



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Académie de Pilotage Internationale Inc. v. Canada (Minister of Transport)*,
2019 TATCE 44 (Review)

TATC File No.: O-4345-41

Sector: Aviation

BETWEEN:

Académie de Pilotage Internationale Inc., Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Ottawa, Ontario, on April 25, 2019

Before: Teryl Robbins, Member

Rendered: October 15, 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 605.84(1) of the *Canadian Aviation Regulations*. The monetary penalty of \$5,000 is revised to \$2,500.

The total amount of \$2,500 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 July 19, 2017, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) alleging that on or about September 20, 2016, at approximately 10:57 a.m. local time, at or near the Carp, Ontario, airport (CYRP), Académie de Pilotage Internationale Inc. (Académie) permitted a take-off to be conducted in a Cessna 172P aircraft bearing registration C-FPAU that was in its legal custody and control, where the aircraft was not in compliance with Airworthiness Directive (AD) 2011-10-09 issued by the United States Federal Aviation Administration (FAA), thereby contravening subsection 605.84(1) of the *Canadian Aviation Regulations (CARs)*. The Minister assessed a monetary penalty of \$5,000.

[2] On August 10, 2017, the applicant, Académie, requested a review hearing by the Transportation Appeal Tribunal of Canada (Tribunal).

II. DISCUSSION AND ANALYSIS

A. Legal framework

[3] Pursuant to subsection 7.7(1) of the *Aeronautics Act*, the Minister can issue a monetary penalty if they believe on reasonable grounds that a person has contravened a designated provision.

[4] In the present case, the designated provision at issue is subsection 605.84(1) of the *CARs*, which reads as follows:

605.84 (1) Subject to subsections (3) and (4), no person shall conduct a take-off or permit a take-off to be conducted in an aircraft that is in the legal custody and control of the person, other than an aircraft operated under a special certificate of airworthiness in the owner-maintenance or amateur-built classification, unless the aircraft

(a) is maintained in accordance with any airworthiness limitations applicable to the aircraft type design;

(b) meets the requirements of any airworthiness directive issued under section 521.427; and

(c) except as provided in subsection (2), meets the requirements of any notices that are equivalent to airworthiness directives and that are issued by

(i) the competent authority of the foreign state that, at the time the notice was issued, is responsible for the type certification of the aircraft, engine, propeller or appliance, or

(ii) for an aeronautical product in respect of which no type certificate has been issued, the competent authority of the foreign state that manufactured the aeronautical product.

[5] FAA AD 2011-10-09 applies to Cessna Aircraft Company model number 172P and requires inspection of seat rails (Exhibit M-4, pages 8–9).

[6] The time frame to comply with AD 2011-10-09 is as follows (Exhibit M-4, page 9):

... within the next 100 hours time-in-service (TIS) after the last inspection done following AD 87-20-03 R2 or within the next 12 calendar months after the effective date of this AD, whichever occurs first. Repetitively thereafter do the actions at intervals not to exceed every 100 hours TIS or every 12 months, whichever occurs first:

B. Overview

[7] During the course of the hearing, the respondent adduced evidence through the submission of seven exhibits and testimony from one witness, Victor Veiga, a Transport Canada (TC) Civil Aviation Investigator. Mr. Veiga has been involved in aviation since 1984 and worked as an aircraft maintenance engineer for the TC Aircraft Services Directorate from 1992 to 2015. He holds an M1/M2 rating for his engineer's licence and has a private pilot's licence with a multi-engine rating. He is currently responsible for investigating breaches of the *CARs* and the *Aeronautics Act* on behalf of the Minister.

[8] The applicant adduced evidence through the submission of 14 exhibits and the testimony of one witness, Jules Selwan, the accountable executive and chief flying instructor at Académie. Mr. Selwan is the owner of the flight school and other companies. He has been a professional pilot for more than 15 years and is a Class 1 flight instructor, the highest flight instructor rating given by TC. He is also an aerobatic pilot and an aerobatic flight instructor, the chief flight instructor at Académie, the chief pilot for Académie's commercial air service, a check and training pilot for banner towing and aerial survey, an aviation examiner appointed by Industry Canada, the head of the aviation program at CEGEP Heritage College and an aviation professor with the CEGEP for the last two years. He held an appointment by TC between 2013 and 2018 as an authorized person to issue temporary licences for students and for pilots and between 2014 and 2016 was the person responsible for maintenance at Académie. He holds a bachelor's degree in math and in science, a master's degree in international business management and a postgraduate certificate in contract law from Harvard University.

C. Elements to prove

[9] The Minister is arguing that the applicant allowed its Cessna 172P aircraft C-FPAU to continue to fly, specifically to conduct a take-off, past the time when an inspection of the seat rails was due under AD 2011-10-09.

[10] The burden of establishing the contravention lies with the Minister, pursuant to subsection 7.91(4) of the *Aeronautics Act*. The standard of proof is the balance of probabilities, pursuant to subsection 15(5) of the *Transportation Appeal Tribunal of Canada Act*.

[11] With respect to this specific case, the following are the elements that must be proven by the Minister on a balance of probabilities:

- a. Date: On or about September 20, 2016;
- b. Place: At or near Carp, Ontario, airport (CYRP);
- c. The applicant conducted a take-off in Cessna 172P C-FPAU;
- d. The applicant had legal custody and control of C-FPAU;
- e. AD 2011-10-09 was applicable to C-FPAU; and,

- f. AD 2011-10-09 was not complied with in regard to C-FPAU.

D. Proof of element (a): date that the applicant conducted a take-off

[12] Mr. Selwan argued that, as shown by the journey log, the contravention of AD 2011-10-09 did not occur on September 20, 2016. He considers the Notice invalid because it did not provide the correct date of the violation. The Notice states, “on or about September 20, 2016”.

[13] Mr. Veiga stated that the date of September 20 represents a clerical error. The date should have read September 19.

[14] The Tribunal is faced with an ambiguity in the date and must determine if the error made by the Minister invalidates the Notice.

[15] First, the Tribunal notes that the Notice contains the broad words “on or about September 20”, as opposed to more precise or restrictive language such as “on September 20”. Second, in looking at the letter sent by Académie to TC on April 24, 2017 (Exhibit M-7), it appears clear that Académie understood which incident was being reviewed by TC. While there may have been an inaccuracy in the date, the Tribunal finds that the applicant had sufficient information to know which incident was being referred to and to prepare for the review.

[16] The Tribunal finds that the date of the incident has been sufficiently proven by the Minister.

E. Proof of elements (b) and (c): place and that the applicant conducted a take-off

[17] The Minister and the applicant provided a copy of the journey log of aircraft C-FPAU (Exhibits M-5 and A-5, respectively) with pages specifically from the relevant time periods.

[18] The applicant acknowledged that Exhibit M-5 was an accurate copy of the journey log. During his testimony, Mr. Selwan did not contest that Académie conducted a take-off in C-FPAU from CYRP airport.

[19] Both the evidence from the journey log and the testimony of the applicant with regard to that flight establish, independently of each other, elements (b) and (c).

F. Proof of element (d): that the applicant had legal custody and control of C-FPAU

[20] The Minister provided documents that proved that the Académie holds a Flight Training Unit Operating Certificate (Exhibit M-2) and that Académie was the registered owner of the Cessna 172P aircraft cited in the contravention, C-FPAU (Exhibit M-3). Therefore, the Tribunal finds that the aircraft in question was under the legal custody and control of Académie at the time of the alleged violation.

G. Proof of element (e): that AD 2011-10-09 was applicable to C-FPAU

[21] The Minister introduced evidence that AD 2011-10-09 applies to C-FPAU, namely that it refers to the inspection of Cessna Aircraft Company model number 172P (Exhibit M-4, page 8). The applicant did not contest this during the hearing.

H. Proof of element (f): that AD 2011-10-09 was not complied with

[22] The Tribunal was required to determine if Académie had contravened subsection 605.84(1) of the *CARS* by conducting a take-off when the aircraft was not in compliance with AD 2011-10-09.

[23] As previously noted, the AD requires inspections within 100 hours TIS or every 12 months, whichever occurs first (Exhibit M-4, page 9).

[24] According to both the Minister's copy of the journey log of aircraft C-FPAU and the applicant's identical copy, AD 2011-10-09 was carried out on July 31, 2016 at 10489.1 total time since new (TTSN) (Exhibits M-5 and A-5, respectively, page 1). This means that the AD would have come due again in 100 hours, at 10589.1 TTSN, or within 12 calendar months, on July 31, 2017, whichever came earlier. The Minister's witness, Mr. Veiga, attested that the AD could not be extended past 10589.1 TTSN, nor could the aircraft be permitted to take off for a flight that was planned to last beyond the inspection due time. Mr. Veiga noted that when an inspection is going to come due during a flight, the procedure to follow is to "write a restriction on the aircraft, you have one hour left, and you fly one hour and you land before it actually becomes due, or you do it prior, before the flight". The journey log showed that AD 2011-10-09 was carried out on aircraft C-FPAU on September 19, 2016 at 10590.5 TTSN (Exhibit M-5, page 3), 1.4 flight hours after it was due.

I. Due diligence

[25] Section 8.5 of the *Aeronautics Act* provides the statutory authority for the applicant to raise a defence of due diligence, and places upon it the onus of demonstrating—on a balance of probabilities—that it exercised all due diligence in the circumstances. In considering such a defence, the Tribunal must examine the reasonableness of the actions of the applicant and whether or not all due care has been taken, pursuant to *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299.

[26] In the case before me, the applicant makes an argument that could be considered a due diligence defence: there seems to have been an issue with the electronic record keeping system (ERKS) used to control the maintenance of the aircraft. The Tribunal cannot accept this argument, given that there is no indication of why, if it existed, this error in the computer system was not discovered during the implementation and testing phase. I do not find that a due diligence defence has been made out and I do not dismiss the case.

J. Program Validation Inspection

[27] Through cross-examination of the witness, testimony and submission of exhibits, the applicant's representative, Mr. Selwan, established that the Detection Notice and subsequent

Notice of Assessment of Monetary Penalty resulted from a routine Program Validation Inspection (PVI) of Académie by a TC inspector. During the course of this inspection, two instances of ADs being over-flown were recorded, but only one led to a Notice.

[28] With respect to the applicant's argument that the company was inappropriately sanctioned while the PVI was open, I would like to address it by noting that the applicant testified as follows: "they [TC] come and do the full audit for the company. However, how would they enforce the law later?" Mr. Selwan, during his testimony, introduced a printout from the TC website, titled "Role of Inspector" (Exhibit A-9), and cited the last sentence of this printout, namely, "If the operator does not try to correct any problems found by inspectors, they will be fined, or even shut down", to prove his argument that TC should have given him the opportunity to correct the problem instead of going straight to the administrative penalty. However, the Tribunal can find no basis for concluding that a notice of assessment of monetary penalty cannot be issued during the period in which a PVI is ongoing.

K. Monetary penalty

[29] In reaching my decision on the monetary penalty, I considered the following elements as potential mitigating or aggravating factors.

[30] The Minister argued that, as a flight training school, Académie needed to be held to the highest possible standard of care and diligence, as it leads by example and represents the future of aviation safety. Mr. Veiga testified that it was a first-level charge—20 per cent of the maximum amount—and that there were no aggravating or mitigating circumstances taken into consideration. However, he did mention that the applicant was cooperative, which could have been a mitigating factor. I accept this as a mitigating factor.

[31] Mr. Selwan entered as an exhibit the TC Aviation Enforcement Policy Manual—TP 13794E (Manual) with a revision date of 12/2004, which indicates that voluntary compliance with the regulations is the most progressive and effective approach to aviation safety (Exhibit A-1, page 19). Under cross-examination, Mr. Veiga admitted that he had not followed this element of the Manual in investigating this case. I accept this as a mitigating factor.

[32] Mr. Selwan also argued that the Manual stated that TC should communicate with him (Exhibit A-1, page 20), in that it notes, "Transport Canada Aviation Enforcement managers will be accessible to members of the public to explain the Enforcement policy process. Suggestions for improvement of this process are always welcome". He did not feel, however, that communications were as open as he would have wished. I accept this as a mitigating factor.

[33] Mr. Selwan showed that he had cooperated with TC throughout the inspection, determined the root cause of the problems that led to the Detection Notice, developed a corrective action plan and fixed the problems (Exhibit M-7). However, the applicant asserted that the inspection was over-flown due to the use of an electronic flight tracking program that had a software error. As discussed above, I do not accept this as a mitigating factor.

[34] The amount of the monetary penalty should be sufficient to deter the applicant from repeating the offence, encourage rehabilitation and ensure that the applicant follows the corrective action plan. The applicant should be assessed an amount lower than the \$5,000

recommended for a first offence because of the mitigating factors mentioned above. An amount of \$2,500 would be more appropriate and encourage rehabilitation.

III. DETERMINATION

[35] The Minister of Transport has proven, on a balance of probabilities, that the applicant, Académie de Pilotage Internationale Inc., contravened subsection 605.84(1) of the *Canadian Aviation Regulations*. The monetary penalty of \$5,000 is revised to \$2,500.

[36] The total amount of \$2,500 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.

October 15, 2019

(Original signed)

Teryl Robbins

Member

Appearances

For the Minister: Micheline Sabourin

For the Applicant: self-represented