TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Jules Selwan v. Canada (Minister of Transport)*, 2020 TATCE 1 (Appeal)

TATC File No.: A-4295-41

Sector: Aviation

BETWEEN:

Jules Selwan, Appellant

- and -

Canada (Minister of Transport), Respondent

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

Before: Blaine Beaven, Member (chairing)

Franco Pietracupa, Member

Dr. Francis Hane, Member

Rendered: January 22, 2020

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The appeal panel upholds the review member's determination that the Minister of Transport had proven on a balance of probabilities that the appellant, Jules Selwan, contravened subsection 700.02(1) of the *Canadian Aviation Regulations*. We adjust the monetary penalty to $1,750.

The total amount of $1,750 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 decision.

I. BACKGROUND

[1] By Notice of Assessment of Monetary Penalty (Notice) dated January 3, 2017 and pursuant to section 7.7 of the *Aeronautics Act*, the Minister of Transport (Minister) assessed a monetary penalty of $2,500 against Mr. Jules Selwan for an alleged breach of subsection 700.02(1) of the *Canadian Aviation Regulations (CARs)*.

[2] The Notice stated, in part:

> On or about January 7, 2016, at approximately 10:56 local time, at or near Carp ON, you Jules Selwan, operated an air transport service when you did not hold an air operator certificate that authorized you to operate that service...

[3] The review hearing took place on July 6 and September 6, 2017, in Ottawa, Ontario. On January 30, 2018, the review member upheld the contravention, but reduced the monetary penalty to $1,875.

[4] The legislative provisions applicable to this proceeding are outlined in the paragraphs that follow.

[5] *CARs* subsection 700.02(1) states:

> **700.02 (1)** No person shall operate an air transport service unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service.

[6] Per subsection 101.01(1) of the *CARs*, the following definitions apply:

> **Air transport service** means a commercial air service that is operated for the purpose of transporting persons, personal belongings, baggage, goods or cargo in an aircraft between two points.
>
> **Operator**, in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise.

[7] Per subsection 3(1) of the *Aeronautics Act*, the following definitions apply:

> **Commercial air service** means any use of aircraft for hire or reward.
>
> **Hire or reward** means any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft.

A. Grounds for Appeal

[8] In his request for an appeal, dated March 1, 2018, Mr. Selwan stated:

> The concise grounds for appeal are as follows:
>
> 1. the Member on Review erred in law by failing to follow or by misapplying the binding precedent of the Appeal Panel of this Tribunal (*Brant Paul Billings v. Minister of Transport*, TATC File No. P-3115-02), appeal to the Federal Court of Canada dismissed (*Billings Family Enterprises Ltd. v. Canada (Transport)*, 2008 FC 17) to the effect that no charges may be sustained under s.700(2) of the *Canadian Aviation Regulations* **("*CARs*")** for operating a commercial air service, except as against the registered owner of the aircraft concerned;
>
> 2. the Member on Review erred in law in upholding a monetary penalty against Mr. Selwan for operating a commercial air service contrary to s.700(2) of the *CARs* where he was not the registered owner of the aircraft concerned;

> 3. the Member on Review erred in fact and in law or in mixed fact and law in that the Decision by the Member on Review was not in accordance with the evidence and the existing laws and jurisprudence;
>
> 4. the Member on Review erred in law by assessing a monetary penalty on erroneous principles, including the concept that a flight instructor should in principle be penalized at a higher rate than other air operators; and
>
> 5. such further and other grounds as Counsel may advise and this Tribunal permit.

[9] Mr. Selwan was encouraged to speak to the grounds of appeal directly, and he did touch on all of the grounds of appeal in some fashion. Mr. Selwan was self-represented and focused much of his argument on his issues with the Minister's actions and how he was charged.

B. Standard of Review

[10] Mr. Selwan did not comment on what the appropriate standard of review was for this appeal, but in his request for an appeal, did allege errors of law and mixed fact and law. In his written submission and oral argument, the Minister's representative acknowledged that the appropriate standard of review is one of reasonableness on questions of fact, as well as mixed fact and law, and that questions of law attract a correctness standard.

[11] In his submissions, the Minister's representative distilled the grounds of appeal down to the following two questions of mixed fact and law:

a. The review member erred when she failed to follow a precedent established in a previous legal matter (the *Billings* case) in relation to subsection 700.02(1) of the *CARs*; and

b. The review member erred in her consideration of the monetary penalty.

[12] This appeal was heard in May of 2019. Draft reasons were prepared in the fall of 2019. Before these reasons were finalized, the Supreme Court of Canada released *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*"Vavilov"*].

[13] This Appeal Panel has reviewed the *Vavilov* decision and legal commentary upon it. It is this Appeal Panel's view that *Vavilov* is explicit with regards to how Courts on judicial review or statutory appeals are to review decisions of administrative tribunals. *Vavilov* is silent on how an administrative tribunal, which has an internal appeal mechanism, is to review decisions.

[14] As *Vavilov* is silent on this point, this Appeal Panel takes guidance from prior jurisprudence as to how best to select an appropriate standard of review (reasonableness or correctness).

[15] Although both parties did not go into great depth into what the different standards of review mean, they were no doubt relying on the law as it was prior to *Vavilov*. In considering whether it is appropriate or necessary to invite further submissions from the parties on this point, this Appeal Panel is guided by the words of Justice Rowe in *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at paragraph 24:

> This appeal was heard shortly after the *Vavilov* and *Bell/NFL* appeals…in which the Court reconsidered and clarified the framework for determining the applicable standard of review as well as the application of reasonableness review ("*Vavilov* framework"). The Federal Court and Federal Court of Appeal decisions in this appeal were taken (and the submissions before this Court were

> made) under the "*Dunsmuir* framework"…I apply the *Vavilov* framework in coming to my conclusion that the decision of the Appeals Officer was reasonable. No unfairness arises from this as the applicable standard of review and the result would have been the same under the *Dunsmuir* framework.

[16] With respect to both parties and their respective recitation of the grounds of appeal, we conclude that there are no real factual disputes, but rather the application of the facts to the law which requires that this appeal panel undertakes the review on a standard of reasonableness.

[17] Our assessment of the standard of review accords with the recent decision of this Tribunal in *Patrick Vaughan v. Canada (Minister of Transport)*, 2018 TATCE 43 (Appeal), and citing *Canada (Attorney General) v. Friesen,* 2017 FC 567 (*Friesen*):

> [40] The Federal Court decision in Friesen specifically addressed the issue, considering: "What is the standard of review to be applied by the TATC Appeal Panel to the Review Member's decision". Justice Mosley agreed with the Tribunal's appeal panel that questions of credibility, fact and mixed fact and law attract a reasonableness standard. He comes to this conclusion despite having also concluded that "A review of the relevant provisions in the IRPA, the TATC Act, and the Aeronautics Act, suggests that the RAD and the TATC appeal panel enjoy a similar statutory foundation."
>
> [41] Because of this decision, which is the most recent and relevant decision pertaining specifically to the *TATC Act*, we must conclude that the correct standard of review in this case is one of reasonableness, except with respect to matters of law, in which case the correctness standard applies.

[18] The question of whether a Federal Court decision constitutes a precedent which this Tribunal is required to follow requires an assessment of the facts and their application to the principle of binding case law. As a question of mixed fact and law, this ground is subject to the standard of reasonableness.

[19] The finding of whether or not a violation is upheld or dismissed, and the penalty that flows from a violation that is upheld, are interconnected but legally distinct parts of a review member's determination. For this reason, it is important to consider what standard of review applies to the application of the penalty in this case.

[20] With regard to the question of the penalty, and the aggravating and mitigating factors the review member relied upon, the standard of review is also one of reasonableness. This is because the question engages both accepted facts and their application to the legal principles surrounding the proper assessment of penalties.

[21] In determining what reasonableness means this Appeal Panel is guided by the following principles distilled from *Vavilov*:

a. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relations to the facts and law that constrain the decision maker (para 85);
b. It is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies (para 86);

c. The reasons should be read holistically and contextually in order to understand the basis on which a decision was made (para 97);

d. Where reasons are provided but they fail to provide a transparent and intelligible justification, the decision will be unreasonable (para 136); and,

e. The challenging party must satisfy the Appeal Panel that any shortcomings or flaws relied on are sufficiently central or significant to render the decision unreasonable (para 100).

C. Facts

[22] The facts in this case are not in dispute. It is helpful to itemize the pertinent facts found by the review member and relied upon by her in upholding the violation. At the review hearing, the parties made the following admissions of fact (review determination para. 9):

a. On January 7, 2016, APII was the registered owner of the aircraft bearing the registration mark C-GPWF;

b. At that time, APII was a corporation incorporated under the *Canadian Business Corporations Act*;

c. After January 7, 2016, the registered owner of the aircraft was changed to the applicant, Mr. Jules Selwan;

d. The Minister of Transport had in its file an application submitted by APII signed by the applicant, as accountable executive for APII, on January 4, 2016 which requested that the aircraft be added to the flight training unit operator certificate of APII. In this respect, the certificate of registration was filed as Exhibit A-5. It shows that the aircraft is registered in the name of APII on December 16, 2015. Exhibit A-6 was also filed, which is the application for a flight training unit operator certificate under the name of APII indicating i) that Mr. Jules Selwan is responsible for the maintenance control system, ii) that the Seneca bearing the registration mark C-GPWF is listed as one of the aircraft, and iii) the training authority requested;

e. The application submitted by APII was refused as concerns the aircraft C-GPWF;

f. In late March 2016, an application was made to change the registered owner of the aircraft to the name of the applicant, pursuant to a lease entered into between APII and Jules Selwan.

[23] The review member made multiple other findings of fact in coming to her decision:

a. That on or about January 7, 2016, at approximately 10:56 local time, at or near Carp, Ontario, the applicant used the aircraft C-GPWS, registered in the name of APII, to carry passengers to St. Catharines, Ontario; (para. 97)

b. The applicant received a payment of $500 for the use of the aircraft, i.e. the approximate cost of fuel; (para. 97)

c. The applicant does business under the name “Azimuth Aviation Group”; (para. 100)

d. The applicant, using his business name “Azimuth Aviation Group”, charged Mr. David McIver an amount of $900; (para. 97)

e. The invoice filed as Exhibit M-6 clearly shows that $400 was charged for the applicant's professional services and $500 for the aircraft fuel, and that the invoice was paid by Mr. McIver to the applicant; (para. 97)

f. The purpose of the flight was to get to St. Catharines to pick up an aircraft that Mr. McIver had purchased and to fly that aircraft back to Carp, and that Mr. Douglas Zahody was the pilot-in-command and that the applicant and two passengers were aboard the flight to St. Catharines; (para. 97)

g. The applicant does not hold an air operator certificate to operate an air transport service; (para. 102)

h. The aircraft was used for the purpose of transporting persons from Carp to St. Catharines and the applicant did not hold an air operator certificate; (para. 103)

i. The applicant organized the use of the aircraft, determined the cost, and received payment for its use; (para. 103)

j. Despite not being the registered owner, the applicant had custody and control of the aircraft on January 7, 2016; (para. 103)

k. The applicant did not testify or provide any evidence as to the contractual arrangements between him and APII for the use of the aircraft; (para. 107)

l. In speaking to Transport Canada about the incident flight, the applicant believed he could personally charge for the cost of fuel under section 401.28 of the *CARs*, and this corroborates that the use of the aircraft was for his personal use. (para. 107)

[24] We pause here to mention that at the appeal hearing, Mr. Selwan did provide background to some of the evidence received by the review member, at times straying into his own personal knowledge. At the outset of the appeal hearing it was made clear to Mr. Selwan that if he wished to adduce new evidence that had not been before the review member, he would need to make an application to tender new evidence. Mr. Selwan indicated he would not be making that application, and it was made clear to him several times by the appeal panel that when he strayed into areas of new evidence, or evidence that was not before the review member, the appeal panel would not consider it.

II. ANALYSIS

What are the issues to be decided?

[25] As Mr. Selwan and the Minister have provided us with disparate grounds for appeal, in order to conduct our review, it will be most efficient for us to frame the issues to be decided.

[26] The review member framed the overarching issue as follows:

> The main issue of this case is to determine whether the applicant violated subsection 700.02(1) of the *CARs* by operating an air transport service and receiving $900 for the flight on January 7, 2016 with aircraft C-GPWF, even though he was not the registered owner of the aircraft on that date.

[27] We frame the issues to be determined in this appeal as follows:

a. Did the review member misinterpret the ratio of the decisions of the TATC appeal panel and the Federal Court in *Billings*?

b. Did the review member err in her consideration of the monetary penalty?

Issue 1: Did the review member misinterpret the ratio of the decisions of the TATC appeal panel and the Federal Court in Billings?

[28] At both the review hearing and appeal hearing, Mr. Selwan argued that the Tribunal was bound by the ratio in *Billings*, and that because Mr. Billings was not the registered owner, he did not have custody and control of the aircraft. The Minister's representative did not contest that the review member was bound by *Billings*. The disagreement on the appeal, as in the review determination, is what *Billings* actually stands for.

[29] The Minister argued, as they did at the review hearing, that *Billings* does not stand for the proposition that only the registered owner can violate subsection 700.02(1).

[30] We reproduce the pertinent section from the TATC appeal panel's decision in *Billings* here:

> [43] We overturn the member's determination that Mr. Billings operated an ATS without an AOC authorizing the service.
> [44] Mr. Billings was not the owner of the aircraft. Therefore, he did not have custody and control of the subject aircraft, notwithstanding that he was the pilot of the aircraft at that time. It is trite law that an individual in a small closely held corporation is capable of wearing many hats. In this case, his role as pilot of the aircraft was that of an employee.
> [45] The role of a pilot and employee does not carry with a requirement to be licensed to operate an ATS. The requirement for the licence rests with the registered owner who has custody and control of the aircraft.
> [46] We set aside the finding of the member at review regarding this matter and cancel the suspension of Mr. Billings' licence. Mr. Billings' appeal is allowed.

[31] It is important to consider that in the *Billings* appeal, the appeal panel overturned the decision to dismiss the violations against Billings Family Enterprises Ltd. (BFEL) under *CARs* subsection 700.02(1), and also overturned the decision to uphold the violations against Mr. Billings, finding that offence had been committed by BFEL, not Challenger or Mr. Billings.

[32] In her extensive review determination, the review member interprets that *Billings* results in upholding the Minister's penalty against Mr. Selwan. As she stated at paragraph 106 of the review determination: "I am of the opinion that the stare decisis of the Federal Court's decision in the Billings case is not that only the registered owner can be charged for having operated an ATC without an AOC, as suggested by the applicant." In doing so, the review member relied upon paragraph 41 of the Federal Court's decision in *Billings*: "this is not to say that 'Challenger' could not also have been charged."

[33] With respect to that Tribunal appeal panel, there was no requirement that Mr. Billings be the registered owner in order to violate subsection 700.02(1) of the *CARs*, as the regulation itself does not have "registered owner" as an element of the violation.

[34] However, the reasons in *Billings* must be read in their entire context. While the appeal panel in *Billings* does state that *"[t]he requirement for the licence rests with the registered owner who has custody and control of the aircraft"* (para. 45), it is within the context that Mr. Billings was the pilot and not the owner of the aircraft.

[35] While the appeal panel's wording in *Billings* leaves some ambiguity of their interpretation of the statute, it is within the entire context of their decision that we consider the principle of *stare decisis.*

[36] Applying the ratio in the Federal Court's upholding of the appeal panel's reasoning in *Billings*, the review member interpreted the meaning of "person" in *CARs* subsection 700.02(1) to "include the possession of an aircraft by any person, as owner, lessee or otherwise, and for which such person receives hire or reward for the purpose of transporting persons between two points" (para. 104). In *Billings,* it was the corporate entity, BFEL, who received the benefit, not the individual pilot, Mr. Billings. (We do note however that we agree with Harrington J. of the Federal Court that in that case, Challenger was the more appropriate beneficiary of Billings' scheme.) In this case, it was Mr. Selwan, through Azimuth Aviation Group, who wrote the invoice and received the monetary benefit of the flight in question; it is Mr. Selwan who is "the person" of *CARs* section 700.02.

[37] During his appeal submissions, Mr. Selwan submitted that we must strictly interpret para. 45 in *Billings* and hold that "only the registered owner can be charged" absent any contextual reasoning. We, as did the review member, disagree.

[38] *CARs* section 700.02 refers to "any person". This person can be an individual, like Mr. Selwan, or a corporation, like BFEL. This "person" is the party who received the monetary benefit or consideration. There is no evidence that the drafters intended to have the regulation so narrowly interpreted that all persons, other than the registered owner, can escape liability for operating a commercial air service without an operating certificate.

[39] Interpreting *CARs* section 700.02 in the manner suggested by Mr. Selwan would lead to a legal absurdity. If this section applied only to the "registered owner", it would be legal for any individual to advertise a commercial air service, rent an airplane from a third party, and fly customers to destinations of their choice. Clearly this is not the intent of the *CARs*.

[40] Mr. Selwan argued before the appeal panel that he could not be charged under Part VII of the *CARs* because he did not personally hold an air operator certificate and was not a commercial operator, and Part VII only applies to commercial operations.

[41] While generally he is correct that Part VII exists mainly to regulate commercial operators, that does not mean that only those with an air operator certificate are bound by it. As noted above, the definition of commercial air service clearly includes those that fly for hire or reward, regardless if they hold an air operator certificate.

[42] The wording of subsection 700.02(1) indicates it is an offence that can be committed by a "person". No definition of person exists in the *CARs* or the *Aeronautics Act*, however none is needed. Mr. Selwan is clearly a person and falls within the usage of that term.

[43] The review member found that Mr. Selwan organized the use of C-GPWF to move himself and passengers from Carp to St. Catharines and accepted $500 for the use of the aircraft. Mr. Selwan did not hold an air operator certificate.

[44] From the definitions cited in part 1 of this decision, it was clear to the review member that by accepting payment of $500 for the use of an aircraft, Mr. Selwan used an aircraft for hire and reward, which constitutes a commercial air service. This commercial air service was for the purpose of transporting persons between two points. We agree with this conclusion made by the review member and find it to be reasonable.

[45] Much time was spent in the review hearing and at the appeal hearing on the meaning of the word "operate". The Minister in both instances said that as the word "operate" was not defined in the regulations, the Tribunal had to consider the definition of "operator" and work backwards from it. The review member chose to do so in her reasons at para. 105.

[46] With respect to the review member's decision on this point, there is no need to conflate the term "operator", which is defined in the regulations, with the everyday usage of the verb "operate". It can be presumed that the Minister of Transport, in drafting the *CARs*, chose not to define this specific word, and so the ordinary meanings that attach to it apply.

[47] Some examples that come to mind: if a person operates a motorcycle, we would assume they are driving it. If a person operates an overhead crane, the assumption is that they are at the controls.

[48] However, the term can also be used in more broad ways: a doctor operates on a patient. A business owner operates their business. Provincial laws operate in the province they are promulgated in.

[49] At the heart of the meaning of this verb is the action of making something occur, but also having control.

[50] On the facts found by the review member, Mr. Selwan organized the use of the aircraft, who was in it, where it went and for what purpose. Regardless of who was actually piloting the plane, Mr. Selwan operated the aircraft, and in doing so operated an air transport service. Mr. Selwan, through Azimuth Aviation Group, received the monetary benefit or consideration.

[51] While we disagree with the path the review member took in determining the meaning of the term "operate", we do agree with the ultimate outcome and find that her determination is a reasonable one. The review member did not err in her interpretation and application of *Billings*.

Issue 2: Did the review member err in her consideration of the penalty?

[52] Having found the review member's determination to be reasonable, we now turn to her consideration of the penalty.

[53] Mr. Selwan argued that the review member erred by considering his status as a flight instructor as an aggravating factor. At paragraph 112, the review member recites the usual list of aggravating and mitigating factors adopted by the Tribunal. That list is, of course, ever evolving

and non-exhaustive. The review member then goes on to discuss the particular factors in Mr. Selwan's case, and at paragraph 113 says: "However, the applicant, who is also a flight instructor, is expected to lead by example. His actions or omissions have an impact on the aviation community and his previous non compliances combined with the fact that he is a flight instructor are considered to be aggravating."

[54] The review member was in the best position to consider what she found particularly aggravating in the circumstances of this case. Given that this appeal panel's review of the penalty amount is on a standard of reasonableness, we cannot say that the review member's determination that Mr. Selwan's violation history and status as a flight instructor was aggravating is unreasonable, and we would not adjust the penalty on that basis. We note that the review member, despite finding this aggravating factor, did ultimately reduce the monetary penalty from $2,500 to $1,875.

[55] Although the standard of review for this ground is one of reasonableness, the Minister's representative acknowledged that the review member made an error in how she calculated the penalty. In the review member's analysis, her reasoning led her to assess a penalty halfway between the original penalty of $2,500 and a minimum penalty of $1,250, which is the Minister's internal policy of setting a minimum of 20 per cent of the regulatory maximum penalty. The review member assessed a penalty of $1,875.

[56] We note that the minimum penalty the Minister would assess (i.e. 20 per cent of the maximum penalty) for this offence is $1,000, not $1,250. If we apply the member's reasoning to this correction, the assessed penalty should be $1,750. We therefore assess the penalty on appeal to be $1,750.

III. DECISION

[57] The appeal is dismissed. The appeal panel upholds the review member's determination that the Minister of Transport had proven on a balance of probabilities that the appellant, Jules Selwan, contravened subsection 700.02(1) of the *Canadian Aviation Regulations*. We adjust the monetary penalty to $1,750.

[58] The total amount of $1,750 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 decision.

January 22, 2020

(Original signed)

Reasons for the appeal decision: Blaine Beaven, Member (chairing)

Concurred by:	Franco Pietracupa, Member
	Dr. Francis Hane, Member

Appearances

For the Minister:	Eric Villemure
For the Applicant:	Self-represented