, the Appellant submits that as Transport Canada called no evidence that the bare boat charter or the employment of the Master were sham arrangements, the Minister's case lacked any factual foundation and was therefore frivolous. Furthermore, the Minister's failure to obtain a legal opinion instead of pursuing a test case is worthy of rebuke.

### IV. ANALYSIS

[21] The Appeal Panel agrees with the Appellant that the Review Member erred in making a decision with regard to costs without first hearing the parties' submissions on the issue. Nevertheless, after hearing the submissions of both parties, the Appeal Panel has decided that an award of costs is not appropriate in this instance.

[22] While the Appellant has cited the *Oxford English Dictionary* in an attempt to convince the Appeal Panel that the Minister's actions were frivolous and vexatious, the Appeal Panel finds that the definitions provided do not support the Appellant's case. Indeed, simply because the charges were unsuccessful before the Review Member does not mean that the Minister did not have sufficient grounds for action, or that the charge was futile. Such findings would suggest that every unsuccessful hearing before the Tribunal would result in costs being granted under paragraph 19(1)(a). This is not the case.

[23] Furthermore, *Black's Law Dictionary*, 8<sup>th</sup> ed. defines frivolous as "lacking a legal basis or legal merit; not serious, not reasonably purposeful", while vexatious is defined as conduct

"without reasonable or probable cause or excuse; harassing, annoying". Meanwhile, a vexatious suit is defined as "a lawsuit instituted maliciously and without good cause".

[24] Various Tribunal decisions have considered the requirements for meeting the threshold of frivolous and vexatious. The Tribunal found in *Butterfield v. Canada (Minister of Transport)*, 2004 TATC File No. P-2933-02 (Appeal), that under paragraph 19(1)(a) of the *TATC Act*, the Tribunal may award costs if:

...it becomes seized of a matter that is frivolous or vexatious... this section does not contemplate an indemnification of a successful party but rather the penalization of a party for the institution of a matter for an improper purpose...

[25] *International Express Aircharter Ltd. v. Canada (Minister of Transport)*, 2006 TATC (Review) File No. P-3247-10, determined that paragraph 19(1)(a) "should operate only in the rarest of circumstances, where there was serious or egregious action, perhaps even malice on the part of the Minister's officials".

[26] *Grande Prairie Airport Commission v. Canada (Minister of Transport)*, 2009 TATCE 20 File No. W-3441-15 (Review) summarized these principles well, finding that "to warrant an award under paragraph 19(1)(a) of the *TATC Act*, the notice in this matter must, at the outset, have been seen to have had no legal merit, or must have been instituted for an improper purpose".

[27] The nature of the investigation represents only the means to the charges and does not determine whether the charges were laid with foundation or reasonable cause. In our view, the charges are neither frivolous nor vexatious if the Minister has a reasonable belief that the actions of the Appellant meet the elements of the offence. In this case, the facts determined in the course of the investigation, as reported in the Review Determination, were not such that they would lead to the inevitable conclusion that the elements of the offence could not be proven. Moreover, the different interpretations advanced by the parties with respect to the statutory provisions provide a reasonable basis for the Minister's attempt to clarify the law on this issue.

[28] Simply because Transport Canada did not prove the allegation does not mean that the Tribunal was seized of the matter for reasons that are frivolous or vexatious. Indeed, the Appeal Panel finds that there were no actions on Transport Canada's part that require penalization, nor has the Appellant proven that this matter was instituted for an improper purpose.

[29] As such, the Appeal Panel does not believe that the Appellant has shown that the circumstances in the case at hand warrant the awarding of costs as contemplated in the *TATC Act*. Accordingly, the Appeal Panel finds that this Appeal should be dismissed.

## V. DECISION

[30] The Appellant has not demonstrated that an award of costs is appropriate in this instance. As such, the Appeal is dismissed.

December 20, 2012

(Original signed)

Reasons for the Appeal Decision: J. Richard W. Hall, Chairperson

Concurred by: David G. Henley, Member

Mark A.M. Gauthier, Member