

 [Orca Airways Ltd. v. Canada \(Minister of Transport\), \[2017\] C.T.A.T.D. No. 32](#)

Canada Transportation Appeal Tribunal Decisions

Canada Transportation Appeal Tribunal

Vancouver, British Columbia

Panel: Herbert Lee, Member

Heard: March 21-23, 2017.

Decision: November 6, 2017.

TATC File No. P-4263-41

MoT File No. 5504-89647

[\[2017\] C.T.A.T.D. No. 32](#) | [\[2017\] D.T.A.T.C. no 32](#) | [2017 TATCE 32](#) (Review)

Between Orca Airways Ltd., Applicant, and Minister of Transport, Respondent

(48 paras.)

Case Summary

Tribunal Summary:

Held: Count One: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Orca Airways Ltd., contravened subsection 605.09(1) of the *Canadian Aviation Regulations*. The monetary penalty originally assessed by the Minister is reduced to \$5,250.

Count Two: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Orca Airways Ltd., contravened subsection 605.09(1) of the *Canadian Aviation Regulations*. The monetary penalty originally assessed by the Minister is reduced to \$5,250.

Count Three: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Orca Airways Ltd., contravened subsection 605.10(1) of the *Canadian Aviation Regulations*. The monetary penalty originally assessed by the Minister is reduced to \$3,500.

The total amount of \$14,000 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.

Statutes, regulations and rules cited:

Canadian Aviation Regulations, SOR/96-433.

REVIEW DETERMINATION AND REASONS

I. BACKGROUND

1 In April 2016, the respondent in this matter commenced investigating the applicant pursuant to allegations made by aviation inspectors and detailed in the Detection Notices (Exhibit M-1). The fact of the investigation was communicated to the applicant in a letter from the respondent dated April 28, 2016 (Exhibit M-16).

2 On August 4, 2016, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) to the applicant (Exhibit M-23). The Notice, which assessed a total of \$20,000 in penalties (\$7,500 for both Counts One and Two, and \$5,000 for Count Three) was issued because the Minister found that the applicant had committed three contraventions of the *Canadian Aviation Regulations, SOR/96-433 (CARs)*, to wit two breaches of subsection 605.09(1) and one breach of subsection 605.10(1).

3 The applicant seeks a review of the Notice and the aforementioned penalties assessed.

II. STATUTES AND REGULATIONS

4 Subsection 7.7(1) of the *Aeronautics Act*, R.S.C., 1985, c. A-2 (*Act*) states:

7.7 (1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

5 Subsection 8.4(2) of the *Act* states:

8.4(2) The operator of an aircraft may be proceeded against in respect of and found to have committed an offence under this Part in relation to the aircraft for which another person is subject to be proceeded against unless, at the time of the offence, the aircraft was in the possession of a person other than the operator without the operator's consent and, where found to have committed the offence, the operator is liable to the penalty provided as punishment therefor.

6 Subsection 605.09(1) of the *CARs* states:

605.09(1) Subject to subsection (2), where a minimum equipment list has been approved in respect of the operator of an aircraft pursuant to subsection 605.07(3), no person shall conduct a take-off in the aircraft with equipment that is not serviceable or that has been removed unless

(a) the aircraft is operated in accordance with any conditions or limitations specified in the minimum equipment list; and

(b) a copy of the minimum equipment list is carried on board.

7 Subsection 605.10(1) of the *CARs* states:

605.10(1) Where a minimum equipment list has not been approved in respect of the operator of an aircraft, no person shall conduct a take-off in the aircraft with equipment that is not serviceable or that has been removed, where that equipment is required by

(a) the standards of airworthiness that apply to day or night VFR or IFR flight, as applicable;

(b) any equipment list published by the aircraft manufacturer respecting aircraft equipment that is required for the intended flight;

(c) an air operator certificate, a special authorization issued under subsection 604.05(2), a special flight operations certificate or a flight training unit operating certificate;

(d) an airworthiness directive; or

(e) these Regulations.

III. PRELIMINARY ISSUE

8 Through counsel, the respondent brought a motion before the Tribunal which would serve to exclude witnesses from the hearing room until the Tribunal hears their testimony. The respondent argued that by allowing the motion, the witnesses would be able to provide their testimony without having heard the testimony of any previous witnesses. It is noted for the record that the applicant was advised by the Tribunal that he was entitled to remain in the hearing room throughout the proceedings.

9 The motion, which was unopposed, was allowed.

IV. SUBSTANTIVE ISSUES

10 The issues to be adjudicated in this case may be summed up by answering the following questions: (a) Has the respondent succeeded in making its case, on a balance of probabilities, that the allegations made against the applicant are legally valid; and (b) If legally valid, are the amounts of the penalties reasonable?

V. EVIDENCE

11 In addition to providing documentary evidence as exhibits, the parties also called several witnesses whose oral testimony has been fully considered in making my decision. The applicant called one witness and the respondent called five witnesses.

12 There were 29 bundles of documents proffered by the respondent; these were marked as Exhibits M-1 to M-29 and were entered into evidence. The applicant late-disclosed one set of documents at the hearing. Having heard no objection from the respondent, however, this bundle was entered into evidence and marked as Exhibit A-1.

VI. ANALYSIS

13 The burden of proof in this case, as weighed on a "balance of probabilities", is borne by the respondent.

14 The respondent submits that on November 4, 2015 at approximately 06:56 local time, at or near Vancouver, B.C., the applicant conducted a take-off of its Beech 99 aircraft, registration C-FMKH, with a global positioning system (GPS) that had an out-of-date database. The respondent further submits that the applicant had not deferred or rectified the defect in accordance with the limitations and conditions specified in C-FMKH's Minimum Equipment List (MEL). These submissions summarize the first count.

15 The respondent further submits that on November 24, 2015 at approximately 06:40 local time, at or near Vancouver, B.C., the applicant conducted a take-off of its Beech 99 aircraft, registration C-FMKH, with an inoperative windshield wiper system. The respondent further submits that the windshield wiper system was not included in C-FMKH's MEL and that, as such, it was not a deferrable item. These submissions summarize the second count.

16 The respondent further submits that on January 14, 2016 at approximately 06:40 local time, at or near Qualicum Beach, B.C., the applicant conducted a take-off of its Piper aircraft, registration C-GWXL, with an unserviceable right-hand outboard fuel tank quantity gauge when that equipment was required by the aircraft manufacturer's MEL. It is also submitted by the respondent that having a fully-functioning gauge is required pursuant to section 507.02 of the CARs, i.e. the aircraft must conform to its type design, which includes aircraft fuel gauges. These submissions summarize the third count.

17 No substantive opening submissions were made on behalf of the applicant.

18 The respondent called Mr. Edward Hildering, Enforcement Investigator at Transport Canada's Vancouver office, as its first witness. Mr. Hildering was assigned to investigate the information contained in the index Detection Notices. He is an airworthiness professional who has specialized knowledge of quality assurance and aircraft maintenance systems. He has been employed by Transport Canada in this capacity for approximately two years. His background is primarily focused on helicopter maintenance; he has approximately 27 years in the industry and for the past 10 to 12 years, has been in quality assurance and maintenance management for various helicopter companies.

19 Mr. Hildering testified that as part of his investigation, he reviewed documents such as *inter alia* aircraft records and initial correspondence with the inspectors (Exhibits M-1 to M-15, inclusive). He summarized the relevant sections, particularly the narrative, of the Detection Notices. These self-explanatory documents are included in the exhibits and the applicant has raised no objection to them being included in evidence or of their *bona fides*.

20 The "deferred defect list", or "report" for C-FMKH, may be found at Exhibit M-2. I am troubled that the index deferred defect list has no aircraft registration shown, i.e. the aircraft identification section was not completed. Mr. Hildering testified that such errors sometimes happen, but that he remains confident that the aircraft being referred to is C-FMKH. I am satisfied on a balance of probabilities that the aircraft being referred to in Exhibit M-2 is C-FMKH.

21 Mr. Hildering testified that a deferred defect sheet typically allows an aircraft to be operated with defects that don't affect airworthiness, and that those defects that are acceptable to be deferred are listed on an MEL. Rectifying these defects can be deferred by the pilot or maintenance individual based on certain conditions.

22 The respondent asked Mr. Hildering to explain to the Tribunal why it is necessary to update the GPS data. He replied that a GPS is used for navigation and most companies use GPS to navigate where they are headed, which airport approach should be taken, etc. and that an outdated database represented a safety risk, a navigational hazard, or both.

23 Under examination by the respondent, Mr. Hildering indicated that C-FMKH made approximately 300 flights from the time the defect was identified and its rectification on or about January 23, 2016.

24 Journey log entry 16750 (dated November 23, 2015) indicates *inter alia* that C-FMKH's windshield wipers were inoperable. The windshield wiper defect was included in the detailed defect report. Based on his review of the logs, Mr. Hildering testified that there were approximately 215 flights conducted without operative windshield wipers.

25 Mr. Hildering stated that windshield wipers are used during taxiing and on approach or take-off and, if inoperable, there is an increased likelihood of reduced visibility on the taxiway and in the final stages of making an approach to an airport.

26 The Canadian Civil Aircraft Register (CCARCS) (Exhibit M-4) provides details about C-FMKH, including the country and year of manufacture (U.S.A. in 1968), that the manufacturer was Beech Aircraft Corporation and that the registered owner is Orca Airways Ltd. C-FMKH is identified as a Beech 2 turbo prop model 99.

27 Exhibit M-5 shows the MEL for a Beech model 99. Mr. Hildering stated that an MEL is *inter alia* a document that is usually created by the manufacturer of an aircraft and is approved by both the FAA and Transport Canada to be used to determine the conditions under which the aircraft may be safely operated. The MEL typically includes a list of items which are not essential to the safe operation of the aircraft under certain specified conditions. The MEL will enable the pilot to determine if a particular defect is critical to the aircraft's safe operation and/or the conditions under which the aircraft may operate without rectifying a particular defect. This is undertaken with reference to the Maintenance Control Manual (MCM) for an aircraft such as C-FMKH.

28 Mr. Hildering testified that the GPS is on C-FMKH's MEL but that the defective windshield wipers were not. As

noted above, the GPS is not a defect for which repair can be deferred. Windshield wipers are not specifically included in the MEL nor are they included in the list of repairs that can be deferred. Mr. Hildering added that since the windshield wipers were not included on the relevant MEL, the aircraft should *not* have been allowed to operate until the defect was rectified. This means that an aircraft such as C-FMKH is effectively grounded until such time as its GPS and windshield wiper repairs are completed. In Mr. Hildering's view, the evidence he examined satisfied him that C-FMKH flew on multiple occasions without an updated GPS or operable windshield wipers.

29 Next, Mr. Hildering was examined regarding the defective fuel gauge on the Piper Navajo Chieftain model PA-31-350, registration C-GWXL. This included questions regarding the deferred defect sheet (Exhibit M-9) as well as the journey logs (Exhibit M-10) for C-GWXL (specifically log entries 16709 and 24618).

30 Mr. Hildering referred to a January 13, 2016 defect entry in the journey log (Exhibit M-10, entry 23724) stating that the outboard right-hand fuel indicator was giving erroneous readings, including zero. He added that, based on his examination of the documents, the fuel gauge defect was rectified on January 28, 2016. Investigator Hildering then explained, however, that the fuel gauge in question was not a deferrable item because it did not meet the requirements of section 605.10 of the *CARs*. This is because in the absence of a valid MEL for C-GWXL, the "go-to" document is the MCM which sets out procedures for C-GWXL operating without an MEL. Referring to the MCM, Mr. Hildering testified that section 4.3.5(a) provides that only defects that do not affect the airworthiness of the aircraft for its intended flight as per *CARs* 605.10 may be deferred.

31 The respondent's counsel submitted that the Transport Canada master MEL (Exhibit M-22) states that one of the fuel quantity indicators may be inoperative provided that all fuel tanks are completely filled with fuel. There was no evidence before me to suggest that C-GWXL took off with completely filled fuel tanks (I include both primary and secondary, or as the applicant describes them, "auxiliary" tanks) during the period in which the fuel gauge was defective.

32 The documentary evidence, namely the journey logs, and the testimony of the applicant's chief pilot establish, in my view, that C-GWXL took off on several occasions with a defective fuel gauge. I must note, too, that there is no suggestion by the applicant that the respondent erred in alleging that the aircraft in question took off on multiple instances with a defective fuel gauge.

33 I now turn to the applicant's argument which may, in my view, be reduced to three basic themes: first, that the aircraft's pilot is both qualified and responsible for deciding whether it is safe for an aircraft to take off. He points to the testimony of the two pilots who gave evidence (Richard Taylor and Marilyn Gilmour) and states that they had "... no issue in flying the aircraft with an auxiliary fuel tank indicator that was not in service".

34 Second, the applicant argues that when C-GWXL flew with a defective fuel gauge, the applicant was not in violation of the *CARs* because the aircraft held two hours of fuel and the longest flight it ever took was 45 minutes.

35 Third, the applicant argues that the failure to update the GPS in C-FMKH was not a violation because the aircraft always operated under visual flight rules (VFR).

36 The applicant concedes that it erred regarding the defective windshield wipers and takes no issue with the respondent's finding.

37 In my view, this is a case where the applicant sees "grey" and the respondent sees "black and white". The *Act*, the *CARs*, and the various policies and procedures are designed to provide for safe aviation; of this, there is surely no disagreement between the parties. As I mentioned at the outset of this three-day hearing, the breaches that the respondent is alleging are "strict liability" offences. As per the *Barron's Canadian Law Dictionary* definition, this means that the applicant is liable for any breaches shown to have occurred on a balance of probabilities without a showing of fault.

38 I am satisfied by the evidence before me that the applicant was in breach of the *Act* and the *CARs* as alleged by

the respondent. In my view, the respondent has overwhelmingly made its case on a balance of probabilities using documentary and testimonial evidence, virtually none of which has been impugned by the applicant based on the law, or fact, or both law and fact.

39 For the reasons I have provided, I find that the respondent has proven, on a balance of probabilities, that the applicant has committed the offences shown in each of the three counts.

VII. SANCTIONS

40 The Civil Aviation Tribunal decision in *Minister of Transport v. Kurt William M. Wyer*, [1988] O-0075-33, is helpful in considering the appropriate principles as they apply to establishing the monetary penalties. They include, but are not limited to:

- * denunciation, as in public repudiation of the wrongful conduct;
- * deterrence, both specific to the offender and general deterrence to the aviation community;
- * rehabilitation, eliminating risk of repeating the wrongful act;
- * enforcement recommendations; and
- * aggravating and mitigating factors.

41 In *Canada (Minister of Transport) v. Bickerstaff*, [2014 TATCE 25](#) (Appeal), this Tribunal rendered a decision examining the question of reducing the amount of sanctions. One conclusion by the appeal panel was that except in the most exceptional circumstances, the penalty should not be reduced to an amount that renders it nugatory, nor should it be increased beyond the amount that is suggested for a subsequent offence. The finding was that while recognizing that the Tribunal is not bound by Transport Canada's policy in determining the amount of sanctions, a variation of 30 per cent in respect of aggravating and mitigating factors was appropriate.

42 Counts One and Two: I am satisfied on a balance of probabilities -- based largely on the credibility and oral testimony of the witnesses -- that neither of the aircraft cited in this case took off when the pilot or the maintenance team felt the aircraft was not airworthy. Flying in clear weather during the daylight hours and under VFR *may* not require the pilot to consult a GPS or be concerned about the effects of rain on a windscreen. The point, however, is that the GPS **should have been updated at the earliest possible opportunity**. As referenced in Exhibit M-7 on page 111 (numbered in hand-writing), item 34 (d and e), this is an MEL Cat. C item; it must be fixed within 10 days. If it is not fixed, the operator needs to apply for an extension from Authority but the applicant failed to comply with this requirement and took off in the airplane.

43 As the respondent submitted that there is simply **no excuse** for ignoring the defective windshield wipers for so long. The applicant may consider this to be a minor infraction and one which reflects a lack of deference to the pilot in charge of the aircraft. While the applicant did not, in my view, demonstrate a cavalier attitude toward safety *per se*, it did, however, demonstrate a cavalier attitude toward the *process*, which is designed to ensure that safe procedures are followed. For that reason, I find that a significant penalty is warranted. In my view, however, the penalty imposed was greater than needed to reinforce to the applicant the seriousness of the offences and, accordingly, I am reducing the penalty for Count One to \$5,250 from \$7,500 and the penalty for Count Two to \$5,250 from \$7,500.

44 Count Three: It cannot be determined after-the-fact that safety was compromised by the failure of the crew to maintain fully functioning fuel gauges for all fuel tanks onboard the aircraft. I have considered the evidence of the applicant regarding their "policy" of having two hours of fuel given that the longest flight the aircraft would be making would have been approximately 45 minutes. The last person to make the final decision is the pilot-in --command, from whom there was no statement. According to Exhibit M-22 (part 2), page 17 (numbered in hand-writing), item 4 - Fuel Quantity Indicators, this is also an MEL Cat. C requirement which must be fixed within 10 days. However, I have also borne in mind that safe operation of an aircraft requires the pilot to know how much fuel, in total, he or

she has on board. There is no legal doubt in my mind that if the worst had happened and it became evident that the aircraft had taken off with defective fuel gauges, the consequences to the applicant (let alone the passengers and crew) would have been enormous. I find that the hand of the regulator came down too heavy on the applicant which is, as was alluded to in the *viva voce* testimony of its chief pilot, not a business with unlimited resources. It is hoped that this kind of infraction will be avoided in the future. Based on all the circumstances of this case, and considering that the penalty is not a punishment and is an education, I am reducing the penalty for Count Three to \$3,500 from \$5,000.

VIII. DETERMINATION

45 Count One: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Orca Airways Ltd., contravened subsection 605.09(1) of the *Canadian Aviation Regulations*. The monetary penalty assessed by the Minister is reduced to \$5,250.

46 Count Two: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Orca Airways Ltd., contravened subsection 605.09(1) of the *Canadian Aviation Regulations*. The monetary penalty is reduced to \$5,250.

47 Count Three: The Minister of Transport has proven, on a balance of probabilities, that the applicant, Orca Airways Ltd., contravened subsection 605.10(1) of the *Canadian Aviation Regulations*. The monetary penalty is reduced to \$3,500.

48 The total amount of \$14,000 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.

November 6, 2017

(Original signed)
Herbert Lee
Member

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