TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Air Canada v. Canadian Transportation Agency*, 2019 TATCE 36 (Ruling)

TATC File No.: Q-4488-80

Sector: Aviation

BETWEEN:

Air Canada, Applicant

- and -

Canadian Transportation Agency, Respondent

Heard by: Written submissions

Before: Andrew Wilson, Member

Rendered: September 3, 2019

RULING ON PRELIMINARY MOTION

Held: The Tribunal finds that it has no jurisdiction to hear the review requested by the applicant. The request for review is therefore dismissed.

I. BACKGROUND

[1] On January 31, 2019, the Canadian Transportation Agency (Agency) issued a letter (Letter) to the applicant, Air Canada, alleging a breach of subsection 67(3) of the *Canada Transportation Act (Act)*. I use the neutral term "Letter" because its legal status is at issue herein.

[2] In the Letter, the Agency did not impose any monetary penalty. Rather, in accordance with its policy regarding first violations, it issued a warning that a contravention had been committed. It warned of a substantial monetary penalty in the event of a subsequent similar contravention.

[3] The applicant applied to the Transportation Appeal Tribunal of Canada (Tribunal) for a review of the Letter in accordance with section 180.1 of the *Act*. The Tribunal thereupon asked the parties for submissions as to whether it had jurisdiction to review the Letter.

[4] The applicant's submissions were, essentially, that whenever the Agency gives notice that it believes a contravention has been committed, section 180.1 of the *Act* permits a review by the Tribunal of the factual allegations in a notice, whether or not a monetary penalty is assessed in regard to the alleged contravention.

[5] The Agency, in its response, submitted in essence that the Tribunal only has jurisdiction under section 180.1 to review a notice of violation, which is defined in section 180 of the *Act* as requiring a monetary penalty. It further submitted that a warning without monetary penalty does not constitute a notice of violation under section 180, and therefore does not attract review by the Tribunal under section 180.1.

[6] The Tribunal requested and received from the applicant a reply to the Agency's submissions.

[7] Lastly, because it is bound by court decisions concerning its jurisdiction, the Tribunal requested and received submissions from the parties as to the relevance and applicability, if any, of the case of *Civil Aviation Tribunal (Re), [1995] 1 FC 43, 1994 CanLII 3504 (FC) (CAT Reference)*.

[8] Procedurally, the Tribunal views this proceeding as a preliminary jurisdictional motion in the application for review by the applicant. No party sought an opportunity to make oral submissions. Accordingly, the written submissions of the parties as described above constitute the record before the Tribunal on this motion.

II. ANALYSIS

A. Issue

[9] The sole issue to be determined in this motion is whether the Tribunal has jurisdiction to review a letter from the Agency that alleges a contravention of a designated regulatory provision but does not assess a monetary penalty.

B. Statutory Interpretation

[10] The Transportation Appeal Tribunal of Canada is a creature of statute, and its jurisdiction is confined to such jurisdiction as is granted to it by statute. Therefore the Tribunal must examine the facts in the context of the extant statutory and regulatory framework to determine the extent of its jurisdiction in this case.

[11] This in turn will require an inquiry into the proper construction of the relevant statutory provisions, those being primarily sections 180 and 180.1 of the *Act*.

[12] In doing so, the Tribunal will be guided by the Supreme Court of Canada's oft-repeated endorsement of the "modern approach" to statutory interpretation, as described by Driedger and Sullivan[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.

C. Statutory Framework

[13] The Tribunal's home statutes include the *Transportation Appeal Tribunal of Canada Act (TATC Act)* and the various related statutes that expressly empower the Tribunal to decide matters thereunder. The Tribunal's jurisdiction is generally defined by subsections 2(2) and 2(3) of the *TATC Act*:

> **Jurisdiction generally**
>
> **(2)** The Tribunal has jurisdiction in respect of reviews and appeals as expressly provided for under the *Aeronautics Act*, the *Canada Shipping Act, 2001*, the *Marine Transportation Security Act*, the *Railway Safety Act* and any other federal Act regarding transportation.
>
> **Jurisdiction in respect of other Acts**
>
> **(3)** The Tribunal also has jurisdiction in respect of reviews and appeals in connection with administrative monetary penalties provided for under sections 177 to 181 of the *Canada Transportation Act*, sections 43 to 55 of the *International Bridges and Tunnels Act*, sections 129.01 to 129.19 of the *Canada Marine Act*, sections 16.1 to 16.25 of the *Motor Vehicle Safety Act* and sections 39.1 to 39.26 of the *Navigation Protection Act*.

[14] Correspondingly, sections 177 to 181 of the *Act* provide that persons who are subject to certain Agency decisions are given a right to a review of those decisions by the Tribunal, as described below.

[15] By subsection 177(1) of the *Act*, the Agency may by regulation designate various provisions of the *Act*, or any regulation thereunder, as being a provision that may be proceeded with as a violation, in the manner set out in sections 179 and 180 of the *Act*.

[16] The alleged contravention in this case is with respect to subsection 67(3) of the *Act.* This subsection has been designated in accordance with subsection 177(1)[2]. Therefore, in accordance

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[1] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), at p. 7.
[2] *Canadian Transportation Agency Designated Provisions Regulations* (SOR/99-244) Schedule item 7.

with section 179 of the *Act*, the Agency may elect to proceed with a contravention of subsection 67(3) either as a violation or as an offence.

[17] The means by which the Agency may proceed with the alleged contravention of a designated section as a **violation** are set out in section 180 of the *Act*:

> **Issuance of notice of violation**
>
> **180** If a person designated as an enforcement officer under paragraph 178(1)(a) believes that a person has committed a violation, the enforcement officer may issue and serve on the person a notice of violation that names the person, identifies the violation and sets out
>
> **(a)** the penalty for the violation that the person is liable to pay; and
>
> **(b)** the particulars concerning the time for paying and the manner of paying the penalty.

[18] Upon service of a notice of violation, the person so served has options, as set out in section 180.1, also reproduced below:

> **Option**
>
> **180.1** A person who has been served with a notice of violation must either pay the amount of the penalty specified in the notice or file with the Tribunal a written request for a review of the facts of the alleged contravention or of the amount of the penalty.

[19] By section 176.1 of the *Act*, the "Tribunal" in section 180.1 of the *Act* means the Transportation Appeal Tribunal of Canada, that is, this Tribunal.

[20] The *Act* is silent with respect to the giving of warnings. However, it is quite clear from the use of the permissive word "may" in section 180 that enforcement officers are not obliged by that section to issue a notice of violation upon detection of a contravention.

D. The Letter

[21] The Letter, which was included with the application for review, forms part of the record. It is in the form of a letter with the subject line "RE: Warning for violation of subsection 67(3) of the Canada Transportation Act".

[22] In the Letter, the Agency asserts that, after an investigation, a designated enforcement officer of the Agency has concluded that the applicant has violated subsection 67(3) of the *Act*. It describes the date of the alleged violation, the subsection violated, and the manner of the violation. The Letter does not impose any monetary penalty for the alleged violation. It is clearly a warning only. However, it specifies that further violations of this provision within four years may attract penalties of up to $10,000.

[23] I pause here to point out that this last section of the Letter is merely a recital of the Agency's powers under the *Act*. However, it also implies that some form of record is being kept, and that the Agency intends to consider that record in the case of a future alleged violation.

[24] The Letter also states that the evidence of the violation is on file with the Agency and may be viewed by the applicant by arrangement. It further advises that if the applicant wishes to contest the findings of the investigation, it may do so within 30 days by providing evidence and submissions in writing to the Secretary of the Agency.

E. Discussion

(1) Grammatical and Ordinary Sense

[25] The applicant's concern is, in a nutshell, that a designated enforcement officer of the Agency has found that it (the applicant) has contravened the *Act* and indicated that it would use this finding against the applicant in the event of a subsequent alleged contravention. The applicant also points out that the "contestation" procedure would also involve a determination by the Agency of a contravention. The applicant argues that, by analogy to the Tribunal's jurisdiction to review determinations by enforcement officials in other aviation matters, it has jurisdiction to hear the present matter.

[26] In order to determine this matter, I will first attempt to interpret the intersecting portions of the *TATC Act* and the *Canada Transportation Act* in their grammatical and ordinary sense and in a manner harmonious with the scheme of the two statutes. I will then consider questions of broader statutory purpose, as expressed in the jurisprudence of the Federal Court.

[27] Firstly, it must be observed that the Tribunal is not a court of original jurisdiction, nor does it have any general statutory power of judicial review. It is therefore not empowered to review every decision made by a government decision maker related to transportation matters. Rather, by section 2.2 of the *TATC Act*, it may only conduct those reviews which are expressly assigned to it by statute.

[28] The sole express provision for a review by the Tribunal under the *Act* is found at subsection 180.3(1), which provides:

> **Request for review of determination**
>
> **180.3(1)** A person who is served with a notice of violation and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice or within any further time that the Tribunal on application may allow, file a written request for a review with the Tribunal at the address set out in the notice.

[29] The plain wording of this section indicates that a review is only available in the case where a "person" has been served with a "notice of violation".

[30] This, of course, begs the question of what constitutes a notice of violation. This question is answered by section 180, which provides that a notice of violation must contain (i) the name of the person, (ii) the particulars of the alleged violation, (iii) the amount of penalty assessed, and (iv) the time and manner in which the penalty must be paid.

[31] Section 180 also specifies that when the enforcement officer believes that a person committed a violation, he/she may, but is not obliged to, issue a notice of violation. However, the section is not permissive as to the content of any notice of violation. I accept the Agency's submission that, on a plain reading, if any of these four elements is missing, the document concerned is not a "notice of violation" within the meaning of the *Act*.

[32] It follows that, unless a monetary penalty is assessed under section 180, the person then has no right to file a request for a review by the Tribunal and, correspondingly, the Tribunal has no jurisdiction under subsection 180.3(2) to conduct a review of the matter.

[33] The applicant argues that by the terms of section 180.1, it has a right to a review of either the facts alleged **or** the amount of the penalty. As I understand it, the applicant's argument is that the use of the word "or" indicates that a right of review exists independently of whether a penalty is assessed or not. I cannot accept this submission.

[34] Firstly, the option to request a review is not free-standing. It is only given to a "person who has been served with a notice of violation". The constituent elements of a notice of violation are enumerated in section 180, and they include a monetary penalty. For the applicant's interpretation to prevail, one must ignore or "read down" section 180 to exclude the requirement for a monetary penalty.

[35] Secondly, in section 180.1, the person **must** either pay the penalty or request a review. There is no third option. This causes difficulty if section 180.1 were intended to operate in the absence of a monetary penalty, because in such a case, it would seem to force the person to apply for a review whether they wanted one or not. The obvious third option—do nothing—would not be permitted. That would be an absurd result.

[36] In short, the applicant's preferred interpretation of the sections concerned is neither a grammatical or ordinary reading of the sections. Nor is it harmonious as between the sections of the *Act*.

[37] In my view, the most reasonable interpretation of section 180 is that, in order to qualify as a "notice of violation", the notice must include the amount of the monetary penalty for which the person is liable and the manner in which it must be paid. That is the plain and unambiguous meaning of the section.

[38] This interpretation is free of any incongruity with section 180.1. If a monetary penalty is imposed (by notice of violation), the person must elect to either pay the penalty or challenge it at the Tribunal. With this interpretation, it makes sense that there is no third option.

[39] Then, section 180.1 provides that the person, if requesting a review, may contest the finding of contravention itself, or the amount of the penalty. The purpose of section 180.1 is to give the person a right to an independent review of the monetary penalty imposed. Accordingly, the word "or" is best understood in the conjunctive sense—when faced with a monetary penalty, the person may contest the contravention itself, the amount of the penalty, or both. Correspondingly, the Tribunal may uphold the penalty, find that there was no contravention, or adjust the penalty. In my view, this is the extent of the meaning to be attached to the word "or".

[40] In summary, this interpretation gives the ordinary grammatical meaning to sections 180 and 180.1, retains the harmony between them, avoids any conflict or ambiguity, and is harmonious with the scheme of sections 177 to 181 of the *Act*.

[41] This interpretation also mirrors subsection 2(3) of the *TATC Act*, which indicates that the Tribunal's jurisdiction with respect to sections 177 to 180 of the *Canada Transportation Act* is specifically to review **administrative monetary penalties** assessed thereunder, not every decision made thereunder. I note that the *TATC Act* does not use terms such as "violation" or "contravention".

[42] In its submission of March 25, 2019, the applicant states that "The Canada Transportation Act clearly grants the Tribunal the right to overturn a finding that a subject has violated a provision of the Act". I can find no such provision under section 180.1, either express or by necessary implication, save in the context of a notice of violation.

(2) Statutory Purpose

[43] The applicant argues that, even if the Letter does not issue a monetary penalty, there is a clear and substantial connection with administrative monetary penalties under sections 177 to 181 of the *Act*, because the Letter indicates that, in the event of a second violation, an administrative monetary penalty of up to $10,000 could be issued.

[44] The applicant also argues that the Letter, regardless of how it is titled, is in substance a notice of violation because it asserts that a contravention has been committed. The applicant argues that, through this characterization, the Agency is attempting to circumvent its right of review of the decision under section 180.1. Of course, this argument presupposes that such a right exists.

[45] In my view, since these arguments do not point to the strict wording of the statute, they are better analyzed in terms of the purpose and object of the *Act*, and/or the intention of Parliament. This larger question has been explored twice by the Federal Court.

[46] I have carefully considered the *CAT Reference* and the submissions of the parties thereon. Although this case was decided under the *Aeronautics Act* rather than under the *Canada Transportation Act*, I consider it to offer significant insight into the purpose behind the creation of the Tribunal, and an aid in placing the above statutory analysis in a broader purposive context.

[47] In the *CAT Reference*, following an alleged contravention of the *Aeronautics Act*, the Minister of Transport issued a "letter of counselling", essentially a warning with no assessment of a monetary penalty. In that respect, the facts are similar to the present case. The warned pilot applied to the predecessor of this Tribunal, the Civil Aviation Tribunal (CAT), for a review. The CAT referred the jurisdictional question to the Federal Court.

[48] The two questions referred to in the *CAT Reference* were:

a. having regard to the scheme of the *Aeronautics Act*, is the Minister of Transport entitled to decide that the holder of a Canadian aviation document has violated a regulation enacted pursuant to Part I of the *Act* without suspending or cancelling the document or imposing a monetary penalty or fine? and

b. if the answer to question 1 was yes, was the document holder entitled to a review of the Minister's decision by the Civil Aviation Tribunal?

[49] In its decision, the Court answered "no" to the first question, and therefore did not answer the second question.

[50] Key to that decision was the detailed statutory scheme of the *Aeronautics Act*, and in particular section 8.3 thereof, which provides for the maintenance of enforcement records, the

right of a document holder to request that their enforcement record be purged after two years, and an appeal to this Tribunal if the Minister refuses to do so.

[51] The central statutory importance of enforcement records to the *ratio* of this decision is emphasized at page 18 thereof:

> The maintenance of an offender's record is fundamental to the administration and enforcement of the Act. An offender's record is kept by the Minister under the authority of the statute. It acts as a strong deterrent against any future breach of the Act *vis-à-vis* the guilty party and allows the Minister to monitor the evolution of a document holder's flight behaviour against the background of the recorded violation. It can also justify the imposition of more drastic sanctions in the event that the document holder's record should again be put into issue by the commission of a further breach, or by the Minister's decision to challenge the competence of the document holder. The fact that the Act only contemplates the notation of an enforcement record with respect to violations which are established in conformity with the Act and that a decision by the Minister to maintain a record beyond a two-year period is subject to appeal, further emphasizes the importance of the interests at stake in both the creation of an offender's record and its maintenance beyond the two-year period.

[52] In penultimate paragraph thereof, the Court goes on to say:

> In my view, therefore, the Minister is not empowered to decide that a violation has taken place **and to register this violation as having been committed in a document holder's enforcement record** without resorting to the prescribed procedure set forth in the Act. The scheme of the Act is such that **the commission of an infraction can only be considered to have been established for purposes of the Act** after the interested party has been afforded a right to an independent review [emphasis added].

[53] In answering "no" to the first question, the chain of logic followed by the Court was therefore:

a. The entry of a violation in the enforcement record constitutes actual prejudice to the document holder because, under the *Aeronautics Act*, once entered it conclusively **establishes** (i.e. proves) the commission of the infraction.

b. The Minister is only permitted to **establish** the commission of the violation if the document holder has been afforded the right to a CAT review.

c. Since the Minister's "letter of counselling" procedure did not afford this right, the Minister was therefore not entitled to establish the violation by entering it into the document holder's enforcement record.

[54] The *CAT Reference* was once considered by the Federal Court of Appeal, again in the context of the *Aeronautics Act*, in the case of *Skyward Aviation Ltd. v. Canada (Minister of Transport)*, 2008 FC 325 (CanLII). In that case, the Minister issued a licence suspension but the suspension was withdrawn after Skyward altered its operation in accordance with the findings of various violations, even though it disagreed with those findings. Skyward requested a review from this Tribunal. The Court distinguished the *CAT Reference* on the facts, but nonetheless applied what it found to be the principle of that case, so as to provide a right to a review by this Tribunal:

> [43] **The principle that is stressed in the *CAT Reference* is the right of an operator to an independent review of decisions of the Minister.** This principle is also highlighted in the parliamentary debates that took place at the time of the legislative amendments that brought the

> Tribunal into existence. Consistent with the purposes for which the Tribunal was established, that right should be available **where decisions of the Minister have continuing effect on an operator.** This right to a review "by persons who have a technical knowledge of all factors involved", should not be extinguished by an overly restrictive interpretation of the enabling legislation [emphasis added].

[55] The "continuing effect" in that case was the same as that in the *CAT Reference*, namely the presence of the record of the violation in the document holder's enforcement record, which **established** that a violation had occurred, and which could be used against him in the future.

[56] The principle I derive from these cases is that, before a violation can be said to be conclusively established, the opportunity for an independent review must be afforded, and this right to review cannot be circumvented by an administrative procedure.

[57] I am bound by these cases and guided by their principles. I also find that, as with the *Aeronautics Act*, one of the purposes of both the *Transportation Appeal Tribunal of Canada Act* and the *Canada Transportation Act* is to generally provide for the right to a review of Agency enforcement decisions by the Tribunal.

[58] However, when these principles are applied to the *Act* and the facts of this case, I am driven to a somewhat different, although consonant, result.

[59] In the *CAT Reference* and *Skyward Aviation Ltd.*, the Court held that an entry in the enforcement record constituted the establishment of the offence. In other words, entries in the record itself were not open to contest. This flowed from the statutory status of the enforcement record under section 8 of the *Aeronautics Act*.

[60] In contrast with the *Aeronautics Act*, there is no statutory scheme under the *Canada Transportation Act* for the maintenance of an "enforcement record". The scheme is administrative only. As the Agency stated in its written submissions:

> The Letter of Warning issued by a DEO of the Agency is also an instrument created by policy, but which contrary to the Letter of Counselling issued by Transport Canada, **does not attract any legal consequences** for the allege [sic] contravener. It is not used by the Agency for any purpose related to the administration and enforcement of the CTA. [emphasis added]

[61] I accept this statement as correct. However, the outcome of this submission is that the entry of the violation in the Agency's records **cannot** be said to **establish** the violation. And if the violation is not established, it remains an unproven allegation only. Only in this way can the record be truly without legal consequences.

[62] This interpretation is reinforced by section 180.4 of the *Act*, which provides:

> **Certificate**
>
> **180.4** If a person neither pays the amount of the penalty **in accordance with the particulars set out in the notice of violation** nor **files a request for a review under subsection 180.3(1)**, the person is **deemed to have committed the contravention alleged in the notice**, and the Minister may obtain from the Tribunal a certificate in the form that may be established by the Governor in Council that indicates the amount of the penalty specified in the notice [emphasis added].

[63] By this section, if a notice of violation is ignored, then the contravention can be deemed to have been committed, and therefore established within the meaning of the *CAT Reference*. But this deeming provision is unavailable where no monetary penalty has been assessed. Also, if the person pays the penalty without appealing to the Tribunal, this would establish the contravention by admission. Lastly, the commission of a contravention can be confirmed by a decision of this Tribunal. Importantly, there is no statutory provision, express or implied, providing that a contravention is established or deemed to be proven merely by the Agency's own entry in its administrative system. I therefore find that entries in the Agency's files, with nothing more, are not sufficient proof that the contravention was committed.

[64] If the Letter of Warning has no legal consequences, as stated by the Agency, then it also seems to me that the same could also be said of the Agency's own internal contestation process. The lack of express authority for such a process no less calls into question whether this process can have any legal consequences, such as the "establishment" of the commission of a violation. Further, the process lacks the independence required by the *CAT Reference* and *Skyward Aviation Ltd*.

[65] I therefore interpret the *Act* in the following manner where, as here, there is no monetary penalty assessed, then there has been no notice of violation as defined in section 180, and therefore the review process provided for by section 180.1 of the *Act* is not engaged. Since it is not engaged, the Tribunal has no jurisdiction to hear a review of a mere record of a violation **at that time**. However, the right of persons to have allegations against them tested by an independent tribunal is preserved. If, in a subsequent enforcement action for a second contravention, the Agency wished to rely on allegations made in an earlier Letter of Warning, the onus would fall on the Agency to prove those earlier allegations, since they are not yet established in accordance with the *Act*.

[66] Interpreted this way, a grammatical and ordinary reading of the *Act* is harmonious with the scheme and objects of the statutes concerned, and with the intention of Parliament as explained in the *CAT Reference* and in *Skyward Aviation Ltd*.

[67] Had I concluded instead that the entry in the administrative record **was** itself sufficient proof that the contravention had been committed, then there would indeed be "a continuing effect on an operator" of an untested internal Agency decision. I would have therefore been obliged, in accordance with the principles set out in the *CAT Reference* and *Skyward Aviation Ltd.*, to interpret the *Act* broadly enough to permit the person concerned to request an immediate review by the Tribunal for a mere warning. As stated in *Skyward Aviation Ltd.*, "[t]his right to a review 'by persons who have a technical knowledge of all factors involved', should not be extinguished by an overly restrictive interpretation of the enabling legislation".

F. Conclusion

[68] Since no administrative monetary penalty was assessed, the Letter is not a notice of violation as defined in section 180, and therefore the review process provided for by section 180.1 of the *Act* is not engaged. As such, the Tribunal has no jurisdiction to hear a review of the matter.

[69] However, this decision is without prejudice to the right of the applicant to require strict proof by the Agency of the allegations contained in the Letter, should the Agency ever raise these allegations against the applicant in any subsequent proceeding before this Tribunal.

III. DETERMINATION

[70] The Tribunal finds that it has no jurisdiction to hear the review requested by the applicant. The request for review is therefore dismissed.

September 3, 2019

(Original signed)

Andrew J. Wilson

Member

Appearances

For the Minister: Karine Matte

For the Applicant: Jean-Francois Bisson-Ross