TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Augusto Crecco v. Canada (Minister of Transport)*, 2023 TATCE 4 (Ruling)

TATC File No.: W-4734-38

Sector: Aviation

BETWEEN:

Augusto Crecco, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by:	Written submissions
Before:	Tracy Medve, Member
Rendered:	February 15, 2023

RULING

Held: The applicant's motion to dismiss the Notice of Assessment of Monetary Penalty is denied.

I. BACKGROUND

[1] On June 22, 2021, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) to the applicant in the amount of $2,000 for failing "to comply with the instructions of a crew member on the aircraft with respect to wearing a face mask," as required by section 35 of the Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 8 (Interim Order), dated September 15, 2020, a designated provision, "thereby committing an offence contrary to subsection 7.6(2) of the Aeronautics Act."

[2] There was also an Information from the Public Prosecution Service of Canada charging the applicant with failing "to comply with instructions given by a flight crew member respecting the safety of persons on board the aircraft to Wit: wear a nose and mouth covering" contrary to subsection 602.05(1) of the *Canadian Aviation Regulations* (CARs) thereby committing an offence pursuant to subsection 7.3(3) of the *Aeronautics Act*. Subsection 602.05(1) of the CARs states, "Every passenger on board an aircraft shall comply with instructions given by any crew member respecting the safety of the aircraft or of persons on board the aircraft."

[3] A case management conference (CMC) was held by the Transportation Appeal Tribunal of Canada (Tribunal) on June 16, 2022. A second CMC was held on July 28, 2022, at which time the applicant raised issues about human rights, double jeopardy and selective prosecution. It was agreed a motion would address these issues in advance of the review hearing.

[4] Following the CMC, on September 16, 2022, the applicant brought this motion containing those three arguments and requested a dismissal of the monetary penalty.

[5] On October 11, 2022, the Minister provided submissions in response to the applicant's motion. The applicant did not submit reply submissions.

II. ANALYSIS

A. Legislative framework

[6] Paragraph 6.41(1)(a) of the *Aeronautics Act* allows the Minister to make an interim order to deal with significant risk, direct or indirect, to aviation safety or the safety of the public. The Interim Order was made pursuant to paragraph 6.41(1)(a) of the *Aeronautics Act*.

[7] Section 34 of the Interim Order provides that an air carrier "must require a person to wear a face mask at all times […] when the person is two metres or less from another person." Section 35 of the Interim Order provides that a person "must comply with any instructions given by […] a crew member with respect to wearing a face mask."

[8] Sections 34 and 35 of the Interim Order are designated provisions for which a monetary penalty may be imposed, which monetary penalty may be dealt with pursuant to sections 7.7 to 8.2 of the *Aeronautics Act*. It is under these provisions that a person may request a review by the Tribunal of the monetary penalty.

B. Is section 35 of the Interim Order a violation of the applicant's human rights?

[9] The applicant has submitted that the Interim Order was an overreach of the powers of the Minister and is in violation of his human rights under section 7 of the *Canadian Charter of Rights and Freedoms* (Charter) to refuse medical treatment and to make reasonable medical choices without the threat of prosecution.

[10] Section 7 of the Charter states as follows:

> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[11] This matter is not one pertaining to the specific facts surrounding the issuance of the Notice and no facts have been presented as the review hearing has not yet occurred. Rather, this appears to be a case of a challenge to the constitutionality of the Interim Order that was issued pursuant to paragraph 6.41(1)(a) of the *Aeronautics Act*. It is important to note that the consideration of this submission by the applicant applies only to the applicant. There will be no assessment of the Notice issued or any arguments pertaining to the applicant's travel companion.

[12] The Minister points out that section 57 of the *Federal Courts Act* requires notice of such a challenge be served on the Attorney General of Canada and the Attorney General of each province at least 10 days prior to the date that the issue would be argued. There is no evidence that such notice has been given. The provisions state:

> **57 (1)** If the constitutional validity, applicability or operability of an Act of Parliament […] is in question before […] a federal […] tribunal, […] 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.

[13] Therefore, no finding can be made on the constitutional validity, applicability or operability of the Interim Order without notice to the Attorneys General. Should the applicant wish to argue this matter at the review hearing, he will be required to give the requisite 10-day notice to the Attorneys General prior to the review hearing date. The proper notification procedure and form of notice to be given are provided for in the *Federal Courts Rules*. It should also be noted that the burden of proof related to the applicant's allegations will lie with the applicant.

C. Did the issuance of a monetary penalty by the Minister constitute double jeopardy?

[14] The applicant submits that he was falsely arrested by Air Canada crew members, that his case was heard before the Provincial Court of Alberta and that the charges were stayed for reasons of false arrest and human rights violations. He argues that since the charges have been stayed, he cannot be pursued by the Minister for the same matter.

[15] The Minister argues that the applicant was not arrested by Air Canada and that his case was not heard in the Provincial Court of Alberta but agrees that the charge was stayed by the prosecutor.

[16] The Minister also argues that this principle applies to criminal convictions and not to acquittals or where charges are pending or have been stayed. In support of this position, the Minister referenced *Catney v. Watson*, 2005 CarswellOnt 4906 (Ont. Div. Ct.) [*Catney*]. This was considered in the context of an alleged abuse of process where a police constable had been acquitted on criminal charges of theft. The issue was whether he could also be charged with discreditable conduct (a disciplinary action) for the same incident. The Ontario Divisional Court found the acquittal did not prevent the disciplinary hearing from going forward. The defendant was acquitted but that did not mean that he was not guilty of the violation but rather that there was a reasonable doubt about his guilt.

[17] There is no evidence that the charge for an offence under subsection 7.3(3) of the *Aeronautics Act*, contained in Information No. 210238770P1, was heard in court and the letter from the office of the Public Prosecution Service of Canada, dated October 13, 2021, confirming a stay of proceedings of a trial scheduled for November 2021 does not provide any reasons for the stay. Therefore, the facts of this case are distinguishable from the *Catney* decision where there was a trial and an acquittal, and the decision of the Ontario Divisional Court was based on the issue of an abuse of process.

[18] Neither party referred to any case law on the matter of double jeopardy.

[19] The main principles governing the rule against double jeopardy are to preclude a **conviction** for two offences where (i) the offences arise from the same transaction; and (ii) there is a connection between the legal elements of the offences at issue. That is, a conviction cannot be registered on a charge if there has been a conviction on another charge that was based on the same violation or cause (*Kienapple v. The Queen*, [1975] 1 S.C.R. 729 [*Kienapple*]).

[20] As addressed in *R. v. Prince*, [1986] 2 S.C.R. 480, there are numerous cases where a single act can involve two or more violations of the law which bear little or no connection the one to the other (i.e., impaired driving and driving while suspended). There must be a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions. The focus should be on distinguishing elements, rather than on the presence of shared elements of the offences.

[21] It is not uncommon that criminal and administrative proceedings can flow out of the same set of facts (*Catney* at para. 15). In this case, the applicant was charged in an Information with one count of failing to comply with instructions given by a flight crew member contrary to section 602.05(1) of the CARs, thereby committing an offence pursuant to section 7.3(3) of the *Aeronautics Act*. The applicant has also received a Notice of Assessment of Monetary Penalty by the Minister for failing to comply with the instructions of a crew member to wear a face mask as required by section 35 of the Interim Order pursuant to section 7.6(2) of the *Aeronautics Act*. I find that both relate to the same incident (they are identical in proximity), but I find there are no distinguishing elements. While it could be argued that "did fail to comply with instructions given by a flight crew member respecting the safety of persons on board the aircraft" is distinguishable from "failed to comply with the instructions of a crew member on the aircraft with respect to wearing a face mask," any distinction must be considered negated by the addition in the

Information of "to Wit: wear a nose and mouth covering." I find that these are the same offences arising from the same act.

[22] However, the principle against a double conviction as expressed in *Kienapple*[1] is not met in this case because the principle applies to multiple convictions. The stay of the Information by the prosecutor in this case cannot be said to be a conviction. Therefore, the Tribunal cannot dismiss the Notice of Assessment of Monetary Penalty on the basis of this argument.

D. Did the Minister's issuance of a Notice of Assessment of Monetary Penalty constitute selective prosecution?

[23] The applicant has submitted that selective prosecution is a procedural defence which would result in a finding of not being criminally liable for breaking the law as the criminal justice system discriminated against him by choosing to prosecute. The applicant has argued that as the offence arises from the requirements pertaining to COVID-19, action should also have been taken against Air Canada for failing to keep passengers six feet apart on board the aircraft. The applicant also submitted that a similar fine against his fellow passenger was dropped which also constitutes selective prosecution.

[24] The Minister responded that the defence of selective prosecution is not available in Canada. Rather, in Canada, it is the tort of malicious prosecution which targets the decision to initiate or continue with a criminal prosecution.

[25] The Minister also confirmed that the applicant's travel companion received a Notice of Assessment of Monetary Penalty, dated August 24, 2021, for an amount of $2,000, for a violation of section 35 of the Interim Order. This passenger paid the monetary penalty in full on October 20, 2021.

[26] The Minister submitted the case of *Miazga v. Kvello Estate*, 2009 SCC 51 [*Miazga*], which sets out the four required elements of the tort of malicious prosecution, that must be proven on the balance of probabilities by the applicant:

a. Prosecution was initiated by the defendant (here the Minister);

b. Prosecution must be terminated in the plaintiff's favour (here the applicant);

c. Absence of reasonable and probable grounds to commence or continue the prosecution; and

d. The defendant (Minister) was motivated to commence the prosecution due to malice.

[27] The principle of Crown independence means that decisions taken by a Crown prosecutor are generally immune from judicial review, subject only to the strict application of the doctrine of abuse of process. The Supreme Court of Canada noted that under the strict standard

[1] As stated in *Kienapple* at page 751:

> If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions….

established in *Nelles*,[2] malicious prosecution will only be made out where there is proof that the prosecutor's conduct was fuelled by "an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve." (*Miazga* at para. 50). As laid out in *Proulx*,[3] malice does not include recklessness, gross negligence or poor judgment. It is only where the conduct of the prosecutor constitutes an "abuse of prosecutorial power" or the perpetuation of a "fraud on the process of criminal justice" that malice can be said to exist (*Miazga* at para. 8).

[28] In this case, the applicant has not proven all the elements of malicious prosecution, so the violation may not be dismissed on the basis of this allegation. Specifically, the second test of the prosecution being terminated in the plaintiff's favour has not been shown. The prosecution, in this case the Notice of Assessment of Monetary Penalty, has not been terminated at all – the Minister has not rescinded the Notice, and there has been no determination on the alleged violation by the Tribunal. It is, therefore, unnecessary to consider the absence of reasonable or probable grounds to commence the prosecution, or the allegation of malice on the part of the Minister.

[29] It should also be noted that I am not able to consider whether the Minister should have taken action against any other passengers or against Air Canada. I am only able to consider the matter of the applicant's Notice of Assessment of Monetary Penalty.

III. RULING

[30] The applicant's motion to dismiss the Notice of Assessment of Monetary Penalty is denied.

February 15, 2023

(Original signed)

Tracy Medve

Member

[2] *Nelles v. Ontario*, [1989] 2 S.C.R. 170.
[3] *Proulx v. Quebec (Attorney General)*, 2001 SCC 66.

Representations

For the Minister:	Micheline Sabourin
For the Applicant:	Self-represented