



**TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

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## **TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

### **INTRODUCTION**

The Transportation Appeal Tribunal of Canada is proposed as a body to which administrative penalties for non-compliance with transportation regulations could be appealed. The mandate for the Tribunal would be defined in the proposed Transportation Appeal Tribunal of Canada Act, the text of which is currently the subject of consultations with the interested members of the public.

The regulatory regime being discussed in relation to the Tribunal concerns safety and does not in any way deal with economic regulation.

The Tribunal's principal responsibility would be to hold hearings on administrative penalties imposed by the Minister of Transport acting through his/her officials. The initial hearing would be a review of the penalty assessed, and that decision could be the subject of an appeal. These hearings would be held at the request of the affected party, i.e., the person who received the penalty.

Administrative penalties are actions taken by departmental officials to punish contravention of regulations. They may include: suspending or revoking a license, or other documents necessary to operate; or the charging of a fine, referred to as an administrative monetary penalty (AMP). The proposed Tribunal would not deal with judicial, or court-imposed, penalties.

Administrative penalties operate outside of the judicial system; therefore, in the interests of fairness, there must be a third party to which they can be appealed.

A system of administrative penalties has been used in the air mode since 1986, and persons have been able to bring appeals to the Civil Aviation Tribunal since that time. The

Civil Aviation Tribunal has the power to overturn administrative decisions it finds to be unjustified or unfair. Both the system of penalties and the Civil Aviation Tribunal are seen as having worked well.<sup>(1)</sup>

## BACKGROUND

### A. Regulation and Compliance

Safe transportation operations are achieved by the government issuing regulations that prescribe safe operating procedures for transportation carriers (and other parties), and the parties involved complying with these regulations. Regulations have the force of law and are issued by the Minister or his/her agents under the authority of the appropriate statute. The appropriateness of the regulations and the enforcement mechanisms must be judged by their effect on safety.

Regulations may be either strict *operating standards*, which prescribe what must be done and how, or *performance standards*, which prescribe the overall result which must be achieved. Operating standards were the type traditionally used; increasingly, the emphasis is being changed to performance standards.

The key issue in achieving transportation safety, assuming the regulations are well formulated, is how to ensure compliance with the regulations. On occasion, operators may be tempted through a desire to save money not to follow – and hence to contravene – the regulations. They may also contravene regulations through ignorance or because of a belief that the regulations are unnecessary and ineffectual.

In light of the importance of the regulations, and the potential for human injury and death when they are contravened, governments historically have brought the full weight of the law to bear when enforcing the regulations. More serious contraventions of certain regulations have been prosecuted as offences for which the penalties have been imprisonment or significant fines. The contravention of other, more routine, regulations has been dealt with as lesser offences.

More recently, there has been a trend by safety regulators to see enforcement (with its emphasis on detection and punishment) as too narrow an approach, and to broaden the

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(1) *Analysis of Compliance Tools and the Potential Development of a Canadian Transportation Tribunal*, prepared for Transport Canada by CPCS Transcom, November 1998. Ref: 98055.

focus to the concept of compliance. With this less punitive and more results-oriented compliance view, the focus has shifted to consider how best to achieve it, and which tools are appropriate and effective.

A wider range of actions and tools, such as licence suspension and monetary fines, are being used; the emphasis now is on demonstrable safety effect.<sup>(2)</sup> For example, a series of fines of increasing financial severity, consistently and fairly applied, can have a greater deterrent effect than an individual, relatively rare, court action.

## **B. Judicial Process and Penalties**

As some judicial penalties will be retained and used in combination with administrative penalties, it may be useful to review the difference between the two.

Judicial penalties are penalties assessed by a court of law after the alleged lawbreaker has been charged under the provisions of a statute and the charge has been proved to the satisfaction of the judge or jury, depending upon the nature of the case. Criminal charges must be proven “beyond a reasonable doubt.”

Court decisions can be appealed to successively senior courts, and one who was convicted might be tempted to do so to avoid a substantial fine or to avoid a criminal record. In general, imposing penalties in a judicial process is lengthy, costly and does not necessarily have a direct safety effect.

Because of the seriousness of laying a charge, safety officers tend to issue a verbal warning for first offences. Research has shown that these verbal warnings are unstructured and informally done. Because they are not systematically recorded and followed up, there is no evidence of their safety effect.

A system of judicial penalties focuses on detection and punishment, rather than prevention. In relation to the level of activity and the number of violations, it is insignificant and has little demonstrable effect on behaviour.

Thus, while a system of strong judicial penalties for non-compliance with safety regulations, augmented by a system of warnings for minor offences, seems intuitively to be a system that would ensure compliance, in reality the safety effect is illusory. It can even be counter-productive if fear of a criminal record causes an operator to attempt to hide errors.

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(2) *Ibid.*, Chapter 2.

In the context of transportation operations, judicial process and penalties are now seen as best reserved for those instances of serious criminal behaviour.

### **C. Administrative Penalties**

Administrative penalties are ones assessed and assigned by a public-service worker based upon an investigation of the facts. For example, when a Transport Canada safety inspector is doing a routine inspection of an aircraft and finds something in the aircraft equipment or personnel procedures that does not conform with the regulations, he/she assesses the penalty prescribed for that instance of non-compliance. This could be a monetary fine or suspension of a document needed by the company to operate or, in extreme cases, the revocation of a document. One benefit of such penalties is that they are easily recorded and tracked and can be part of a system of increasingly serious consequences for non-compliance.

Administrative penalties have the following benefits in safety effect:

- There is the perception of fairness because the operator knows in advance the “cost” of non-compliance and it is applied uniformly.
- The penalties can be applied more consistently: there is less discretion for giving warnings, and therefore less opportunity for favouritism.
- The penalty is applied immediately, and so the price paid is more closely associated by the offender with non-compliance and therefore more likely to result in a change in behaviour.
- Administrative penalties give a signal, sometimes monetary, as to the gravity of the offence: the penalty can be increased if analysis shows that penalties are not conveying sufficient gravity to result in behaviour change.
- Administrative penalties allow for the clear recording of offences, which has two advantages: (1) repeated offences by individual operators can be tracked and penalties of increasing severity can be applied to them; and (2) statistics on violations and compliance can be developed and maintained. These statistics can be analyzed to show the effectiveness of a regime of inspections and penalties and/or the need to make changes to achieve a greater safety effect.

### **D. Safety Regulation across Modes**

The move to a wider range of compliance tools took place in the air mode a number of years ago. Since 1986, the air mode has used administrative penalties, which are used by Transport Canada safety inspectors when operators are found to be in non-compliance.

Administrative penalties in the air mode can include suspension or revocation of a transportation document needed to operate or Administrative Monetary Penalties (AMPs). The system has met with widespread acceptance and approval.

The Civil Aviation Tribunal – an integral part of the new compliance regime – is the third-party appeal tribunal for administrative penalties in the air mode. Also set up in 1986, the Tribunal is under the authority of Part IV of the *Aeronautics Act*. The Tribunal has also met with widespread acceptance and approval, and the system of administrative penalties and appeal tribunal in the air mode have proven to be both effective and efficient.

The other modes, notably rail and marine, have older and long-established legal traditions and industry practices. These modes have continued to use traditional regulation enforcement tools, primarily judicial penalties which are adjudicated and appealed in the court system.

The success over several years of the administrative penalty regime in the air mode resulted in the government giving serious consideration as to how it could be implemented in the other modes. It was seen as desirable for two reasons: the inherent greater effectiveness of an administrative penalty regime, and the opportunity to achieve greater consistency across modes.

A 1998 review of the *Railway Safety Act* recommended the modernization of the railway regulatory regime, including the development of new tools – such as administrative penalties – to oversee safety and ensure compliance.

Similarly, a 1998 departmental study of the *Canada Shipping Act* – which focused on modernizing the marine regulatory regime – proposed new enforcement tools, outside of the criminal justice system.

## **THE NEED FOR A MULTIMODAL TRIBUNAL**

If the government chooses to extend administrative penalties to modes other than air, a body to which these administrative decisions can be appealed must be established (see the next section). The most efficient means of doing this would be to simply take the existing aviation tribunal and expand it to encompass the other modes. This is what is planned under the draft legislation.



A bill to establish a multimodal transportation appeal tribunal is currently before Parliament. Bill C-34, the Transportation Appeal Tribunal of Canada Act, was introduced in the House of Commons in September 2001.

The government is also moving to implement an administrative penalty regime in two modes other than air. Bill C-14, the Canada Shipping Act, 2001 – which proposes to introduce administrative penalties in the marine mode – has been passed by the House of Commons and is now before the Senate.

Administrative penalties in the rail mode would be enacted as part of the proposed Transportation Appeal Tribunal of Canada Act.

There is no activity at this time to extend the jurisdiction of the Tribunal to encompass the highway mode, or to infractions under the *Transportation of Dangerous Goods Act*. Highway transport is largely under provincial jurisdiction, and there has been legal opinion that the *Transportation of Dangerous Goods Act* is based on constitutional criminal law authority and therefore the sanctions under the Act must be criminal.

#### **A. The Role of an Appeal Tribunal in an Administrative Penalty Regime**

It is accepted that a system of administrative penalties must be accompanied by an appeal mechanism. This was articulated by the Commission of Inquiry on Aviation Safety (the Dubin Commission) which resulted in the system being implemented in the air mode.

At the time, the Commission called for a restructuring of Transport Canada's air safety enforcement, based on more vigorous enforcement by more inspectors with greater responsibility. To achieve this, the Commission recommended the introduction of:

- administrative penalties to allow for more effective enforcement; and
- an independent and impartial quasi-judicial review mechanism to mitigate any negative effects of the increase in responsibility (i.e., an appeal tribunal).

A review mechanism is required because the penalties are decided and applied administratively and so, unlike a judicial process, the accused does not have the opportunity to defend him/herself. Therefore, it was felt that sanctioned persons had to be given an opportunity to “give their side of the story” if they felt they had been wrongly punished.

If decisions of the department could only be appealed to the department itself, or to the Minister's office, there would be – at the very least – a perception of unfairness.

Therefore, it was decided to have a review process and to ensure that it was presided over by a neutral third party.

The Civil Aviation Tribunal, as well as the system of administrative penalties in the air mode, went into effect in 1986. The Tribunal adheres to the principles of “natural justice” and fairness, which means that the person affected by a decision of the Minister is entitled to know the reasons for that decision and has the opportunity to respond before an impartial and independent third party. The Tribunal is not bound by the rules of evidence and allows hearsay evidence.

The same principles hold for a multimodal appeal tribunal.

### **EXPERIENCE WITH ADMINISTRATIVE PENALTIES AND A QUASI-JUDICIAL TRIBUNAL IN THE AIR MODE**

The existing Civil Aviation Tribunal, in operation for 15 years, has been evaluated in combination with the system of administrative penalties.

Research done in the development of the proposed Transportation Appeal Tribunal of Canada Act found that there was wide acceptance and approval of the new system, as compared to the judicial regime that had preceded it.<sup>(3)</sup> Industry believes that the government fulfilled its promise to make the system fair, non-legalistic, efficient and expeditious.

The existing Civil Aviation Tribunal operates efficiently with relatively modest resources. The personnel includes only eight people (or full-time equivalents) of which two are the Chair and Vice Chair. On average, they deal with about 420 cases per year (400 are challenged, 90 actually go to review, and 20 go to appeal).

Also, the Civil Aviation Tribunal has largely succeeded in keeping to the targets it set to ensure expeditious treatment and avoid a backlog. The Tribunal itself is seen as successful by the department, the industry and the Tribunal itself.

The system of part-time Members in particular has been praised as it allows for informed decision-making while controlling costs.

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(3) *Ibid.*, Chapter 4.

## **TRANSPORTATION APPEAL TRIBUNAL OF CANADA: STRUCTURE AND PROCESS**

The proposed multimodal appeal tribunal will essentially be the existing Canadian Aviation Tribunal expanded to embrace the rail and marine modes. Legislatively, however, it will require the formal ending of the Civil Aviation Tribunal and the establishment of the new multimodal Transportation Appeal Tribunal of Canada.

The structure and processes of the proposed tribunal will be largely similar to those of the existing Civil Aviation Tribunal, and proposed legislation closely follows the provisions which established the Civil Aviation Tribunal, Part IV of the *Aeronautics Act*.

### **A. The Existing Civil Aviation Tribunal**

In the existing aviation regime, an individual who has been given an administrative penalty can ask the Civil Aviation Tribunal to review the decision. The time between the request for, and the holding of, a review is targeted for 60 to 90 days. This review is carried out by one Member of the Civil Aviation Tribunal who listens to the evidence, examines the documentation, and renders a decision. This decision can uphold the administrative penalty, alter it or overturn it.

If the individual is unhappy with the decision of the review, he/she may appeal it. The appeal is heard by the Chairperson of the Civil Aviation Tribunal and two other Members. As mentioned, all proceedings are informal, non-legalistic and expeditious (they generally just take one day). As well, they take place in the community of the complainant. Currently, all Members of the Civil Aviation Tribunal have expertise in aeronautics, and several have expertise in aviation medicine. Hearings are held in various locations across the country, close to the location of the applicant. Proceedings are held in the official language chosen by the applicant.

### **B. The Proposed Transportation Appeal Tribunal of Canada**

The proposed multimodal tribunal would be quite similar to the existing Civil Aviation Tribunal in three respects:

- the principles upon which it is based;
- its structure; and
- the procedures that it follows.

The Transportation Appeal Tribunal of Canada would review, upon application, administrative penalties that have been imposed in the air, rail and marine modes. The Tribunal will also hear appeals of decisions rendered in the review hearings.

In keeping with practice established by the Civil Aviation Tribunal, it is intended that the Transportation Appeal Tribunal of Canada would conduct hearings and appeals in a fair, but informal, non-legalistic and expeditious manner. They would take place in the community of the complainant and in the official language of his/her choice.

In summary, under the proposed legislation, the multimodal Transportation Appeal Tribunal of Canada would be established with the following characteristics (as laid out in Sections 2 to 22 of the proposed Act):

The Tribunal would have jurisdiction for reviews and appeals under: the *Aeronautics Act*; the *Canada Shipping Act*; the *Marine Transportation Security Act*; the *Railway Safety Act*; and for Administrative Monetary Penalties under the *Canada Transportation Act*.

Members of the Tribunal: would have expertise in transport modes under federal jurisdiction; may be full or part time; hold office under good behaviour for up to seven years (may be reappointed).

Chair and one Vice Chair would be full time; Chair is Chief Executive Officer of the organization and supervises work and staff.

Full time Members could not do work in conflict with their duties; part-time members would be ineligible to adjudicate cases where they have an interest.

Reviews would be heard by a Member sitting alone, with expertise in relevant transport sector (except for medical cases where medical knowledge will be the qualification).

Appeals would generally be heard by three Members and are on the merits based on the record of proceedings of the review.

The Tribunal would be non-legalistic: it would not be bound by legal rules of procedure; an individual could appear for himself without a lawyer; hearings would be public; proceedings would be recorded; and the Tribunal could issue its own rules of procedure.

The Tribunal could award costs if the matter were frivolous or if a person failed to appear without sufficient reason (this is an innovation and has not been the case with the predecessor Civil Aviation Tribunal).

The principal office would be located in the National Capital region, but under Tribunal rules, convenience hearings would be conducted in various regions of Canada in either official language.

## **TRANSITIONAL ISSUES AND OTHER LEGISLATIVE CHANGES**

The proposed Transportation Appeal Tribunal of Canada Act, in addition to establishing the Tribunal, prescribes transitional procedures so that a smooth change can be made from the operations of the Civil Aviation Tribunal to the Transportation Appeal Tribunal of Canada.

Also, as mentioned above, through the proposed Transportation Appeal Tribunal of Canada Act, changes will be made to relevant statutes either to establish administrative penalties or to allow for their appeal to the new Tribunal. Amendments to the *Railway Safety Act* will establish administrative penalties in the rail mode. Amendments to the *Marine Transportation Security Act* and the *Canada Shipping Act* will establish or extend administrative penalties in the marine mode.

In addition, some additional amendments are proposed which will take effect if Bill C-14, the Canada Shipping Act, 2001, completes the legislative process and comes into force. The Canada Shipping Act, 2001, once proclaimed into force, will generally repeal and replace the current *Canada Shipping Act*.