TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Académie de Pilotage Internationale Inc. v. Canada (Minister of Transport)*, 2019 TATCE 29 (Review)

TATC File No.: A-4307-45

Sector: AviationAviation

BETWEEN:

Académie de Pilotage Internationale Inc., Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Ottawa, Ontario, on April 24, 2019

Before: Jacqueline Corado, Vice-Chair and Member

Rendered: July 3, 2019

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Académie de Pilotage Internationale Inc., contravened subsection 406.03(1) of the *Canadian Aviation Regulations*. The Minister did not justify the amount of $12,500; the monetary penalty is reduced to $7,000.

The total amount of $7,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

[1] On February 3, 2017, the Minister of Transport issued a Notice of Assessment of Monetary Penalty (Notice) to the attention of Jules Selwan, Accountable Executive, alleging that Académie de Pilotage Internationale Inc. (Académie) had contravened subsection 406.03(1) of the *Canadian Aviation Regulations (CARs)*. The penalty imposed was $12,500.

[2] The notice stated:

> On or about February 6, 2016, at approximately 12:38 local time, at or near Carp Ontario, you Academie de Pilotage Internationale Inc., operated a flight training service using an aeroplane in Canada when you did not hold a flight training unit operator certificate which authorized you to operate that service, thereby contravening subsection 406.03(1) of the Canadian Aviation Regulations (CARs).

[3] On March 5, 2017, Mr. Selwan, on behalf of Académie, requested a review of this Notice by the Transportation Appeal Tribunal of Canada (Tribunal).

[4] Mr. Selwan is the president of Académie. The company also operates under the name International Pilot Academy.

II. ISSUES

A. Did the applicant contravene subsection 406.03(1) of the *CARs*?

[5] No person shall operate a flight training service in Canada using an aeroplane unless the person holds a flight training unit operator certificate that authorizes the person to operate the service and complies with the conditions and specifications set out in the certificate (subsection 406.03(1) of the *CARs*).

[6] The Minister needed to prove the following elements in order to conclude that the applicant contravened subsection 406.03(1) of the *CARs*:

a. The applicant operated a flight training service using an aeroplane.

b. The applicant did not hold a flight training unit operator certificate authorizing multi-engine class rating training with the aircraft Piper Seneca PA-34, registration marks C-GPWF.

c. The flight service was provided on February 6, 2016 at or around Carp, Ontario.

B. Does the applicant fit any of the exemptions provided under subsection 406.03(2) of the *CARs*?

[7] The designated provision provides two exemptions under which providing a flight training service without holding a flight training unit operator certificate would be acceptable. The Tribunal will examine whether the applicant fits the criteria provided for those two exemptions.

C. Is the amount of the penalty justified?

[8] The applicant submitted that the Minister should have proceeded with oral counselling instead of a monetary penalty. The Tribunal will examine this argument.

III. ANALYSIS

A. Did the applicant contravene subsection 406.03(1) of the *CARs*?

First element of the violation: the applicant operated a flight training service using an aeroplane

[9] A flight training service is defined in section 101.01 of the *CARs* as a commercial air service that is operated for the purpose of conducting flight training. Therefore, the applicant needed to operate a commercial air service, which means any use of aircraft for hire or reward as per section 3 of the *Aeronautics Act* (the *Act*).

[10] An aircraft will be considered to be used for hire or reward when a payment, consideration, gratuity or benefit is directly or indirectly charged, demanded, received or collected by any person for the use of the aircraft (section 3 of the *Act*).

[11] The applicant is the registered owner of the aircraft in question, a Piper Seneca with model designation PA-34-200T, serial number 34-7770272 and registration marks C-GPWF; this aircraft is the object of the application for registration in Exhibit M-4, and a registration certificate was subsequently issued on December 16, 2015 (Exhibit M-5). The type of registration for the aircraft is commercial (Exhibits M-14 and M-5).

[12] On February 25, 2016, Hassan Kelkas confirmed by email the contents of an interview he had two days prior with Transport Canada Inspector Nick Taylor. He stated that Arash Mahinakbarzadeh was allowed to do his multi-engine rating training on a Seneca aircraft for a reduced hourly price of $325 (Exhibit M-7); it was submitted that the reduced price was due to the aircraft not being on the operating certificate. The Seneca aircraft he was referring to was aircraft C-GPWF. This constitutes the first evidence that the applicant's aircraft was used for hire or reward in the context of providing commercial air services for the purpose of conducting flight training.

[13] The applicant's representative questioned the credibility of Mr. Kelkas, stating that he was a former employee of Académie looking to defame it; he questioned the discrepancy between the amounts of the hourly rate reported by Mr. Mahinakbarzadeh (Exhibit M-9) and Mr. Kelkas (Exhibit M-7). The Tribunal agrees that there is a discrepancy in the amounts mentioned by the two individuals; however, both men declared that there was an amount of money collected per hour for use of the aircraft in relation to the flight training received, and that consistency in the evidence cannot be ignored.

[14] Mr. Kelkas' email and statements to Transport Canada's inspector and investigator constitute the beginning of proof in writing. Furthermore, the following was corroborated by additional evidence: Mr. Mahinakbarzadeh used the Seneca C-GPWF for multi-engine rating

training, and he provided the applicant with monetary consideration for the fuel and with services in exchange for the training.

[15] As per the journey log, Exhibit M-12, the aircraft C-GPWF was used by Mr. Mahinakbarzadeh on February 6, 2016; he was accompanied by Francis Faludi, a flight instructor for the applicant (Exhibit M-8).

[16] Mr. Faludi confirmed on March 17, 2016 to Inspector Taylor that he flew with Mr. Mahinakbarzadeh (Exhibit M-8) and that this was part of training for a multi-engine flight test. Mr. Faludi thought that Mr. Mahinakbarzadeh paid the applicant for that training, and he confirmed that he did those flights as an instructor for Académie. This would also make Mr. Faludi the third person mentioning that there was some sort of payment or consideration exchanged between Mr. Mahinakbarzadeh and the applicant for the multi-engine flight training service received.

[17] Mr. Faludi confirmed later, on April 10, 2016, in an email to Inspector Taylor that he had not been paid by Académie for the training given to Mr. Mahinakbarzadeh on the Seneca aircraft, and he added that he also spent significant time ground briefing with him; he said he was "ticked off" when he realized he had not been paid (Exhibit M-10). On a balance of probabilities, this confirms that Mr. Faludi was acting as a flight instructor for the applicant when he provided multi-engine training to Mr. Mahinakbarzadeh.

[18] On March 21, 2016, during an interview with Inspector Taylor (Exhibit M-9 and testimony from Inspector Taylor), Mr. Mahinakbarzadeh stated that he received training from Frank (Francis Faludi) for a multi-engine rating and paid for gas at a rate of $250/hour. He stated that he didn't pay Mr. Faludi for this training because Jules (referring to Mr. Selwan, president of the applicant) pays Frank to offset work that he does for Mr. Selwan. Therefore, Mr. Mahinakbarzadeh admitted to indirectly paying the applicant for the instruction received by Mr. Faludi, who acted in his capacity as flight instructor for the applicant.

[19] During the same interview, Mr. Mahinakbarzadeh admitted to logging the time when he is being instructed and said that he would like to continue having Mr. Faludi as an instructor if he is available.

[20] The testimony and notes of Inspector Taylor and Investigator Michael Munro (Exhibits M-16 and M-17) as well as the documentary evidence confirm that the aircraft C-GPWF was used for hire or reward in the provision of a commercial air service when Académie received payment for the cost of gas in addition to benefiting from services rendered by Mr. Mahinakbarzadeh to offset the cost of the training.

[21] The applicant highlighted the phone interview that Inspector Taylor held with Marc St-Onge, chief flight instructor for the applicant, on March 21, 2016 (Exhibit M-11). During his interview he stated that the aircraft was not used for flight training; however, three other people (Mr. Mahinakbarzadeh, Mr. Kelkas and Mr. Faludi) have contradicted this statement. On a balance of probabilities, I cannot retain Mr. St-Onge's statement that the aircraft was not used for training.

[22] In the same statement, Mr. St-Onge went on to say that Mr. Mahinakbarzadeh only paid for gas; this is consistent with Mr. Mahinakbarzadeh's statement that he paid for gas and performed work for the applicant to offset the cost of the training. It is also consistent with the definition in the *Act* that hire or reward is the payment or consideration directly or indirectly charged for the use of the aircraft. Mr. Mahinakbarzadeh declared that he rented the aircraft (Exhibit M-9); however, his use of the aircraft is inconsistent with the definition of lease in section 203.01 of the *CARs*, and no evidence was provided that this was a lease operation that could be considered as an exemption under subsection 406.03(2).

[23] The Tribunal finds that the applicant operated a flight training services using aircraft C-GPWF. The first element of the violation has been proven.

Second element of the violation: the applicant did not hold a flight training unit operator certificate authorizing multi-engine class rating training with the aircraft Piper Seneca PA-34, registration marks C-GPWF

[24] The applicant held a flight training unit operator certificate, but its certificate did not authorize it to provide training for the multi-engine rating. The parties agreed that sometime toward the end of 2015, the applicant requested to amend its flight training unit operator certificate to add the multi-engine rating to the list of authorities held and to add a Piper Seneca PA-34 registration C-GPWF to the list of aircraft on this certificate.

[25] On December 8, 2015, a letter from Transport Canada acknowledged the applicant's request to amend its flight training unit operator certificate in order to add as a training authority the multi-engine rating (Exhibit M-1). The letter contained the requirements to meet prior to the issuance of the authority and advised the applicant to make contingency plans in the event that the authorization could not be issued.

[26] Exhibit M-2 is a series of documents, including an application dated January 4, 2016 requesting to add the multi-engine rating authority and to add the aircraft C-GPWF to the list of aircraft on the flight training unit operator certificate. However, the authority was not amended, and on February 6, 2016, the applicant did not hold a flight training unit operator certificate that allowed it to provide flight training services on aircraft C-GPWF for the multi-engine rating.

[27] The flight training unit operator certificate that was valid on February 6, 2016 was introduced as Exhibit M-3, and it clearly shows that there was no authority for multi-engine rating training or for aircraft C-GPWF to be used for training.

[28] Furthermore, Inspector Taylor testified that aircraft C-GPWF was never approved by Transport Canada to be on the certificate.

[29] On February 22, 2016, Mr. Selwan wrote an email to Transport Canada (Exhibit M-6) stating that Académie had decided to keep aircraft C-GPWF under private operation and that it wished to apply the request to amend the flight training unit operator certificate to another aircraft that it would be purchasing (another Seneca II with half time engines).

[30] I find that the applicant operated a flight training service without a flight training unit operator certificate that authorized multi-engine class rating training. The second element of the violation has been proven.

Third element of the violation: the flight service was provided on February 6, 2016 at or around Carp, Ontario

[31] Although this element has indirectly been addressed throughout the analysis, it will be dealt with here in more detail. The aircraft journey log (Exhibit M-12) for aircraft C-GPWF demonstrates that on February 6, 2016, Mr. Faludi, flight instructor for the applicant, flew with Mr. Mahinakbarzadeh from CYRP (Ottawa–Carp Airport) for about 0.6 hours. Mr. Faludi's statements to Inspector Taylor confirm that he flew aircraft C-GPWF with Mr. Mahinakbarzadeh on February 6, 2016 and that he did so as a flight instructor for the applicant (Exhibit M-8).

[32] As decided previously, this flight constituted a flight service provided without holding the proper authorization on the flight training unit operator certificate. The third and last element of the violation has been proven.

B. Does the applicant fit any of the exemptions provided under subsection 406.03(2)?

[33] Subsection 406.03(2) of the *CARs* states that a person who does not hold a flight training unit operator certificate may operate a flight training service under specific circumstances.

> **406.03(2)** A person who does not hold a flight training unit operator certificate may operate a flight training service if
>
> > **(a)** *the person holds* a private operator registration document or *an air operator certificate*, *the aircraft used for training — in the case of the holder of an air operator certificate — is specified in the air operator certificate*, **and** the training is other than toward obtaining a pilot permit — recreational, a private pilot licence, a commercial pilot licence or a flight instructor rating; or
> >
> > **(b)** the trainee is
> >
> > > **(i)** the owner, or a member of the family of the owner, of the aircraft used for training,
> > >
> > > **(ii)** a director of a corporation that owns the aircraft used for training, and the training is other than toward obtaining a pilot permit — recreational or a private pilot licence, or
> > >
> > > **(iii)** using an aircraft that has been obtained from a person who is at arm's length from the flight instructor, and the training is other than toward obtaining a pilot permit — recreational or a private pilot licence.
>
> **[emphasis added]**

The exemption under paragraph 406.03(2)(a) of the CARs

[34] Under paragraph 406.03(2)(a) of the *CARs*, a person who does not hold a flight training unit operator certificate may operate a flight training service if the person meets all three of the conditions specified.

[35] The first condition under paragraph 406.03(2)(a) is that the applicant needs to hold a private operator registration document or an air operator certificate.

[36] An air operator certificate is issued under Part VII of the *CARs* and authorizes the document holder to operate a commercial air service. A private operator registration document is issued under Part VI of the *CARs* and authorizes the document holder to operate certain aircraft for the purposes described under that part.

[37] There was evidence submitted that the applicant holds a flight training unit operator certificate (Exhibit M-3), which is issued under subpart 6 of Part IV and authorizes the holder to operate a flight training service, but no evidence was provided by the parties to the effect that the applicant holds either an air operator certificate or a private operator registration document. Therefore, the Tribunal cannot conclude that the first condition of the exemption under subsection 406.03(2) is met.

[38] The second condition is that, in the case of an air operator certificate, the aircraft used for training needs to be specified on the air operator certificate. At the risk of repetition, no evidence was provided that the applicant holds such a certificate; therefore, the second condition of the exemption is not met.

[39] The third condition of the exemption is that the training received on the aircraft is other than toward obtaining a pilot permit — recreational, a private pilot licence, a commercial pilot licence or a flight instructor rating. Considering that the applicant does not meet the first two conditions and that all three conditions must be met for the exemption to apply, the Tribunal will not analyze the third condition.

[40] I find that the applicant does not meet the exemption under paragraph 406.03(2)(a) of the *CARs*.

The exemption under paragraph 406.03(2)(b) of the CARs

[41] Under paragraph 406.03(2)(b) of the *CARs*, a person who does not hold a flight training unit operator certificate may operate a flight training service if the trainee meets one of three scenarios specified.

[42] The first scenario is that the trainee is the owner, or a member of the family of the owner, of the aircraft used for training. Mr. Mahinakbarzadeh was the trainee and he was neither the owner nor a family member of the owner of the aircraft C-GPWF used in the training.

[43] The second scenario is that the trainee is the director of a corporation that owns the aircraft used for training, and the training is other than toward obtaining a pilot permit — recreational or a private pilot licence. Again, Mr. Mahinakbarzadeh was the trainee and he does not fit this scenario.

[44] The third scenario allowed by the *CARs* for the exemption to be applicable is that the trainee uses an aircraft obtained from a person who is at arm's length from the flight instructor, and the training is other than toward obtaining a pilot permit — recreational or a private pilot licence.

[45] The aircraft in question was obtained from the applicant, who happens to be the employer of the flight instructor (Mr. Faludi) who gave the training to Mr. Mahinakbarzadeh. This could hardly constitute an arm's length relationship between the flight instructor, Mr. Faludi, and the applicant, employer of Mr. Faludi and owner of the aircraft.

[46] The applicant introduced into evidence the Aviation Enforcement Case Report prepared by Investigator Michael Munro (Exhibit A-5) and asked him about the following statement on page 14 of the report: "Prepared questions for Justice to clarify 'arm's length' relationships and the definition of 'Flight Training Service'". The Minister's lawyers objected to the question as this constituted disclosing the advice received by a lawyer from the Justice Department, which is considered as solicitor–client privilege. The Tribunal sustained the objection as subsection 15(2) of the *Transportation Appeal Tribunal of Canada Act* states that it shall not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[47] The applicant's representative orally provided the following definition of arm's length relationship that he said he found in a law dictionary on the internet: "An arm's length transaction is a transaction between two parties who have a personal or family relationship. The transaction is kept separate, at arm's length from their personal relationship. An arm's length transaction can be used to avoid the appearance of a conflict of interest or to keep the relationship businesslike so personal relationship is not affected".

[48] The definition of "arm's length" in *Black's Law Dictionary* is "Of or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power". I conclude that Mr. Faludi, as the instructor, and the applicant, as the employer of the instructor, were not at arm's length.

[49] The applicant also submitted during Mr. Selwan's testimony that Mr. Mahinakbarzadeh was an employee of Académie de Pilotage and not a student and that the training done by Mr. Mahinakbarzadeh was deducted from his salary. Paragraph 406.03(2)(b) provides no scenario where an employee can receive training for a multi-engine rating when this authority does not exist in the flight training unit operator certificate and the aircraft has not been approved for such use. There is no exemption under the applicable charge of subsection 406.03(1) for such a situation.

[50] To support this statement, the applicant's representative introduced into evidence three emails: the first email (Exhibit A-1) dates from December 8, 2016 and says that Mr. Mahinakbarzadeh has an outstanding balance and that he has invoiced the applicant for his instruction time in October and November. Exhibit A-2, an email dated January 23, 2017, states that Mr. Mahinakbarzadeh's account is not in good standing and that he should not be allowed to make any more bookings. Exhibit A-3, an email from February 13, 2017, states that Mr. Mahinakbarzadeh's balance has not been cleared and requests confirmation of the amount and method of payment. None of this evidence relates to the scenarios under subparagraph 406.03(2)(b)(iii); it only proves that there was an exchange of services and an outstanding balance between Mr. Mahinakbarzadeh and the applicant and that, as a result of that outstanding balance, Mr. Mahinakbarzadeh should not be allowed to book any more flights.

[51] I find that the applicant does not meet the exemption under paragraph 406.03(2)(b) of the *CARs*.

C. Is the amount of the penalty justified?

[52] The applicant submitted that the Minister could have proceeded with oral counselling and referred to the Minister's Aviation Enforcement Policy Manual (Exhibit A-4). The Aviation Enforcement Policy Manual (page 27) describes the circumstances when oral counselling is available and defines it as an option, not an abligation, that provides immediate guidance on the need for future compliance.

[53] The applicant deplored that it had never been contacted by Transport Canada directly. However, the Minister sent an investigation letter dated November 23, 2016 (Exhibit M-15) to the applicant informing it that there was an investigation under subsection 406.03(1) of the *CARs* and gave the applicant the opportunity to contact the investigator. The applicant chose not to contact the investigator.

[54] When asked by the Minister why he chose not to contact the investigator after receiving the letter in Exhibit M-15, the applicant's representative alluded to concerns of fairness or being treated unfairly by the Ontario enforcement office. He referred Inspector Taylor, during cross-examination, to pages 19 and 20 of Exhibit A-4, which state that Transport Canada had an obligation to enforce the regulations with fairness and open communication.

[55] The Minister explained that in order to avoid any conflict of interest, considering that one inspector in the Ontario office seemed to have a closer relationship to the applicant, the investigation had been delegated to the Atlantic region enforcement office instead of the Ontario or Quebec region office.

[56] The applicant's representative also submitted that he did not contact the investigator because his letter stated that the incident being investigated under subsection 406.03(1) of the *CARs* was a flight conducted on January 23, 2016, while the Notice stated February 6, 2016, and this was confusing. With all due respect, this statement is contradictory. The investigation letter was sent on November 23, 2016 (Exhibit M-15) and the Notice was issued on February 3, 2017; there was no room for confusion in the time between those two events, and the applicant could have decided to communicate with the investigator and express why it thought oral counselling was preferable.

[57] The Tribunal agrees that the Notice stated that the violation occurred on February 6, 2016, and that this was a different date from the one given in the letter of investigation. Nonetheless, the detection notice (Exhibit M-13) and aircraft journey log (Exhibit M-12) state that Mr. Mahinakbarzadeh flew on three occasions, and Investigator Munro explained in his testimony that only the flight on February 6, 2016 was considered for the purpose of a monetary penalty due to statutory limitations.

[58] The designated violation for the charge in both documents (Exhibit M-15 and the Notice) was the same (subsection 406.03(1) of the *CARs*), the file number was the same (5504-90105), and only the date of the flight changed but aircraft journey log showed that a flight took place between those two dates (January 23 and February 6, 2016). Therefore, this is a different

situation from the one the applicant referred to in a previous Tribunal decision (Exhibit A-6), where the letter of investigation had a different charge under the *CARs* and a different file number from the actual notice of assessment that the applicant had received.

[59] Investigator Munro testified as to why the Minister considered that a penalty of $12,500 was warranted. He submitted that this was considered a second-level violation, since there had been previous violations related to maintenance from the same applicant; he also identified two aggravating factors: 1) previous enforcement history and 2) ignoring the letter from Transport Canada that advised it not to use the aircraft for multi-engine training.

[60] The applicant did not contest the statements regarding previous violations for maintenance; nevertheless, it introduced the only other evidence at the hearing of a previous charge being laid (but dismissed) by this Tribunal (Exhibit A-6). No further evidence was provided by the Minister regarding previous violations: no file number, no date of the violations, no mention of the designated provision being violated, no mention of compliance with these violations, and no reference to the public record kept under section 8.3 of the *Act* in relation to suspensions or penalties imposed.

[61] Only Exhibit A-5, submitted by the applicant, mentions that there were two other events in the aviation enforcement record or pending cases (page 11). However, it is unclear if those two other events were confirmed as violations, possibly by payment of a fine, or if they were related to the Tribunal's decision that dismissed the penalty based on a maintenance issue (Exhibit A-6).

[62] As for the second aggravating factor, the Minister submitted that the applicant ignored the advice in the letter presented as Exhibit M-1 where it was requested not to use the aircraft for training purposes until the authorization for the flight training unit certificate was granted.

[63] Considering the lack of evidence and precision in relation to other verifiable pre-existing violations and considering the existence of one aggravating factor, I reduce the amount of the penalty to $7,000.

IV. DETERMINATION

[64] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Académie de Pilotage Internationale Inc., contravened subsection 406.03(1) of the *Canadian Aviation Regulations.* The Minister did not justify the amount of $12,500; the monetary penalty is reduced to $7,000.

[65] The total amount of $7,000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

July 3, 2019

(Original signed)

Jacqueline Corado

Vice Chair and Member

Appearances

For the Minister: Eric Villemure

For the Applicant: Jules Selwan