

# Transportation Notes: Transportation Appeal Tribunal Unable to Consider Costs After Withdrawal

July 27, 2020

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The Federal Court of Canada recently upheld a decision of the Transportation Appeal Tribunal of Canada (“TATC”) finding that the tribunal did not have jurisdiction accept submissions about the legal costs of an application by an air carrier to review an administrative monetary penalty issued by the Canadian Transportation Agency (“Agency”).

The Federal Court held that, as the penalty was unilaterally withdrawn by the agency prior to the TATC hearing, the tribunal did not have jurisdiction to deal with the question of costs.

## The Facts

On December 21, 2016, a plane operated by Saudi Arabian Airlines was scheduled to fly from Toronto to Jeddah. The airport’s ground handling workers began to push the plane back from the gate before the flight’s commander had given his instructions to do so, resulting in the plane’s engine cowling striking a stationary Air Canada service vehicle. A passenger onboard filed a complaint.

On September 21, 2017, the Agency found the air carrier liable to the passenger for payment of the sum of \$610.00, which the carrier paid.

However, on December 20, 2017, the Agency issued a Notice of Violation against the carrier. It is not clear why the Agency issued the Notice of Violation, given the carrier had made the required payment.

On February 22, 2018, the carrier filed a request for review of the Notice of Violation with the TATC.

The TATC scheduled a hearing for September 19, 2018.

Two days before the hearing, on September 17, 2018, the Agency withdrew the underlying Notice of Violation.

On September 18, 2018, the carrier sent a letter to the TATC seeking direction as to how submissions might be made to recover costs as a result of the withdrawal.

On September 19, 2018, the TATC sent a letter to the carrier stating that because the Notice of Violation had been withdrawn, the TATC was no longer seized of the matter. Therefore, it would not accept submissions about costs.

On September 24, 2018, the carrier sent a letter to the TATC contesting the determination that it was no longer seized of the matter as a result of the withdrawal.

On September 27, 2018, the TATC Chairperson sent a follow up letter confirming the TATC's position that the tribunal was no longer seized of the matter.

The carrier then brought the matter before the Federal Court, requesting:

- a declaration that the TATC unlawfully or improperly refused to exercise its jurisdiction;
- a declaration that the TATC failed to observe a principle of natural justice and procedural fairness; and
- a declaration that the TATC remained seized of the matter.

### **Position of the Carrier**

The carrier, Saudi Arabian Airlines, took the position that the tribunal's determination that it could not order costs because it was no longer seized of the matter due to withdrawal was legally incorrect and procedurally unfair.

The carrier argued that subsection 180.3(3) of the *Canada Transportation Act*, SC 1996, c 10, obligates members of the TATC, and by extension the tribunal itself, to observe procedural fairness and natural justice in the conducting reviews.

With respect to the authority of the TATC to award costs, the carrier argued that section 19 of the *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 empowers the tribunal to award costs.

The carrier noted that if the power to award costs was interpreted in a manner which results in the TATC losing jurisdiction only as a result of a withdrawal, applicants would be left with no avenue to recover costs from the Agency. The carrier emphasized that this would be procedurally unfair and a denial of natural justice.

### **Position of the TATC**

The TATC, assisted by counsel for the Agency, argued that the existence of a Notice of Violation before the TATC is a condition precedent to the tribunal's jurisdiction to act.

The TATC argued that the power to award costs could only apply if the tribunal had jurisdiction to hear the underlying matter.

The statutory scheme gives the TATC the power to review "appeals in connection with administrative monetary penalties provided for under sections 177 to 181 of the *Canada Transportation Act*".

In this case, the relevant section of the *Canada Transportation Act* relating to reviewing a Notice of Violation was section 180.3(1), which provides:

"A person who is served with a notice of violation that sets out a penalty and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice or within any further time that the Tribunal on application may allow, file a written request for a review with the Tribunal at the address set out in the notice."

Therefore, the TATC argued, it was not able to address the question of costs when there was no longer an underlying Notice of Violation to review in respect of the facts alleged or the amount of the penalty.

The TATC noted that it had addressed the issue of whether it could award costs without an underlying administrative monetary penalty to review in a previous case—*Guardian Eagle*—and had come to the same conclusion.

The TATC noted that its usual practice in the case of a withdrawal was to issue a notice of cancellation of the hearing and *not* to consider the question of costs.

## Decision

The Federal Court accepted the TATC's position wholesale.

The Federal Court held that, based on the statutory scheme, without providing notice, the Agency may withdraw a Notice of Violation that is part of a proceeding before the TATC. Upon doing so, an applicant who has contested the Notice of Violation has no right of recourse to the TATC, as the tribunal no longer has jurisdiction over the matter.

## Comment

While surely frustrating for carriers facing unfounded or mistaken administrative monetary penalties from the Agency, this decision clarifies that the Agency has the ability to withdraw an underlying Notice of Violation and thereby avoid an adverse costs award at a review hearing.

[Saudi Arabian Airlines Corp. v. Canada \(Transportation Appeal Tribunal\), 2019 FC 1378](#)

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any circumstances. For application of the law to specific situations, the reader should seek professional advice.***

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