TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Alexander Ross v. Canada (Minister of Transport)*, 2019 TATCE 24 (Ruling)

TATC File No.: O-4480-33

Sector: Aviation

BETWEEN:

Alexander Ross, Applicant

- and -

Minister of Transport, Respondent

Heard by: Written submissions on January 25 and February 1 and 6, 2019

Before: Jacqueline Corado, Vice-Chair and Member

Rendered: June 12, 2019

RULING

Held: I dismiss the late application for review of the Notice of Assessment of Monetary Penalty dated December 7, 2018 and bearing file number Z 5504-0100751 P/B.

I. BACKGROUND

[1] On January 23, 2019, the applicant sent an e-mail to the Transportation Appeal Tribunal of Canada (Tribunal) registrar's office with one sentence stating "Please see this as my formal submission to tribunal for the fallowing fees" (sic). The e-mail was a forwarded communication containing as an attachment a scanned copy of the Notice of Assessment of Monetary Penalty dated December 7, 2018 and bearing file number Z 5504-0100751 P/B (Notice).

[2] The Notice stated that the applicant must either pay the penalty or request a review before the Tribunal no later than January 7, 2019.

[3] On January 25, 2019, the Tribunal registrar requested that the applicant provide reasons explaining the late request for review.

[4] On the same day, the applicant submitted that he had received the files from "larry lypic at the TATC in Barrie at holiday in on jan 22 2018" (sic). The applicant claims that this is the effective date of service.

[5] On February 1, 2019, the Minister of Transport (Minister) made submissions opposing the late application for review. The applicant replied to those submissions on February 6, 2019.

II. ISSUES

[6] The first question before the Tribunal is as follows:

A. Was the applicant late in applying for a review of the Notice?

[7] A positive answer to the above question prompts this next question:

B. Should the Tribunal accept the applicant's late request for review?

III. ANALYSIS

A. Was the applicant late in applying for a review of the Notice?

[8] The applicant claims that the effective date of service was January 22, 2019, the day he received a copy of the Notice from Mr. Lipiec. The Minister alleges that the Notice does not have to be received by the applicant; it only has to be sent by the Minister.

[9] The Minister is of the opinion that sending the Notice by registered mail is the extent of the Minister's responsibility whether the applicant receives it or not. In support of this statement, the Minister pleads that there is no doubt as to the meaning of the legislation or any ambiguity in its application to the facts, and that the statutory provision must be applied as it reads.

[10] The applicant argues that regardless of what the Minister deems as service, Ontario and federal case law dictate otherwise, but provides nothing in support of this statement.

[11] Both parties provide their desired interpretation of section 7.7 of the *Aeronautics Act (Act)* but fail to apply the now-established guiding principles of statutory interpretation.

[12] The Supreme Court has, time and again, endorsed Elmer Driedger's approach, commonly known as the modern principle, as the guide to statutory interpretation[1]:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[2]

[13] Therefore, solely relying on the provision as it reads without taking into account the context of the *Act*, the scheme of the *Act* and the intention of Parliament falls short of the established approach to statutory interpretation developed over the past decades.

The intent of Parliament

[14] I agree with the Minister that nothing in the *Act* reads that the notice of assessment has to be received by the applicant. However, in every case of legislative interpretation, the text, context and purpose of the legislative provision in issue must be examined[3]. The key responsibility for the Minister in subsection 7.7(1) of the *Act* is to "notify the person of his or her decision" to assess a monetary penalty. *Black's Law Dictionary*, eighth edition, defines the word "notify" as "To inform (a person or group) in writing or by any method that is understood".

[15] As per the *Act*, such notification can be done in three different ways: by personal service, by registered mail or by certified mail. The notification has to be sent to the latest known address of the alleged contravener.

[16] Among the three forms of notification, the Minister chose to notify the applicant by registered mail on December 7, 2018, and it is the Minister's prerogative to do so. The Minister proved that the applicant was sent the Notice by registered mail and submitted a print-out of Canada Post's record of service.

[17] Does the Minister's obligation (shall notify) to inform the alleged contravener go as far as ensuring that the Notice was received, as suggested by the applicant? We believe this is not the case and, as stated by the Supreme Court, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise[4].

[18] The Tribunal takes judicial notice of the *Aeronautics Act*[5] and its legislative history. In 1985, following recommendation #85 of the Dubin report[6], section 6.7 (the provision preceding

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[1] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 20-21; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, para. 8; *British Columbia Human Rights Tribunal v. Schrenk*, [2017] 2 S.C.R. 795, para. 30.
[2] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), p. 67.
[3] *Lukacs v. Swoop Inc.*, 2019 FCA 145, paragraph 7.
[4] *Rizzo*, *supra*, note 1, para. 31.
[5] *Canada Evidence Act*, section 18.
[6] Recommendation 85 reads as follows: "Except in cases of urgency, no administrative penalty should be imposed unless preceded by a written notice specifying the breach complained of and a reasonable opportunity has been

today's section 7.7) was proposed by Bill C-35[7]. Recommendation #85 of the Dubin report stated that there would be no administrative penalty imposed unless preceded by a written notice, and the proposed legal provision inspired by that recommendation read:

> **6.7**(1) Where the Minister believes on reasonable grounds that a person has contravened a designated provision, he shall notify the person of the allegations against him in such form as the Governor in Council may by regulation prescribe specifying in the notice …
>
> (2) A notice under subsection (1) shall be served personally or by ordinary mail sent to the latest known address of the person to whom the notice relates.

[19] The parliamentary work from the Standing Committee on Transport stated that the mechanism used to ensure that someone had received notice would be personal service or registered mail and that the 30-day period to request a review from the Tribunal would begin when service had been demonstrated[8].

[20] In 1991, when Bill C-5, *An Act to amend the Aeronautics Act and to amend An Act to amend the Aeronautics Act*, was introduced, no significant amendments were introduced to the old section 6.7 of the *Act*, but it does appear that the intention and interpretation of notifying was to be applied with more flexibility. The Standing Committee on Transport at the House of Commons studied the notion of notice regarding decisions from the Minister of Transport. Parliament then discussed the question of "… the whole problem of somebody being punished for something they have no knowledge of. Should we be looking at an amendment that at the very least requires some physical evidence of notice having been **given**?"[9]

[21] Discussions around the issue included industry stakeholders' statements that the "intent of the amendments is to make it broader and a bit easier for Transport Canada"[10].

[22] The last recorded amendment to section 7.7 was introduced in 2001 with *An Act to establish the Transportation Appeal Tribunal of Canada and to make consequential amendments to other Acts*. The wording of the provision changed from "**shall be served** personally or by ordinary mail" to "the Minister **shall**, by personal service or by registered or certified mail …, **notify** the person of his or her decision"[11]; there is no longer a mention of service in the text, and this time around, there is no discussion in Parliament regarding the intent behind the provision.

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afforded for a response in writing." *Report of the Commission of Inquiry on Aviation Safety*, Commissioner the Honourable Mr. Justice Charles L. Dubin, October 1981, Volume 2, p. 634.

[7] *An Act to amend the Aeronautics Act*.

[8] Canada, Parliament, House of Commons, Standing Committee on Transport, *Minutes of Proceedings and Evidence*, Bill C-36, *An Act to amend the Aeronautics Act*, 33rd Parliament, 1st Session Vol 1, No 9 (7 May 1985) at 28.

[9] Canada, Parliament, House of Commons, Standing Committee on Transport, *Minutes of Proceedings and Evidence*, Bill C-5, *An Act to amend the Aeronautics Act and to amend an Act to amend the Aeronautics Act*, 34th Parliament, 3rd Session, Vol 1, No 3 (8 October 1991) at 41.

[10] Canada, Parliament, House of Commons, Standing Committee on Transport, *Minutes of Proceedings and Evidence*, Bill C-5, *An Act to amend the Aeronautics Act and to amend an Act to amend the Aeronautics Act*, 34th Parliament, 34th Parliament, 3rd Session, Vol 1, No 3 (8 October 1991) at 42.

[11] Bill C-34, *An Act to establish the Transportation Appeal Tribunal of Canada and to make consequential amendments to other Acts*, 1st session, 37th Parliament, 2001, cl 39 (royal assent 18 December 2001).

[23] I conclude that the intent of Parliament changed over time: it went from requiring that a notice be served on the intended recipient in 1985, at the time of the creation of the Civil Aviation Tribunal, to easing the requirement to allow the Minister to send notification in one of the three proposed forms (personal service, registered mail or certified mail). The Minister's responsibility is to prove that notification was performed through one of the three methods stated in the *Act* and that the notice was sent to the latest known address.

The scheme and context of the *Aeronautics Act*

[24] Under the current legislative scheme, if an applicant claims that he or she did not receive the notice, the Tribunal has the discretion to accept a late request for review.

[25] Subsection 7.7(1) of the *Act* states that the registered letter has to be sent to the applicant at their latest known address. The Minister fully complied with this obligation.

[26] Canada Post's record of service demonstrates that Canada Post left a notice to the applicant on December 11, 2018 indicating when and where to pick up the Notice and that the applicant refused delivery and the Notice was returned to the sender.

[27] The Minister submits a copy of the envelope that was sent by registered mail to the applicant's address and marked "refused". The applicant does not dispute that the address used by the Minister was correct, and even if it was incorrect, a registered owner or a document holder has the responsibility under section 202.51 or 400.07 respectively of the *Canadian Aviation Regulations* to notify the Minister in writing of any change of address no later than seven days after the change.

[28] The legislative scheme of the *Act* comprises the *Canadian Aviation Regulations*. As per the *Act*, the Minister's obligation is to send the notice by registered mail to the latest known address. The wording of subsection 103.08(3) of the *Canadian Aviation Regulations* reinforces the idea that the obligation does not go beyond sending the notice; no onus is placed on the Minister to ensure that an applicant picks up his or her registered mail, and concluding otherwise would be erroneous.

[29] The Minister compares the *Aeronautics Act* to the legislative scheme of the *Canada Revenue Agency Act*, and submits that the Federal Court of Appeal has upheld that when a notice is required to be sent by registered mail to the address provided by the taxpayer, it is not the regulator's responsibility to ensure that the registered letter is received[12].

[30] For the purpose of comparison, one must go no further than the other acts under which this Tribunal has jurisdiction. For example, the legislative scheme of the *Canada Shipping Act, 2001* states that a document that is served by registered mail is deemed to be served on the fourth day after the day on which it **was mailed** (subsection 3(5) of the *Administrative Monetary Penalties and Notices (CSA 2001) Regulations*).

[12] *Rossi v. Canada*, 2015 FCA 267, para. 7.

[31] Therefore, the applicant cannot claim that he was only served the Notice on January 22, 2019, especially not after he refused to accept the registered letter sent to him.

[32] I conclude that the Minister fulfilled the Minister's obligation to send the Notice by registered mail and that it is not the Minister's obligation to ensure that said Notice is picked up by the applicant. Therefore, the deadline to request a review of said Notice was January 7, 2019, and by sending his request on January 23, 2019, the applicant was close to 15 days late.

B. Should the Tribunal accept the applicant's late request for review?

[33] As per subsection 7.91(1) of the *Act*, the Tribunal has the discretion to allow further time for filing a request for review. In the exercise of that discretion, the Tribunal has developed and made publicly available on its website a policy with guiding principles for accepting late requests for review.

[34] As per the Tribunal's discretion and its *Policy on Late Applications*, a request that is late by more than five days will not be accepted unless there are extenuating circumstances to justify the applicant's failure to apply for a review within the 30 days provided by statute.

[35] The Tribunal recognizes that there could be times when, despite proper notification by the Minister, the notice does not reach the applicant on time to request a review of the Minister's decision. However, this is not one of those instances.

[36] By e-mail dated January 25, 2019, the applicant submits as reasons for his late application that he received the Notice from "larry lypic at the TATC in Barrie at holiday in on jan 22 2018" (sic). As explained previously, the Minister demonstrated that the Notice was sent by registered mail on December 7, 2018 and that the applicant refused delivery. I therefore reject this argument from the applicant; this does not constitute an extenuating circumstance.

[37] By e-mail dated February 6, 2019, the applicant submits additional reasons for his late application.

[38] One reason submitted was, "I travel lots for work and racing and am not home often and only received these violations two weeks ago in Barrie". Canada Post's record of service states that the Notice was refused by the recipient on December 11, 2018.

[39] Another reason submitted by the applicant on February 6, 2019 is that regardless of what the Minister deems as service, Ontario and federal case law dictate otherwise. However, he provides nothing in support of this statement. It is worth mentioning that a landmark case from the Supreme Court, *Lumbermens Mutual Casualty Co. v. Stone*, recognized that notice could be considered given by registered mail despite the non-delivery of that registered mail[13]. Other courts in Ontario and British Columbia have applied this finding, especially when the recipient in their actions has been "wilfully blind" by having no intention to accept service[14].

[13] [1955] S.C.R. 627.
[14] *Mississauga (City) v. Aregers*, 2013 ONCJ 269, paras. 98-103.

[40] In *Lumbermens*, the Supreme Court even acknowledged that once the registered mail had been delivered to the post office, there was a risk of non-delivery, but that risk was not to be placed on the sender: "Whether the post office undertakes to endeavor to find the person indicated or leaves the latter to call for his mail, is entirely a matter of the 'post office'"[15].

[41] Once the Minister has properly complied with the Minister's obligation to notify by sending a notice by registered mail and there is proof that the post office received the notice, an error from the post office in the delivery or the refusal to accept the delivery by an addressee is not imputable to the Minister. An error in delivery from a post office, such as delivering to the wrong address or undue delays, could be a reason for the Tribunal to accept a late application; flat-out refusal by the addressee or negligence in accepting delivery of a document will not be considered a justifiable reason for a late application.

[42] As explained in the analysis of the statutory interpretation of section 7.7 of the *Act*, the Minister's obligation to notify the applicant does not mean ensuring that the notice was received, especially when the applicant decides to refuse service of the Notice.

[43] I find there are no extenuating circumstances to allow an extension of the deadline past January 7, 2019.

IV. RULING

[44] I dismiss the late application for review of the Notice of Assessment of Monetary Penalty dated December 7, 2018 and bearing file number Z 5504-0100751 P/B.

June 12, 2019

(Original signed)

Jacqueline Corado
Vice-Chair and Member

Appearances

For the Minister: Éric Villemure
For the Applicant: self-represented

[15] *Supra*, note 13.