TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Académie de Pilotage Internationale Inc. v. Canada (Minister of Transport)*, 2020 TATCE 22 (Appeal)

TATC File No.: A-4307-45

Sector: Aviation

BETWEEN:

Académie de Pilotage Internationale Inc., Appellant

- and -

Canada (Minister of Transport), Respondent

Heard by:	Videoconference on October 14, 2020
Before:	Arnold Olson, Member (chairing) Fazal Bhimji, Member Dr. Francis Hane, Member
Rendered:	December 16, 2020

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The appeal panel upholds the review member's determination that the Minister of Transport has proven on a balance of probabilities that the appellant, Académie de Pilotage Internationale Inc., contravened subsection 406.03(1) of the *Canadian Aviation Regulations*.

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 one year of service of this decision.

I. BACKGROUND

[1] By Notice of Assessment of Monetary Penalty (Notice) dated February 3, 2017, and pursuant to section 7.7 of the *Aeronautics Act*, Transport Canada (TC) assessed a monetary penalty to the attention of Jules Selwan, Accountable Executive of Académie de Pilotage Internationale Inc. (Académie), alleging the contravention of subsection 406.03(1) of the *Canadian Aviation Regulations (CARs)*. The administrative monetary 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 ….

[3] The review hearing took place on April 24, 2019, in Ottawa. In a determination dated July 3, 2019, the review member upheld the contravention, finding that the appellant had contravened subsection 406.03(1) of the *CARs*, and that the exemptions under subsection 406.03(2) did not apply. However, the review member reduced the monetary penalty from $12,500 to $7,000.

[4] On July 28, 2019, the appellant filed a request for an appeal of the review member's determination and subsequently filed a motion to introduce new evidence at appeal. On September 18, 2020, the appeal panel denied the appellant's request to consider new evidence consisting of an air operator certificate (AOC) held by the appellant that had been issued under Part 702 of the *CARs*. The appeal panel did not admit this new evidence for several reasons: the AOC specified that the Académie was authorized to conduct **aerial advertising or aerial photography** using a **single-engine Cessna 172P** type of aircraft. The appeal panel was unconvinced that this AOC authorized the Académie to conduct multi-engine flight training. Moreover, the panel found that the AOC was available at the time of the review hearing, was not relevant to the alleged contravention of subsection 406.03(1) of the *CARs*, and would not have changed the outcome of the review hearing. Therefore, the AOC was not necessary for the purpose of the appeal.

A. Legal framework

[5] Pursuant to subsection 7.7(1) of the *Aeronautics Act*, the Minister of Transport (Minister) can issue a monetary penalty if the Minister believes on reasonable grounds that a person has contravened a designated provision. In this case, the designated provisions at issue are subsections 406.03(1) and 406.03(2) of the *CARs*, which read as follows:

> Requirement to Hold a Flight Training Unit Operator Certificate
>
> **406.03 (1)** Subject to subsections (2) and (3), no person shall operate a flight training service in Canada using an aeroplane or helicopter in Canada unless the person holds a flight training unit operator certificate that authorizes the person to operate the service and complies with the conditions and operations specifications set out in the certificate.
>
> **(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.

B. Grounds of appeal

[6] A pre-hearing case management conference was held on August 6, 2020, at which time the appellant amended its grounds of appeal, without objection by the Minister. The appellant alleges the following errors of law and fact:

a. The member on review erred in law in upholding a monetary penalty against the Académie for operating a flight training service without holding a flight training unit operator certificate (FTUOC) authorizing multi-engine class rating training contrary to subparagraph 406.03(2)(b)(iii) of the *CARs* where the trainee is 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 private pilot licence. The member on review erred in fact by misinterpreting "arm's length" transaction using the *Black's Law Dictionary*'s definition.

b. The member on review erred in law in upholding a penalty against the Académie for operating a flight training service under subsection 406.03(1) when the Académie had complied with the conditions and specifications set out under section 702.76 of the *CARs*.

c. The member on review erred in fact and in law or in mixed fact and law in that the determination by the member on review was based on contradictions in evidence that were provided to the investigators.

d. The member on review erred in law by assessing a monetary penalty on erroneous principles, namely the concept that the discrepancy between the date in the letter of investigation and the date in the Notice should not create confusion; and the concept that the Académie was advised not to use the aircraft for training purposes until the authorization for the FTUOC was granted.

II. ANALYSIS

A. Standard of review

[7] The recent Supreme Court of Canada (SCC) decision *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] is silent on the applicable standard of review for administrative tribunals with internal statutory appeal mechanisms such as the Transportation Appeal Tribunal of Canada (Tribunal). Therefore, appeals before the Tribunal continue to operate on previous standards of review as established by the Federal Court in *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17 and more recently in *Canada (Attorney General) v. Friesen*, 2017 FC 567. A standard of reasonableness applies to findings of credibility, fact, and mixed fact and law, and an appeal panel must give considerable deference to the review member. On questions of law, the standard is one of correctness, and an appeal panel is entitled to take its own view.

[8] However, *Vavilov* does provide guidance to an appeal panel on what constitutes a reasonable decision:

> [85] … 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.

The standard of review considered by the appeal panel as applicable is specified for each ground of appeal.

B. Ground one: Did the review member reasonably interpret a definition of arm's length and apply it to the facts?

[9] The standard of review on this ground is reasonableness as this is a question of mixed fact and law. The term "arm's length" is cited in the *CARs*, a definition was interpreted by the review member (a matter of law) and this definition was applied to the facts at hand (a matter of fact).

[10] Whether the review member reasonably defined and applied subparagraph 406.03(2)(b)(iii) of the *CARs* begins with an understanding of the broad purpose of the regulation. Section 406.03 of the *CARs* begins with the general requirement that a flight training service hold an FTUOC and must comply with certain conditions and specifications that serve to protect the public interest. The exemption available under subparagraph 406.03(2)(b)(iii) of the *CARs* requires that a person with the aircraft be at arm's length from the person who provides the flight instruction. The Minister argued that this requirement for arm's length exists in order to avoid the situation whereby a person could provide both the aircraft and flight instruction to a trainee without the necessity to hold an FTUOC and the requirement to comply with its conditions and specifications.

[11] The appeal panel notes that while the Minister must prove the elements of the violation, it is the Académie who must prove whether it meets the conditions of the exemption available under subparagraph 406.03(2)(b)(iii) of the *CARs*. Recognition by the Tribunal of this shift of the legal burden is well established. The Tribunal case *Minister of Transport v. Gordon E. Boklaschuk*, 1990 CAT File No. C-0142-33 (Appeal) concludes that:

> If Transport proves a breach of the rule, the *onus* shifts to the Respondent to establish that he falls within one of the exceptions; it is not up to Transport to prove the exception.

This shift of the burden of proof to the party seeking the exemption was quoted in *Minister of Transport v. Mark Frank Killen*, 1997 CAT File No. C-1300-33 (Appeal); upheld in *Francis Yvon Paquin v. Minister of Transport*, 2005 TATC File No. A-3021-33 (Review); and more recently cited in *Bradley Friesen v. Canada (Minister of Transport)*, 2019 TATC File No. P-4283-02 (Appeal). The Académie had the burden to prove that it qualified for an exemption under subparagraph 406.03(2)(b)(iii).

[12] The term "arm's length" only appears in the *CARs* in subparagraph 406.03(2)(b)(iii). Surprisingly, neither the *Aeronautics Act* nor the *CARs* provide a definition of the term. Without a regulatory definition upon which to rely, the review member turned to available definitions of arm's length. She considered an unsourced internet definition provided by Mr. Selwan: "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 a personal relationship is not affected" (paragraph 47 of the review determination). But ultimately, the review member preferred a definition from *Black's Law Dictionary*: "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" (paragraph 48). The appeal panel finds that, in the absence of an available and suitable definition of arm's length from either the *Aeronautics Act* or the *CARs*, the review member was reasonable to rely on one from *Black's Law Dictionary*, a well-established legal reference.

[13] At the appeal hearing, Mr. Selwan argued that the review member should have relied on a definition from a Canadian regulatory agency rather than one from *Black's Law Dictionary* because it is a US publication. His new definition was extracted from the Canada Revenue Agency (CRA) website and defines arm's length as a "relationship where persons act independently of each other or who are not related." He argued that this definition provided that the employer-employee relationship between the Académie and the instructor, Francis Faludi, should not result in the conclusion that they could not act independently of each other. He contended that Mr. Faludi is not related to the Académie because he is not a shareholder with voting rights. For these reasons, he claimed, the review member erred by finding that the relationship between the two was not at arm's length.

[14] The Minister contended that, whatever the definition of arm's length, it most probably does not include the employer-employee relationship that existed between the Académie and its instructors. The Minister's representative argued that on this matter of mixed fact and law, the review member was in the best position to make her conclusions based on the evidence and was reasonable in concluding that Mr. Faludi, as the instructor, and the applicant, as the employer of the instructor, were not at arm's length.

[15] At the appeal hearing, the presiding chair noted that the appeal panel would take this CRA definition under reserve, and the panel undertook to decide whether or not it would be appropriate to take judicial notice of this new definition. Essentially, judicial notice is acceptance of a court of such general knowledge that formal proof is dispensed. The panel has considered

the SCC case of *R. v. Find*, 2001 SCC 32. In the interest of brevity, we cite only its formulation of the threshold for judicial notice:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as **not to be the subject of debate among reasonable persons**; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy […] [emphasis added]

Since it is the definition of arm's length that is the very subject of debate of this ground of appeal, we find the threshold for judicial notice has not been met. Accordingly, the CRA definition was not judicially noticed.

[16] Despite not being judicially noticed, we note that this new CRA definition is clearly further against the appellant's interest than the definition used by the review member. Mr. Faludi did not act independently but acted at the direction of Mr. Selwan, who was his employer. Nor can it be said the two were not related. A relationship need not be a blood relationship. Here, Mr. Faludi acted within an employer-employee relationship; employers have a duty of care to an employee not consistent with an arm's length relationship. Therefore, we find that this new CRA definition of arm's length does not advance the appellant's cause.

[17] The appeal panel finds that it was reasonable for the review member to conclude that facts of the case pointed to an employer-employee relationship between the Académie as both the provider of the aircraft and the flight instructor that, on the balance of probabilities, could not be characterized as one of arm's length.

C. Ground two: Was the flight training conducted under the authority of an AOC?

[18] The evidentiary basis for this ground was an AOC under Part 702 of the *CARs* held by the appellant that, in a prior ruling, was not accepted as new evidence to be used at the appeal. Without an evidentiary basis, the appellant abandoned this ground at appeal and it is not considered further.

D. Ground three: Did the review member reasonably consider contradictions in evidence?

[19] The standard of review applicable to this ground is reasonableness, as this is a question of fact.

[20] The appellant argued that the review member erred by not giving sufficient weight to contradictions in evidence, claiming that the review member should have recognized that these contradictions weakened the case against the Académie and should therefore not have confirmed the monetary penalty.

[21] The Minister acknowledged some contradictions in evidence, such as the amount paid by the trainee for the use of the aircraft or whether the instructor was paid directly or indirectly by the Académie. The appeal panel was asked to consider these discrepancies in light of a statement in *Boulos v. Public Service Alliance of Canada*, 2012 FCA 193, paragraph 11: "… the decision

maker is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown [Florea v. Canada (Minister of Employment and Immigration, [1993] F.C.J No. 598 (C.A.) (Q.L.) at paragraph 1]".

[22] The appeal panel notes that the review member was alive to these contradictions (paragraphs 13, 16, 21, and 22) as she gleaned from the evidence several salient points: flight training took place on February 6, 2016, some form of payment or consideration was paid by the trainee, and both the aircraft and flight instructor were provided by the Académie. We find that the review member reasonably considered the contradictions in evidence.

E. Ground four: Did the review member reasonably consider the discrepancy between the date in the letter of investigation and the date in the Notice? Did the review member reasonably consider the advice to the Académie to not use the aircraft until authorized to do so?

[23] The standard of review applicable to this ground is reasonableness, as these are questions of fact.

[24] The appellant argued that the review member did not properly appreciate the confusion created after he received a letter of investigation (dated November 23, 2016) in reference to a training flight on January 23, 2016, then later received the Notice (dated February 3, 2017) in reference to a training flight on February 6, 2016. He maintained that the review member's statement (paragraph 56) "… there was no room for confusion in the time between these two events …" is an error that in itself should provide reason for the appeal panel to reverse the review member's determination.

[25] The Minister argued that the date specified in the letter of investigation, January 23, 2016, was not an error. TC was concerned about a short series of flights that included both the January 23 flight and also the flight a couple of weeks later on February 6, 2016. The Minister noted that the designated violation and file number were the same in both documents and maintained that Mr. Selwan chose not to respond to the letter and did not contact the investigator seeking clarification. During the intervening months between receiving the letter of investigation and receiving the Notice, the appellant had ample opportunity to address with TC the nature of their concern.

[26] The Minister also argued that since there is no regulatory requirement to send a letter of investigation, any errors in the document, if they exist at all, are immaterial. Our view on this argument is best left unstated.

[27] The appeal panel notes that the review member addressed these very arguments (paragraphs 56-58). Her expression "no room for confusion" seems to indicate that if confusion had been created by different dates, there was ample time for the appellant to clear it up. We find the review member understood and considered the possibility for confusion created by differing dates and arrived at a reasonable conclusion.

[28] In relation to the second part of this ground, the appellant's arguments at appeal were brief. The Minister argued that the review member did not err by concluding that the Académie

had used aircraft C-GPWF for training purposes, even though advised not to do so until authorized by an amended FTUOC.

[29] As a matter of fairness, we have considered the evolving circumstances surrounding this advice from TC, all in evidence before the review member. Shortly after this advice was given, the aircraft in question (C-GPWF) was determined by TC to be not eligible to be added to an FTUOC. Mr. Selwan had to purchase a different aircraft in order to continue with his application for an amended FTUOC. The original aircraft was withdrawn from the application process and, though airworthy and insured, was unusable by the Académie for training purposes. If it is the appellant's contention that the advice from TC was invalidated because that particular aircraft was no longer the subject of the application process for an amended FTUOC, it is important to note that the clear intent of the advice was for the Académie to not use **any** aircraft for pilot training of a type that was not specified by an FTUOC. At the time of the series of training flights conducted in February 2016, the FTUOC held by the Académie specified various single-engine types of aircraft, not a multi-engine PA-34-200T type as was C-GPWF. The appeal panel finds that the review member did not err in finding that the Académie ignored advice from TC to not use the aircraft for training purposes unless it was authorized to do so by an FTUOC.

F. Amount of the monetary penalty

[30] At the appeal hearing, the appellant asked that the amount of monetary penalty be considered by the panel. He argued that the amount of $7,000 is not reasonable in light of the minor nature of the violation. The Minister argued that the review member had already reduced the penalty by a substantial amount from the original assessment.

[31] The original monetary penalty was assessed as a second-level violation by TC per the Sanction Schedule because of a previous enforcement history (paragraph 59). However, the review member concluded that the Minister had not substantiated any previous violations by way of dates, reference to the public record or whether the Minister was referring to a penalty that had been subsequently dismissed by the Tribunal (paragraph 60). Thus, reference to a first-level sanction schedule appears to have been more appropriate. The review member allowed an aggravating factor: as part of the application process to amend the FTUOC, the appellant was advised to not use the aircraft until the document was issued. The appeal panel has also considered the minor nature of the violation: an Académie flight instructor provided training to a person who was doing internal administrative work for the company. Although the occurrence did indeed meet the narrow regulatory definition of a "flight training service," because the Académie received an indirect compensation, we note that this service was never advertised nor made available to the public. Though we may have applied this mitigating factor to further reduce the penalty, we find that the review member was in the best position to consider this matter of fact. She reduced the penalty to within a range of reasonable outcomes and provided coherent reasons. For these reasons, the appeal panel confirms the monetary penalty assessed by the review member.

[32] Due to current economic conditions that did not exist at the time of the review hearing, we have extended the normal period for payment of the monetary penalty. In accordance with subsection 8.1(4) of the *Aeronautics Act*, the period of time allowed by the Tribunal during which payment must be received is set at one year following service of this decision.

Obiter dictum

[33] The appeal panel notes certain limiting effects that have flowed from subparagraph 406.03(2)(b)(iii) of the *CARs*. In some specialized areas of flight training, an aircraft may only be available from a person **not at arm's length** from the person who provides the flight training, that is, the person who owns a particular aircraft might be the only person reasonably available who has the knowledge and experience necessary to provide proper flight instruction on that type of aircraft or for that specialized type of training. Examples include advanced-level competitive aerobatic training, heritage ex-military or antique aircraft flight training, or high-performance aircraft type training to name a few. The requirement for arm's length does not exist in the US regulatory scheme and the result is the availability of areas of specialized flight training that do not exist in Canada.

III. DECISION

[34] The appeal is dismissed. The appeal panel upholds the review member's determination that the Minister of Transport has proven on a balance of probabilities that the appellant, Académie de Pilotage Internationale Inc., contravened subsection 406.03(1) of the *Canadian Aviation Regulations*.

[35] 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 one year of service of this decision.

December 16, 2020

(Original signed)

Reasons for the appeal decision:	Arnold Olson, Member (chairing)
Concurred by:	Fazal Bhimji, Member
	Dr. Francis Hane, Member

Appearances

For the Minister:	Eric Villemure
For the Appellant:	Jules Selwan