

**CIVIL AVIATION TRIBUNAL**

BETWEEN:

**Minister of Transport, Appellant**

- and -

**Executive Helicopter Services Inc., Respondent**

**LEGISLATION:**

*Classification of Canadian Airspace Order (Air Navigation Order, Series V, No. 23), s. 18*

**Special Use Controlled Airspace, Conditions of Entry**

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**Appeal decision**

**Bruce L. Pultz, Jack R. Ellis, William C. Pearson, Q.C.**

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**Decision: October 3, 1994**

**The Appeal is granted. The Minister's allegation is dismissed.**

**The Appeal Hearing** on the above matter was held Thursday, September 8, 1994 at 10:00 hours, at the Sheraton Gateway Hotel, Lester B. Pearson International Airport, in the city of Mississauga, Ontario.

**BACKGROUND**

Executive Helicopter Services Inc. is one of several commercial aviation companies who conduct a business of carrying sightseeing passengers over the Niagara Falls area. Because of the number of flights, the airspace over the area can be quite busy. Indeed, on September 29, 1992, two helicopters collided, resulting in the loss of four lives. Neither helicopter involved in this accident belonged to Executive Helicopter Services Inc.

As a result of this accident, Transport Canada and the Federal Aviation Administration in the United States, in consultation with local operators and other interested parties, introduced a new set of procedures designed to reduce the risk of collision between aircraft operating over the Niagara Falls area.

The procedures governing commercial aircraft flights are made up of a number of elements. One of those elements is that all aircraft entering the area use a specified communications frequency. Another element is that pilots receive a briefing from Transport Canada regarding the operation of aircraft in the area.

On June 10, 1993, a Bell 206 helicopter registration C-FKKM owned by Executive Helicopter Services Inc., entered the Niagara area. The pilot of this helicopter was not using the prescribed communications' frequency nor had he received a briefing from Transport Canada. A pilot of another helicopter, owned by a competitor company, was conducting a sightseeing tour in the area at the time. He notified Transport Canada that aircraft C-FKKM had entered the area while attempting to establish communication on the wrong frequency (Exhibit M-11). The operator of the Flight Service Station at St. Catharines also sent in an Occurrence Report regarding the incident (Exhibit M-12).

Transport Canada charged Executive Helicopter Services Inc. with contravening the *Classification of Canadian Airspace Order* (ANO V, No. 23, s.18) and assessed a monetary penalty of \$250.00.

Executive Helicopter Services asked the Civil Aviation Tribunal to review their case. A Review Hearing was held before Tribunal Member Dr. David Hurst, in St. Catharines, Ontario on March 9, 1994. Dr. Hurst determined that Executive Helicopters had contravened the Air Navigation Order and upheld the Minister's decision to assess a monetary penalty of \$250.00.

Executive Helicopters appealed Dr. Hurst's Review Determination, and an Appeal Hearing was held before designated Tribunal members on September 8, 1994 in Mississauga, Ontario. These Reasons for Appeal Determination are a result of that hearing.

## **GROUND FOR THE APPEAL**

Executive Helicopter Services Inc. stated their grounds for Appeal in a letter to the Tribunal dated April 11, 1994. The substance of the letter reads:

"I am in receipt of your Review Determination dated March 28<sup>th</sup> 1994 and received by us April 7, 1994.

I request an appeal based on the "Discussion" section of the Review Determination, and evidence that was recently found.

Specifically the ministers case is based on the pilots being briefed. This is based on our Company Operations Manual, a contract between Executive and the Ministry of Transport, but the other parameters of the Operations Manual are being ignored. They have taken only partial guidelines not all the guidelines. Also an exam was found that was believed to have been lost in transfer to the company's sub-base in St. Lucia.

In summary it is clear from the discussion section of the Review Determination that the fundamental position of the ministers case and our defence was inadvertently missed."

## **THE CONTRAVENTION**

The Notice of Assessment of Monetary Penalty sent to Executive Helicopter Services Inc. was dated December 19, 1993. It reads, in part:

"Pursuant to section 7.7 of the *Aeronautics Act*, the Minister of Transport has decided to assess a monetary penalty on the grounds that you have contravened the following provision(s):

Classification of Canadian Airspace Order (ANO V, No. 23, s.18), in that on or about June 10, 1993 at approximately 16:20 U.T.C., you, as operator of a Bell 206 helicopter registered C-FKKM, entered Class F special use airspace, designated as CYR 518, without complying with the procedures specified in the Designated Airspace Handbook. Specifically, you did not comply with the conditions of the authorization issued by the Regional Director, Air Carrier Operations Branch, Ontario Region. In accordance with the *Aeronautics Act*, s.8.4(2), Executive Helicopters is liable for the penalty provided for this contravention.

The total assessed penalty of \$250 must be paid on or before January 17, 1994."

## **THE LAW**

**Air Navigation Order, Series V, No. 23, known as the *Classification of Canadian Airspace Order* states in part:**

"VFR Flight in Class F Special Use Airspace

18. A person operating an aircraft in Class F Special Use Airspace, whether controlled or uncontrolled, in VFR flight shall operate the aircraft in accordance with any procedures specified in the Designated Airspace Handbook for that airspace."

Note: The above Order was in force at the time of the alleged contravention. On October 28, 1993, Air Navigation Order, Series V, No. 23 was revoked, and a new regulation was made entitled "*Airspace Structure, Classification and Use Regulations*," section 6. (SOR/93-458) With respect to this case, the content of the new regulation is the same as the Air Navigation Order in force at the time.

**Section 8.4(2) of the *Aeronautics Act* provides that the operator of an aircraft may be found liable:**

"(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."

## THE ISSUES

### Company Authorization

A company operating a commercial air service is required, by regulation, to produce an *Operations Manual* containing details of how the organization will conduct its affairs. This document, while written by the company, must be approved by Transport Canada. Both parties agree to the content, which forms a contractual accord between the company and Transport Canada. The content details precisely how the operations of the air carrier will be conducted.

Executive Helicopter Services Inc. recently modified their *Operations Manual* to include the necessary information to receive approval from Transport Canada to conduct passenger carrying flights within the Niagara Falls area. The area is described in the *Designated Airspace Handbook*. It is the portion of a circle within Canadian airspace, two nautical miles in diameter centred in the river between Horseshoe Falls and the American Falls (43°05¢00²N 79°04¢25²W), from the surface up to but not including 3500' ASL. This area is known as Class "F" restricted airspace CYR518. The aircraft's flight path is known as the Niagara Falls Scenic Route.

On March 18, 1993, Transport Canada's Regional Director of Air Carrier Operations, Debra Taylor, wrote to Mr. Richard Cooper, President of the company, authorizing the operation of Executive Helicopter Services Inc. within this area (Exhibit M-6), as follows:

"Executive Helicopter Services Inc. is hereby authorized pursuant to NOTAM CYR518 092030 to conduct helicopter passenger sightseeing operations within the class F Restricted Uncontrolled Airspace in accordance with the Niagara falls Flight Procedures Minimum requirements subject to all of the following conditions:

(a) Company aircraft shall be operated in accordance with the Transport Canada Approved Subsection 4.12 of the Company Flight Operations Manual.

(b) No changes shall be made to Subsection 4.12 of the Company Flight Operations Manual without the approval of the Regional Director, Air Carrier Operations, Ontario Region.

This authority may be revoked or amended by Transport Canada Officials acting on behalf of the Minister at any time."

There was no evidence in the Record that there had been any communication from Transport Canada to Executive Helicopters indicating a withdrawal of this authority.

Transport Canada stated that the sections of Executive Helicopters' *Operations Manual*, which apply to flights over the Niagara area (Exhibit M-7), are based on the *Niagara Falls Flight Procedures Minimum Requirements* document referred to in Debra Taylor's letter, above.

Appropriate sections of the relevant documents that apply to this case are:

- Section 7.3.9 of Executive Helicopters' *Operations Manual* (Exhibit M-7) contains eight distinct training items that "Pilots conducting passenger sightseeing flights along the Niagara Falls Scenic Route shall receive". Paragraph (b) states the following item: "briefing on Transport Canada and safety related requirements by a Transport Canada Rotorcraft Air Carrier Operations Inspector".
- Paragraph 4.12(3)(n) of Executive Helicopters' *Operations Manual* states that: "Pilots must communicate and maintain a listening watch on the published frequency 122.90 MHZ."
- Paragraph (2)(f) of The *Niagara Falls Flight Procedures Minimum Requirements* document goes a step further and states:

"(2) No air carrier shall be issued with an authorization to conduct passenger sightseeing flights within the Class "F" restricted airspace ... unless:

f) all pilots assigned to flight duty on the approved Scenic Falls Route have been briefed on the flight procedures and operations by Transport Canada and/or Federal Aviation Administration officials and a record is maintained of these briefings on the respective pilot training files."

Transport Canada argued:

(1) The receipt of a briefing from Transport Canada is a precondition to the issuance of authority to operate in the area and thus the conducting of flights in the area.

(2) The authorization to operate in the area was issued to the company on the basis that they had a pilot in their employ who had been briefed.

(3) When the pilot who had been briefed left the employ of the company, the authorization was automatically no longer in effect, and the company should have known that.

### **Pilot Qualifications**

Transport Canada further argued that, of the two people on board the helicopter, only Mr. Chris Korzeniowski was qualified to act as a crew member. The other person on board, Mr. Gordon

Cooper, holds a private pilot licence. This level of licence does not qualify him to act as a crew member in a commercial air carrier operation such as Executive Helicopter Services.

Mr. Gordon Cooper is the brother of Richard Cooper, the company President. Gordon Cooper is the Vice-President of the company and was involved in the many communications with Transport Canada to have the amendments to their *Operations Manual* approved. Transport Canada stated that Mr. Gordon Cooper does not have the qualifications to give instruction to Mr. Korzeniowski; therefore, he must have been a passenger, and the flight in question is most properly defined as a passenger flight. Transport Canada further stated that any company training should be conducted by the Chief Pilot, or his designate, if that person is properly qualified.

Executive Helicopters argued this was not a passenger sightseeing flight; therefore, the restrictions that govern normal commercial operations do not apply. Mr. Korzeniowski was already qualified to fly the helicopter and Mr. Cooper, because of his extensive involvement in the development of the amendments to their *Operations Manual*, was qualified regarding the procedures to use in the area. Mr. Korzeniowski received a briefing from Mr. Cooper and wrote a written examination covering details of the procedures for the area.

The relevant Air Navigation Order, Part IV of Series VII, No. 6 states:

"ORDER PRESCRIBING STANDARDS AND PROCEDURES  
FOR AIR CARRIERS USING ROTORCRAFT IN AIR  
TRANSPORT OPERATIONS

CREW MEMBER REQUIREMENTS

39. (1) No air carrier shall assign a person as flight crew member unless that person

(a) holds a valid licence issued under the Air Regulations appropriate to the duties to be performed, and

(b) is otherwise qualified in accordance with this Order.

(2) No air carrier shall operate a rotorcraft with less than the minimum flight crew specified in the certificate of airworthiness of the aircraft flight manual."

### **Frequency Change**

At some point during the 11 weeks between when Executive Helicopters received authorization to operate within the Niagara Falls area (March 18, 1993) and the incident that resulted in the allegation against the company (June 10, 1993), Transport Canada decided to change the communications frequency to be used by aircraft in the area. The frequency was changed from 122.9 MHz to 122.05 MHz.

Transport Canada did not notify Executive Helicopters directly of the frequency change, but they did send a letter to notify the helicopter company who conducts most of the sightseeing flights in the area, Niagara Helicopters Limited. Transport Canada stated they did not notify Executive Helicopters because it was their understanding that no pilot currently employed by the Company had received the required briefing. Therefore, Executive Helicopters would not be operating in the area.

### **The Briefing**

Executive Helicopters pointed out that, while Transport Canada states they did not notify Executive Helicopters because none of their pilots had been briefed, Transport Canada did, more than a month later, on July 20, 1993, notify Executive Helicopters that the Niagara Class "F" Airspace would be closed to all traffic for 30 minutes. At this time, Executive Helicopters still did not have any pilots briefed by Transport Canada. Executive Helicopters asked the question, why did Transport notify them of the closure and not notify them of the frequency change, when none of their pilots had been briefed in either case?

Executive Helicopters' position is that, while the documentation clearly shows a pilot briefing from Transport Canada is required before carrying passengers, it is equally clear that there is no requirement that the briefing be received before entering the area on a training flight. There were no passengers on board the flight that resulted in the allegation against Executive Helicopters.

Transport Canada argued that, if it is important that a pilot receive a briefing from Transport before carrying passengers in the area, common sense would say that it is equally important, from a flight safety point of view, to receive the briefing before entering the area on a training flight. A midair collision is a midair collision, no matter whether the aircraft are on a passenger flight, or a training flight.

### **Special Procedures**

Mr. Cooper and Mr. Korzeniowski said that, before departing on the flight in question, they checked the page in the *Canada Flight Supplement* showing the *Niagara Falls VFR Terminal Procedures Chart* and the NOTAM that contains similar information regarding flights in the area.

The text at the bottom of the *NIAGARA FALLS VFR TERMINAL PROCEDURES CHART* in the *Canada Flight Supplement* (Exhibit M-5) reads as follows:

"CYR 518 - Do not enter below 3500' ASL unless authorized. All other aircraft fly clockwise pattern as depicted at a minimum altitude of 3500" ASL. Do not exceed 130 kts IAS.

Broadcast altitude and intentions on 122.050 MHz prior to entry. Monitor 122.050 MHz in the pattern.

Use Niagara Falls Intl Altimeter Setting.

CAUTION: Numerous flights in CYR 518 and high speed aircraft departing Niagara Falls, N.Y. in the vicinity of Whirlpool bridge."

The NOTAM (Exhibit M-4) reads as follows:

"930070 NOTAMR 930069 CYSN ST. CATHERINES

CYSN WEF 9305270901 AMEND CFS: NIAGRA FALL VFR TERMINAL PROC CHART RECOMMENDED SCENIC PATTERN AS FOLLOWS: NORTHERN BOUNDARY OVER RAINBOW BRIDGE, SOUTHERN BOUNDARY OVER RAILWAY YARDS. ALL ACFT FLY CLOCKWISE PATTERN AT A MINALT OF 3500 FT MSL. DO NOT EXCEED 130 KNOTS IAS. BROADCAST INTENTIONS ON 122.05 PRIOR TO ENTRY. MONITOR 122.05 WHEN IN PATTERN. CURRENT ATIMTER SETTING AVBL FROM NIAGRA FALLS INTL ATIS 120.8 OR TWR 118.5. EXTENSIVE FLIGHT ACTIVITY WITHIN THE UNDERLYING RESTRICTED AIRSPCE AND HIGH SPEED FLIGHT ACTIVITY IN VICINITY OF WHIRLPOOL BRIDGE" (underline added)

The procedures outlined in these documents include:

- (1) flying a right-hand race track pattern, as diagrammed in the *Canada Flight Supplement* (Exhibit M-5),
- (2) communicating on 122.050 MHz, and
- (3) flying at an altitude of 3,500 feet above sea level, or higher.

The above information is in contrast to the procedures in *Executive Helicopters' Operations Manual* which shows:

- (1) a totally different flight pattern (Exhibit M-7),
- (2) communications are to be on 122.90 MHz, and
- (3) the aircraft is to fly at altitudes below 3,500 feet above sea level.

Mr. Cooper and Mr. Korzeniowski concluded that the information in the *Canada Flight Supplement* and the NOTAM did not apply to them. They thought it must be intended for someone else, perhaps itinerant, non commercial operations. This, they believed, was further confirmed by the statement in the NOTAM which reads: "Extensive flight activity within the underlying restricted airspace ..." This "underlying restricted airspace" is where they were planning to fly and is precisely the area where their *Operations Manual* authorizes them to fly.

## **DISCUSSION**



Executive Helicopters did not contest Transport Canada's allegation that one of their helicopters, C-FKKM, flew into the restricted airspace while attempting to communicate on the wrong frequency and without the pilot having been briefed by Transport Canada. Executive Helicopters explained that, because their *Operations Manual* had received official approval less than three months before, and they had not been advised of any changes, they had every reason to expect that the information in it would be correct, and that the flight could be properly conducted.

The reason Transport Canada imposes these requirements and restrictions on the air carriers operating in this area is safety. This includes the requirement for the briefing. It is not clear in the record what information might be included in the briefing from Transport Canada that would not have been included in the previous briefing from the company Chief Pilot, or his designate. The content of the briefing, or its importance, did not become an issue and was not thoroughly argued. Transport did state that the briefing would include any changes in the procedures to be followed. Presumably the Chief Pilot would also be immediately advised of any procedural changes so he could inform the previously briefed pilots.

It was also pointed out that Transport Canada is in the best position to know any unique procedures other operators are using, such as entry and exit points, and thus be able to spread important safety details among all the operators. However, surely this type of safety information would be required knowledge for every pilot operating in the area and thus form a prime part of any briefing given by a Chief Pilot.

## **COMMENT**

The requirement for a pilot briefing by Transport Canada is obviously a well-meaning effort to enhance safety. The Appeal Panel would comment, however, that we had difficulty finding evidence in the Record, or during argument at the Appeal Hearing, that clearly established the actual safety benefit provided by the briefings. In fact, in this case, the requirement for a briefing may have had a negative effect on safety.

Transport Canada stated they did not advise Executive Helicopters of the frequency change, because they believed no pilot had been briefed. It then seems reasonable to assume that, had there been no requirement for a briefing, Transport would have automatically advised Executive Helicopters of the frequency change, and the entire incident would probably not have occurred. If this is accurate, it would be unfortunate that a regulation or procedure, introduced specifically to enhance safety, turned out to unexpectedly create a situation that may be more dangerous than the condition that existed before the new regulation or procedure was put in place.

The Tribunal also notes that this incident was brought to Transport Canada's attention by another helicopter company who conducts sightseeing flights over the Niagara area. That company, Niagara Helicopters Limited, was maintaining a listening watch on the old frequency, 122.90 MHz, and heard C-FKKM's call. Mr. Ruedi Hafen, President and Operations Manager of Niagara Helicopters, then made a call to C-FKKM. During this conversation, Mr. Hafen questioned and generally admonished them regarding the communications frequency they were using and whether they had been briefed by Transport Canada. Mr. Hafen concluded the

conversation by stating he was going to give Matt Millar from Transport Canada a call right now. An audio tape of this exchange was submitted to the Review Hearing as Exhibit M-3.

Given that safety is the prime concern, and given the impact that communicating on the radio can have on a pilot's ability to maintain a good lookout for other aircraft, the Tribunal believes this type of conversation is best conducted on the telephone, or face-to-face, while on the ground. Neither Niagara Helicopters nor the St. Catharines Flight Service Station, who monitored the conversation, felt it important to immediately ask C-FKKM to switch to 122.05 MHz. It may have actually occurred, but there was no evidence in the Record that either of them confirmed with C-FKKM such safety-related items as the helicopter's position, altitude or intended flight path, to ensure it was conforming with the other elements of the procedure.

## CONCLUSION

The Tribunal, sitting in Appeal, concludes that both Transport Canada and Executive Helicopter Services Inc. must accept some blame for this incident.

The company acknowledged several times the importance of the pilot receiving a briefing from Transport Canada before conducting passenger flights. They then did not appear to attach equal importance to ensuring the pilot received the briefing before a training flight. Also, assigning a person with a private pilot licence to conduct a familiarization flight, while not, in the Tribunal's view, a contravention of the regulations, does open the question of whether proper judgement was exercised.

The Appeal Panel recognizes that Mr. Gordon Cooper is not qualified to act as an instructor for licensing or conducting line checks or route checks. However, we conclude that this flight was a familiarization flight and not training for licensing purposes.

What is more important, the Tribunal concludes that Transport Canada failed to provide adequate information in their *Niagara Falls Flight Procedures Minimum Requirements* document and in the company *Operations Manual*, regarding the stage in their training at which a new pilot must receive the prescribed briefing from Transport Canada.

Executive Helicopters followed the directions in their amended *Operations Manual*, which is how the system is designed to operate. The Tribunal believes that the onus was on Transport Canada to notify Executive Helicopters of the communications frequency change in CYR518.

Transport Canada demands that all companies abide by the conditions outlined in their *Operations Manual*. It appears to this panel that if the *Operations Manual* is to be an effective tool for management and control, the company must be able to expect that Transport Canada will abide by it as well.

**For the reasons given above, the Appeal is hereby granted.** The Tribunal concludes that, if an infraction of Air Navigation Order V, No. 23, section 18 occurred, it was as a result of a legitimate misunderstanding of Transport Canada's regulations. The misunderstanding arose directly as a result of incomplete directions in the *Niagara Falls Flight Procedures Minimum*

*Requirements* document and in the company *Operations Manual* regarding the point in a pilot's training where a briefing must be conducted by Transport Canada.

**The allegation is therefore dismissed.**

Reasons for Appeal Determination by:

Bruce Pultz, Vice-Chairperson

Concurred:

William Pearson, Q.C., Member

Jack Ellis, Member