Federal Court  Cour fédérale

Date: 20160711

Docket: T-1518-13

Citation: 2016 FC 777

Fredericton, New Brunswick, July 11, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

AIDAN BUTTERFIELD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Summary

[1] This matter arises out of an incident which occurred on September 1, 2006. On that date, the Appellant, Mr. Butterfield, flew his personal aircraft from Pitt Meadows Airport, British Columbia to Boundary Bay Airport, British Columbia. He failed to enter the flight into the log book on that day as required by the *Canadian Aviation Regulations* SOR/96-433 (the

Regulations). Furthermore, Mr. Butterfield made the flight without a maintenance release demonstrative of the fact that the requisite annual inspection of the aircraft had been carried out.

[1] As a result of those violations, the Minister of Transport (the Minister) fined Mr. Butterfield $1,750.00. Mr. Butterfield contends the penalty is unjust, and has challenged it via a lengthy series of proceedings, culminating in the within application for judicial review. The initial challenge to the fine consumed four hearing days before a single member of the Transportation Appeal Tribunal of Canada (TATC) in October of 2010 (the Review Hearing). At that hearing, the Member found that the Minister had discharged her burden to establish a breach of the Regulations.

[2] Mr. Butterfield appealed the decision of the Member under s 8.1 of the *Aeronautics Act* RSC, 1985, c A-2 (the Act). Following a five-day hearing before a three-member panel (the Appeal Panel), the TATC upheld the Member's decision. It is that appeal decision which is challenged in the present application.

[3] Mr. Butterfield does not dispute the elements of the offences which led to the imposition of the fine. However, he contends the fine should not have been assessed since he acted in good faith. Without entering into all of the details, suffice it to say that Mr. Butterfield became embroiled in a dispute with the aircraft maintenance engineering firm who performed repairs to his plane. As a result of that dispute it appears he flew the plane from the Pitt Meadows Airport without the log book on board and without a maintenance release. Apparently, when Mr.

Butterfield asked the aircraft maintenance engineer for the log book in order that he could enter his flight, the request was refused because of a dispute regarding payment.

[4] Mr. Butterfield advances several grounds of review. First, he contends the Minister failed to respect the limitation period within which the fine could be imposed. Second, he contends the log book should not have been admitted as evidence. Third, he contends the Appeal Panel was tainted with actual bias or there existed a reasonable apprehension of bias. The first issue involves the interpretation of the TATC's home statute for which the reasonableness standard applies, see: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 54-56 [*Dunsmuir*]. The second issue involves the admission of evidence and the appreciation of facts by an administrative tribunal. The standard of review on that issue is also one of reasonableness, see: *Dunsmuir*, above at para 53; *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, [2005] FCJ No 584. The final issue raised by Mr. Butterfield, that of bias or apprehension of bias, raises a combination of issues involving bias and procedural fairness and must be assessed by the Court on the standard of correctness: *Dunsmuir*, above at para 50; *Sketchley v Canada*, 2005 FCA 404, [2005] FCJ No 2056 at para 53; *McEvoy v Canada (Attorney General)*, 2014 FCA 164, [2014] FCJ No 762 at para 17. In the event the Appeal Panel failed to reach the correct decision on the bias and procedural fairness issues, the application should be allowed.

[5] For the reasons set out below, I am of the view the Appeal Panel's decision meets the test of reasonableness with respect to the first two grounds advanced by Mr. Butterfield and that it

reached the correct decision with respect to the bias or reasonable apprehension of bias arguments. I would therefore dismiss the application for judicial review.

II. Relevant Provisions

[6] The relevant provisions of the Act are attached hereto as Schedule A.

III. Analysis

A. *Limitation Period*

[7] Mr. Butterfield contends the Minister was statute-barred from assessing the fine since he (Mr. Butterfield) did not receive notification of the fine until September 5, 2007, twelve months and five days after the date of the incident. He relies on *Brière v Canada*, 57 DLR (4th) 402, [1989] FCJ No 551 for the proposition that proceedings under the Act are not instituted until the offender has been notified of the penalty. In that case, the Federal Court of Appeal found that notice must be provided within the limitation period prescribed by s 57 of the *Unemployment Insurance Act*, 1971, SC 1970-71-72, c 48. Further, Mr. Butterfield contends that s 7.7(1) of the Act requires notice before a proceeding can be initiated per s 26.

[8] The Respondent contends that the notice requirement set out in s 7.7(1) is not engaged until after the Minister has decided to assess the monetary penalty. It is illogical to contend that the proceeding is not instituted until notice has been served. If that were the case, an offender could simply avoid a charge by evading service. Further, the Respondent contends Mr.

Butterfield's reliance on *Brière* is misplaced since the legislative provision at issue in that case required the notice be served within the limitation period.

[9] The TATC has, in the past, interpreted this very provision in a manner consistent with the decision of the Appeal Panel. While those decisions are not binding on this court, they demonstrate the reasonableness of the approach taken by the Appeal Panel (see: *Edgcumbe v Canada (Minister of Transport)*, [2008] CTATD No 6; *Canada (Minister of Transport) v Royds*, [2004] CTATD No 26, *Canada (Minister of Transport) v Canadian Aero Accessories Ltd*, [1997] CATD No 2, *Insight Instrument Corp v Canada (Minister of Transport)*, [2005] CTATD No 22). I am of the view it would be unreasonable for the TATC to depart from its longstanding jurisprudence absent intervention by the legislator. In addition, I am satisfied, for the reasons advanced by the Respondent, that the approach adopted by the Appeal Panel is reasonable in the circumstances.

B. *Hearsay Evidence*

[10] Mr. Butterfield contends that by admitting the entirety of his log book, the TATC admitted hearsay evidence, which does not fall under any lawful exception, including that potentially created by s 28 of the Act. Mr. Butterfield contends that since he provided evidence which contradicts that found in the log book, it (the log book) should not have been admitted into evidence. I would note here there is no suggestion the log book contains a reference to the relevant flight or the necessary maintenance certificate.

[11] The Respondent contends the impugned entries were not admitted for the truth of their contents, but to prove their existence and the absence of other entries. Further, the Respondent contends, among other things, that nothing turned on the entries since Mr. Butterfield admitted the elements of the offences.

[12] The presiding Member overruled Mr. Butterfield's objection to the admissibility of the log book. She found there was no 'evidence to the contrary' as contemplated by s 28. The Appeal Panel upheld her conclusion. I am of the view Mr. Butterfield failed to establish that the decision to allow the evidence was unreasonable. Regardless, there was no evidence that the contested evidence had any impact upon the outcome of the case.

C. *Bias, Reasonable Apprehension of Bias and Procedural Fairness*

[13] Mr. Butterfield submits that the Chairperson of the Appeal Panel should have recused himself because of bias or a reasonable apprehension of bias. The Chairperson admits that he attended a portion of the Review Hearing before the Member in October, 2010. He attended at the back of the hearing room in his capacity as Chairperson of the TATC for purposes of observing and assessing how the Member performed her duties. In his own words, the Chairperson said he was 'judging the judge' which is part of his responsibilities as Chairperson of the TATC. Mr. Butterfield contends that since the Member was re-appointed after her assessment by the Chairperson, his (the Chairperson's) evaluation must have been positive and that positive assessment creates a reasonable apprehension that he (the Chairperson) had pre-judged the issues. I would note here that the Chairperson does not appoint members to the TATC. That task rests solely with the Governor-in-Council.

[14] Further, with respect to the allegation of bias or reasonable apprehension of bias, Mr. Butterfield says that pursuant to the *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 an appeal is to be judged on the merits of the record of the proceedings before the member. Mr. Butterfield contends the appeal could not have been judged on the 'merits of the record' since the Chairperson acquired first-hand knowledge to at least part of the evidence. He submits that exposure to a witness giving testimony may taint how one reads a transcript, and, hence a reasonable apprehension of bias. I would reject this contention for several reasons. First, the Chairperson did not attend the whole of the hearing, only part of it. Second, he did not participate in any of the deliberations by the Member. Third, if one were to accept the position advanced by Mr. Butterfield, one would have to acquiesce to the notion that any appellate tribunal that chooses to watch a video recording of a trial is, in some way, biased by being too engaged in the trial process. I cannot agree. Courts of Appeal have been known to listen to the whole of the transcript, see for example *R v Gillis*, 2014 NBCA 58, [2014] NBJ No 242. I am of the view that an appellate tribunal which chooses to watch a video recording or listen to an audio recording of a hearing, does not become biased, or suffer an apprehension of bias, by the mere fact it has considered the record beyond that of a typed transcript. I would adopt a similar approach in the circumstances of the present case.

[15] Finally, Mr. Butterfield observed that the Chairperson admits to having obtained legal advice regarding whether he was disqualified from presiding on the Appeal Panel. He (the Chairperson) informed Mr. Butterfield that his legal counsel opined that the circumstances did not give rise to any conflict of interest or reasonable apprehension of bias. Mr. Butterfield disagrees. In addition, he contends that the very fact the Chairperson sought advice, the full

contents of which were not disclosed, violates a fundamental principle of procedural fairness. Mr. Butterfield claims he should have had access to the complete legal opinion, which request was refused by the Chairperson. Mr. Butterfield ties this procedural fairness issue to the bias issue by asserting that the very receipt of the opinion demonstrates the Chairperson was predisposed to follow that opinion; and therefore biased in deciding the bias issue.

[16] The Respondent contends that Mr. Butterfield's assertions do not meet the high threshold for bias or reasonable apprehension of bias. In summary, the Respondent contends that the Chairperson simply sat at the back of a publicly accessible hearing room for purposes of assessing one of his tribunal members. This constituted part of the Chairperson's functions in assessing how members conduct hearings. The Chairperson had no personal interest in whether the case involved Mr. Butterfield or some other litigant. The Respondent says that even if the Chairperson provided the Member with a favourable review, such a review was only with respect to the Member's conduct of the hearing and not the result. The Respondent notes there is no evidence the Chairperson participated in the Member's deliberations or the outcome. Finally, the Respondent notes that the Chairperson's attendance at a portion of the review hearing occurred more than two years prior to the conduct of the hearing before the Appeal Panel.

[17] The threshold to establish bias or a reasonable apprehension of bias is high. The dissenting opinion of de Grandpré J. in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 has become the universally accepted test for reasonable apprehension of bias in Canada. He stated:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the

> question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude, Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

[18] The Chairperson's decision to seek legal advice on the standard for establishing a reasonable apprehension of bias is not indicative of such an apprehension. Rather, it is the conscientious action of an administrative decision-maker seeking to ensure the legitimacy of proceedings. It is not in anyone's interest that this sort of prudence be considered proof of bias or of an apprehension of bias. Decision-makers are entitled to seek legal advice regarding procedural and substantive matters before them, provided always, that they retain an open mind and the ultimate decision is their own (*Telus Communications Inc v Canada (Attorney General)*, 2004 FCA 380, [2004] FCJ No 1918 at paras 8-9; *Pritchard v Ontario Human Rights Commission*, 63 OR (3rd) 97, [2003] OJ No 215 at para 54). Every communication between the Chairperson and Mr. Butterfield demonstrates clearly that the Chairperson was attentive to Mr. Butterfield's concerns and did not approach the issue of his potential bias with a closed mind, see: *Arsenault-Cameron v Prince Edward Island*, [1999] 3 SCR 851. Furthermore, there is no evidence the legal advice in question placed the Chairperson in a position of conflict of interest (*Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920, [2007] FCJ No 1195 at para 66).

[19] Mr. Butterfield claims the Chairperson's refusal to provide him with a copy of the legal opinion constitutes a breach of procedural fairness. Clearly, any such opinion is protected by solicitor client privilege. The Chairperson candidly advised the parties he had sought and

obtained an opinion and informed them of the lawyer's advice. The Chairperson clearly informed the parties, including Mr. Butterfield, that he was not bound by that opinion and was seeking their advice and guidance. The record shows Mr. Butterfield was afforded extensive opportunities to advance his position that the Chairperson was biased or tainted with a reasonable apprehension of bias. I am satisfied the Appeal Panel met its obligation of procedural fairness toward Mr. Butterfield by disclosing the fact it had sought an opinion and informing him of the nature of that opinion. It was in my view unnecessary to disclose the whole of the opinion letter (see: *Telus* and *Pritchard*, above).

[20] Based upon that set out in paragraphs 15 to 20, I am not satisfied the Appeal Panel erred in concluding Mr. Butterfield failed to establish bias, reasonable apprehension of bias or a breach of procedural fairness.

D. *Costs*

[21] At the close of the hearing the parties were asked their position on costs. They agreed to an all-inclusive amount of $2,500.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs payable by Mr. Butterfield to the Respondent in the amount of $2,500.00 inclusive of disbursements.

"B. Richard Bell"

Judge

APPENDIX A

***Aeronautics Act*, RSC, 1985, c A-2**	***Loi sur l'aéronautique*, LRC (1985), ch. A-2**
7.7 (1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.	**7.7 (1)** Le ministre, s'il a des motifs raisonnables de croire qu'une personne a contrevenu à un texte désigné, peut décider de déterminer le montant de l'amende à payer, auquel cas il lui expédie, par signification à personne ou par courrier recommandé ou certifié à sa dernière adresse connue, un avis l'informant de la décision.
26 No proceedings under sections 7.6 to 8.2 or by way of summary conviction under this Act may be instituted after twelve months from the time when the subject-matter of the proceedings arose.	**26** Les poursuites au titre des articles 7.6 à 8.2 ou celles visant une infraction à la présente loi ou à ses règlements punissable sur déclaration de culpabilité par procédure sommaire se prescrivent par douze mois à compter de la perpétration de l'infraction.
28 In any action or proceeding under this Act, an entry in any record required under this Act to be kept is, in the absence of evidence to the contrary, proof of the matters stated therein as against the person who made the entry or was required to keep the record or, where the record was kept in respect of an aeronautical product, aerodrome or other aviation facility, against the owner or operator of the product, aerodrome or facility.	**28** Dans toute action ou procédure engagée en vertu de la présente loi, les inscriptions portées aux registres dont celle-ci exige la tenue font foi, sauf preuve contraire, de leur contenu contre l'auteur des inscriptions ou le responsable de la tenue des registres ou, s'il s'agit de produits aéronautiques, d'un aérodrome ou autre installation aéronautique, contre leur propriétaire, utilisateur ou exploitant.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1518-13
STYLE OF CAUSE:	AIDAN BUTTERFIELD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 30, 2016
JUDGMENT AND REASONS:	BELL J.
DATED:	JULY 11, 2016

APPEARANCES:

Aiden Butterfield	FOR THE APPLICANT (ON HIS OWN BEHALF)
Oliver Pulleyblank	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Aiden Butterfield Richmond, BC	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT