Date: 20071220

Docket: T-693-07

Citation: 2007 FC 1346

Ottawa, Ontario, December 20, 2007

PRESENT: The Honourable Orville Frenette

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

PRISM HELICOPTERS LIMITED

Respondent

and

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by the applicant pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, respecting a decision rendered by the Transportation Appeal Tribunal of Canada (the "Tribunal"), wherein it concluded that it had jurisdiction to review a decision by the Minister of Transport to cancel an exemption granted pursuant to s. 5.9(2) of the *Aeronautics Act*, R.S., c. A-3, s. 1 (the "Act").

[2] The jurisdiction of the Tribunal is limited to reviewing the Minister of Transport's decision to cancel, suspend, refuse to issue, review or amend a Canadian aviation document ("CAD").

[3] The applicant contends that a s. 5.9(2) exemption is not a Canadian aviation document (CAD) as defined by the Act, and therefore falls outside of the Tribunal's jurisdiction. The intervener, the Tribunal, asserts that a s. 5.9(2) exemption is a CAD under the Act and thus a decision to cancel or refuse to renew by the Minister is reviewable by the Tribunal. The respondent, Prism Helicopters, has failed to appear and thus took no part in the present application.

INTRODUCTION

[4] Subsection 605.85(1) of the *Canadian Aviation Regulations* (the Regulations) prohibits a pilot from taking-off in an aircraft that has undergone maintenance unless an aircraft maintenance engineer signs a maintenance release.

[5] On November 9, 2005, the Minister exempted Canadian air operators of certain aircraft types and their flight crew from certain specific requirements of section 605.85 (1) of the Regulations (the "exemption"). This exemption was made pursuant to section 5.9(2) of the Act.

[6] On July 12, 2006, the respondent was advised that the exemption would not be re-issued upon its expiry on May 1, 2007, and that Canadian air operators would once again be required to obtain a maintenance release from the aircraft maintenance engineer upon take-off of an aircraft that

had undergone maintenance. On February 2, 2007, the Minister cancelled the exemption effective March 7, 2007.

[7] The Respondent applied to the Tribunal for a review of the Minister's decision to cancel the exemption on October 2, 2006. On October 23, 2006, the Tribunal requested representations from the parties as to whether or not it had jurisdiction to undertake such a review.

THE TRIBUNAL'S DECISION

[8] In a decision dated March 27, 2007, the Tribunal found that it had jurisdiction to conduct a review of the Minister's decision to cancel the exemption from s. 605.85(1) of the Regulations.

[9] First, the Tribunal determined whether the exemption in question was a statutory instrument pursuant to the *Statutory Instruments Act*, 1970-71-72, c. 38, s. 1.

[10] To be considered a statutory instrument, the Tribunal was of the view that an exemption would have to fulfill the definition of a statutory instrument set out in s.2 of the *Statutory Instruments Act*:

> […]
> "statutory instrument"
> (a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or

> functions in relation to a matter to which that instrument relates, or
> (ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,
> […]

The Tribunal found that a s.5.9(2) exemption did not meet the definition of a statutory instrument.

[11] In arriving at this conclusion, the Tribunal examined the two types of exemptions set out in the Act. One exemption, described as an "Exemption by Governor in Council" (s.5.9(1)), authorizes the Governor in Council may make regulations exempting any person or aeronautical facility from the application of any regulation made under Part I of the Act. The second exemption, described as an "Exemption by the Minister" (s.5.9(2)), authorizes the Minister to exempt any person or aeronautical facility from the application of any regulation made under Part 1 of the Act. The Tribunal was of the view that a 5.9(1) exemption by the Governor in Council was a statutory instrument, while a s.5.9(2) exemption by the Minister was not.

[12] Second, it was determined whether a s.5.9(2) exemption fulfilled the definition of a CAD. In its analysis, the Tribunal reviewed the purpose of the exemption:

> […] to permit **Canadian air operators and its flight crew members** to perform tasks that are identified in airworthiness directive FAA AD 2005-21-02 that are within the flight crew member's capacity to perform, but are not enumerated in the elementary work listings set out in the *Aircraft Equipment and Maintenance Standards*, without requiring a maintenance release. [Emphasis added]

[13] Based on the foregoing, the Tribunal held that the exemption was an accreditation or a permit that, on complying with the conditions and requirements therein, gave to Prism Helicopters a privilege of a waiver from compliance with section 605.85(1) of the Regulations.

LEGISLATIVE CONTEXT

[14] The paramount requirements and objectives of the Act include promoting the safety and security of air travel in *Aztec Aviation Consulting Ltd. v. Canada*, [1990] F.C.J. No. 154 (QL); *Swanson Estate v. Canada (F.C.A.)*, [1992] 1 F.C. 408, [1991] F.C.J. No. 452 (QL).

[15] Section 2.(2) of the *Transportation Appeal Tribunal of Canada Act* (the "TATC Act") grants the Tribunal jurisdiction "in respect of reviews and appeals as expressly provided for under the *Aeronautics Act, the Canada Shipping Act, 2001*, the *Marine Transportation Security Act*, the *Railway Safety Act* and any other federal Act regarding transportation." Further, pursuant to s. 7.1(3) of the Act, the holder of a CAD who has been affected by a Minister's decision to suspend cancel or refuse to renew the document may apply to the Tribunal to have the Minister's decision reviewed.

[16] With respect to CADs specifically, the Minister is authorized by section 7.1(1) of the Act to "suspend, cancel or refuse to renew a Canadian aviation document" [CAD] on the grounds that the holder is incompetent, has failed to meet the necessary qualifications or fulfilled the conditions required for its issuance, or on public interest grounds.

[17] A CAD is defined in s. 3(1) of the Act in the following manner:

> “Canadian aviation document" means, subject to subsection (3), any licence, permit, accreditation, certificate or other document issued by the Minister under Part I to or with respect to any person or in respect of any aeronautical product, aerodrome, facility or service;

Furthermore, s. 6.6 adds to the definition by indicating that a CAD includes any privilege accorded by a CAD.

[18] However, certain documents are expressly excluded from belonging to the class of CADs in s. 3(3), such as:

> (a) a security clearance;
> (b) a restricted area pass that is issued by the Minister in respect of an aerodrome that the Minister operates; and
> (c) a Canadian aviation document specified in an aviation security regulation for the purpose of this subsection.

Thus, the Act establishes the contours of what types of documents may constitute CADs.

ISSUES

[19] This application raises the following issue:

1. Does the Tribunal have jurisdiction to review the Minister’s decision to cancel an exemption made pursuant to subsection 5.9(2) of the Act?

THE STANDARD OF REVIEW

[20] The applicant, relying on previous jurisprudence of this Court (*Air Nanavut Ltd. v. Canada (Minister of Transport)*, [2001] 1 F.C. 138; *Canada (Attorney General) v. Woods*, [2002] F.C.J. No. 1267), submits that the appropriate standard of review is that of correctness.

[21] The intervener, while not asserting what it believes to be the proper standard of review, contends that "the applicable standard of review for a decision of the Tribunal will not automatically be one of correctness, even in those cases where the nature of the determination is related to the jurisdiction".

[22] I agree with the intervener that the standard of review is not to be applied automatically. In the recent Supreme Court case of *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4 (QL), at para. 23, Bastarache J. held that:

> In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

[23] However, based on the pragmatic and functional approach that follows, I conclude that the applicable standard of review is that of correctness.

- The presence or absence of a privative clause. This factor focuses generally on the statutory mechanism of review. (*Dr. Q v. College of Physicians and Surgeons* [2003] 1 S.C.R. 226, at para. 27). Section 7.2(1)(a) of the Act provides that a person affected by a determination of the Tribunal may appeal the determination to an appeal panel in the Tribunal. Section 7.2(3)(a) further provides that the appeal panel

of the Tribunal may either dismiss the appeal or refer the matter back to the Minister for reconsideration. The Act is silent with respect to the availability of judicial review; however a statute's silence on this point is a neutral factor (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 30).

Further, I am cognisant of MacKay J.'s assertion in *Stewart Lake Airways Ltd. v. Canada (Minister of Transport)*, [1995] F.C.J. No. 358 (QL) at para. 16, cited by the intervener, "that judicial review of CAT "Civil Aviation Tribunal", replaced by the Transportation Appeal Tribunal of Canada] decisions should ordinarily not be undertaken except with regard to final decisions of the tribunal, unless there be extraordinary circumstances that would warrant intervention." Accordingly, I conclude that this factor suggests that some deference is to be accorded to the Tribunal.

- Relative expertise. The analysis under this heading "has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise" (*Pushpanathan*, *supra*, at para 33).

In furtherance of its argument, the intervener refers to *Seprotech Systems Inc. v. Peacock Inc.*, [2003] FCA 71, [2003] F.C.J. No. 205 (QL), at para. 18, wherein Evans J.A. held that "[s]pecialist administrative tribunals' expertise is particularly relevant for resolving ambiguities and filling gaps in the text of statutes and other documents that they are required to interpret." While it is true, that the Tribunal is a specialized body which possesses a high degree of institutional expertise in its field, the present question is one of pure law and general statutory interpretation, explicitly recognized by Evans J.A. in the same case as exceptions to the deferential approach usually taken. Accordingly, I conclude that this factor militates in favour of no deference.

- The Purpose of the Statute. The Tribunal performs an adjudicative function and seeks to resolve disputes or determine rights between two parties. I do not see a balancing of multiple interests as being a primary function of the Tribunal in the fulfillment of its mandate. Thus, no deference is suggested by this factor.

- The nature of the problem. As indicated above, the nature of the present problem is one of pure law going to jurisdiction. Accordingly, no deference is merited.

[24] Case law reviewing a tribunal in aviation matters, has applied the standard of correctness, see *Canada (Attorney General) v. Woods*, 2002 FCT 928, [2002] F.C.J. No. 1267, *Air Nunavut Ltd. v. Canada (Minister of Transport) (T.D.)*, [2000] F.C.J. No. 1115, [2001] 1 F.C. 138.

[25] Based on the foregoing, I conclude that the applicable standard of review is that of correctness.

THE POWERS AND FUNCTIONS OF THE TRANSPORTATION APPEAL TRIBUNAL OF CANADA

[26] The Transportation Appeal Tribunal was given broad powers by section 24 of the *Transportation Appeal Tribunal Act*, S.C. 2001, c.29.

> **24.** Wherever, in any Act of Parliament, in any instrument made under an Act of Parliament or in any contract, lease, licence or other document, a power, duty or function is vested in or is exercisable by the former Tribunal, the power, duty or function is vested in or is exercisable by the new Tribunal.

ANALYSIS

[27] The crux of the matter before this Court involves determining whether or not an "exemption" granted by the Minister is a CAD as defined by the Act. If a s.5.9(2) exemption is a CAD, the Tribunal's decision is correct and must be allowed to stand. If it is not a CAD, the interference of this Court is warranted.

[28] This Court has pronounced on previous occasions whether certain documents constituted CADs.

[29] In *Canada v. Cooper*, [1995] F.C.J. No. 1653 (QL), Gibson J. held that letters from the Minister to the applicants which delegated to them the authority to act as Examiners constituted

accreditations or other documents akin to accreditations, the cancellation of which could be reviewed by the Tribunal. Justice Gibson wrote at para. 5:

> "Canadian aviation document", is very broadly defined by the Act. It includes not only any of the specified documents but also any "other document", issued by the Minister under Part 1 of the Aeronautics Act. Clearly the delegations of authority issued to the Applicants in March and May of 1994 were contained in written documents, namely, letters containing those delegations.

[30] Further, at para. 11, Gibson J. asserted that "[i]t is of no consequence that the Minister of Transport may not have intended that the letters constitute 'Canadian aviation documents".

[31] In *Canada (Minister of Transport) v. Beingessner*, [1996] F.C.J. No. 787 (QL), Rothstein J. held that an Examiner's decision to fail a pilot on a Pilot Proficiency Check fell within the Tribunal's jurisdiction. In that case, while no license or permit was suspended, the effect of the decision to fail the pilot was a prohibition from being assigned to fly A-320 aircraft. Thus by operation of law, a privilege was lost that had otherwise been accorded by an endorsement on the pilots' licences. Thus, a privilege granted by a CAD was affected and pursuant to s.6.6 the decision was reviewable.

[32] The applicant attempts to distinguish the previous case law from the present instance by asserting that those cases involved essentially administrative decisions, while an exemption issued pursuant to s.5.9 (2) of the Act is made according to the regulatory powers of the Minister.

[33] In support of its contention, the applicant cites s.6.2(1) of the Act which states that:

> The following are exempt from the application of sections 3, 5 and 11 of the *Statutory Instruments Act*:
> […]
> (d) an exemption made under subsection 5.9(2); […]

The applicant asserts that this provision has the effect of identifying an exemption as a statutory instrument. As an exemption made under subsection 5.9(2) of the Act is explicitly removed from the application s. 3, 5, and 11 of the *Statutory Instruments Act*, then it follows that the exemption must be considered as being otherwise a statutory instrument. However, I do not agree.

[34] I interpret s.6.2 (1) of the Act as indicating that s.5.9(2) exemptions are not to be considered statutory instruments. The wording of s.6.2(1) has the effect of specifically removing a s.5.9(2) exemption from the application of the *Statutory Instruments Act.*

[35] Further, I find the case of *Marine Research Inc. v. Canada (Attorney General)*, [2006] FCA 425, [2006] F.C.J. No. 1946 (QL), wherein the Federal Court of Appeal dealt with the difference between an administrative and a legislative act particularly instructive. The Court cited to an excerpt from S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed., 1980, which states:

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

I am of the view that the s.5.9(2) exemption in question is akin to the adoption of a policy in accordance with expediency or administrative practice. This exemption was directed to Canadian air operators and flight crew members and relates specifically to airworthiness directive FAA AD 2005-21-02.

[36] Moreover, in the case of *Liberty Home Products v. Canada (Minister of National Revenue*), [1990] F.C.J. No. 555, at para. 3, the Federal Court of Appeal held that "for an instrument to be statutory within the meaning of that definition [of the *Statutory Instruments Act*], it must be made pursuant to a legislative provision expressly providing that the power it confers must be exercised by the making of a specific type of instrument."

[37] Exemptions granted under s. 5.9(2) do not provide that the Minister shall issue an exemption by means of a specific type of instrument. This is to be contrasted with s.5.9(1) which states that the Governor in Council may "make regulations" exempting […] from the application of any regulation or order made under this Part" and thereby establishes a specific form by which exemptions are to be issued.

[38] In light of the foregoing, I find that an exemption issued pursuant to s. 5.9(2) is not a statutory instrument.

[39] In determining whether a s. 5.9(2) exemption is a “permit” or “accreditation”, I find it useful to refer to the definitions of those term used by the Tribunal. In its reasons, the Tribunal cited an earlier decision where “accreditation” and “permit” were defined:

> The Oxford dictionary of current English, second edition, does not define “accreditation”, but defines “accredited” as officially recognized” or “generally accepted”. Webster’s thesaurus of the English language lists a number of synonyms fro “accredited”, including “qualified”, “licensed”, “empowered” and “certified”. “Permit” means to “give permission” or “consent to”, “authorize” or “a document giving permission to act.” (*Aurora Helicopters Ltd. v. Canada (Minister of Transport)*, [2005] TATC file no. W-3011-98, [2005] C.T.A.T.D. No. 8 (QL)).

[40] I am of the view that given the fact that the contours of what constitutes a CAD are explicitly set out in the Act, including those documents which are expressly excluded from this category, the determination of what constitutes a permit or accreditation should be carried out in a broad manner. Consistent with this broad interpretative approach, the determination of what constitutes a CAD involves consideration of the particular *effect* of the document in question. In the present case, the effect of the exemption was to grant the respondent a permit to perform certain tasks that were prohibited prior to its issuance. This permit granted a privilege to the respondent in the form of a waiver from compliance with certain regulatory requirements. Thus, I see no error in the Tribunal’s determination.

[41] As I find that the 5.9(2) exemption in issue is a permit or accreditation, there is no need to examine extensively the applicant’s further submission that exemptions are excluded from the definition of CADs based on the *ejusdem generis* principle.

THE APPLICABILITY OF THE *EJUSDEM GENERIS* RULE OF INTEPRETATION OF STATUTES

[42] The applicant invokes the *ejusdem generis* rule of interpretation of statutes to argue that the definition of a CAD is found in the Act and must be restricted to the class of documents enumerated in section 3(1) of the Act.

[43] This rule was well expressed by Justice Turgeon in the case *Renault v. Bell Asbestos Mines Ltd.*, [1980] C.A. 370, 372 in the Quebec Court of Appeal as follows:

> […] means that generic or collective term that complete on enumeration of terms should be restricted to the same generic or collective term even though the generic or broader term may ordinarily have a broader meaning…

[44] This rule must be read with another rule of statutory interpretation, set out by E.A. Driedger in *Construction of Statutes* (2nd ed. 1983) at page 87:

> Today there is only one principle approach, namely, the words of an Act are to be reach in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament.

[45] The answer to the applicant's query is found in the reasoning of Justice Gibson, in the *Cooper* case, supra where he wrote at para. 9:

> Since I am satisfied that the letters are accreditations or akin to accreditations, no question arises that the letters might be excluded from the definition by application of the limited class rule or ejusdem generis.

[46] In my opinion, the same reasoning applies to exemption documents which fall in the classification of section 3(1) of the Act. Therefore, the Applicant's argument fails on this point.

CONCLUSION

[47] Therefore, for the foregoing reasons, the application for judicial review of the Tribunal's decision will be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review of the Tribunal's decision is dismissed.

"Orville Frenette"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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