



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *John Camarao v. Canada (Minister of Transport)*, 2023 TATCE 30 (Review)

**TATC File No.:** H-4721-38

**Sector:** Aviation

### **BETWEEN:**

**John Camarao**, Applicant

- and -

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

**Heard by:** Videoconference on November 9, 2022

**Before:** Joelle Malette, Member

**Rendered:** June 21, 2023

### **REVIEW DETERMINATION AND REASONS**

**Held:** The Minister of Transport has proven, on a balance of probabilities, that the applicant failed to comply with instructions given by a crew member, with respect to wearing a face mask, as required pursuant to section 35 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 7*, a designated provision, thereby committing an offence contrary to subsection 7.6(2) of the *Aeronautics Act*.

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] The year 2020 was marked by unparalleled change caused by COVID-19 creating a new landscape and leading to the introduction of rules and regulations designed to keep the public safe. Mr. John Camarao, the applicant, who had travelled to Morocco, was caught in the whirlwind and was unable to leave Morocco prior to the COVID-19 lockdown. The applicant was in Morocco from March 2020 to September 2020, when he was finally able to return home to Canada.

[2] At that time, an interim order was in place requiring all passengers and air crew to wear a face mask and to comply with instructions from the air crew. While on board Air Transat flight TS111 from Charles de Gaulle Airport (Paris) to Pierre Elliot Trudeau International Airport (Montreal), the applicant experienced health issues and did not, always, wear his mask.

[3] This led to the issuance of a Notice of Assessment of Monetary Penalty (Aviation Security) (Notice) on June 4, 2021, by the Minister of Transport (Minister) to the applicant, pursuant to section 7.7 of the *Aeronautics Act* (Act).

[4] The Notice stated:

On or about September 10<sup>th</sup> 2020, during Air Transat flight TS111 from Paris France to Montreal QC, between 11:30 UTC (Coordinated Universal Time) and 19:40 UTC, or thereabouts, you failed to comply with the instructions of a crew member with respect to wearing a face mask, thereby contravening section 36 of *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 7*.

Administrative Monetary Penalty: \$5,000

[5] On June 23, 2021, the applicant requested a review of the Notice by the Transportation Appeal Tribunal of Canada (Tribunal or TATC).

[6] The parties have agreed to the following statement of facts:

- a. The alleged infraction occurred on September 10, 2020, on Air Transat Flight TS111 from Paris, France, to Montreal, Quebec, between 11:30 UTC and 19:40 UTC.
- b. The municipal police (Service de Police de la Ville de Montréal) was called on landing of the flight and escorted the applicant off the flight.

## **II. PRELIMINARY ISSUES**

[7] There are three preliminary issues to be addressed:

1. Typographical error in the Notice
2. Late request to postpone the hearing
3. Reduction of the penalty amount

## **A. Typographical error in the Notice**

[8] A typographical error in the Notice incorrectly references section 36 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 7* (Interim Order). The correct section that should be cited is section 35 of the Interim Order.

[9] The respondent advised the applicant of the typographical error at the case management conference which took place on October 26, 2021, and raised it as a preliminary issue at the hearing.

[10] The applicant took no issue with the typographical error and was not prejudiced by it. He was notified of the error well over one year prior to the hearing. The error solely consisted of a typographical error. The Notice referenced the correct text. Accordingly, the Tribunal will conduct a review of whether there was a breach of section 35 of the Interim Order.

## **B. Late request to postpone the hearing**

[11] Prior to the commencement of the hearing, the applicant requested a postponement of the hearing expressing his desire to cross-examine Air Transat employee, Josée Patry. The Minister opposed the applicant's request.

[12] Section 4.8 of the TATC's *Policy on Postponements/Adjournments* states

4.8 No postponement will be granted within two weeks of the scheduled hearing date unless the party requesting the adjournment demonstrates that exceptional circumstances require it. If through exceptional circumstances the hearing cannot be attended by a party, the Tribunal should be contacted immediately.

[13] The Tribunal heard submissions from both parties and found that no exceptional circumstances warranting a postponement existed. The applicant's request was denied on the following grounds:

- a. The incident occurred over two years prior to the hearing date.
- b. This was a second adjournment request. A prior hearing was adjourned at the last minute, at the request of the applicant.
- c. A case management conference was held on October 26, 2021—over one year prior to the hearing.
- d. The applicant was provided with both an electronic copy and a hard copy of the Minister's disclosure package and was advised of the Minister's intended witnesses.
- e. On October 26, 2022, exactly one year after the case management conference and a few weeks prior to the hearing, the applicant contacted the TATC Registry and informed it of his wish to call the "female air transatlantic employee who registered and filed the complaint against me" as his witness. (We now know this employee to be Josée Patry.)
- f. Several emails were exchanged in which the Registry explained to the applicant that it was not the role of the Registry to summon witnesses or produce documents. Guidance was provided to the applicant, including how to subpoena witnesses, and suggesting that he contact the Minister to discuss the identity of the proposed witness.

- g. The applicant emailed the Minister's representative who responded to the applicant and invited him to contact her by phone or by email to discuss the identity of the witness.
- h. The applicant did not respond to the Minister's representative and did not take any further steps to identify and/or subpoena the witness.
- i. The applicant did nothing further to identify the witness until the morning of the hearing.

[14] For these reasons, the applicant's request was denied, and the hearing proceeded as scheduled.

### **C. Reduction of the penalty amount**

[15] The Minister originally assessed the applicant's monetary penalty in the amount of \$5,000.

[16] At the hearing, the Minister advised the applicant that it had instructions to withdraw the \$5,000 monetary penalty and instead seek a \$1,000 monetary penalty.

[17] The applicant was provided with the opportunity to consider the reduction of the monetary penalty to determine whether he wanted to proceed with his hearing. Despite the reduction in monetary penalty, he elected to move forward with the hearing.

## **III. ANALYSIS**

### **A. Issues**

[18] The Tribunal must decide on the following issues:

1. Does the requirement to wear a face mask apply to Mr. Camarao pursuant to section 31 of the Interim Order?
2. If so, did Mr. Camarao contravene section 35 of the Interim Order and fail to comply with instructions given by a crew member with respect to wearing a face mask? And, if the allegation is proven:
  - a. Do any of the exceptions listed in subsection 34(2) of the Interim Order apply to Mr. Camarao, precluding him from the requirement to wear a face mask?
  - b. Did the applicant establish that he exercised due diligence to prevent the violation or raised any other defence?
  - c. Was the amount of the penalty justified?

### **B. Legal framework**

[19] Pursuant to subsection 7.6(2) of the Act, a person who contravenes a designated provision is guilty of an offence and liable to the punishment imposed in accordance with sections 7.7 to 8.2 and no proceedings against the person shall be taken by way of summary conviction.

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

[21] According to section 8 of the Act, at the conclusion of the review hearing, the TATC member can either:

- a. determine that the applicant has not contravened the designated provision, dismissing the penalty; or
- b. determine, in accordance with the Minister, that the applicant has contravened the designated provision. In this case, the TATC member can also review and determine the amount of the penalty.

[22] Subsection 47(1) of the Interim Order states that:

**Designation**

**47 (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.

[23] In this case, the designated provision is section 35 of the Interim Order which states:

**Compliance**

**35** 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.

[24] The preamble to the Interim Order sets out that the Interim Order is required to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public.

[25] The definition section of the Interim Order defines a face mask as follows:

*face mask* means any non-medical mask or face covering that is made of at least two layers of tightly woven material such as cotton or linen, is large enough to completely cover a person's nose and mouth without gaping and can be secured to a person's head with ties or ear loops.

[26] According to Schedule 2 of the Interim Order, the maximum penalty for an individual who contravenes section 35 is \$5,000.

**C. Issue 1: Does the requirement to wear a face mask apply to the applicant pursuant to section 31 of the Interim Order?**

[27] The Minister described and demonstrated, to the satisfaction of the Tribunal, the validity of the Interim Order and its applicability on the date of the alleged infraction. The Minister also provided the Tribunal with all relevant authorities and provisions, including those for monetary penalties. This information was not contested by the applicant. I therefore accept that the Interim Order was valid and in force at the time of the alleged infraction.

[28] Prior to determining whether the applicant contravened section 35 of the Interim Order, the Tribunal must first determine whether section 35 applies to the applicant. Specifically, section 31 of the Interim Order provides for non-application of sections 32 to 37 in six instances.

[29] In general, sections 32 to 37 of the Interim Order mandate the obligation of a private air operator or air carrier to notify passengers of the requirements to wear a face mask, it mandates the possession of a face mask prior to boarding, the wearing of a face mask, compliance with instructions given by a gate agent, security personnel or a crew member, exceptions to the requirement to wear a face mask and actions to be taken in the case of a refusal to comply with instructions given.

[30] Section 31 of the Interim Order states that:

Non-application

31 Sections 32 to 37 do not apply to any of the following persons:

- (a) an infant;
- (b) a person who provides a medical certificate certifying that they are unable to wear a face mask for a medical reason;
- (c) a person who is unconscious;
- (d) a person who is unable to remove their face mask without assistance;
- (e) a crew member;
- (f) a gate agent.

[31] It was the applicant's evidence that he did not wear his mask because he experienced breathing issues and he felt anxious and light-headed. In closing submission, he stated that he felt as though he was going to faint. He did not lead any evidence to that effect. Nonetheless, there was no evidence that he was, at any time throughout the flight, a person who is unconscious.

[32] The applicant admitted that he did not provide a medical certificate certifying that he was unable to wear a face mask for medical reasons. It was the applicant's evidence that he notified the flight crew that he was unable to obtain a medical certificate in Morocco. He provided the following explanation:

- There was a language barrier (he does not speak Arabic or French).
- Finding an English-speaking doctor would have been difficult.
- He did not have the means to pay the out-of-pocket medical expenses associated with obtaining a medical certificate.

[33] The Tribunal recognizes that the applicant was confronted with unusual circumstances and that obtaining a medical certificate would have been challenging. However, the Interim Order specifically outlines six instances that allow for the non-application of sections 32 to 37. The applicant does not meet the requirements.

[34] For these reasons, I find that the applicant is not excluded from the application of sections 32 to 37. The Tribunal must now determine whether the applicant contravened section 35 of the Interim Order.

**D. Issue 2: Did the applicant contravene section 35 of the Interim Order?**

[35] To establish whether the applicant contravened section 35 of the Interim Order, the Tribunal must make the following determinations:

1. Whether the applicant complied with instructions from flight crew to wear a face mask.
2. If he did not, whether the applicant falls within the exceptions provided for in subsection 34(2) of the Interim Order.

[36] First, the Minister must show that it is more likely than not that the applicant failed to comply with instructions of flight crew to wear a face mask. If the Minister is successful, and the circumstances warrant it, as they do in this case, the Tribunal must then determine whether the applicant falls within the exceptions provided for in subsection 34(2) of the Interim Order. Here, the burden of proof rests with the applicant.

**(1) *Compliance with instructions from flight crew to wear a face mask***

[37] It is clear from the applicant's own evidence that he did not comply with the instructions given by the flight crew with respect to wearing of a face mask. The applicant, who presented in a credible and reliable manner, offered the following relevant testimony:

- He experienced health concerns such as difficulty breathing, feeling anxious and light-headedness which prevented him from wearing his face mask.
- He tried to comply throughout the flight, and he advised the flight director of his health issues. He suggested that he would wear the face mask to cover his face; however, he could not cover his mouth and nose.
- When the flight crew advised him that a report would be issued and police called, he became anxious and frustrated and no longer wore his mask. He stated that he was "no longer in a place to be in compliance."

[38] Based on the applicant's own admissions, he failed to comply.

[39] The heart of the issue, in this matter, is whether the exceptions provided for in subsection 34(2) of the Interim Order are applicable to this case.

**(2) *Exceptions to wear a face mask***

[40] Subsection 34(2) of the Interim Order provides five exceptions in which a passenger will not be required to wear a face mask:

- a. when the only other persons who are two metres or less from the person are occupants of the person's dwelling-house or other place that serves that purpose;
- b. when the safety of the person could be endangered by wearing a face mask;
- c. when the person is drinking, eating or taking oral medications;
- d. when a gate agent or a crew member authorizes the removal of the face mask to address unforeseen circumstances or the person's special needs; or

- e. when a gate agent, a member of the aerodrome security personnel or a crew member authorizes the removal of the face mask to verify the person's identity.

[41] For the purposes of this decision, only paragraphs (b) and (d) are relevant.

**(a) Paragraph (b) – When the safety of the person could be endangered by wearing a face mask**

**The Minister's evidence**

The Minister called two witnesses: Flight Attendant Sonia Stahl and Transportation Security Inspector Vincent Lecoquierre. The Minister also relied on the Air Transat Safety Report dated September 17, 2020 (Exhibit 2), completed by Flight Director Josée Patry which contained witness statements from flight attendants Sonia Stahl, Josée Dumont and Julie Allman.

*The Air Transat Safety Report*

[42] All witness statements in the Safety Report noted that the applicant failed to comply with flight instructions to wear a face mask on multiple occasions. Flight Attendant Josée Dumont requested that the applicant wear his face mask on three occasions. She further stated that the applicant advised her, on the second occasion, that he could not wear the face mask due to health concerns. A medical mask was offered to the applicant. He declined to wear it. Flight Attendant Julie Allman confirmed that she was with Josée Dumont when she informed the applicant that she would notify the flight director of the incident.

*Testimony of Sonia Stahl*

[43] Sonia Stahl is an experienced flight attendant and has been in the employ of Air Transat for approximately 33 years. She was on duty on September 10, 2020. Because of the pandemic, she had been laid off from March 2020 until July 2020. When she resumed work in July 2020, security and safety measures had increased. Flight crew was required to follow sanitizing measures such as sanitizing washrooms every 15 minutes and cleaning of the grounds, seats, and bins prior to boarding. In addition, several announcements were made informing passengers of the requirement to wear a face mask during the flight. Announcements were made by the flight director and the pilot. It was also broadcasted in the inflight announcements during boarding.

[44] Despite the passage of time, Ms. Stahl testified that she recalled the applicant because it is rare to give a passenger a disruptive passenger card. The occurrence therefore stands out in her mind. She explained that the applicant was given a disruptive passenger card because of his refusal to wear a face mask despite numerous requests to do so. Ms. Stahl explained that disruptive passenger cards are given after a passenger has been given chances to change the disruptive behaviour and does not. The decision to provide the applicant a disruptive passenger card was made by Flight Director Josée Patry.

[45] Ms. Stahl provided a police statement on September 14, 2020, in which she stated that the applicant was told numerous times to wear his face mask. Ms. Stahl witnessed the flight director, Josée Patry, give the applicant a Disruptive Passenger Form to read and she overheard the applicant state that he was not doing anything wrong by not wearing his face mask. The flight director explained to the applicant that he was possibly infecting everyone on the plane and putting passengers and crew in danger. He would not put his mask on. Passengers were



complaining and moved to other seats. Ms. Stahl further stated that she was working in the Club Class and that the applicant travelled to the Club Class asking for the toilets. Ms. Stahl informed him that they were in the centre of the plane. He was not wearing his mask and she followed him with one. She waited for him at the washroom and told him to wear the mask. She disinfected the washroom. She stated that the applicant returned to his seat and removed his face mask. She stated that this happened numerous times throughout the flight.

[46] Ms. Stahl confirmed that the applicant informed the flight director that the face mask was causing him health issues and that he had issues breathing and could not wear his mask. She explained that a disruptive passenger card is always given with a witness present. She was the flight director's witness when she overheard this. She further stated that to her knowledge he did not lose consciousness during the flight. She testified that she did not observe the applicant to present with breathing issues when he was walking to and from the washroom.

*Testimony of Vincent Lecoquierre*

[47] Vincent Lecoquierre is a transportation security inspector for Transport Canada, and he was responsible for investigating this matter. For his investigation, he attempted to contact the applicant on several occasions between November 2020 and January 2021. He did so by phone, registered letter and email correspondence. The applicant did not have a voice mail; therefore, he was unable to leave a message. Two of the registered letters were returned to the sender, and email correspondence was left unanswered.

[48] As a result, Mr. Lecoquierre proceeded with his investigation without the applicant's involvement. On March 26, 2021, he completed an Aviation Security Operations Preliminary Investigation Case Report (Exhibit 3), in which he concluded that the applicant was in breach of the Interim Order.

[49] Mr. Lecoquierre noted the following relevant factors:

- The applicant did not wear his face mask on boarding until he was advised to do so.
- The applicant refused to wear his face mask despite several requests to do so.
- Passengers were moved to ensure that the applicant was isolated.
- Police involvement on landing was required.
- When police entered the cabin, the applicant was not wearing a face mask and he was restrained and handcuffed due to his agitation.
- The applicant advised the police that he had health concerns. He also advised the police that he had not consulted with a medical doctor in the last two and a half years.

[50] On cross-examination Mr. Lecoquierre confirmed that he was aware of the applicant's health issues and concluded that they were not serious enough to prevent travel. He acknowledged that it would have been useful to know that, because of the lockdown, the applicant was "trapped" in Morocco from March 2020 until September 2020, making it difficult to obtain a medical certificate.

[51] Mr. Lecoquierre agreed that the reports provided to him should have contained the following information: that the applicant was becoming light-headed from a breathing condition, causing him anxiety, increased heart rate and nervousness.

[52] Mr. Lecoquierre explained that he attempted to reach the applicant to obtain his version of events.

### **The applicant's evidence**

[53] The applicant alleged that he was unable to wear his face mask due to health concerns. The applicant testified that he experienced breathing issues and experienced health concerns that prevented him from wearing his mask. He testified that he was feeling anxious, light-headed and flustered. It was his evidence that he shared this information with the flight crew. This is consistent with the evidence of the Minister.

[54] The applicant testified that he was unable to obtain a medical certificate for a number of reasons summarized as follows:

- Because of the pandemic, he had been “trapped” in Morocco from March 2020 until September 2020.
- There was a language barrier (he does not speak French or Arabic).
- It would be difficult to find an English-speaking doctor.
- He could not afford the out-of-pocket expenses associated with obtaining a medical certificate.

[55] The applicant did not produce any clinical notes and records or medical reports to support his position that he had health issues and that his safety could be endangered by wearing a face mask.

[56] For the exemption to wear a face mask to apply, the applicant must prove, on a balance of probabilities, that his safety could have been endangered by wearing a face mask.

[57] I accept the applicant's evidence that he experienced health concerns during his flight from Paris to Montreal that caused him issues with breathing, light-headedness, and anxiousness. I accept that the applicant advised the flight crew of his health concerns. I further accept that he notified the flight crew of his constraints in obtaining a medical certificate.

[58] The question is whether his safety could have been endangered by wearing a face mask. As such, it is important to consider the wording of paragraph 34(2)(b) of the Interim Order which states: “when the safety of the person could be endangered by wearing a face mask”.

[59] Key words include **could**, **safety** and **endangered**. The word “could” is non-exhaustive and is used to express or indicate a possibility. Paragraph 34(2)(b) was not drafted using the word “is.” The word “safety” designates the condition of being safe from undergoing or causing hurt, injury, or loss. Whereas the word “endanger” can be interpreted to mean putting someone or something at risk or in danger.

[60] A simple consideration of the wording may lead to the conclusion that the applicant has met the burden of proof and that his safety could be endangered by wearing a face mask due to his health concerns. However, the analysis does not end here. Consideration must also be given to the intent of the Interim Order, which is outlined in the preamble and provides that the purpose of the order is to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public. Exemptions must be read with this in mind.

[61] In September 2020, the pandemic was at its early stages: the information available on the impact of the pandemic was limited in comparison to now, vaccination was not available in Canada until December 2020 and flights had been grounded until only a few months pre-incident. It was a new and unforeseen landscape, and the safety of the public was paramount.

[62] Unfortunately, the Interim Order does not provide guidance on the interpretation of paragraph 34(2)(b). No examples of its intended application are provided which suggests that it is to be assessed on a case-by-case basis.

[63] Paragraph 34(2)(b) is intended to provide for circumstances where a passenger's health may be unexpectedly affected by the use of a face mask—thereby endangering the safety of that person. Because of the unexpected nature posed by such circumstances, a passenger may not have a medical note.

[64] I have given a lot of thought to the applicant's circumstances and have empathy for him. However, I find that he has not met the burden of proving that, on a balance of probabilities, his safety could have been endangered by wearing a face mask for the following reasons:

- a. It is not sufficient to refuse to wear a mask by simply stating that you are experiencing health concerns. Although the concerns stated by the applicant are important (difficulty breathing, light-headedness...), it would have been reasonable for the applicant and for the safety of the other passengers to, at a minimum, accept to wear the medical face mask offered by the flight crew.
- b. The applicant was aware of the requirement to wear a face mask while flying and he was aware of his health issues—they did not present as unforeseen or unexpected. He nonetheless chose to fly (without a doctor's note) and without having taken any real steps to attempt to obtain one. It is understood that this may have proved challenging in the circumstances; however, no attempt was even made. His decision not to obtain a medical certificate is based on assumptions. Taking into consideration the landscape of the time, his decision may have risked the safety of other passengers.
- c. He did not advise the flight crew of his health concerns prior to boarding the airplane. Notably, he only notified the flight crew after he removed his mask and after he was directed to wear it. Had he addressed his issues and concerns with the flight crew, arrangements may have been made to physically distance him from other passengers, ensuring a distance of more than two metres between him and other passengers. This was eventually done, but only after he repeatedly failed to comply with flight crew instruction to wear his face mask.
- d. He did not advise the flight crew of his constraints in obtaining a medical certificate until he was already in non-compliance with the Interim Order.

- e. The applicant was offered a medical mask, which he declined to use. It may have made a difference.

[65] The flight crew was placed in a situation of having to consider the safety of the passengers at large as well as the safety of the applicant. In considering the safety of the applicant, it could not ignore the safety of all other passengers on board.

[66] Although there is some flexibility built into the Interim Order to allow air carriers to deal with exceptional circumstances, it could not be overlooked by air carriers that the face covering requirements represented an important part of the Canadian government's layered approach to keeping travellers safe by mitigating the spread of COVID-19 in the air sector.

[67] Air carriers and crew members were required to adhere to the measures laid out in the Interim Order but also owed all passengers a careful determination of what was deemed exceptional circumstances. Allowing a passenger to fly unmasked increased the risk of infection to all individuals onboard the flight. This can be a fine and difficult balance to achieve.

[68] The flight crew must have some degree of certainty before exercising its discretion when dealing with special circumstances. I find that the applicant does not fall within the exception provided for at paragraph 34(2)(b).

**(b) Paragraph (d) – When a gate agent or a crew member authorizes the removal of the face mask to address unforeseen circumstances or the person's special needs**

[69] The gate agent or a crew member did not authorize the removal of the applicant's face mask.

[70] In this case, the applicant did not advise the gate agent of his health concerns or constraints in obtaining a medical certificate. The issue is whether a crew member should have authorized the removal of the face mask to address the applicant's unforeseen circumstance or special needs. For the following reasons, the applicant failed to demonstrate that he fell within the exception provided for at subsection 34(2)(d):

- Despite several announcements notifying passengers of the requirement to wear a face mask, the applicant did not take any steps to discuss his conditions or his constraints in obtaining a medical certificate with a crew member prior to the removal of his mask. In this case, the applicant experienced breathing issues and health concerns that he says prevented him from wearing his mask. He testified that he was feeling anxious, light-headed, and flustered.

[71] I accept that the applicant experienced the above-noted health concerns. I also accept the Ministry's evidence that Ms. Stahl did not observe the applicant exhibiting any difficulties breathing when walking to and from the washroom, something the applicant did several times during the flight. Therefore, I am not convinced, on a balance of probabilities, that his health concerns prevented him from wearing a face mask.

[72] Because the applicant stated that he was having difficulty breathing, the applicant was provided with a medical mask, which he declined to wear. Given the gravity of the pandemic in

2020, it would have been incumbent on him to at least attempt to wear the medical face mask. He did not.

[73] The flight crew appropriately used its discretion not to authorize the removal of the applicant's face mask.

**(3) *Due diligence***

[74] Pursuant to section 8.5 of the Act, no person shall be found to have contravened a provision if the person exercised all due diligence to prevent the contravention.

[75] In *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, the court found that that the defence of due diligence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event (p. 1326).

[76] For the following reasons, I find that the applicant did not exercise all due diligence to prevent the contravention and failed to show that he took all reasonable steps to avoid the event:

- a. There was no evidence that he attempted to obtain a medical certificate.
- b. He took no steps to speak with the gate agent prior to boarding.
- c. He did not speak with the flight crew to advise them of his circumstances and health concerns prior to being in non-compliance.
- d. He was given a medical face mask and he declined to use it.
- e. He refused to wear a face mask to disembark the aircraft, he then became agitated and police involvement was required to escort him from the airplane.

**(4) *Penalty***

[77] Under Schedule 2 of the Interim Order, a maximum penalty of \$5,000 can be imposed on an individual who has contravened section 35 of the Interim Order. In the case, the monetary penalty was originally assessed by the Minister at \$5,000. At the onset of the hearing, the Minister indicated a reduction in the penalty amount to \$1,000.

[78] During his testimony, Mr. Lecoquierre, Transportation Security Inspector, explained that a penalty can range from a written warning to a monetary penalty. He opined that a monetary penalty was warranted because of the repetitive non-compliance and the need for police involvement.

[79] Although this was a first offence, and the applicant was confronted by unusual circumstances, I agree with the Transport Canada recommendations for a penalty in the amount of \$1,000.

#### **IV. DETERMINATION**

[80] The Minister of Transport has proven, on a balance of probabilities, that the applicant failed to comply with instructions given by a crew member, with respect to wearing a face mask, as required pursuant to section 35 of the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 7*, a designated provision, thereby committing an offence contrary to subsection 7.6(2) of the *Aeronautics Act*.

[81] 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.

June 21, 2023

(Original signed)

Joelle Malette  
Member

Representations

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