TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Ian Murray Auld v. Canada (Minister of Transport)*, 2019 TATCE 45 (Ruling)
TATC File No.: C-4308-33
Sector: Aviation

BETWEEN:

Ian Murray Auld, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Written Submissions

Before: Arnold Olson, Member

Rendered: October 17, 2019

RULING ON APPLICANT'S REQUEST FOR COSTS

Held: The request for costs is denied.

I. BACKGROUND

[1] On November 6 and 7, 2018, the Transportation Appeal Tribunal of Canada (Tribunal) held a review hearing into the matter of an alleged contravention of section 602.01 of the *Canadian Aviation Regulations (CARs)* by Mr. Ian Murray Auld. At the conclusion of the hearing, as the review member, I agreed to receive a written submission for costs requested by the applicant, Mr. Auld. On May 15, 2019, the Tribunal received the applicant's submissions, and as of June 17, 2019, the Tribunal had also received the respondent's written submissions and the applicant's final reply.

II. LEGAL FRAMEWORK

[2] A person may apply for the reimbursement of costs under section 19 of the *Transportation Appeal Tribunal of Canada Act* (*TATC Act*), which states:

> **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.

III. ANALYSIS

[3] In Mr. Auld's submission, the request for costs is based on paragraph 19(1)(a) of the *TATC Act*. Therefore, the issue to be decided is whether the Tribunal was seized of the matter for reasons that were frivolous or vexatious. The burden is on the applicant to establish, on the balance of probabilities, that the Minister's conduct in the enforcement matter against him was frivolous or vexatious.

[4] The applicant refers to previous rulings in which the Tribunal has considered whether the Minister's actions were "frivolous" or "vexatious". In *International Express Aircharter Ltd. v. Minister of Transport*, 2006 TATC File no. P-3247-10 (Review), the Tribunal employed the following definitions of these terms:

> The question for the Tribunal is whether the revocation and suspension actions taken by the Minister were "frivolous or vexatious". *Black's Law Dictionary* (8th ed., edited by Bryan A. Garner, St. Paul, Minn.: Thomson/West, 2004) defines "frivolous" as "lacking a legal basis or legal merit; not serious; not reasonably purposeful". It defines "vexatious" as "without reasonable

> or probable cause or excuse; harassing; annoying" and "vexatious suit" as "a lawsuit instituted maliciously and without good cause".
>
> It seems clear 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. The question here is whether there was any ill intent on the part of Transport Canada in taking the action it did …

[5] Similarly, in the matter of *Christiane Lévesque v. Canada (Minister of Transport)*, 2017 TATCE 27 (Ruling), the Tribunal noted:

> [4] … Applying the word "frivolous" in this review hearing would mean that the Minister had no reasonable chance of succeeding. Applying the word "vexatious" would mean that there had been malice in the Minister's actions.

Was the Tribunal seized by a matter that was frivolous? Was the Minister's case at review without legal basis and without chance of success?

[6] In his submission, Mr. Auld contends that the Minister's case had no legal basis in fact and therefore no chance of success, since Inspectors Jennifer Fortier and Robert Fortier provided testimony that they did not perceive any danger to themselves or their family while on the scene of the helicopter and its departure. Further, the testimony of an objective bystander, Mr. Christopher Mitchell, provided no support for a finding of a likelihood of injury.

[7] Mr. Auld argues that the expert witness, Mr. Daniel Stelman, did not conduct any research to justify a conclusion of endangerment. The Minister presented no factual authoritative studies to support an allegation of risk to injury or persons or property; the Minister's case is entirely devoid of evidence of actual, or likelihood of, endangerment.

[8] Moreover, the applicant contends that the review determination itself, as well as the transcript of the proceedings, provides ample proof that the Minister's case was built on speculation of mere "possibility" rather than the requirement of "probability" to establish likelihood, and was entirely devoid of a reference to any objective basis to support a conclusion that Mr. Auld had been reckless. As stated in the review determination, *Ian Murray Auld v. Canada (Minister of Transport)*, 2019 TATCE 7 (Review):

> [23] In this specific case, on a balance of probabilities, I find that the Minister did not meet its burden of establishing that Mr. Auld's actions were reckless as defined above in these reasons. Nor can it be said that possibilities of tragic scenarios add up to evidence of a likelihood of danger to persons or property. The Minister's evidence does not come close to supporting either assertion.

[9] The applicant argues that lack of evidence of a likelihood of endangerment, coupled with the findings in the review determination, constitutes a clear indication that the Minister's case lacked a reasonable legal basis or chance of success. As such, the applicant contends that the matter clearly fell within the meaning of "frivolous" and therefore on that basis, he should be awarded costs.

[10] In its submission, the Minister contends that it cannot be said that the case against Mr. Auld was without merit. Inspector Jennifer Fortier clearly expressed her concern for public safety in the Detection Notice that she prepared. She had a legitimate concern about a lack of crowd control measures and cordoning around the parked helicopter. She recommended further investigation. In taking enforcement action against Mr. Auld, the Minister believed it was acting reasonably, in good faith, and in accordance with its heavy responsibility for public safety.

[11] Further, the Minister argues that it is a mischaracterization of the evidence to say that the expert witness, Mr. Stelman, did not conduct any research concerning the likelihood of endangerment to bystanders. In direct evidence, he indicated that he had completed research to determine that no independent studies or risk assessments had been undertaken on this issue. To dwell on whether studies had been conducted is to sidestep the main public safety issue: that the inspectors who witnessed the event were concerned that no safety measures were in place to protect the public.

[12] The Minister recalls that, despite a finding that Mr. Auld's operation of the helicopter was not reckless, the review member did question the wisdom of the choice to land the helicopter in the parking lot, as stated in the review determination:

> [24] However, I too question the wisdom of Mr. Auld's decision to land on the gravel parking lot rather than the adjoining fenced grass field. Although his photographic evidence shows that no persons or vehicles were present while he landed, he did limit his options for take-off. By landing in the gravel lot, he placed himself in a position wherein he could not be certain that the area would be similarly clear in the future when he took off. Further, the fenced field would have provided greater distance and protection to bystanders when he engaged the rotor blades and lifted off. I am confident that had Mr. Auld landed on the grass field, Inspector Jennifer Fortier would not have so much as raised a regulatory eyebrow.

The Minister submits that the review member's statement indicates that he shared a public safety concern regarding Mr. Auld's operation of the helicopter. As such, it would be unreasonable to conclude that Transport Canada had acted in bad faith when it decided to take enforcement action against Mr. Auld.

[13] The underlying issue is whether the case presented by the Minister at review had some legal basis or chance of success; if that is so, then it cannot be said to be frivolous. First, one argument must be quickly dispelled: because the Minister has a heavy responsibility for public safety, it must follow that an enforcement action cannot be considered frivolous. Accepting this specious argument would mean that, since the Minister always has a responsibility for public safety, the Minister could never be held to account under subsection 19(1) of the *TATC Act*.

[14] In the matter at hand, it is apparent that Inspector Fortier had an initial legitimate concern for public safety. She expressed concern in the Detection Notice that the helicopter was being operated in a "built-up area" in possible violation of subsection 602.13(1) of the *CARs*. That the allegation was subsequently changed to a different contravention does not mean that the case against Mr. Auld was undertaken for a frivolous reason. Whether Skinner's gravel parking lot could be defined as a "built-up area" was not relevant to the charge and therefore not considered at the review hearing or in the present matter. Nevertheless, I find that Inspector Fortier's

recommendation of an investigation was reasonable and that the matter, at least in its initial stages, could not be considered as without merit.

[15] Evidence at the review hearing included testimony from the Minister's expert witness, Mr. Stelman. He indicated that he had canvassed the research available and had found nothing pertaining to the operation of a helicopter creating a likelihood of risk to bystanders. However, insufficient research evidence of risk to bystanders does not necessarily mean that the enforcement action was frivolous. *Jules Selwan v. Canada (Minister of Transport),* 2018 TATCE 4 (Review) addresses this issue:

> [118] … an action is not frivolous simply because it is not supported by the evidence, as it is not that unusual for a case to be dismissed for want of evidence attributed to human frailties such as faulty memory of a witness, reluctant evidence, loss of documents as well as error in judgment. Costs would be awarded under section 19 against the Minister only in the rarest of circumstances where there was serious or egregious action, or malice on the part of the Minister's officials.

Although research evidence of risk to bystanders may have been helpful to the Minister's case, it cannot be said that its absence rendered the case to be without merit.

[16] The charge of "reckless" established a somewhat higher threshold for the Minister to meet than would have a charge of "reckless or negligent", as provided for in section 602.01 of the *CARs.* According to *Black's Law Dictionary*, Fifth Edition, "recklessness is a stronger term than mere or ordinary negligence". That neither testimonial nor photographic evidence was sufficient to meet this higher threshold cannot be misconstrued as evidence of frivolity.

[17] In his submission, the applicant states that the review member "accepted that his planning and execution of the flight that day was careful and uneventful". The applicant's statement is inaccurate. It is true that Mr. Auld had previously walked the landing site and had obtained prior permission from Skinner's Restaurant to land. As it turned out, the approach and departure were uneventful. However, I did not describe the decision to land where he did as "careful". In the review determination, I questioned Mr. Auld's decision to land on the gravel parking lot when a safer alternative, the adjacent fenced grass field, was readily available. In addition to Inspector Fortier, I recognized that Mr. Auld had significantly narrowed his margin of safety. The reasons reflect that his decision to land on the gravel parking lot was unwise. He placed the helicopter in a location wherein his options for a safe take-off were unknown and potentially limited, thereby creating unnecessary risks. Mr. Auld was at the very least inconsiderate of others who were enjoying a quiet meal at Skinner's Restaurant that evening. To determine whether the operation of the helicopter was "reckless" and whether danger was "likely" required careful analysis of the evidence; it cannot be said that the Minister's case was devoid of merit. Therefore, I find that the Minister's actions were not frivolous.

Was the Tribunal seized by a matter that was vexatious?

[18] The applicant claims that the Minister's case was not only frivolous but also contained evidence of vexation. In the review determination, I found that the Aviation Enforcement Case Report was lacking in accuracy, objectivity and dispassion. In the report, Investigator Scholefield stated, "There was no need for AULD to attend Skinner's in a helicopter, with his passenger, to

have a meal. They could have driven there as everyone else does". The applicant submits that this statement shows much more than an error in judgment; it shows *malice*, possibly based on jealousy or some other unacceptable motive. These comments are egregious and are certainly within the *Black's Law Dictionary* definition of vexatious: "without reasonable or probable cause or excuse; harassing; annoying."

[19] The applicant argues that the Tribunal has taken the approach that the awarding of costs is not necessarily to reimburse actual costs and disbursements, but is intended to discourage improper conduct or inappropriate behaviour. In *Aidan Phillip Butterfield v. Minister of Transport*, 2004 TATC File no. P-2933-02 (Appeal), the Tribunal indicated:

> … we find that the term "costs" as used in section 19 is not the same as court costs. We do not consider a tariff pursuant to court rules to be helpful in the establishment of a quantum. The term "costs" is used but the section really acts to dissuade a party from inappropriate behavior. It is the amount that will discourage improper behavior that has to be decided rather than the sum that would indemnify the other party.

The applicant submits that Investigator Scholefield's vexatious comment underpins the Minister's enforcement action and is exactly the kind of inappropriate behaviour addressed in *Butterfield* that should rightfully be dissuaded by an award of costs.

[20] Mr. Auld also contends that the Minister's delay of over one year to provide a disclosure package was further improper conduct or inappropriate behaviour that should be dissuaded with an award of costs.

[21] Alternatively, the applicant asks that actual costs be considered; the cost of necessary legal counsel and an expert witness at the review hearing as well as preparation for an appeal by the Minister that was subsequently abandoned. These real expenditures are significant and should be considered as further reason for granting costs.

[22] The Minister submits that no concrete examples of bad faith that could amount to frivolous or vexatious behavior have been provided. Though remarks made by Investigator Scholefield in his case report could have been stated differently, they do not provide evidence of malice, jealousy or other improper purpose. Additionally, the timing of disclosure is not directly relevant to establishing whether the investigation or penalty was pursued for an improper purpose.

[23] The Minister provides an affidavit from Mr. Paul McCulloch, Manager of Civil Aviation Enforcement in the Prairie and Northern Region, Transport Canada, asserting that the restaurant parking area in which the helicopter had landed constitutes a "built-up area" and should thus be considered subject to subsection 602.13(1) and paragraph 602.14(2)(a) of the *CARs*. In the affidavit, Mr. McCulloch contends that the Transport Canada investigation followed appropriate policies and procedures "despite the potentially inadequate evidence". In part, the affidavit states:

> 19. There is no indication in the file of any vexatious motive on behalf of anyone at Transport Canada. On the contrary, the investigation was motivated by good faith interest in ensuring public safety.

The Minister asks that the affidavit be considered in support of its case that the enforcement action against Mr. Auld was not without merit, was not frivolous and was not vexatious.

[24] The underlying issue is whether Investigator Scholefield's statement was malicious, perhaps based on jealousy, and therefore vexatious. I disagree. I characterize his remark as simply a regrettable way of saying that there were no exigent circumstances that day requiring Mr. Auld to land where he did. In the review determination, I have already assigned little weight to the entire enforcement case report, thus accounting for any slight whiff of animus it may contain. I conclude that Investigator Scholefield's statement was not malicious. Therefore, I find no evidence of vexation on the part of the Minister.

[25] In conclusion, I have found no evidence that the Tribunal was seized of matters that were frivolous or vexatious. I considered Mr. McCulloch's affidavit only insofar as it related to the Minister's charge against Mr. Auld – that of recklessness – and not on speculation of what success the Minister might have enjoyed in enforcing other provisions in the *CARs*.

IV. RULING

[26] The request for costs is denied.

October 17, 2019

(Original signed)

Arnold Olson

Member

Appearances

For the Minister: Mathieu Joncas

For the Applicant: Joe Barnsley