

[Tilroe v. Canada \(Minister of Transport\), \[2017\] C.T.A.T.D. No. 13](#)

Canada Transportation Appeal Tribunal Decisions

Canada Transportation Appeal Tribunal

Edmonton, Alberta

Panel: Arnold Olson, Member

Heard: January 31, 2017.

Decision: April 20, 2017.

Docket: C-4272-33

MoT File No.: 5504-088648 P/B

[2017] C.T.A.T.D. No. 13 | 2017 TATCE 13 (Review)

IN THE MATTER OF the review hearing requested by Kevin Andrew Tilroe with respect to a Notice of Assessment of Monetary Penalty issued by the Minister of Transport pursuant to section 7.7 of the Aeronautics Act, R.S.C., 1985, c. A-2, for a contravention of paragraph 602.96(3)(g) of the Canadian **Aviation** Regulations, SOR/96-433, as alleged by the Minister Between Kevin Andrew Tilroe, Applicant, and Minister of Transport, Respondent

(29 paras.)

Case Summary

Tribunal Summary:

Held: The Minister has proven, on the balance of probabilities, that on November 20, 2015, the applicant, Kevin Tilroe, as pilot-in-command, conducted a take-off in an **aircraft** without first obtaining clearance to do so, contrary to paragraph 602.96(3)(g) of the *Canadian Aviation Regulations*. The monetary penalty of \$525 is reduced to \$400.

The revised penalty of \$400 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.

Appearances

For the Applicant: Kevin Tilroe (self-represented).

For the Respondent: Catherine Newnham.

REVIEW DETERMINATION AND REASONS

I. BACKGROUND

1 On August 18, 2016, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty to Mr. Kevin Tilroe, the applicant, for an alleged contravention of paragraph 602.96(3)(g) of the *Canadian Aviation Regulations, SOR/96-433 (CARs)*. Schedule A of the Notice reads:

On or about 20 November 2015, at approximately 0115 hrs UTC, while operating an **aircraft**, specifically a Beech King Air bearing Canadian Registration mark C-FSAO, you did conduct a take-off from runway 30 at Edmonton International **Airport**, Alberta, without first obtaining clearance to do so from the appropriate Air Traffic Control unit at Edmonton Tower Contrary to Canadian **Aviation Regulations** 602.96(3).

TOTAL MONETARY PENALTY - \$525.00

II. STATUTES AND REGULATIONS

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

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.

3 Section 602.96 of the *CARs* reads in part as follows:

602.96 (1) This section applies to persons operating VFR or IFR **aircraft** at or in the vicinity of an uncontrolled or controlled **aerodrome**.

(3) The pilot-in-command of an **aircraft** operating at or in the vicinity of an **aerodrome** shall:

(g) where the **aerodrome** is a controlled **aerodrome**, obtain from the appropriate air traffic control unit, either by radio communication or by visual signal, clearance to taxi, take off from or land at the **aerodrome**.

III. EVIDENCE

A. Minister

(1) Examination-in-chief of Inspector David Gaboury

4 Inspector Gaboury is the Transport Canada **aviation** enforcement investigator who was assigned to investigate a Civil **Aviation** Daily Occurrence Reporting System (CADORS) report (Exhibit M-1) of an **aircraft** taking off without take-off clearance on November 20, 2015. From Transport Canada's National **Aviation** Company Information System (NACIS) database (Exhibit M-2), he determined that Can-West Corporate Air Charters Ltd. owned the **aircraft**. The company's operations manager, Mr. Justin Krasnikoff, provided that Captain Tilroe had been the pilot-in-command and Ms. Natalie Hanczak the second-in-command, and sent the relevant **aircraft** journey log book pages (Exhibit M-3). Mr. Krasnikoff's report also stated that after confirming that the CADORS information was correct, he had terminated Captain Tilroe's employment. Inspector Gaboury then accessed the Transport Canada Distributed Air Personnel Licensing System (DAPLS) database and determined that the crew's licences were valid (Exhibits M-4 and M-5).

5 In an email dated December 15, 2015, he then requested that Ms. Hanczak provide her description of the events of November 20, 2015 (Exhibit M-6). She replied that she and Captain Tilroe received an urgent dispatch for an immediate evening high-priority Code Red Medevac flight from the Edmonton **airport**. They received taxi clearance and taxied the short distance to hold short of runway 30. She heard the tower controller ask if they were able to take off immediately. She replied, "We are." As Captain Tilroe completed the take-off checks she thought she heard

something, "shushed" the Captain and asked him, "Was that for us?" He replied, "I think so." Instead of asking the tower controller to repeat what might have been said, she transmitted "33.45 [the departure frequency], clear take-off [runway] 30, Rider 522 Medevac." She assumed that what she had transmitted would trigger a response if it had been in error. Hearing nothing from the tower controller, they took off. She realized only much later, after the fact, that the tower controller never heard her transmissions.

6 Captain Tilroe replied to the Letter of Investigation (Exhibit M-7) with his own version of events (Exhibit M-8). Ms. Hanczak had interrupted his take-off briefing and asked if he thought that the tower had issued a take-off clearance. He replied he thought so, expecting her to ask for the clearance to be repeated. Instead he heard her read back a take-off clearance. He understood that they now had a clearance to take off and proceeded to do so. His letter also specified that his employment was immediately terminated without any investigation into the incident's contributing causes, that he had not received any severance or unemployment insurance benefits, that he had been unable to find other employment as a pilot, and that he believed he had already paid a huge penalty. After reading the statement, Inspector Gaboury said that if there was confusion regarding an air traffic control (ATC) clearance, good crew resource management would dictate that the clearance should be verified.

7 Inspector Gaboury requested (Exhibit M-9) the relevant Nav Canada WINRAD radar data. The series of screen captures (Exhibit M-10) show RD522 conducting a take-off from runway 30 at Edmonton International **Airport**. He also prepared a summary of the corresponding ATC audio (Exhibit M-11). Further, he obtained the ATC tower "log" notes (Exhibit M-12) that said RD522 Medevac took off without a clearance but with "no impact to operations".

(2) Cross-examination of Inspector Gaboury

8 Inspector Gaboury was asked about the **Aviation** Enforcement Case Report he had prepared and why he had not looked into the lack of a safety management system (SMS) investigation. Inspector Gaboury replied that companies regulated under subpart 704 (Commuter Operations) of the CARs are not required to have an SMS program. In any event, no SMS information was used in his investigation of this occurrence.

(3) Redirect of Inspector Gaboury

9 On redirect, the Minister introduced into evidence the **Aviation** Enforcement Case Report (Exhibit M-13). In the report, Inspector Gaboury said the tower controller did not receive a response to the query if RD522 was ready for an immediate take-off. So the controller cleared another **aircraft** to land on a different runway. In the report, he speculated that "both Tilroe and Hanczak heard part of [that] landing clearance...and incorrectly assumed it was a take-off clearance for them".

10 As mitigating factors in determining the amount of the penalty, Inspector Gaboury noted that the controller had made no attempt to stop RD522 Medevac from taking off as there was no conflicting traffic. Had she done so, this would likely have alerted the crew to their communication problem. Inspector Gaboury also noted the stress of operating the air ambulance flight in the conditions under which the crew was operating, that Captain Tilroe had readily admitted the infraction, and that he had accepted responsibility as pilot-in-command. He recommended the imposition of a first-level sanction reduced by 30% to \$525.

(4) Examination-in-chief of Dina Jammaz

11 Ms. Jammaz was the ATC tower controller on duty at the Edmonton International **Airport** on the evening of November 20, 2015 and confirmed the contents of both the ATC audio file (Exhibit M-14) and WINRAD live radar data (Exhibit M-15). She described watching RD522 conduct a take-off without a clearance from her. She did not have a safety concern.

B. Applicant

(1) Testimony of Captain Kevin Tilroe

12 Captain Tilroe introduced Exhibit A-1, a summary of the occurrence, the subsequent investigation and the effect the violation has had on his **aviation** career and financial standing. He described that the air ambulance crew had received a "RED CALL", the highest priority type of call. He and Ms. Hanczak expedited their start-up duties and received taxi clearance for the short distance to runway 30. He taxied the **aircraft** and Ms. Hanczak had the duty of radio operator. He heard the tower controller ask if they were able to take off immediately and heard Ms. Hanczak transmit the reply, "Affirmative." So they were expecting an immediate clearance for take-off. While completing his take-off briefing he was interrupted by Ms. Hanczak who thought she heard a radio transmission from the control tower. She asked, "Was that for us?" He replied, "I think so" as a prompt for her to get clarification if she was unsure of what she had heard. Her next transmission was a readback of a take-off clearance. Her action in doing so communicated to him that she had received the clearance to take off, so they did. He was not aware at that instant, nor did he believe there was a way for him to determine, that in fact the tower controller had not heard Ms. Hanczak. He and Ms. Hanczak were most surprised when, three days later, Can-West received notification that they had contravened the regulations. He was fired from Can-West for this occurrence.

(2) Cross-examination of Captain Tilroe

13 Captain Tilroe agreed that as pilot-in-command, the ultimate duty rests with him to verify that take-off clearance is received prior to taking off. However, he understood Ms. Hanczak's "readback" to be verification that she had received a take-off clearance. It was unthinkable that she would simply invent a readback of a clearance she had not heard.

14 He could not account for why Ms. Hanczak's critical transmission was not recorded on the tower tape. Insisting that she made that transmission, he stated "I heard her say it!" He agreed that he personally did not hear a take-off clearance from the tower controller.

IV. ARGUMENTS

A. Minister

15 The Minister submitted that the evidence of Inspector Gaboury and the radar evidence proved on the balance of probabilities that the applicant contravened subsection 602.96(3) of the CARs. The regulation states that, in the case of a controlled **aerodrome**, the pilot-in-command must obtain clearance to take off from the appropriate ATC unit. Ms. Hanczak thought she heard something and asked, "Was that for us?" In spite of a lack of clarity as to whether or not a clearance to take off had been received, Captain Tilroe did not ask ATC for verification of the take-off clearance, which he was responsible to do as pilot-in-command. The ATC audio establishes that no clearance to take off was issued to RD522 and the radar data establishes that the **aircraft** did take off. Thus, the contravention is proven.

B. Applicant

16 Captain Tilroe said he heard the tower ask if they were ready for an immediate take-off and Ms. Hanczak reply in the affirmative. When he then heard Ms. Hanczak clearly transmit a "readback" of a clearance to take off, he understood it to be verification that she had received a take-off clearance. He trusted his crewmember. It did not occur to him that she would simply fabricate a readback to a clearance she had not heard. Captain Tilroe said he should be judged on what he believed to be true at the time, which is that they had received a clearance to take off. They did not hear the tower controller dispute Ms. Hanczak's readback of the take-off clearance so he had no reason to think that a clearance had not actually been transmitted to the **aircraft**. In any event, safety was not compromised.

17 The applicant also submitted that applying a monetary penalty does not address the root cause of the problem.

There should have been a proper SMS investigation internally within Can-West to determine root causes. He believes his termination of employment was without cause as there was no adequate investigation. Moreover, he believes that Transport Canada should have conducted a non-punitive safety investigation into the occurrence. He should more appropriately have received oral counselling. Instead, Transport Canada conducted an enforcement investigation paying little regard to the devastating effect of this blemish on his otherwise infraction-free record. As a result, he has been unable to find other employment as a professional pilot and has suffered financially and emotionally. He asked that the contravention be overturned.

V. ANALYSIS

18 The standard of proof imposed on the Minister is specified in the *Transportation Appeal Tribunal of Canada Act*, [S.C. 2001, c. 29](#), subsection 15(5) as "proof on the balance of probabilities".

19 The facts of the violation of paragraph 602.96(3)(g) of the *CARs* are not in dispute and all elements of the violation have been proven. It is established through the witnesses' testimony and exhibits that Captain Tilroe, as pilot-in-command, did conduct a take-off without a clearance on November 20, 2015. The issue to be decided is whether or not he can establish a defence.

(1) Defence of Due Diligence

20 Section 8.5 of the *Aeronautics Act* states that no person shall be found to have contravened a provision such as subsection 602.96(3) of the *CARs* if the person exercised all due diligence to prevent the contravention. The burden of proving a defence of due diligence rests on the applicant and the defence is available if he or she took all reasonable steps to avoid the particular event, as specified in *R. v. Sault Ste. Marie*, [\[1978\] 2 SCR 1299](#) (p. 1326).

21 Given the situation--the urgency of a "Code Red" flight to save a life, a request from the tower controller asking if they were able to take off immediately, followed by the First Officer stating confirmation of a take-off clearance--in the heat of the moment, Captain Tilroe trusted his crewmember and believed they had received a take-off clearance. But did he take all reasonable steps to avoid the incident? Immediately prior to blurting out her fictitious readback, Ms. Hanczak asked Captain Tilroe, "Was that for us?" In the lexicon of the flight deck, this question really means "I'm not sure what I just heard." **Aviation** safety and professional flight crew discipline in radio communication procedures require that such uncertainty be resolved. Captain Tilroe said he expected Ms. Hanczak to request clarification from the tower controller. As she was handling the radio communications, it was her professional duty at that moment to transmit a request to have the take-off clearance repeated in order to remove any uncertainty. But though it was her professional duty to do so, it was Captain Tilroe's legal duty as the pilot-in-command to ensure the clearance had been received before departing and therefore to ensure that the transmission was repeated if there was uncertainty. As he himself did not clearly hear the take-off clearance, he should have directed Ms. Hanczak to request the tower controller to repeat the transmission so that he, as well as she, could hear it. By not doing so, he did not take all reasonable steps to avoid the occurrence. Therefore I find that the due diligence defence is not established.

(2) Defence of Officially Induced Error

22 Since Captain Tilroe argues that he was misled by erroneous information obtained from his second pilot regarding the clearance to take off, I will also consider the nature and availability of the defence of officially induced error as per *R. v. Jorgensen*, [\[1995\] 4 SCR 55](#).

23 It was a stunning breach of procedure for Ms. Hanczak to fabricate a "readback" to a non-existent take-off clearance. Though she was wrong, Captain Tilroe believed her. Is there a defence available for believing erroneous information from one's crewmember? The defence of officially induced error rests on two main considerations: who is an "official" and what constitutes "official advice" (*Jorgensen*, paragraph 24). In the vast majority of cases, an official is someone employed by the state, although this defence has been successful in other circumstances. As

per paragraph 30 of *Jorgensen*, "the official must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question." Ms. Hanczak cannot be considered an official for the purpose of this defence because it was Captain Tilroe, not her, who was the individual responsible for ensuring that a clearance to take off was received.

24 Secondly and more importantly, in considering what constitutes official advice, Captain Tilroe was not misled by a misapplication of a law. He was misled into believing a clearance existed when in fact it did not. Thus his error was a pure error in fact (mistaking Ms. Hanczak's "readback" to be a reply to an ATC clearance to take off) and not an error of law or a mixed error of fact and law regarding a regulatory offence. The bottom line is that the defence of officially induced error is the principle that an individual must not be held accountable "when he or she is induced by an official's conduct into relying on a reasonable but incorrect understanding of the law" (*La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, [2013 SCC 63](#), paragraph 127). That is clearly not the case here as the error was not in law nor was it induced by an official with an incorrect understanding of the law. Therefore I find the defence of officially induced error not to be available to Captain Tilroe.

(3) Final Considerations

25 Both Captain Tilroe's testimony and Ms. Hanczak's description of events (Exhibit M-6) are in agreement that her inventive "readback" had actually been transmitted. Yet it was not heard by the tower controller and was not recorded on the tower frequency audio. The evidence shows that one of the **aircraft** radios was selected to the ground frequency as taxi instructions had been received. The other radio was selected to the tower frequency as both crewmembers heard the tower controller ask if they could take off immediately. In Ms. Hanczak's description of events she allows the possibility that her radio switch selections were not correct. Captain Tilroe was unsuccessful in obtaining access to the ground frequency audio in order to confirm that Ms. Hanczak had mistakenly transmitted her fictitious readback on the ground frequency rather than on the tower frequency. Unfortunately for Captain Tilroe, it is not relevant whether or not her transmission was or was not fabricated or had actually been transmitted at all. It is only relevant that he, as pilot-in-command, had not received a clearance to take off from the appropriate ATC unit.

26 A cautionary tale is a tale told in folklore to warn of a danger; this occurrence is such a cautionary tale. Crew resource management has been a positive force in improving **aviation** safety by reducing human error and is now mandated for commercial air operations. Pilots receive training in areas such as open communication, interpersonal dynamics, influence sharing and effective decision-making. But unfortunately these principles may not always accord well with the legal framework of the responsibilities of the pilot-in-command. While an atmosphere of safety-focused cooperation on the flight deck is a worthy objective and tasks may be delegated to other crewmembers, the corresponding legal duty for the execution of those tasks rests with the pilot-in-command and cannot be delegated.

27 In examining the monetary penalty I have referenced this Tribunal's decision in the case of *Minister of Transport v. Wyer*, CAT File No. O-0075-33 (Appeal), which lists the principles to be considered: denunciation of the conduct, deterrence, rehabilitation, enforcement recommendations, as well as any aggravating and mitigating factors. Captain Tilroe presents as a highly competent individual who has already paid a high price, both professionally and personally, for trusting his crewmember. In balancing the regulatory considerations against the exceptional circumstances of the occurrence, I reduce the monetary penalty from \$525 to \$400.

VI. DETERMINATION

28 The Minister has proven, on the balance of probabilities, that on November 20, 2015, the applicant, Kevin Tilroe, as pilot-in-command, conducted a take-off in an **aircraft** without first obtaining clearance to do so, contrary to paragraph 602.96(3)(g) of the *CARs*. The monetary penalty of \$525 is reduced to \$400.

29 The revised penalty of \$400 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.

April 20, 2017

(Original signed)
Arnold Olson
Member

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