TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Marco Accurso v. Canada (Minister of Transport)*, 2023 TATCE 32 (Ruling)

TATC File No.: P-4649-33

Sector: Aviation

BETWEEN:

Marco Accurso, Applicant

- and -

Canada (Minister of Transport), Respondent

[Official English translation]

Hearing by:	Written submissions
Before:	Franco Pietracupa, Member
Rendered:	July 13, 2023

RULING

Held: The respondent's request to quash the subpoena issued to Ms. Judy Patricia Morris is granted. The applicant's request that the Minister of Transport's representative be disqualified is denied. All without costs.

I. BACKGROUND

[1] On July 28, 2020, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) with a penalty of $750 to the applicant, pursuant to section 7.7 of the *Aeronautics Act*. The Notice alleges that the applicant has contravened subsection 602.86(2) of the *Canadian Aviation Regulations* (*CARs*). The Notice states that:

> On or about August 1st, 2019, at approximately 1317 hours Pacific Daylight Time (PDT), at or near the Whistler Heliport (CBE9), British Columbia, you, Marco Accurso, operated a Robinson R44 II helicopter, registration C-GKUM, with carry-on baggage on board when a normal and emergency exit accessible to the passengers was blocked by the carry-on baggage, thereby violating Canadian Aviation Regulation (CAR) 602.86(2).

[2] On August 31, 2020, the applicant requested that the Transportation Appeal Tribunal of Canada (Tribunal) review the Notice.

[3] On February 17, 2022, the applicant requested that the Tribunal declare electronic evidence (R1 and R2) provided to the Minister by Mr. John Morris (Mr. Morris) inadmissible because the Minister had not proven its authenticity and reliability.

[4] On March 25, 2022, I refused to set aside any electronic evidence on the grounds that the request was premature and ordered that the matter be dealt with at the outset by way of *voir dire* at the hearing on the merits.

[5] In preparation for the hearing, the applicant sent a subpoena to Ms. Judy Patricia Morris (Ms. Morris) on August 30, 2022, requiring her to appear at the hearing scheduled for October 25 and 26, 2022.

[6] On September 22, 2022, the Minister asked the Tribunal to quash the subpoena issued to Ms. Morris because her testimony would not contain any evidence relevant to the issue to be determined. The applicant replied that her testimony is relevant and requested that the Tribunal disqualify the Minister's representative, since he would have communicated with his witness, Ms. Morris, with costs.

[7] On October 21, 2022, after considering the submissions of the parties, I granted the Minister's request to quash the subpoena issued to Ms. Morris, stating that my reasons would form an integral part of my determination on the merits.

[8] On October 24, 2022, the day before the hearing, the applicant requested an adjournment, which I refused.

[9] On October 25, 2022, the applicant applied to the Federal Court for judicial review of the rulings rendered on October 21 and 24, 2022.

[10] On December 20, 2022, the Federal Court ordered that the application for judicial review be struck out on the grounds that the applicant had failed to establish the existence of exceptional circumstances justifying departure from the general rule prohibiting judicial review of an interlocutory administrative decision.

[11] As my appointment by the Governor in Council as Tribunal member expires before I can hear the case on its merits, here are the reasons supporting my decision to quash the subpoena of Ms. Morris, to refuse to disqualify the Minister's representative and to refuse to award costs.

II. ANALYSIS

A. Issue

[12] The parties' respective motions raise the following issues:

1. Should the Tribunal grant the Minister's request to quash the subpoena issued to Ms. Morris?
2. Should the Tribunal disqualify the Minister's representative because of his communications with Ms. Morris?
3. Should the Tribunal award costs?

B. Legal framework

(1) Quashing a subpoena

[13] The parties base their comments on subpoena jurisprudence, in particular *Zündel, Re*, 2004 FC 798 [*Zündel*], to establish that the party subpoenaing a witness must demonstrate that the testimony is likely to provide relevant evidence.

[14] In *Zündel*, the Federal Court set out the grounds for quashing a subpoena:

> [5] The case law on subpoenas shows that there are two main considerations which apply to a motion to quash a subpoena: 1) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify?; (e.g. *Samson Indian Nation and Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2003] F.C.J. No. 1238); 2) Is the evidence from the witnesses subpoenaed relevant and significant in regard to the issues the Court must decide? (e.g. *Jaballah (Re)*, [2001] F.C.J. No. 1748; *Merck & Co. v. Apotex Inc.*, [1998] F.C.J. No. 294)

[15] The applicant also relies on the words of the Honourable Justice Snider of the Federal Court in *Laboratoires Servier v. Apotex Inc.*, 2008 FC 321 [*Laboratoires Servier v. Apotex Inc.*], suggesting that the threshold for demonstrating the relevance of testimony is rather low:

> [31] I begin with the issue of relevance, a question that affects all of the subpoenas. Based on my review of the jurisprudence, I am satisfied that the threshold to show relevance is not high. However, a party must do more than merely assert relevance (*Harris*, above at para. 4; *Zundel (Re)*, above, at para. 8).

[16] The Tribunal agrees with the parties that two main considerations apply when deciding a motion to quash a subpoena:

a. Is there a privilege or other rule of law that applies so that the witness is not compelled to testify?

b. Is the testimony of the subpoenaed witnesses relevant and important to the issues before the Court?

[17] Since the parties agree that there is no privilege or rule of law allowing Ms. Morris to avoid testifying, the Tribunal need only address the second part of the analysis.

(2) Costs

[18] Subsection 19(1) of the *Transportation Appeal Tribunal of Canada Act* reads as follows:

> **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.

[19] The jurisprudence has interpreted the term "vexatious" as broadly synonymous with the concept of abuse of process set out in *Foy v. Foy* (1979), 102 D.L.R. (3d) 342 (Ont. C.A.). A case is frivolous if the applicant has no reasonable chance of success, or if it would lead to no possible good. It is also vexatious if it is intended to cause hardship to the opposing party by forcing it to defend against an unsuccessful applicant, or in a case where the issues have already been determined.

C. Is Ms. Morris's testimony relevant and important?

[20] The Minister alleges that Ms. Morris's testimony will not provide any relevant information to determine whether the applicant contravened section 602.86 of the *CARs* by placing a piece of luggage in the back seat of the helicopter.

[21] The Minister claims that Ms. Morris's affidavit is clear and that it is obvious that her testimony cannot be relevant since:

a. She was present at the hotel with her husband on August 1, 2019.

b. She was aware of a phone call received by her husband.

c. Her husband told her it was something related to a helicopter operated by another company, without further details.

d. She saw her husband using his computer, but nothing more.

e. She can offer no further details, as the events date back more than three years.

f. She is not involved in her husband's business.

[22] The Minister argues that having Ms. Morris testify about her husband's intentions to harm the applicant is completely irrelevant to the alleged offence and cannot invalidate it.

[23] For his part, the applicant maintains that the issues to be determined are not limited to the content of the Notice, but also encompass all aspects relevant to the debate, including in particular the question of the admissibility of evidence, which will be the subject of a *voir dire* at the hearing on the merits.

[24] The applicant alleges that it would be wrong to claim that Ms. Morris cannot give relevant evidence simply because she was not present at the time when the evidence to be the subject of a *voir dire* was [TRANSLATION] "fabricated" by her husband, Mr. Morris.

[25] In the applicant's view, since questions are being raised about the authenticity and reliability of the evidence "fabricated" by Mr. Morris, Ms. Morris's testimony is relevant because of her proximity to her husband. The applicant maintains that the email exchanges between Mr. Morris and the applicant's representatives following service of the subpoena demonstrate that Mr. Morris has, for several years, had the avowed intention of harming the applicant and his business, which reasonably leads one to believe that Ms. Morris would have personal knowledge of certain facts on this subject.

[26] The applicant adds that, unlike her potential testimony, Ms. Morris's affidavit does not reveal everything she knows about the facts in dispute. He alleges that he cannot be compelled at this stage to disclose the nature and scope of his defence, including the topics to be addressed in Ms. Morris's testimony.

[27] The applicant also relies on the words of the Honourable Justice Snider of the Federal Court in *Laboratoires Servier v. Apotex Inc.* to suggest that the threshold for demonstrating the relevance of testimony is low:

> [31] I begin with the issue of relevance, a question that affects all of the subpoenas. Based on my review of the jurisprudence, I am satisfied that the threshold to show relevance is not high. However, a party must do more than merely assert relevance (*Harris*, above at para. 4; *Zundel (Re)*, above, at para. 8).

[28] I am of the opinion that, in this case, the substantive issue to be determined at the hearing is whether the applicant contravened subsection 602.86(2) of the *CARs*. In light of Ms. Morris's affidavit, I am convinced that she cannot provide relevant and important evidence on this issue, among other things because she was not present at the scene of the alleged infraction.

[29] The applicant argues, however, that because of her "proximity" to Mr. Morris, Ms. Morris's testimony is relevant to the issue of the admissibility of electronic evidence, which will be the subject of a *voir dire* at the hearing on the merits.

[30] Although the threshold of relevance for subpoenaing a witness is not high, the Federal Court in *Laboratoires Servier v. Apotex Inc.* stated that it would not allow a party to use subpoenas as a fishing expedition, or to examine witnesses in the hope that something would emerge that would help it present its case.

[31] Contrary to the applicant's allegation, I am far from convinced that Ms. Morris's "proximity" [TRANSLATION] "reasonably leads to the conclusion" that she will be able to provide evidence of Mr. Morris's intentions to harm the applicant. I am of the opinion that the subpoena of Ms. Morris is irrelevant both to the substantive issue and to the issue of the authenticity and

reliability of the evidence to be the subject of the *voir dire*. Consequently, I conclude that the applicant has not met the threshold required to demonstrate the relevance of Ms. Morris's testimony.

[32] Ms. Morris's subpoena is consistent with the fishing expeditions that the Court warned us to avoid.

D. The authority of the Minister's representative

[33] The applicant alleges, among other things, that by communicating with Mr. and Ms. Morris or by advising them to produce an affidavit in support of the application seeking to quash the subpoena, the Minister's advisor demonstrated a negative bias against him. The applicant maintains that the actions of the Minister's representative amount to a mandate to represent a witness and asks the Tribunal to disqualify him from representing the Minister.

[34] The Minister relies on *R. c. F.B.*, 2014 QCCS 5388, to assert that its representative did nothing wrong and that he was perfectly entitled and authorized to communicate with Ms. Morris, since a witness does not belong to the party who assigns them:

> [TRANSLATION]
>
> [16] The Tribunal thus reiterates each of the rules set out in *R. c. Mario Lepire*, which govern the relationship between lawyers and witnesses:
>
> > - witnesses are not the property of the party summoning or subpoenaing them, but are, in law, court witnesses and, as such, each party is fully entitled and authorized to meet all witnesses, including those of the opposing party…

[35] Furthermore, the Minister alleges that the Tribunal does not have jurisdiction to decide who should represent the Minister and that, consequently, it cannot disqualify its representative.

[36] The applicant's claim that Ms. Morris is his personal witness runs counter to the well-established principle that "there is no property in a witness."[1] Furthermore, there is no need to address the issue of the Tribunal's authority to disqualify a representative as suggested by the Minister, since I am of the opinion that the Minister's representative was able to communicate with Mr. and Ms. Morris. The applicant's request is dismissed.

E. Should the Tribunal award costs?

[37] Both the Minister and the applicant have asked the Tribunal to award them costs pursuant to subsection 19(1) of the *Transportation Appeal Tribunal of Canada Act*.

[38] I decline to award costs. I find that the parties' requests are neither frivolous nor vexatious. The parties' motions were not without merit. Neither party has put forward any evidence or argument that the other's motion was made maliciously and without sufficient reason.

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[1] *Harmony Shipping Co. S.A. v. Davis*, [1979] 3 All E.R. 177, at p. 181 (C.A.); *Apotex Inc. v. Merck Canada Inc.*, 2012 FC 1235, at para. 30.

III. RULING

[39] The respondent's request to quash the subpoena issued to Ms. Judy Patricia Morris is granted. The applicant's request that the Minister of Transport's representative be disqualified is denied. All without costs.

July 13, 2023

(Original signed)

Franco Pietracupa
Member

Representations

For the Minister:	Martin Forget
For the Applicant:	Marc-Olivier Brouillette
	Jean-Marc Fortier