

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Shawn Huntington, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A-2, mod. by R.S., c. A-3, s. 7.7
Canadian Aviation Security Regulations, SOR/2000-111, s. 40(b)

Review Determination
Howard M. Bruce

Decision: May 17, 2007

Citation: *Huntington v. Canada (Minister of Transport)*, 2007 TATCE 13 (review)

[Official English translation]

Heard at Montréal, Quebec, on April 3, 2007

Held: The Tribunal is of the opinion that the Minister of Transport has not discharged its burden of proof on the balance of probabilities by establishing that the applicant did indeed assist a person who did not have a pass in their possession to enter a restricted area. The allegation is dismissed and the penalty of \$300 assessed against the applicant is therefore cancelled.

I. OBJECT OF THE REVIEW HEARING

[1] On December 6, 2006, the Minister of Transport issued a notice of assessment of monetary penalty to the applicant, Shawn Huntington, pursuant to section 7.7 of the *Aeronautics Act*, R.S.C. 1985, c. A-2, amended by R.S., c. A-3, assessing a monetary penalty of \$300. The latter had allegedly contravened section 40(b) of the *Canadian Aviation Security Regulations*, SOR/2000-111.

[2] Schedule A of the notice of assessment reads as follows:

[translation]

On October 31, 2006, at about 7:00 a.m., at Montréal Pierre Elliott Trudeau International Airport, while you were at the wheel of a GMC Savana vehicle bearing licence FCH1908 of the Catalogna company, you presented yourself at entry point 1A of the restricted area commonly known as the "Marshall" entrance. At the time, you were aware of the concealed presence of Martin Falardeau in your vehicle and of the fact that he did not have a pass allowing him access to the restricted area.

[3] On January 2, 2007, the registry of the Tribunal received a request for a review from Mr. Huntington.

II. APPLICABLE LEGISLATION

[4] Section 7.7 of the *Aeronautics Act* provides as follows:

7.7 (1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

(2) A notice under subsection (1) shall be in a form prescribed by regulation of the Governor in Council and shall, in addition to any other information that may be prescribed, indicate

a) the designated provision that the Minister believes has been contravened;

b) subject to any regulations made under paragraph 7.6(1)(b), the amount that is determined by the Minister, in accordance with any guidelines that the Minister may make for the purpose, to be the amount that must be paid to the Minister as the penalty in the event that the person does not wish to appear before a member of the Tribunal assigned to conduct a review to make representations in respect of the alleged contravention; and

c) the address at which, and the date, being thirty days after the notice is served or sent, on or before which, the penalty must be paid or a request for a review must be filed.

[5] Section 40(b) of the *Canadian Aviation Security Regulations* provides as follows:

40. A person must not

...

(b) assist any other person who does not have a restricted area pass in their possession for the restricted area to enter that restricted area.

III. MINISTER'S EVIDENCE

[6] The Minister's first witness, Pierre Sekla, is an employee of the security service of Montréal Pierre Elliott Trudeau International Airport. During his testimony, the Minister adduced in evidence a plan of Montréal Pierre Elliott Trudeau International Airport showing the perimeter of the airport, the restricted areas and the location of gate 1A, commonly known as the "Marshall gate" (exhibit M-1).

[7] During Mr. Sekla's testimony, the Minister also filed, in a bundle, four photographs showing a van belonging to the company Catalogna et Frères Ltée (exhibit M-2). Since Mr. Sekla arrived at gate 1A after the events in question here, he cannot testify about the other facts of the alleged offence.

[8] The second witness, Fernand Lamarche, is a constable with the security service of Montréal Pierre Elliott Trudeau International Airport. He testified that he received a call at 8:41 a.m. to the effect that an unauthorized person had attempted to gain access to the restricted area through gate 1A.

[9] The third witness, Yves Després, is a labour relations and health and safety coordinator for Aéroports de Montréal. He testified that he received a call informing him that there had been an incident at the Marshall gate, i.e., gate 1A. Someone had tried to gain access to the site without a pass. Mr. Després did not, however, witness the events that led to the issuance of the notice of assessment of monetary penalty.

[10] During Mr. Després' testimony, the Minister filed an example of the passes needed to gain access to the restricted area (exhibit M-3), explaining that these passes are always issued off-site. He then filed the cardholder history report pertaining to Martin Falardeau (exhibit M-4). According to this report, Mr. Falardeau had previously worked in a restricted area at Montréal Pierre Elliott Trudeau International Airport, the last time being June 4, 2004.

[11] Finally, still during the testimony of Mr. Després, the Minister filed a booklet [translation] "Job Site Rules" published by Aéroports de Montréal (exhibit M-5). It sets out the rules for job sites at Montréal Pierre Elliott Trudeau International Airport. Anyone admitted to a restricted area to do work there receives a copy.

[12] While these testimonies and exhibits M-3, M-4 and M-5 help provide an overall understanding of the events, the Tribunal does not consider them evidence relevant to the elements of the offence.

[13] The Minister's fourth witness, Léo Kontopoulos, is a foreman with Catalogna et Frères Ltée, the applicant's employer. He testified that when he arrived at security hut 1A at about 7:00 a.m. on October 31, 2006, Mr. Huntington was already at the site. The two men then discussed the workday that lay ahead.

[14] According to Mr. Kontopoulos, Mr. Falardeau then arrived in his automobile, which he parked outside the restricted area. Mr. Falardeau then took a seat in Mr. Huntington's van, which headed for security hut 1A to enter the restricted area.

[15] Mr. Kontopoulos' testimony was weak and at times confused as to the sequence of events. However, he clearly recounted a discussion that took place between Mohammed En Haili, the officer who did the security check, and Mr. Huntington. During this check, Mr. En Haili opened the door of the vehicle and noticed Mr. Falardeau in the back. After questioning him, Mr. En Haili confirmed that he had no pass.

[16] The testimony of the Minister's last witness, Mr. En Haili, was clear, concise and detailed. Mr. En Haili is a security officer at Montréal Pierre Elliott Trudeau International Airport, and on October 31, 2006, he was assigned to check entries and exits at security hut 1A. During his testimony, the Minister produced a statement by Mr. En Haili as to the events of October 31, 2006, which was signed at noon (exhibit M-7).

[17] In his statement, Mr. En Haili states that at about 7:00 a.m. on October 31, 2006, a van belonging to the Catalogna et Frères Ltée company approached security hut 1A. He noticed there were two people in the front of the vehicle, namely, Messrs. Huntington and Shane Lapointe. Sensing that something was not right, he asked Mr. Huntington to open the back door of the vehicle. He was told it was impossible to open that door and it was suggested he therefore open the door on the right-hand side of the vehicle. Mr. En Haili then went around the vehicle, opened the right-hand door and noticed Mr. Falardeau lying on the materials inside. Noting that the latter had no pass, he asked him to get out of the vehicle and go to the trailer indicated to get the necessary pass.

[18] The witness En Haili was categorical. As soon as he noticed Mr. Falardeau in the vehicle, he asked him to get out. Mr. Falardeau therefore did not enter the restricted area with the applicant, Mr. Huntington.

[19] Next, Mr. En Haili testified that Mr. Kontopoulos then approached him with a pass for Mr. Falardeau. Mr. En Haili told him that this made no sense because Mr. Falardeau had already gone to the trailer to get his pass. After checking, Mr. En Haili noticed that this pass, bearing number 3715, was one that had been lost. Note that this fact is of no relevance to the allegation in this case.

[20] In cross-examination by Mr. Huntington, Mr. En Haili again confirmed that he had denied Mr. Falardeau entry to the site immediately after noting that he did not have a pass.

IV. APPLICANT'S EVIDENCE

[21] The applicant, Mr. Huntington, testified about the events of October 31, 2006. He is a surveyor and works for Catalogna et Frères Ltée. The day before the events, he had asked his foreman, Mr. Kontopoulos, to find him a few extra employees so he could complete the work on schedule. He had also asked him to take them to the site on October 31, 2006.

[22] When he arrived at the site on October 31st, he saw Mr. Kontopoulos and met Mr. Falardeau, the latter being one of the employees assigned by Mr. Huntington's employer. Mr. Kontopoulos told him he had no room in his truck to take Mr. Falardeau onto the worksite and therefore asked Mr. Huntington to take him in his van. Mr. Huntington said that at the time, they were about 150 feet from security hut 1A.

[23] Mr. Huntington then proceeded to security hut 1A with Mr. Lapointe, who was in the front passenger's seat, and Mr. Falardeau, who was in the back. When they reached the gate, they were greeted by Mr. En Haili. Messrs. Huntington and Lapointe showed their passes at Mr. En Haili's request. Mr. En Haili also asked them to open the back door of the vehicle and, as it would not open, Mr. Huntington suggested that Mr. En Haili go around the vehicle and open the right-hand door, which Mr. En Haili did straightaway.

[24] Still according to Mr. Huntington's testimony, the right-hand door did not open outward, so Mr. Falardeau opened it from inside the vehicle. When he heard the conversation between Messrs. En Haili and Falardeau, Mr. Huntington realized that Mr. Falardeau had no pass. Mr. En Haili then asked Mr. Falardeau to get out of the vehicle and go to the trailer indicated to get a pass. Before leaving the van, Mr. Falardeau gave Mr. Huntington a pass, which proved to be the lost pass bearing number 3715 that Mr. Huntington then handed to Mr. En Haili.

[25] After Mr. Falardeau got out of the vehicle, Messrs. Huntington and Lapointe were allowed to enter the restricted area and go to their job site, where they worked until 9:00 a.m. At about that time Mr. Huntington received a call from Mr. Kontopoulos asking him to return to the security hut to answer some questions about the events that had taken place that morning.

[26] It is clear from Mr. Huntington's testimony that he did not know that Mr. Falardeau did not have his pass and that the latter never entered restricted area 1A.

V. MINISTER'S SUBMISSIONS

[27] The Minister argues that it has proven all of the elements of the offence, namely, that gate 1A gives access to a restricted area, that access is controlled by a pass, and that on the morning of the offence, Mr. Falardeau was checked by Mr. En Haili. He further argues that the evidence shows that Mr. Falardeau had no pass.

[28] According to the Minister, Mr. Huntington's action constitutes a contravention of section 40(b) of the *Canadian Aviation Security Regulations* since he had intended to enter the restricted area when he presented himself at security hut 1A, regardless of whether or not he was cleared.

VI. RESPONDENT'S SUBMISSIONS

[29] Mr. Huntington, for his part, argues that he did not know that Mr. Falardeau did not have his pass, that he had only met him that very morning and had counted on his employer, represented by Mr. Kontopoulos, to supply him with an employee who had the pass allowing access to the restricted area.

VII. ANALYSIS

[30] Subsection 7.91(4) of the *Aeronautics Act* reads as follows:

(4) The burden of establishing that a person has contravened a designated provision is on the Minister.

[31] Section 8.5 of the *Aeronautics Act* provides as follows:

8.5 No person shall be found to have contravened a provision of this Part or any regulation, notice, order, security measure or emergency direction made under this Part if the person exercised all due diligence to prevent the contravention.

[32] The Minister must prove on the balance of probabilities each of the elements of the offence stipulated in section 40(b) of the *Canadian Aviation Security Regulations*.

[33] The applicant's testimony is consistent with that of the Minister's witness Mr. En Haili regarding the essential points. At 7:00 a.m. on October 31, 2006, Mr. Huntington presented himself at security hut 1A where Mr. En Haili works, accompanied by Messrs. Lapointe and Falardeau; the latter was in the back of the vehicle. The photographs of the vehicle clearly show that there are only two front seats and no back seat. A third person must therefore sit in the rear of the vehicle where the tools and equipment are kept.

[34] The evidence further shows that when the van reached the security hut, Mr. En Haili asked if he could check inside the rear of the vehicle, which he did after one of the passengers inside opened the right-hand door for him. After Mr. En Haili noticed Mr. Falardeau and ascertained that he did not have a pass, the latter got out of the applicant's vehicle and went over to the trailer indicated to get a pass allowing him to enter the restricted area.

[35] The undisputed evidence therefore clearly shows that Mr. Falardeau was inside the applicant's vehicle until it reached gate 1A, but that following Mr. En Haili's intervention, he got out of the vehicle and never entered the restricted area with Mr. Huntington.

[36] According to the Minister's main argument, at the time of Mr. Huntington's arrival at the security hut with, in his vehicle, Mr. Falardeau who had no pass, the applicant was in contravention of section 40(b) of the *Canadian Aviation Security Regulations*.

[37] The Tribunal respectfully disagrees with this interpretation. In *R. v. Paul*, [1982], 1 S.C.R. 621, [1982] S.C.J. no. 32 at ¶ 25 (QL), Lamer J. writes that:

... when dealing with a penal statute the rule is that, if in construing a statute there appears any reasonable ambiguity, it be resolved by giving the statute the meaning most favourable to the persons liable to penalty.

[38] According to the Tribunal, one of the essential elements of the offence is the fact of assisting a person to enter a restricted area. If there is ambiguity in the drafting of section 40(b)

as to the meaning of the expression "assist ... to enter that restricted area", that ambiguity must be construed in favour of the applicant. Had the legislator wanted to make it an offence to present oneself at a security hut without a pass or to have as a passenger someone who has no pass, the regulation would have been drafted accordingly. The expression "assist ... to enter" logically requires someone's entry into a restricted area.

[39] In fact, in doing his job efficiently and professionally on October 31, 2006, at about 7:00 a.m., Mr. En Haili prevented the commission of a contravention of section 40(b) of the *Canadian Aviation Security Regulations*.

VIII. DETERMINATION

[40] As the Minister has not succeeded in proving all the elements of the offence, the Tribunal sets aside the Minister's decision and cancels the monetary penalty of \$300 assessed against the applicant, Mr. Huntington.

May 17, 2007

Howard M. Bruce
Member