



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Christiane Lévesque v. Canada (Minister of Transport)*, 2019 TATCE 53 (Appeal)

TATC File No.: H-0021-27

Sector: Rail

BETWEEN:

Christiane Lévesque, Appellant

- and -

Canada (Minister of Transport), Respondent

[Official English Translation]

Heard in: Quebec City, Quebec, on November 14, 2018

Before: John Gradek, Member (chairing)
George Ashley, Member
Michael J. Regimbal, Member

Rendered: December 17, 2019

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The Minister of Transport has proven on the balance of probabilities that the appellant, Christiane Lévesque, contravened section 31 of the *Railway Safety Act*. The monetary penalty of \$1,500 is upheld.

The total amount of \$1,500 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this decision.

I. BACKGROUND

[1] On October 16, 2014, François Cournoyer, Rail Safety Inspector, Transport Canada, conducted an initial inspection of the grade crossing located near the home of the appellant, Christiane Lévesque, on Route 138 in Cap-Santé, Quebec. He made subsequent visits on April 29 and October 28, 2015. On November 27, 2015, in accordance with subsection 31(2) of the *Railway Safety Act*, he sent the appellant a notice and order compelling her to ensure that no obstacle placed on her property restricts the movement of vehicles in such a way that a vehicle blocks the grade crossing or is unable to clear the grade crossing when a train is approaching. Since the order was not challenged before this Tribunal, the inspector returned to the site on July 27, 2016, and found that the appellant had not complied with the order.

[2] On October 25, 2016, Transport Canada issued the appellant a Notice of Violation containing a monetary penalty of \$1,500, alleging that she failed to comply with the inspector's order.

[3] The appellant filed a request for review with the Transportation Appeal Tribunal of Canada (Tribunal) on November 11, 2016, and a review hearing was held on April 12 and 13, 2017, in Quebec City.

[4] The appellant appeared at the hearing with submissions relating only to the order directing her to take certain measures.

[5] The review member concluded that the appellant could not have the order reviewed as she did not exercise this right in a timely manner and in accordance with the provisions of the *Railway Safety Act*.

[6] With respect to the violation alleged by the Minister, the review member found that the respondent had discharged its burden of proving that the appellant contravened the order issued by the inspector.

[7] The review member confirmed the contravention and upheld the penalty in the amount of \$1,500.

[8] On August 30, 2017, the appellant filed a request to appeal the Tribunal's determination, including the following requests:

- a. overturn the determination, except for the *obiter dictum* in paragraph 113 of the determination;
- b. rescind the notice and order issued by the respondent;
- c. strike out the Notice of Violation and the penalty from that Notice;
- d. recommend to the appropriate public law authorities to review and reassess the relevance of the rules relating to individuals and inevitably their private rights; and
- e. order the respondent to pay the full costs of both cases and decide any other remedy that the Tribunal may consider just and to which the applicant may be entitled by law.

II. PRELIMINARY ISSUES

[9] At the appeal hearing, the appellant, Ms. Lévesque, filed with the Tribunal a preliminary motion and a declinatory exception asking it to:

- a. decline jurisdiction in the proceeding undertaken by the respondent;
- b. declare the notice and order issued by the respondent to the appellant to be unlawful and not in accordance with the *Railway Safety Act*;
- c. declare the *Railway Safety Act*, as amended in 2015, to be unconstitutional, including the increased authority of the respondent and its officials to:
 1. compel any person to comply with the provisions of the *Railway Safety Act* as amended from 2015; and
 2. make such actions equivalent to the authority of a court when such action is taken against an individual;
- d. determine the nature of the respondent's notice procedure when its action is taken against an individual;
- e. rule on the issue of time limits or whether to allow the constitutional challenge as raised by the appellant without regard to any procedural, legislative or regulatory time limits; and
- f. refer the issues in this case to a federal court for determination.

III. STANDARD OF REVIEW

[10] According to the Federal Court in *Canada (Attorney General) v. Friesen*, 2017 FC 567, there are two standards that apply when an appeal panel reviews a decision; questions of credibility, of fact and of mixed fact and law require the application of the reasonableness standard, while questions of law require the application of the correctness standard.

A. Conclusion of the appeal panel

[11] In this appeal, the appellant asserted that errors of law and jurisdiction were made in the review determination. The appellant argues that the *Railway Safety Act* is unconstitutional and that the review member did not have the proper mandate to rule on her private property rights which, in her view, were compromised. These are important legal and jurisdictional issues and as such, the appeal panel concludes that they must be reviewed on the standard of correctness. Other grounds of appeal relate to whether the review member properly assessed and weighed the merits of the appellant's case in his determination, including the facts that led to the issuance of the Notice of Violation and the extent of the inconvenience or unfairness to the appellant in the use of her property. These matters, to the extent necessary, will be considered on the standard of reasonableness.

IV. ANALYSIS

A. Analysis of the preliminary motion and the declinatory exception

[12] The appellant raised arguments concerning the Tribunal's jurisdiction in relation to matters she considered to be constitutional and charter of rights issues. The appellant has, on several occasions, questioned the Tribunal's jurisdiction to deal with the dispute initiated by the respondent. The appellant has also questioned the jurisdiction of the Minister and the Minister's officials with respect to the interpretation of the *Railway Safety Act* and human rights.

[13] The Tribunal finds that the appellant's arguments do not apply in this case because the *Railway Safety Act* permits the Minister's officials to enforce the requirements of the Act. Subsection 27(1) identifies the persons who may be designated to perform the duties of a railway safety inspector. Persons so designated act for and on behalf of the Minister.

[14] Section 31 of the *Railway Safety Act* provides that an inspector shall give notice to a person if the inspector is of the opinion that a person's conduct or any thing for which a person is responsible constitutes a threat to the safety or security of railway operations—or the safety of persons or property. The notice may contain an order if the inspector is satisfied that the threat is immediate. In addition, section 40.11 of the same Act allows the Minister to designate enforcement officers to determine whether there was a violation of a designated provision. Under section 40.13 of the Act, any contravention of a designated provision is a violation and the person who commits a violation is liable to a penalty.

[15] Subsection 3(1) of the *Transportation Appeal Tribunal of Canada Act* provides that the Governor in Council shall appoint as members of the Tribunal persons who collectively have expertise in the transportation sectors in respect of which the federal government has jurisdiction, which includes railway safety. Subsection 31.1(1) of the *Railway Safety Act* specifies that the Tribunal has jurisdiction to review a notice issued by an inspector, and subsection 40.16(1) confirms the Tribunal's jurisdiction to review a Notice of Violation.

[16] Accordingly, the Tribunal dismisses the arguments raised by the appellant in the preliminary motion and the declinatory exception.

B. Analysis of the appeal

[17] In his determination on August 9, 2017, the review member clearly specified that he no longer had jurisdiction to review the order or to rule on its merits. He indicated that he must only deal with the elements of the violation related to the Notice of Violation of October 25, 2016.

[18] Subsection 31.1(1) of the *Railway Safety Act* provides that a person who is sent a notice that contains an order may, on or before the date specified in the notice or within any further time that the Tribunal on application allows, file a written request for a review of the order.

[19] The appellant never exercised this right and never asked the Tribunal for more time to do so.

[20] The review member noted that an administrative monetary penalty for non-compliance with an order is a compliance measure that the Minister may take against an individual who refuses to implement the measures set out in the notice and order to mitigate the risk to railway safety.

[21] The member clearly identified the elements that must be present for the Minister to issue such a penalty:

- a. the proper issuance of an order by a railway safety inspector;
- b. the person subject to the order has not exercised the right to appeal the order to the Tribunal within the required time frame; and
- c. the order and the measures specified therein were not implemented after the deadline for challenging the order.

The member found these elements to exist.

[22] The appellant confirmed to the review member that she had received the Minister's Notice of Violation and that she continued to park her vehicle in a manner inconsistent with the notice and order.

[23] The appellant made submissions on the issue of the merits of the notice and order, suggesting that the evidence and arguments she presented were admissible at this stage of the Tribunal's review.

[24] The review member concluded that the appellant did not comply with the order and that the monetary penalty was issued and delivered in accordance with the *Railway Safety Act*.

[25] The appellant asserts that her right to the enjoyment of her property and possessions is paramount over all else, so she does not have to comply with any law that might otherwise affect those rights. Fundamentally, she claims that the right to use and enjoy her property is absolute and is expressly protected by the Civil Code of Quebec. She further asserts that it is an unconditional right, and that it allows her to park her car on her property wherever and however she wishes.

[26] The appellant submits that no federal law, in particular the *Railway Safety Act* and the regulations made thereunder, can compel her to park in a different manner. She argues that federal laws have no legal force or effect because they are fundamentally "meaningless" and it is this irrelevance, she says, that led her to ignore the Notice of Violation without fear of reprisal.

[27] On the basis of this argument, coupled with the argument about the primacy of her property rights, the appellant argues that her appeal should be allowed because there is nothing to appeal in this case anyway, and because the Tribunal's review determination, which upheld the issuance of the Notice of Violation, does not legally exist.

[28] The Minister's representative responds that, to the extent that this may be an argument of constitutional law, no notice was given to the Attorney General of Canada, as required by section 57 of the *Federal Courts Act*, which states in part that:

57 (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.

[29] The representative also alleges that the railway safety and security objectives set out in the *Railway Safety Act* establish the primacy of the Act, adding that this is unassailable.

[30] As such, there is no conflict of rights and federal safety rules apply.

[31] The appellant submits that the review member did not hear her on the issue of the original order she received. The member concluded that she had 30 days to challenge the original order and that she did not do so. The Minister's representative responds that an extension beyond the 30-day time limit provided for in the *Railway Safety Act* is only applicable in exceptional circumstances, which is not the case here.

[32] The review member stated:

[111] ... In the case at hand, subsection 31.1(1) of the *Railway Safety Act* could have permitted the Tribunal to extend the time if the applicant had made an application. However, she never made any such application up to the day of the hearing regarding the administrative penalty that had been imposed on her, despite the email from the inspector dated January 18, 2016, asking her to comply with the Order. The purpose of such a provision is to give the Tribunal discretion to remedy a reasonable delay if it was impossible for a party to act. Such is not the case here: the applicant disagrees with the Order, and even though that same Order contained the information she needed to challenge it, she nonetheless did not avail herself of her right to do so.

[33] The appellant submits that the Tribunal lacks institutional independence from Transport Canada and that the review member was biased towards the Minister's representative. The appellant stated that the member referred to the Minister's representative by his first name and by using the familiar pronoun "tu" [you].

C. Conclusion

[34] The panel concludes that, in the post-Lac-Mégantic rail operating environment in Canada, the need for rail safety and security is absolutely essential.

[35] The applicable legislation and regulations must be read and applied in accordance with the purpose of the *Railway Safety Act*, which is to provide for the safety and security of the public and railway employees on a practical and ongoing basis.

[36] Safety is the specific focus of this appeal and the relevance of the *Railway Safety Act* and its application cannot be undervalued or ignored.

[37] To the extent that property rights may be incidentally affected by this appeal, there is no evidence that the *Railway Safety Act* unlawfully infringes on those rights.

[38] With respect to the appellant's allegation regarding the constitutionality of the *Railway Safety Act*, no motion was given to the Attorney General of Canada; therefore, this Tribunal cannot make any finding on the constitutionality of the *Railway Safety Act* in this appeal.

[39] The appeal panel finds that the Minister has the authority and jurisdiction to issue a Notice of Violation to the appellant and that the Tribunal has the authority and jurisdiction to review the Notice of Violation upon request by the appellant.

[40] The panel finds that the appellant's arguments and discussions related to matters that were either dealt with during the review hearing or were not related to a review of the original review determination.

[41] The appeal panel upholds the review member's finding of inaction by the appellant during the 30-day appeal period. The *Railway Safety Act* specifically addresses the appeal timeframe that is in place:

31.1 (1) A person who is sent a notice under section 31 that contains an order may, **on or before the date specified in the notice or within any further time that the Tribunal on application allows**, file a written request for a review of the order. [Emphasis added]

The panel finds that the review determination was correct in that it indicated that the appellant did not exercise her right to have the order reviewed.

[42] The panel notes the appellant's argument concerning the review member's bias. The panel concludes that the burden of establishing a lack of independence or an allegation of bias rests with the complainant (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 91), and that the appellant did not provide any evidence of a reasonable apprehension of bias or a lack of institutional independence in this case.

Obiter dictum

[43] It is unfortunate that this case has reached this point of disagreement and mistrust, with all the resulting recriminations and appeals. Hopefully, in similar circumstances in the future, those involved, including the railway company and Transport Canada officials, can sit down and work on a case-by-case basis to find solutions that can meet the needs and interests of all parties. In this case, the matter could have been resolved quickly and simply by moving a garden shed several feet to allow vehicles to make a wider turn for access to neighbouring properties.

V. DECISION

[44] The appeal is dismissed. The Minister of Transport has proven on the balance of probabilities that the appellant, Christiane Lévesque, contravened section 31 of the *Railway Safety Act*. The monetary penalty of \$1,500 is upheld.

[45] The total amount of \$1,500 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this decision.

[46] The appeal panel makes no ruling on costs.

December 17, 2019

(Original signed)

Reasons for the appeal decision: John Gradek, Member (chairing)

Concurred by: George Ashley, Member

Michael J. Regimbal, Member

Appearances

For the Minister: Mr. Éric Villemure

For the Appellant: Ms. Christiane Lévesque (self-represented)