

**CIVIL AVIATION TRIBUNAL**

BETWEEN:

**Minister of Transport**, Applicant

- and -

**Foxair Heliservice Inc.**, Respondent

**LEGISLATION:**

*Aeronautics Act*, R.S.C. 1985, c. A-2, ss. 7.7, 8.4

*Canadian Aviation Regulations*, s. 602.13(1)

**Special authorization, Policy letter, Landing, Helicopter, Dictionary definition, Built-up area**

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**Review Determination**  
**Michel Larose**

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**Decision: September 4, 2002**

TRANSLATION

*The Tribunal confirms the Minister of Transport's decision to assess a monetary penalty of \$1,250 for each of the two alleged contraventions. The sum of \$2,500 is to be made payable to the Receiver General for Canada and must be received by the Civil Aviation Tribunal within 15 days of service of this determination.*

A **Review Hearing** on the above matter was held Thursday, June 6, 2002, at 9:00 hours at the courthouse in Montréal, Quebec.

**PRELIMINARY REMARKS**

The procedure was explained to both parties; no preliminary motions were presented, and the parties had reached an agreement before the hearing, to wit, an admission of facts by the Foxair Heliservice Inc. company [hereinafter "the Respondent"] was filed as Exhibit M-1, signed by Messrs. Denis Paré, a Transport Canada investigator, and Christian Assad, chief pilot for the Respondent, on June 6, 2002, and stated as follows:

Madam, Sir,

For the purpose of simplifying the proceedings before this Tribunal, Mr. Christian Assad, representing the FOXAIR HELISERVICE Inc. company in this matter, and I have reached an agreement on the following facts:

1. The FOXAIR HELISERVICE Inc. company is indeed the registered owner of the Bell 222 aircraft registered as C-FJSM, bearing serial number 47065.
2. The aforementioned aircraft did indeed conduct an approach, landing and take-off on October 11, 2001, at or about 17:50 hours local time at Île des Sœurs on a plot of land adjacent to the Jitec building. See attached photo.
3. The aforementioned aircraft did indeed conduct an approach, landing and take-off on December 8, 2001, at or about 23:10 hours local time at Île des Sœurs on a plot of land adjacent to the Jitec building. See attached photo.
4. The pilot-in-command of aircraft C-FJSM for both these flights was Mr. Christian Assad, chief pilot for the FOXAIR HELISERVICE Inc. company.

## **OBJECT OF THE REVIEW HEARING**

The Minister of Transport, through Mr. Denis Paré, is asking the Civil Aviation Tribunal to confirm a notice of assessment of monetary penalty issued and served on the Respondent on January 10, 2002. This penalty in the amount of \$2,500 was to be paid by no later than February 10, 2002, and the Respondent's failure to meet this deadline is the reason for this review hearing:

### **NOTICE OF ASSESSMENT OF MONETARY PENALTY**

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 subsection 602.13(1) of the *Canadian Aviation Regulations*.

See Appendix A

You are being proceeded against pursuant to subsection 8.4(1) of the *Aeronautics Act* as the registered owner.

The foregoing provision has been designated pursuant to section 103.08 of the *Canadian Aviation Regulations* and the procedures in sections 7.7 to 8.2 of the *Aeronautics Act* respecting monetary penalties apply.

The total assessed penalty of \$2,500 must be paid on or before February 10, 2002 to the Regional Manager, Aviation Enforcement, at the address above. Payment may be made in cash or by certified cheque or money order payable to the Receiver General for Canada.

Full payment of the amount specified above will be accepted in complete satisfaction of the penalty assessed and no further proceedings under Part I of the Act shall be taken against you in respect of the contravention.

If the full amount of the penalty has not been received on or before February 10, 2002, a copy of this Notice will be forwarded to the Civil Aviation Tribunal. The Tribunal will request that you appear before it to hear the allegations against you. You will be afforded a full opportunity consistent with procedural fairness and natural justice to present evidence and make representations in relation to the alleged contravention before the Tribunal makes its determination.

The Tribunal has prepared a *Guide to Applicants* which you may obtain from the Registrar.

[...]

<b>Date : January 10, 2002</b>	<b>no. de dossier - file no. : 5504-045740</b>	<b>Nom : Foxair Hélicservice Inc.</b>
<b>APPENDIX A</b>		
<b>Offence No. 1</b>		
On October 11, 2001, at or about 17:50 hours local time, you permitted the Bell 222 aircraft registered as C-FJSM to conduct *a take-off, approach and landing * within a built-up area of Île-des-Sœurs, in the municipality of Verdun, when the take-off, approach and landing were not conducted at an airport or a military aerodrome.		
<b>PENALTY: \$1,250</b>		
<b>Offence No. 2</b>		
On December 8, 2001, at or about 23:10 hours local time, you permitted the Bell 222 aircraft registered as C-FJSM to conduct *a take-off, approach and landing * within a built-up area of Île-des-Sœurs, in the municipality of Verdun, when the take-off, approach and landing were not conducted at an airport or a military aerodrome.		
<b>PENALTY: \$1,250</b>		

## THE LAW

Section 602.12 of the *Canadian Aviation Regulations* (CARs) (relating to Exhibit D-4), subsection 602.13(1) of the CARs and section 703.36 of the CARs stipulate as follows:

## Overflight of Built-up Areas or Open-air Assemblies of Persons during Take-offs, Approaches and Landings

**602.12** Except if conducting a take-off, approach or landing at an airport or military aerodrome, no person shall conduct a take-off, approach or landing in an aircraft during which the aircraft will overfly a built-up area or an open-air assembly of persons, unless the aircraft is operated at an altitude from which, in the event of an engine failure or any other emergency necessitating an immediate landing, it would be possible to land the aircraft without creating a hazard to persons or property on the surface.

## Take-offs, Approaches and Landings within Built-up Areas of Cities and Towns

**602.13** (1) Except if otherwise permitted under this section, section 603.66 or Part VII, no person shall conduct a take-off, approach or landing in an aircraft within a built-up area of a city or town, unless that take-off, approach or landing is conducted at an airport or a military aerodrome.

[...]

## Minimum Altitudes and Distances

**703.36** For the purposes of sections 602.13 and 602.15, a person may conduct a take-off, approach or landing in a helicopter within a built-up area of a city or town, or operate a helicopter at altitudes and distances less than those specified in subsection 602.14(2), if the person

(a) has an authorization from the Minister or is authorized to do so in an air operator certificate; and

(b) complies with the *Commercial Air Service Standards*.

# **THE FACTS (according to the documentary and testimonial evidence)**

## **Evidence of the Applicant**

In view of the admission of certain facts by the parties to this matter, Messrs. Alain Brunelle and Richard Gref were dismissed, as they were the two witnesses to the allegations.

Mr. Denis Paré, on behalf of the Minister of Transport [hereinafter "the Applicant"], then proposed, pursuant to section 7.7 of the *Aeronautics Act* and section 103.08 and subsection 602.13(1) of the CARs (Exhibit M-3) to prove that Mr. Christian Assad, pilot and chief pilot for the Respondent, landed its helicopter registered as C-FJSM twice, in October and in December 2001, on land situated within a built-up area of Île des Sœurs.

He also wanted to prove, with the aid of three witnesses and documentary evidence, that Mr. Christian Assad had made two requests before October and December 2001, in accordance with section 703.36 of the CARs, for approval of a temporary heliport on the site in question and another request for a permanent heliport on a grassy plot of land immediately alongside the aforementioned site (Exhibit M-2).

Mr. Luan Huynh, a civil aviation safety inspector, Aerodrome Safety, helicopter section, was called as the first witness. He has 16 years of experience and he authenticated document M-5, a letter dated September 20, 2000, addressed to Messrs. Bernard Henry, manager, Aerodrome Safety, and Justin Bourgault, regional manager, Aviation Enforcement, and signed by Messrs. Benoit Laliberté, president of Jitec, and Christian Assad, vice-president of Foxair. There are several parts to this letter, as there are two entities, Jitec Corporation and Foxair Heliservice Inc.:

[...]

Jitec is situated on Île des Sœurs, alongside the Champlain Bridge, on the south side. The president and chief executive officer of the company has just purchased the Bell 222 aircraft registered as C-FJSM, currently operated by Foxair Hélicservice of St-Hubert.

Recently the aircraft has conducted several landings in a vacant parking lot adjacent to the Jitec building, with the property owner's consent. After examining the location and public access to it and making a detailed check of the VFR navigation chart showing the location as being nearly half a nautical mile outside the urban area, the operator's chief pilot had deemed it safe and convenient to land on this site by conducting the approach and departure always on the same side, that is, over the water avoiding any buildings. The last portion of the final approach crosses highway 10, a steep approach angle is used to maintain a safety margin with the vehicles on the highway. The aircraft flies along a trajectory that at no time creates a hazard to persons or property on the ground. It should also be noted that this is a twin-engine aircraft.

Plans have been drawn up and bids submitted to turn this site into a very fine heliport that would be lighted and comply in all respects with the established standards. It would be paid for, maintained and used initially by the owners of FJSM (222) and FCOS (Colibri based with Skyservice at Dorval). These are very recent decisions and the closure of the downtown heliport next October 15 has somewhat precipitated events.

This letter and the accompanying documents (Request for Exemption - Appendix A) constitute our official request for a temporary heliport permit. This request was not made earlier because, as explained before, there was no need, in our humble opinion, to do so. We understand that many complaints have been registered, but I submit to you that they would have been made regardless of the status of the site. We sincerely apologize to the authorities and to anyone who has been disturbed by our operations. Obviously, given the visibility of the site, we did not attempt to

land repeatedly at this site without contacting the parties we felt were affected. Furthermore, we are always in contact with Dorval or St-Hubert for authorizations.

However, we can only deplore the fact that it was an unofficial call from a Transport Canada senior official that alerted us to the fact that you assessed the location as being in [a] "built-up area" and that, rather than notifying us immediately of a possible administrative error, you kept us in the dark. We conclude from this that our assessment of the manoeuvre as safe is correct since, logically, were it not, you would certainly have intervened. We venture to believe that we are all here to help one another, and hope we can count on your support and your advice, which we will hasten to act on.

The date of the transaction for helicopter FJSM is today. The details were being worked out at the time of the call in question, which is why we are hastening to contact you in order to come into [compliance], a status we believed we already had.

Since this morning, Christian Assad of Foxair has been appointed to represent the interests of Jitec in the matter of the proposed heliport. The request was conditional on the purchase of the aircraft. The blueprints will be submitted to you in the coming days.

Photos M-6 and M-2 show very clearly, on the one hand the parking lot alongside the building at 16 Place du Commerce and a grassy plot of land alongside the parking lot. The parking lot is where the two alleged contraventions occurred, whereas the grassy plot of land is where the permanent heliport was planned. It should be noted that photo M-2 consists of two photographs, whereas photo M-6 shows the two sites in question.

Mr. Luan Huynh then filed, as Exhibit M-7, an exchange of e-mail communications and related physical evidence, namely a series of photos. They are essentially as follows. On September 15, 2000, Mr. Denis Robillard sent an e-mail to Messrs. Justin Bourgault and Richard Archambault, with a copy to Messrs. Bernard Henry, Yves Gosselin, Jules Pilon and Luan Huynh, with the subject line: Foxair: alleged contravention, and worded as follows:

For your information I have been receiving for 1 week complaints from citizens of Île des Sœurs about a helicopter belonging to Foxair that lands every day taking on passengers in a small parking lot surrounded by buildings.

Luan will go to the site this afternoon to assess whether this is a built-up area. But at first glance, this would seem to be the case.

Here are 2 names and particulars of complainant witnesses to these events that occur daily between 07:00 and 07:30 hours. The registration of the aircraft is C-

FJSM (aircraft for about 10 passengers, according to the witness).  
Company: Foxair

Witnesses

Alain Brunelle, 16 Cour des Fugères, [Îles des Sœurs], 992-0759

Richard Gref, 32 Cour des Fugères, 481-5170

Still under Exhibit M-7 is an e-mail dated September 18, 2000, from Mr. Luan Huynh to Mr. Bernard Henry, with the subject line: Foxair: alleged contravention, very important, and worded as follows:

Here are the observations of Alain Charron and myself at Île des Sœurs with regard to the site used as a heliport for the Bell 222 aircraft C-FJFM [sic] belonging to Foxair:

- This is a paved parking lot on the S.E. side of the 10-storey building at 16 Place de Commerce (enclosed is a scaled drawing of this site as assessed by Alain Charon).
- The site is surrounded by obstacles and buildings and adjacent to the residents of this island (see enclosed photos).

In both our views, it is within the built-up area. I would like to have your final decision to pass on to Denis Robillard.

The photos attached to these e-mail communications are numbered P001402 to P001408, i.e., Exhibits M-8 to M-13.

These aerial photos were taken by the witness Mr. Luan Huynh. In Exhibit M-14, a drawing made by Mr. Alain Charron, the largest dimension in metres is 79 metres and the 10-storey building is at 16 Place du Commerce. This is a scaled topographical view made to be attached to Exhibit M-7, i.e., the various e-mail communications, and the other photos<sup>[1]</sup> were taken by him.

Still with regard to Exhibit M-7, another e-mail dated September 18, 2000, from Mr. Luan Huynh to Mr. Denis Robillard, with a copy to Mr. Alain Charron, with the subject line Foxair: alleged contravention, very important, is worded as follows: "Here is our manager's decision: 'According to the information you provided to me, this is indeed a built-up area and the heliport should be [certified]. Inform the interested parties accordingly'".

Finally, still with regard to Exhibit M-7, another e-mail dated December 17, 2001, from Mr. Luan Huynh to Mr. Jean-Guy Carrier, worded as follows: "In reply to your e-mail of December 17, 2001, concerning the decision that the site [of Île des Sœurs] is a built-up area, here is the decision of our then manager Bernard Henry".

Exhibit M-15 is a record of a telephone call between the witness and Mr. Richard Archambault concerning an exemption to section 703.36 of the CARs for Foxair at Île des Sœurs, and the summary of this conversation of February 2, 2001, is transcribed as follows:

Mr. Archambault tells me that he has given Foxair authorization to land at Île des Sœurs for the last time, according to him, since he has received from Foxair a blueprint for construction as of next week.

We, however, have not been [informed] by Foxair of anything, nor has it provided us with a survey plan, manual or met with us about the construction of this heliport.

This telephone conversation between the witness and Mr. Richard Archambault took place at 8:55 hours on February 2, 2001.

Exhibit M-16 is another record following a meeting between the witness and Mr. Christian Assad, on June 7, 2001, at 1:15 in the afternoon. The subject discussed was the certification of the heliport at Île des Sœurs. This meeting took place during a briefing session of Grand Prix 2001 pilots. Mr. Christian Assad advised Mr. Luan Huynh that he had to halt the whole certification process for the heliport, as his boss wanted to change the site for the heliport and the matter was considered closed until further notice.

Then the witness, returning to Exhibit M-7, namely, the various e-mail communications of September 2000, said that the final decision was that the site was a built-up area and that Mr. Christian Assad had been advised by Mr. Bernard Henry of this decision. He went on to say, moreover, that the features of the land adjacent to the parking lot would have been suitable for a heliport or certifiable with major changes and the standards would have had to be met.

In cross-examination, Mr. Christian Assad asked the witness, Mr. Luan Huynh, to state whether he considered this site to be a built-up area. He repeated his question several times, [but] the witness refused to take a position, stating always that he provided the necessary information to his superior and that it was up to the latter to make the decision. The witness also did not want to provide a specific definition of built-up area, but added that an authorization from Transport Canada is also necessary for any landing and an exemption to land or take-off from a built-up area; it is his boss, not he, who decides, and other than within a built-up area, landings and take-offs are permitted. As a civil aviation safety inspector, Aerodrome Safety, he can only certify the heliport, but any decision about a heliport in a built-up area is made by his boss. When asked again by Mr. Denis Paré, the witness did not want to say that he was giving his opinion on the built-up area, but that there were buildings and other structures on the site in question.

Called as a second witness was Mr. Richard Archambault, regional superintendent, Helicopter Operations, Commercial and Business Aviation for the Québec region since 1982. He authenticated Exhibit M-17, a fax transmittal slip dated February 2, 2001, which is a valid authorization until March 15, 2001, permitting the B222 helicopter to land at Île des Sœurs. This authorization also asks Mr. Christian Assad to have an indication of wind direction in order to properly assess wind direction in the landing area during his approaches and take-offs. This



authorization is pursuant to section 703.36 of the CARs (Exhibit M-4). It is the air carrier that completes the form to obtain such an authorization. This same document also contains an authorization dated October 12, 2000, also valid until March 15, 2001. This type of special authorization, formerly called an exemption, is generally granted for a brief period, while the process is underway to have the requested heliport site officially certified. Exhibit M-2 very clearly identifies the grassy plot of land adjacent to the parking lot for certification of the heliport and the parking lot for the two alleged contraventions. Such an authorization is granted to enable an air operator to operate outside the standards if this is in the public interest. Referring to subsection 602.13(1) of the CARs, this is a built-up area because if it were not, there would be no obligation to grant a special authorization.

Next, Mr. Richard Archambault authenticated Exhibit M-18, which is a reproduction of two e-mail transmissions. The first is from Mr. Jean-Guy Carrier sent to him December 17, 2001, at 8:10 hours, which reads as follows: "Can you confirm to me by e-mail that you have notified the Foxair company that the site of Île [des] Sœurs is considered to be a built-up area and that this site cannot legally be used as a heliport and that no exemption has been issued since March 2001."

And Mr. Richard Archambault's reply to Mr. Jean-Guy Carrier, also on December 17, 2001, at 9:57 hours:

This company, early in the year I believe, asked me for authorization to land on a plot of land situated next to their building on Île des Sœurs. In consultation with NAD I gave them an authorization and warned that they had to have this site certified as I would grant them no further authorizations. Since then the company has made no further requests for authorization and we have heard nothing more on this subject.

If they land again on the same site, they will have to have an authorization or certification as NAD was in the process of making an assessment for this purpose ... I recommend you see NAD about this.

If there is anything else contact me.

According to the witness, this site is within a built-up area, which is why he gave them a special authorization for the parking lot, until the application for a heliport for the adjacent grassy plot of land was certified.

## **Evidence of the Respondent**

In cross-examination, Mr. Christian Assad asked Mr. Richard Archambault what the yellow area on the VFR navigation chart of July 1988 indicated. The witness could not give a definition. This aeronautical chart of the Montréal area of July 1988 (Exhibit D-1) gives topographic data corrected in May 1983. Another VFR navigation chart of the Montréal area, dated February 1995 (Exhibit D-2), shows topographic data corrected in May 1992. Mr. Christian Assad pointed out

to the witness that there was quite a gap between the published charts and the surveyed topographic data, i.e., a difference of 3 to 5 years. The witness confirmed this.

Mr. Christian Assad then asked the witness for a definition of built-up area, and the witness explained that when comparing a site to a clock face with the arms positioned in a cross, between 3 and 9 o'clock, everything that is behind, that is, 3 o'clock, 6 o'clock to 9 o'clock, with buildings is inside a built-up area, and everything that is in front, that is, 3 o'clock, 12 o'clock, 9 o'clock, is outside: this is the "inside and outside" principle [in the French expression "le principe d'Alain et d'Alex," Alain refers to "à l'intérieur" (inside), and Alex to "à l'extérieur" (outside)] and for inside, an authorization is needed. Mr. Christian Assad asked whether one can find a particular text defining a built-up area, and Mr. Richard Archambault replied that there is a consensus in aviation. He confirmed that the pilot does not have access to a specific definition of built-up area.

Mr. Christian Assad asked the witness whether the pilot's judgement is sufficient for judging if a place is safe for a landing. Mr. Archambault answered that, in general, he visits the location and also judges the calibre of the carrier. He admitted, however, that he did not always visit the location and that he may in the past have given an authorization without a specific visit to this site. In this regard, Mr. Assad filed a photo, Exhibit D-3, showing a landing site that had allegedly been authorized for landing on Taschereau Boulevard on Montréal's south shore. Mr. Archambault also confirmed the fact that an authorization had previously been given in October and another in February 2001, both valid until March 15, 2001. When asked whether landing a twin-engine aircraft in a parking lot creates a hazard to persons or property, Mr. Archambault replied that a twin-engine aircraft is actually safer, but also that this should not be done too often. Mr. Assad got confirmation that he had been given a special authorization for 105 consecutive days and this proved safe, which the witness could not deny, and that he stopped landing and taking off once the authorizations expired, and that the two alleged contraventions followed the expiry of the authorizations.

The witness confirmed that he indeed had telephone conversations with Mr. Assad about the definition of built-up area. In this regard, Mr. Archambault explained to Mr. Assad that there were several draft definitions of built-up area with regard particularly to section 703.36 of the CARs, and two documents were filed, Exhibits M-21 and M-22, bearing number 64978, but undated, to which the witness referred:

Exhibit M-21 : POLICY LETTER - Number 64978

[...] In general, 'built-up' means a group of structures that are erected or built by man and includes private dwelling residences, schools, elevators, service stations and so forth. [...] In situations where there is some doubt, it is better to err on the side of caution and issue an authorization.

[...]

Exhibit M-22 : POLICY LETTER - Number 64978

[...] within the Province of Nova Scotia, 'regional municipalities' shall be considered to be cities.

[...] In general, 'built-up' means a group of structures that are erected or built by man and includes private dwelling residences, schools, elevators, service stations and so forth. [...] In situations where there is some doubt, it is better to err on the side of caution and issue an authorization.

[...] This should only be issued in exceptional circumstances and never to allow an air operator to avoid certifying a site which normally is required to be certified under CAR 602.13. If this Operations Specification is to be issued, the site should be such that it would meet the standard for certification with only minor modification.

And the new policy of April 24, 2002 (Number 145 - Exhibit M-20) in no way changes the interpretation of a built-up area, and according to the witness there is no reference to the distances of buildings for interpreting the term "built-up area":

[...]

There is a significant body of jurisprudence regarding the interpretation of what constitutes "built-up", most of which is in the context of low flying violations. In general, "built-up" means a group of structures that are erected or built by man and includes private dwelling residences, schools, elevators, service stations and so forth. A departmental legal opinion indicates that a dock could be considered such a structure, particularly if it can be shown that there is a risk of damage to property or injury to persons. In situations where there is some doubt, it is better to err on the side of caution and issue an authorization.

The word "within" in this context has been interpreted to mean substantially surrounded by the "built-up area." [...]

Mr. Christian Assad then filed the proposed *Regulations Amending the Canadian Aviation Regulations (Part VI)* (Exhibit D-4) concerning section 602.12 of the CARs, in particular subsection 602.12(2) (proposed amendment of section 602.12 of the CARs - Part VI, *Canada Gazette*, Part I, September 8, 2001):

[...]

(2) Except at an airport or military aerodrome, no person shall conduct a take-off, approach or landing in an aircraft **over** a built-up area or over an open-air assembly of persons, in a manner that is likely to create a hazard to persons or property.

[...] [emphasis added]

In view of subsection 602.13(1) of the CARs and subsection 602.12(2) of the proposed regulations, he believes there is some ambiguity, so as to clearly convey the impression that one can conduct a landing, take-off or approach in a built-up area other than at an airport or a military aerodrome provided it is done without creating a hazard to persons or property. To this, Mr. Archambault replied that section 602.12 is not about the landing or take-off as it is intended to clearly distinguish "overflight" and this regulation is intended to eliminate any overflight of a built-up area.

Mr. Archambault confirmed the fact that the Respondent has been officially warned that this was a built-up area and that is why he had given two special authorizations, in October 2000 and February 2001, before certification of the proposed heliport.

## **ARGUMENT**

Mr. Denis Paré, for the Applicant, has shown that the Respondent contravened subsection 602.13(1) of the CARs with regard to the approach, landing and take-off in a built-up area of the city of Verdun on October 11, 2001, at or about 17:50 hours local time, and on December 8, 2001, at or about 23:10 hours local time.

Mr. Christian Assad knew very well that this was a "built-up area" of the city of Verdun as his repeated steps to obtain authorization for a certified heliport show it to be a site adjacent to the parking lot where the two alleged contraventions occurred. He received two special authorizations required to use the site in question. The last authorization expired March 15, 2001. He refers to subsection 602.12(2) of the proposed regulations, but this does not apply to the case in question.

Concerning the built-up area, Mr. Assad received definitions or draft definitions from Mr. Archambault during telephone conversations, but the consensus in aviation with regard to "Alain" (inside) and "Alex" (outside) still holds. According to Mr. Paré this therefore constitutes an intentional disregard of the CARs and, aviation safety being compromised, the Tribunal should confirm the Applicant's decisions.

Mr. Assad pointed out that the fact that he had formally requested certification of a heliport and made requests for special authorizations does not necessarily show that this was a built-up area, but this was to avoid citizens' complaints. He also believes the definition of built-up area is very vague and that it is the pilot who judges whether an area is built-up. He says he no longer lands without a site visit by Transport Canada and it was at the recommendation of the helicopter's owner, Mr. Benoit Laliberté of Jitec, that he took steps to have a heliport certified. No one from Transport Canada told him that this was a built-up area and even after expiry of the authorization, when he asked verbally for the definition of a built-up area, he got no satisfactory reply. What is more, Transport Canada knew very well that he had been landing at this site since 2000 and, according to him, Transport Canada has simply reacted to the complaints.

According to Mr. Christian Assad, this is not a case of public nuisance because of noise, since the residents of the city of Verdun, especially of Île des Sœurs, had no objection to his landing at this site. This island has private dwellings, a commercial and industrial zone, there are even ten

zoning categories. For the residential area, the density must be low, average or very high. The zone in question is an industrial zone according to the municipality of Verdun, and the municipality had no objection to his landing at this site since the building was vacant and the parking lot was outside a built-up area and safe. He repeated that he never thought he was in a built-up area and this definition of built-up area proves more or less appropriate. He also was very surprised that he was authorized to land for 105 consecutive days and stopped his landings in mid-March 2001 and would have had to pay the sum of \$325 for an additional request for a special authorization. He feels that he paid for the bickering between the citizens, the city of Verdun and Transport Canada and that he has always been mindful of safety.

Exhibit M-19 , which is the complete file of the request for a certified heliport, proves that the city and the citizens were in agreement and that a number of persons were interested in this project.

In rebuttal, Mr. Denis Paré pointed out that even though the definitions of "built-up area" were in preliminary form, this policy letter was on the Transport Canada Internet site, in particular the definition and the official policy letter of April 24, 2002. He went on to say that it is not the user who decides whether an area is built-up or not. A built-up area is clearly different in terms of housing, strictly speaking, and aviation. There are in fact two highways near the parking lot used, highways 15 and 10. There is a definite difference between what a city may decide and what Transport Canada may decide. It is not noise that guides Transport Canada, it is the risk to safety. Indeed, whether or not a building is vacant or the parking lot is used, the fact remains that there are two highways and several buildings and the land is not at all fenced in. As for the amount of the penalties, Mr. Paré mentioned that for a first offence for a corporation in contravention of subsection 602.13(1) of the CARs, the *Aviation Enforcement Procedures Manual* recommends the amount of \$1,250 (x 2). Mr. Christian Assad had no comment to make about this.

## DISCUSSION

The Tribunal must therefore determine, on the balance of probabilities, whether the Applicant has met the burden of proof by proving all of the elements of the two offences of which the Respondent is accused and the penalty relating to subsection 602.13(1) of the CARs. To this query, the Tribunal answers "yes," for the following reasons:

Mr. Christian Assad was the pilot-in-command of the aircraft (helicopter) C-FJSM and co-owner of Foxair Heliservice Inc. He admitted, before the hearing, that he had conducted two approaches, landings and take-offs, on October 11 and December 8, 2001, on land adjacent to the Jitec building on Île des Sœurs. This admission of the facts was signed by both parties, namely, Mr. Assad, chief pilot at Foxair Heliservice Inc., and Mr. Denis Paré, for the Applicant.

The land adjacent to the Jitec building on Île des Sœurs is certainly not an airport or a military aerodrome as defined in section 3 of the *Aeronautics Act*.

According to the *Cities and Towns Act*, Île des Sœurs was part of the city of Verdun until one second after 00:00 hours on January 1, 2002, that is to say, at the time of the alleged contraventions on October 11 and December 8, 2001. A city is defined as "a town or other

inhabited place. A large town; *spec.* a town created a 'city' by charter, esp. as containing a cathedral. Also, a municipal corporation occupying a definite area. The people or entire community of a city."<sup>[2]</sup> In this regard, neither the Applicant nor the Respondent, in either their evidence or their respective arguments, has ever challenged the status of "city." There is therefore no reason for the Tribunal to dwell further on this.

There remains the matter of "built-up area," which is the crux of the dispute. When the legislature drafts an act and its regulations, in this case the *Aeronautics Act*, the foundation of which is the safety of persons and property, it does not speak in order to say nothing, and as it has not defined "built-up area," we must turn to the dictionaries of common usage.<sup>[3]</sup>

There is abundant jurisprudence on "within a built-up area," and in *Delco Aviation Limited v. Minister of Transport*,<sup>[4]</sup> the Chairperson of the Tribunal, Ms. Faye Smith, refers to *R. v. Crocker*<sup>[5]</sup> in which, according to the judge, a built-up area is not confined to regions situated within incorporated regions; rather, one must determine whether an area is built-up from the situation on the ground. "The regulations are designed for pilots and thus built-up areas should be recognizable from the air."

As for the three Transport Canada policy letters, two undated drafts (M-21 and M-22) and one dated April 24, 2002, after the alleged events, this one being the official policy of Transport Canada for the definition of "within a built-up area" in respect of sections 702.22, 703.36 and 602.13 of the CARs, the Tribunal cannot accept them as elements of proof.

In the case under study, the Tribunal could easily, just from the aerial photos filed, decide that the two landings and take-offs were conducted in a parking lot located in a built-up area,<sup>[6]</sup> but as the Respondent is entitled to detailed reasons for the decision, the documentary and testimonial evidence will be considered together, taking the chronology of events into account.

On September 15, 2000, following citizens' complaints that a helicopter belonging to Foxair was landing every day in a small parking lot surrounded by buildings to take on passengers, Mr. Denis Robillard of Transport Canada wrote to Messrs. Justin Bourgault and Richard Archambault, with a copy to Messrs. Bernard Henry, Yves Gosselin, Jules Pilon and Luan Huynh.

On September 18, 2000, Mr. Luan Huynh, accompanied by Mr. Alain Charron, visited the site of the landings and take-offs in question and took aerial photos - 1402 Helico and NE side of the site used as a heliport - 1408 view from the SE side of the site - 1407 view from the SW side of the site - 1406 view from the NW side of the site - and concluded that it was a paved parking lot on the SE side of the 10-storey building at 16 Place du Commerce.<sup>[7]</sup> A scaled drawing (M-14) of this site shows that it is surrounded by obstacles, buildings and is adjacent to the residents of this island. Both consider it a built-up area and Mr. Huynh informed Mr. Bernard Henry of this. In response, Mr. Henry asked Mr. Huynh to inform the interested parties of this and that the heliport would have to be certified. This was directed on September 20, 2000.

Mr. Christian Assad considered the location to be outside the urban area by nearly half a nautical mile according to the VTA aeronautical chart. He mentioned his approach and his departure over

the water, avoiding any buildings (M-5). Mr. Assad wanted to get a certified heliport on the grassy plot of land adjacent to the aforementioned parking lot and proposed to file the plans and call for bids. Still in this same document, he requested an exemption (special authorization) for a temporary heliport. Finally, he confessed that a senior Transport Canada official warned him that the site was considered to be a "built-up area."

On October 12, 2000, Mr. Archambault granted a special authorization valid until March 15, 2001 (M-17), in accordance with section 703.36 of the CARs. A second special authorization was granted February 2, 2001, also valid until March 15, 2001. For these authorizations, the operator itself completes the requests with the required specifications.

On October 13, 2000 (M-19), Mr. Huynh wrote to the Respondent informing it that the heliport could be certified for one or two approach paths with certain mandatory changes in order to comply with the certification standards. This aspect is not part of this dispute.

On January 18, 2001, Mr. Assad requested a postponement of the work to be done by the Montsud company because of the winter season. During this period, the two special authorizations were still in effect.

On June 7, 2001, the project for a certified heliport was abandoned.

Then, on October 11 and December 8, 2001, Mr. Assad landed at this same site, knowing that Transport Canada considered it to be a "built-up area" requiring two special authorizations that had expired March 15, 2001, and he was well aware of this fact.

- How can Mr. Assad, for the Respondent, today plead in defence the two aeronautical charts (VTA) with surveys dating from May 1983 for July 1988, [and from] May 1992 for February 1995?
- How could he cite subsection 602.12(2) of the proposed regulations, which speaks of "overflight" of a built-up area, when Transport Canada has never cited it and it cannot in any way be confused with subsection 602.13(1) of the CARs?
- How could he cite the reason of noise rather than refer to the notion of hazard of the two highways, the residents and the nearby buildings?
- How could he cite the cost of \$325 for a special authorization in connection with safety? The Tribunal notes that these costs were duly paid once or twice for these special authorizations in accordance with section 703.36 of the CARs from October 12, 2000, to March 15, 2001.

The Tribunal also wishes to point out that the Respondent's chief pilot is unaware of the "inside and outside" principle, which Mr. Richard Archambault testified is recognized by the aviation community.

The shoreline of the island or even the spaces free of any buildings might meet the standards for a certified heliport. Finally, this parking lot is alongside the 10-storey building at 16 Place du Commerce and a little to the north is 14 Place du Commerce, a 5-storey building, to the east, at

1001 Levert, is a large 1-storey building that is the Bank of Canada, and just to the southwest is 20 Place du Commerce, a 3-storey building.

As for the monetary penalty, it is true that the *Aviation Enforcement Procedures Manual* is not a regulation, but it serves as a guide for Transport Canada for the various offences. The purpose of this penalty is to inform, deter and re-educate. In this particular case, the Respondent's chief pilot and co-owner did not exercise all due diligence to prevent these two contraventions.

Moreover, the Tribunal considers, as a mitigating factor, the Respondent's unblemished record and its 105 days of special authorization to land and take off from the same site, and as an aggravating factor, the fact that after two special authorizations, it did not see fit to request and pay the fees for a third special authorization for the period of October 11 to December 8, 2001.<sup>[8]</sup>

## CONCLUSION

**The Tribunal therefore confirms the notice of monetary assessment for the two alleged contraventions.**

Dr. Michel Larose  
Member  
Civil Aviation Tribunal

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<sup>[1]</sup> "Topography: A detailed description, delineation, or representation on a map of the features of a place. The detailed description or mapping of the natural and artificial features of a town, district, etc. The identification of the locality or local distribution of a thing. The surface features of a place or region collectively." (*The New Shorter Oxford English Dictionary*, 1993, p. 3341).

<sup>[2]</sup> *The New Shorter Oxford English Dictionary*, 1993, p. 407.

<sup>[3]</sup> *Collins Robert English-French Dictionary*, Fifth Edition, 2000, p. 987: the French terms: "zone: zone, area"; "bâti,e: developed site." *The New Shorter Oxford English Dictionary*, 1993, p. 296: "built-up: fully occupied by houses etc.," p. 110: "area: a particular tract of the earth's surface; a region; a neighbourhood; a vicinity." As for the definition of "within" (p. 3705), this means "inside or not beyond the limits or boundaries of (a place); inside (specified boundaries)."

<sup>[4]</sup> CAT File No. O-1918-41, on appeal.

<sup>[5]</sup> (1979) N.S. County Court, O' Hearn, J.C.C.

<sup>[6]</sup> "[A] picture is worth a thousand words," *Minister of Transport v. Delco Aviation Limited*, Mr. Pierre Beauchamp, CAT File No. Q-1918-41.

<sup>[7]</sup> Graphic representation of a plot of land, of the situation of territory, showing its features.



<sup>[8]</sup> The Wyer decision: *Minister of Transport v. Kurt William M. Wyer*, CAT File No. O-0075-33, appeal.