**TATC File No. C-3449-33**
**MoT File No. RAP5504-63503 P/B**

**TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

BETWEEN:

**William Edward Kipke**, Appellant

- and -

**Minister of Transport**, Respondent

**LEGISLATION:**
*Canadian Aviation Regulations*, SOR/96-433; ss 602.13(1)

---

**Interlocutory Decision**
**Elizabeth MacNab**

---

**Decision: September 7, 2012**

Citation: *Kipke v. Canada (Minister of Transport)*, 2012 TATCE 45 (Ruling)

**RULING ON APPLICANT'S MOTION FOR COSTS**

**Held:** The request for costs is denied.

## I. BACKGROUND

[1] On November 27, 2007, the Minister of Transport ("Minister") issued a Notice of Assessment of Monetary Penalty ("NAMP") to the Applicant, William Edward Kipke, alleging that he had contravened subsection 602.13(1) of the *Canadian Aviation Regulations*, SOR/96-433 ("*CARs*") and assessing a monetary penalty of $750 in respect of that penalty. The matter was heard over three sessions between December 2010 and September 2011, and on June 28, 2012, the Tribunal issued a Determination finding that the Minister had not, on a balance of probabilities, proven the allegation against Mr. Kipke.

[2] A number of preliminary matters were raised before the commencement of the Hearing, including Notices of Motion filed by the Applicant, dated November 30, 2009, December 14, 2010, and December 16, 2010. All three of these Motions included requests for costs. The first two motions were dismissed and the third was determined as part of the Hearing. The reasons for

refusing the requests for costs were set out in the Determination regarding the first motion, and no specific discussion of costs was included in the Determination of the other two motions.

[3] On July 27, 2012, the Applicant, through his Representative, sent a letter to the Transportation Appeal Tribunal of Canada ("Tribunal") requesting, on the basis that the Tribunal's Determination was in accord with the motion of December 16, 2010, that he be awarded costs as between a solicitor and his client and that the award be for double costs in accordance with Rule 420 of the *Federal Courts Rules*, SOR/98-106 *("FC Rules"*).

## II. APPLICANT'S ARGUMENT

[4] The Applicant's Representative referred to the Offer to Settle made to the Minister's Representative on July 8, 2010, wherein she asked the Minister's Representative to review the matter, and indicated that the Applicant would agree to a withdrawal of the matter without claiming costs.

## III. MINISTER'S RESPONSE

[5] The Minister's Representative responded that the basis on which the Tribunal can award costs is set out in section 19 of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29 ("*TATC Act*"), and Rule 420 of the *FC Rules* does not apply. Section 19 of the *TATC Act* sets out three circumstances in which the Tribunal may award costs and none of these circumstances apply in this matter. The issue before the Tribunal, the definition of "town" for the purposes of the *CARs*, had not been settled by the jurisprudence and it was not "frivolous or vexatious" to pursue the matter.

## IV. APPLICANT'S REPLY

[6] The Applicant's Representative argues that Rule 420 of the *FC Rules* should apply and that the Offer to Settle, dated July 8, 2010, was intended to support a claim for costs under that Rule if the Applicant was successful. Rule 420 of the *FC Rules* applies to matters before Federal Tribunals in relation to matters under federal legislation. Rule 4 of the *Transportation Appeal Tribunal of Canada Rules*, SOR/93-346 ("*TATC Rules*"), allows the Tribunal to address the matter.

[7] Principles of natural justice support a claim for costs. Costs should follow the result; otherwise, the Minister would be free to use his "unlimited" resources to bring charges against pilots with impunity.

[8] She also argues that the definition of "town" has not been settled for the purposes of the *CARs* by the result in this matter. It does not settle the matter with respect to "settlements" on Indian Reserves, nor does it address the matter with respect to non-Reserve lands.

[9] She submits that the matter was vexatious. She relied on the evidence of Grand Chief Evans to argue that the charges against Mr. Kipke were brought as part of a Transport Canada

initiative to pressure certain First Nations to build heliports on their Reserves and suggests that it was unfair to Mr. Kipke to place the burden on him of determining whether the Little Grand Rapids First Nation Indian Reserve is a town.

## V. ANALYSIS AND DISCUSSION

[10] Subsection 19(1) of the *TATC Act* sets out the authority of the Tribunal with regard to costs 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.

[11] This section was exhaustively analyzed by an Appeal Panel of the Tribunal in *Butterfield v. Canada (Minister of Transport)*, 2004, **TATC File No. P-2933-02 (Appeal)**. That matter involved the Appellant's failure to appear at the Appeal Hearing and was based on paragraph 19(1)(*b*) of the *TATC Act*. The Appeal Panel, however, discussed the circumstances in which each paragraph might be applied, as well as the meaning of "costs" as used in the subsection. The Minister had asked for costs to be assessed on the basis of Tariff B of the *FC Rules* on the inference that an award of costs would be analogous to those awarded by the Federal Court. The Appeal Panel held that this was not the case, and that there was a different purpose to costs awarded by such courts, and to those authorized under the *TATC Act*. Unlike costs awarded under the *FC Rules*, which are intended to indemnify a successful party for costs incurred, subsection 19(1) of the *TATC Act* authorizes costs where a party may be penalized for its actions in relation to a hearing, and does not depend upon the ultimate success or failure of that party.

[12] Although she made no mention of paragraph 19(1)(*a*) of the *TATC Act* in her original request of November 9, 2009, the Applicant's Representative stated in her reply that the charge was "vexatious" as having been brought by the Minister as part of the pressure from Transport Canada to require certain Indian Reserves to establish heliports. This allegation ignores the findings in paragraphs [234] and [235] of the Determination on this matter, which concluded that the charge against and investigation of Mr. Kipke were not related to this initiative.

[13] The Minister's Representative, in her response to the Request for Costs, argues that none of the criteria set out in subsection 19(1) of the *TATC Act* apply, and that the matter could not be considered frivolous or vexatious since it presented the issue, heretofore unsettled, of the definition of "town" for the purposes of subsection 602.13(1) of the *CARs*. In her reply, the Applicant's Representative argues that it was apparent from the aerial photograph shown to the Minister's Representative that the settlement at Little Grand Rapids Indian Reserve was not a "town", and that the Determination in this matter did not settle the definition of "town" with regard to non-Reserve lands.

[14] While the Determination did not establish a definition of "town", it did from paragraphs [252] to [261] establish the criteria that should be applied in determining whether a community should be considered a town in geographic areas that are within federal jurisdiction and, to that extent, determined an area of law that before was unsettled. While there was no determination as to whether a settlement on a First Nations Reserve could be a town under constitutional law, both parties acknowledged that matters should not be determined on the basis of a constitutional question if they can be determined on the basis of general law, as happened in this matter. Consequently, I find that the charge was laid in a manner that was neither frivolous nor vexatious, but rather dealt with a substantial issue.

[15] The Applicant's Representative argues that costs should be awarded as a matter of fairness since Mr. Kipke was put to the expense of defending an allegation which was not supported in the Determination. She did not, however, provide any precedent either where costs had been awarded on this basis, or where the statute under which the proceedings took place included specific authority to award costs and placed limitations on that authority. As pointed out in *Butterfield*, the Tribunal's concern is that no person should be deterred from seeking a Tribunal Review out of concern that costs might be assessed against him. Costs, in this context, are seen as a method of discouraging the behaviours set out in subsection 19(1) of the *TATC Act*, rather than as an incident of success.

[16] The Applicant's Representative argues that the Tribunal is entitled to make orders relating to costs pursuant to Rule 4 of the *TATC Rules* which provides:

> 4. Where a procedural matter not provided for by the Act or by these Rules arises during the course of any proceeding, the Tribunal may take any action it considers necessary to enable it to settle the matter effectively, completely and fairly.

[17] I note that the Tribunal's authority under this rule is limited to matters of procedure. I do not believe that a decision to award costs in the absence of a statutory authority to do so can be considered a matter of "procedure", especially in a situation where the governing statute (here the *TATC Act*), includes specific provisions concerning costs that do not apply to the situation on which the request for costs is based. The nature of a Tribunal hearing is set out in subsections 15(1) and (2) of the *TATC Act* as follows:

> 15.(1) Subject to subsection (2), the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and all such matters shall be dealt with by it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.
>
> (2) The Tribunal shall not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[18] While an applicant may choose to present his case in a more formal manner, as if it were before a court, this choice does not diminish the thrust of subsection 15(1) of the *TATC Act* and the legislative intention to provide an informal, expeditious and fair hearing. Once a determination is made that costs should be awarded according to the result, applicants risk a claim for costs by the Minister if they are unsuccessful. Again, as asserted in *Butterfield*: "We do not want anyone to be deterred from applying to the Tribunal because of a fear of costs".

[19] The Applicant's Representative submits in her Reply that the *FC Rules* apply to matters before Federal Tribunals in relation to issues tried under legislation of the Parliament of Canada. She provides no authority for this submission and it is not supported by the words of subsection 1.1(1) of the *FC Rules*, which provides that the *FC Rules* apply to proceedings before the Federal Court and Federal Court of Appeal. While it has been the practice of the Tribunal to adopt the *FC Rules* in the absence of specific Tribunal Rules, this practice has been limited to matters within the Tribunal's jurisdiction.

[20] The Applicant's argument that Rule 420 of the *FC Rules* should govern the awarding of costs fails since there is no authority for the Tribunal to order such costs.

September 7, 2012

(Original signed)

Elizabeth MacNab

Member