



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Christina Cherban v. Canada (Minister of Transport)*, 2023 TATCE 15 (Review)

**TATC File No.:** P-4782-38

**Sector:** Aviation

### BETWEEN:

**Christina Cherban**, Applicant

- and -

**Canada (Minister of Transport)**, Respondent

**Heard by:** Videoconference on September 13, 2022

**Before:** Sébastien Desbiens, Member

**Rendered:** March 23, 2023

### REVIEW DETERMINATION AND REASONS

**Held:** The Minister of Transport has proven, on a balance of probabilities, that the applicant, Ms. Cherban, contravened section 22 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19*, No. 38.

The monetary penalty of \$1,000, imposed by the Minister, is maintained. The total amount of \$1,000 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 determination.

## **I. BACKGROUND**

[1] On September 1, 2021, after a WestJet flight from Toronto to Kelowna, a safety report was filed by the flight crew regarding Ms. Cherban's failure to wear or properly wear a face covering. Upon landing in Kelowna, Ms. Cherban was escorted off the airplane by RCMP officers.

[2] On December 3, 2021, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Aviation Security) (Notice) to the applicant, Ms. Christina Cherban, pursuant to section 7.7 of the *Aeronautics Act*. The Notice stated:

On or about the 1st day of September 2021, on WestJet flight WS511 from Toronto to Kelowna, Christina Cherban, a passenger on board said flight, failed to comply with instructions given by crew members with respect to wearing a face mask, contrary to Section 22 of the Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 38 dated August 28 2021

[3] On December 30, 2021, Ms. Cherban requested a review of the Notice by the Transportation Appeal Tribunal of Canada (the Tribunal).

[4] In July 2022, the Tribunal issued a Notice of Hearing to both parties for a review hearing on September 13, 2022.

## **II. PRELIMINARY ISSUE**

[5] On September 8, 2022, two business days before the hearing, the Tribunal received an email from Ms. Cherban requesting a postponement. Ms. Cherban submitted that she had contracted COVID-19 and had to reschedule. In a letter sent to the Tribunal on September 9, 2022, the Minister opposed the postponement. The availability of the Minister's witness was an issue and the Minister argued that appearing at the hearing on Zoom was not a health risk for the applicant.

[6] On September 10, 2022, the Tribunal denied the applicant's request to postpone the hearing mainly because the reason given by the applicant was not substantiated by any evidence and the applicant could not demonstrate exceptional circumstances as required by section 4.8 of the Tribunal's *Policy on Postponements/Adjournments*.

[7] On September 11, 2022, the applicant sent an email to the Tribunal Registry stating: "A doctors note can be provided as well as positive Covid tests." The Registry did not receive such a note.

[8] On September 13, 2022, the applicant failed to appear at the scheduled hearing. As per the Tribunal *Policy in regard to Failure to Appear*, the Tribunal decided to allow the hearing to proceed in the applicant's absence. Therefore, the Tribunal's analysis is based on the evidence and arguments presented by the Minister.

### III. ANALYSIS

#### A. Legal framework

[9] Pursuant to subsection 7.7(1) of the *Aeronautics Act*, the Minister can issue a monetary penalty if it believes on reasonable grounds that a person has contravened a designated provision.

[10] Subsection 7.91(4) of the *Aeronautics Act* provides that the burden of establishing that a person has contravened a designated provision is on the Minister.

[11] Also, subsection 34(1) of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 38* (Interim Order) states:

Designation

**34** (1) The provisions of this Interim Order set out in column 1 of Schedule 2 are designated as provisions the contravention of which may be dealt with under and in accordance with the procedure set out in sections 7.7 to 8.2 of the Act.

Maximum amounts

(2) The amounts set out in column 2 of Schedule 2 are the maximum amounts of the penalty payable in respect of a contravention of the designated provisions set out in column 1.

[12] In this case, the designated provision is section 22 of the Interim Order, which states:

Compliance

**22** A person must comply with any instructions given by a gate agent, a member of the aerodrome security personnel or a crew member with respect to wearing a face mask.

[13] The penalty for contraventions of section 22, for an individual, is a maximum of \$5,000 (Schedule 2 of the Interim Order).

#### B. Issue

[14] The Tribunal will first determine whether the Interim Order was applicable and in force during the WS511 flight on September 1, 2021.

[15] Then, the Tribunal will look into the main issue of determining whether Ms. Cherban contravened section 22 of the Interim Order by failing to comply with instructions given by crew members with respect to wearing a face mask. If the contravention is established, the Tribunal will determine whether the amount of the penalty was justified.

(1) *Was the Interim Order applicable and in force during the WS511 flight on September 1, 2021?*

[16] The Minister argued section 6.41 of the *Aeronautics Act*, which states in part:

**6.41(1)** The Minister may make an interim order that contains any provision that may be contained in a regulation made under this Part

(a) to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public;

[...]

(2) An interim order has effect from the day on which it is made, as if it were a regulation made under this Part, and ceases to have effect fourteen days after it is made unless it is approved by the Governor in Council within that fourteen day period.

[...]

(4) An interim order must be published in the Canada Gazette within 23 days after the day on which it is made.

[17] The Interim Order was issued on August 28, 2021, by Michael Keenan, Deputy Minister of Transport, and was published in the Canada Gazette on September 11, 2021, fewer than 23 days later. Therefore, I find that the Interim Order was in force and applicable on September 1, 2021, and that monetary penalties can be imposed to a person who would contravene to a provision of this Interim Order, in this case, section 22.

(2) ***Did Ms. Cherban contravene section 22 of the Interim Order by failing to comply with flight crew instructions?***

[18] The Minister's first witness was Ms. Jennifer Hyslop, Lead Flight Attendant for WestJet. Ms. Hyslop confirmed she was a flight attendant (FA) for WestJet with 15 years of experience and that on the day of the flight, September 1, 2021, she was the lead FA.

[19] Ms. Hyslop's testimony was supported by the WS511 Safety Report (Exhibit 1), which she filed on September 1, 2021. Two other FAs named in the WS511 Safety Report, who reported directly to Ms. Hyslop on the day of the flight, were also involved in the interventions with Ms. Cherban. During her testimony, Ms. Hyslop confirmed the WestJet procedures were applied to inform passengers during boarding and over the public announcement (PA) system before departure. She mentioned there was no standard PA message but that the crew, in their procedures, had to advise the passengers of the obligation to wear a mask for the entire duration of flight as per the federal legislation related to COVID-19. Ms. Hyslop confirmed that she personally did the PA message. The face mask requirements had to be clear to Ms. Cherban due to the multiple reminders from the airline.

[20] Based on the WS511 Safety Report and Ms. Hyslop's testimony, there were at least four exchanges where Ms. Cherban was asked or reminded to wear a face cover properly by Ms. Hyslop or her subordinates.

[21] In her testimony, Ms. Hyslop confirmed that the first intervention happened before take-off while Ms. Cherban was sitting in seat 5D, using FaceTime on her phone and not wearing her face covering properly. Ms. Hyslop asked Ms. Cherban to hang up the phone and wear her mask properly. According to Ms. Hyslop, Ms. Cherban told her it was an emergency but replaced her mask appropriately.

[22] The second intervention happened immediately after take-off when a direct reporting FA, intervened and reported the incident to Ms. Hyslop. The FA asked Ms. Cherban to wear her mask properly because it was not covering her nose and mouth. According to the FA, Ms. Cherban stated her mask kept falling off. The flight attendant then provided a disposable mask. Ms. Cherban put it away.

[23] A third intervention was conducted one hour into the flight. Ms. Hyslop reported she personally observed Ms. Cherban in line for the lavatory while not wearing her mask. Ms. Hyslop could not intervene directly because she was too far from Ms. Cherban. She managed to make eye contact with Ms. Cherban and pointed to her nose to remind her to wear her mask. Ms. Cherban replaced her mask correctly.

[24] A fourth intervention happened when a direct reporting FA reported to Ms. Hyslop that Ms. Cherban used abusive language toward him, after he reminded her to wear her mask properly. He reported that he offered Ms. Cherban a mask that would fit. After this incident, and after having consulted with the pilots, Ms. Hyslop went back to discuss with Ms. Cherban and told her that the obligation to wear a mask was a requirement from federal legislation. Ms. Cherban declared that she would get a doctor's note which would exempt her from wearing a mask. Ms. Cherban did not present a doctor's note and cursed at Ms. Hyslop, saying it was stupid and she did not have to wear a mask, and she would not do so. After this interaction, Ms. Hyslop issued yellow card to Ms. Cherban. Ms. Hyslop explained that a yellow card was handed to passengers when an intervention was required more than twice for any safety issues. This procedure was used for mask wearing application since June 2021. The content of this card explains to the passenger what the safety issues at stake are and what the next step will be if he or she does not comply.

[25] In her testimony, Ms. Hyslop explained that, normally, the warned passenger would have to read the card. Ms. Cherban refused to read the yellow card. Ms. Hyslop then read out loud the verbiage of the yellow card as established in the WestJet COVID-19 playbook. According to Ms. Hyslop, Ms. Cherban mentioned that she would refuse to listen. Ms. Cherban did not wear the mask during the time Ms. Hyslop read the card to her. Only at the end, when the card was placed in Ms. Cherban's seat pocket, did she comply and put her mask back on. Immediately after having remitted the yellow card to Ms. Cherban, Ms. Hyslop went in the front galley to report to the pilots the situation as per WestJet procedures. Ms. Cherban then joined her in the front galley, approached her in few inches and cursed at her and used offensive language saying her daughter (Ms. Cherban's daughter) was in hospital. That is when Ms. Hyslop, with the crew, decided to ask for the RCMP to be present upon the arrival in Kelowna. The captain, in collaboration with the cabin crew, decided to have the RCMP wait for Ms. Cherban in Kelowna so she would be escorted out of the plane.

[26] Right after this altercation, Ms. Cherban went back to her seat. Ms. Hyslop then received a call from row 5ABC (opposite to seat 5D on the other side of the aisle). Ms. Hyslop attended personally to this call. The passengers were complaining of being accosted verbally by the person sitting in 5D (Ms. Cherban), and they wanted Ms. Cherban to be moved. Ms. Cherban refused to be relocated and was cursing at the passenger in seat 5C, blaming him for the warnings she had received.

[27] Later, the passenger from seat 5F, in the same row as Ms. Cherban, came to meet Ms. Hyslop to complain of a physical altercation with Ms. Cherban. For their comfort and to put them at ease, a direct reporting FA relocated passengers who were occupying seats 5E and 5F away from Ms. Cherban. Ms. Cherban was then given seat 5F.

[28] Also, the following statement was not part of the WS511 Safety Report, but during her testimony, Ms. Hyslop stated that about 45 minutes before landing, Ms. Cherban finally fell asleep, without wearing her mask. She decided at that moment not to enforce the mask wearing rule because of all the previous issues with Ms. Cherban. Normally, the procedure would require waking up the passenger and asking them to replace their mask.

[29] In my opinion, the fact that adjacent passengers had to be moved away from Ms. Cherban and that Ms. Hyslop was hesitant to wake up Ms. Cherban indicates clearly that Ms. Cherban demonstrated unruly behaviours.

[30] Upon arrival, a direct reporting FA gave the option to Ms. Cherban to leave the airplane first and join the officer outside or to have the officer come onboard and escort her off the airplane. Ms. Cherban chose to deplane first to meet the officers.

[31] Ms. Hyslop confirmed that she wrote her report the same day upon her arrival in Kelowna at the airport. Therefore, the report was written soon after the events unfolded.

[32] Ms. Cherban was not present at the hearing and she did not submit any evidence in her defence. Based on the evidence presented by the Minister stating that Ms. Cherban was asked several times to wear a mask or to wear it properly and in the light of her general unruly behaviour, I believe, on balance of probabilities, that Ms. Cherban failed to comply with crew member instructions in regard to the obligation to wear a mask or wear a mask properly pursuant to section 22 of the Interim Order.

**(3) *Is the \$1,000 penalty imposed by the Minister justified?***

[33] The Minister called a second witness, Mr. Jethro Leung, Transportation Security Inspector for Transport Canada (TC). Mr. Leung confirmed he was a Transportation Security Inspector since 2007 and employed by TC since 2002. He joined the TC Interim Order Enforcement Team (Enforcement Team) in 2021 and part of his job is to follow up on non-compliance incidents. He has handled 40 to 50 similar cases so far.

[34] When a non-compliance report is filed by an airline, as required by the Interim Order, Mr. Leung confirmed that, as part of the Enforcement Team, these types of files would fall on his desk, depending on the geographic region.

[35] After reviewing the details of the WestJet Safety Report and confirming the individuals involved in the incident, Mr. Leung attempted to contact these individuals to advise them that TC was reviewing a case where they were involved.

[36] During his testimony, Mr. Leung confirmed what was written in the Investigation Case Report (Exhibit 2) related to Ms. Cherban.

[37] Mr. Leung had a phone conversation with Ms. Hyslop and she confirmed verbally everything that was contained in the WS511 Safety Report.

[38] Mr. Leung confirmed that he had some difficulty contacting Ms. Cherban and that the letter of non-compliance sent by mail could not be delivered.

[39] On November 3, 2022, Mr. Leung then sent an email to Ms. Cherban. On November 10, 2022, she contacted him in regard to this email.

[40] Mr. Leung finally managed to have a phone conversation with Ms. Cherban on November 15, 2022. Mr. Leung stated that, during this phone conversation, Ms. Cherban told him she was warned only once to wear the mask, while she was drinking tea.

[41] Mr. Leung reported that Ms. Cherban felt she was targeted by the WestJet crew for the mask wearing and she confirmed she got in an altercation with other passengers because they were also targeting her for not wearing her mask.

[42] Mr. Leung added that Ms. Cherban questioned the need to wear a mask when directed by crew members and questioned the efficacy of wearing the face mask to protect against COVID-19. She also mentioned that the masks being worn were not effective in preventing COVID-19.

[43] On November 19, 2022, based on the information acquired and reviewed, Mr. Leung submitted his final report to the management of the Enforcement Team, recommending that the Minister move forward with an administrative penalty of \$1,000. On November 24, 2022, Mr. Leung's report was reviewed, approved and signed by Marie-Josée Lepine, Manager of the Enforcement Team at TC. The report confirmed that enforcement action was required. The required paperwork was filled, and the Notice was served to Ms. Cherban.

[44] After she received the Notice, Ms. Cherban contacted Mr. Leung again. During this phone conversation, he explained to her how to file a request for a review of a TC decision.

[45] In his testimony, Mr. Leung confirmed that he took the following aggravating and mitigating factors into consideration when determining the penalty amount.

**(a) Aggravating factors**

[46] Mr. Leung considered the general unruly behaviour of Ms. Cherban as an aggravating factor. In his testimony and the Investigation Case Report, he states that Ms. Cherban had altercations not only with the crew members but with other passengers. It was reported in the WS511 Safety Report that Ms. Cherban argued about the efficacy of masks to combat COVID-19 and claimed that she would not wear it. Weeks after the incident, Ms. Cherban made the same kind of statements while talking on the phone with Mr. Leung, during their conversation of November 15, 2021. Mr. Leung considered that as a lack of remorse demonstrated by Ms. Cherban.

**(b) Mitigating factors**

[47] As Mr. Leung mentioned in the Investigation Case Report and during his testimony, based on the WS511 Safety Report, Ms. Cherban stated her daughter was in the hospital and she was told just before the departure. Mr. Leung believes this could have rendered Ms. Cherban emotionally fragile and could explain some of her actions.

[48] Another mitigating factor was that this was a first reported offence for Ms. Cherban, and TC uses an incremental approach.

[49] This is why Mr. Leung justifies applying the minimum penalty of \$1,000.

[50] Mr. Leung testified that it was a baseline penalty and stated, “We wanted an amount that was sufficient to penalize the behaviour of the person who was not complying and a significant amount so that it would get their attention and hopefully encourage compliance on future flights.”

[51] The maximum penalty for non-compliance with section 22 of the Interim Order is \$5,000. The unruly behaviour of Ms. Cherban during the flight could have been penalized, but the Enforcement Team decided to consider it only as an aggravating factor.

[52] Based on the evidence presented by the Minister, I find that the \$1,000 penalty imposed on Ms. Cherban for contravening section 22 of Interim Order is reasonable and justified.

#### **IV. DETERMINATION**

[53] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Ms. Cherban, contravened section 22 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19*, No. 38.

[54] The monetary penalty of \$1,000, imposed by the Minister, is maintained. The total amount of \$1,000 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 determination.

March 23, 2023

(Original signed)

Sébastien Desbiens  
Member

Representations

For the Minister:	Micheline Sabourin
For the Applicant:	Failed to appear