

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Joseph Dan Elie Bellefleur, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Canadian Aviation Regulations, SOR/96-433, section 602.01

Canadian Aviation Regulations, SOR/96-433, subsection 401.28(1)

Review Determination
Franco Pietracupa

Decision: May 17, 2016

Citation: *Bellefleur v. Canada (Minister of Transport)*, 2016 TATCE 13 (Review)

Heard in: Edmunston, New Brunswick, on January 26, 2016

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven, on the balance of probabilities, that the applicant, Joseph Dan Elie Bellefleur, contravened subsection 401.28(1) and section 602.01 of the *Canadian Aviation Regulations*. Consequently, the monetary penalty of \$1,000 for each contravention is maintained.

The total amount of \$2,000 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.

I. BACKGROUND

[1] On October 31, 2014, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) in the total amount of \$2,000 to the applicant, Joseph Dan Elie Bellefleur, pursuant to section 7.7 of the *Aeronautics Act*, R.S.C., 1985, c. A-2, for two

contraventions. The first relates to subsection 401.28(1) of the *Canadian Aviation Regulations*, SOR/96-433 (*CARs*), and the second to section 602.01 of the same regulations.

[2] Schedule A to the Notice sets out the charges as follows:

[*CARs* 401.28(1)]

On or about August 13, 2014 at approximately 0012Z at or near Edmunston, New Brunswick, as the holder of a private pilot licence, you, Joseph Dan Elie Bellefleur, acted as the pilot of C-172, C-FHLQ, for hire or reward when the conditions set out in subsection 401.28(2), (3) (4) or (5) of the Canadian Aviation Regulations (*CARs*), as applicable, were not met, thereby contravening subsection 401.28(1) of the *CARs*.

Monetary penalty of \$1000.00 assessed.

[*CARs* 602.01]

On or about November 11, 2013, at approximately 1806Z, at or near Edmunston, New Brunswick, you, Joseph Dan Elie Bellefleur, operated an aircraft, C-172, C-FHLQ, in such a negligent manner that likely endangered the life or property of any person, thereby contravening section 602.01 of the Canadian Aviation Regulations.

Monetary penalty of \$1000.00 assessed.

Total Monetary Penalty Assessed: \$2000

[3] The applicant requested a review of this matter by the Transportation Appeal Tribunal of Canada (Tribunal) on December 1, 2014. A review hearing was initially scheduled for July 7 and 8, 2015, but was then rescheduled for January 26 and 27, 2016 at the request of the applicant.

II. STATUTES AND REGULATIONS

[4] Subsection 7.7(1) of the *Aeronautics Act* states the following:

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] The provisions allegedly breached by the applicant are set out in sections 401.28 and 602.01 of the *CARs* as follows:

401.28 (1) The holder of a private pilot licence shall not act as the pilot-in-command of an aeroplane or helicopter for hire or reward unless the conditions set out in subsection (2), (3), (4) or (5), as applicable, are met.

(2) The holder of a private pilot licence may receive reimbursement for costs incurred in respect of a flight if the holder

(a) is the owner or operator of the aircraft;

(b) conducts the flight for purposes other than hire or reward;

(c) carries passengers only incidentally to the purposes of the flight; and

(d) receives a reimbursement that

(i) is provided only by the passengers referred to in paragraph (c), and

(ii) is for the purpose of sharing the costs of fuel, oil and fees charged against the aircraft in respect of the flight, as applicable.

[...]

602.01 No person shall operate an aircraft in such a reckless or negligent manner as to endanger or be likely to endanger the life or property of any person.

III. OBJECTION TO THE ADMISSIBILITY OF EVIDENCE

[6] The Minister tried to introduce into evidence two audio recordings of phone conversations (Exhibits M-5 and M-6). The applicant objected to this evidence.

[7] The phone conversations were allegedly between Inspector Michael McDermott of Transport Canada and a third party he contacted during his investigation into the alleged contraventions. As per those recordings, the person receiving the call was called at his/her house and was asked information about himself/herself and his/her dealings with the applicant. Mr. McDermott identified himself as someone calling from Transport Canada but did not identify himself as an inspector. The person receiving the call was not informed of the purpose of the call or that a contravention was being investigated, he/she was not asked to give a statement, he/she was not advised that the call was being recorded or that the recorded conversation would potentially be used as evidence in a public legal proceeding. He/she was not called as a witness at the hearing.

[8] Evidence is accepted by the Tribunal subject to the review member's evaluation with respect to its admissibility and the weight it shall be given. Exhibits M-5 and M-6 must not only be considered in light of subsections 15(1) and (2) of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29 (*TATC Act*), they must also be dealt with in consideration of fairness and natural justice as specified in subsection 7.91(3) of the *Aeronautics Act*. Additionally, as the Supreme Court stated in paragraph 35 of its decision in the case of *Doré v. Barreau du Québec*, 2012 SCC 12, administrative decisions are always required to consider fundamental values and the *Canadian Charter of Rights and Freedoms* acts as a reminder that some values are clearly fundamental and cannot be violated lightly.

[9] Generally, a conversation between the originator and the recipient of a call is reasonably expected to be private unless otherwise stated or unless there is an explicit authorization to intercept it and disclose it to other audiences. This country's highest court has concluded that there is an infringement of privacy—a *Charter* value—when an agent of the state records a conversation without prior judicial authorization: “if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to the right to live our lives free from surveillance” (*R. v. Duarte*, [1990] 1 SCR 30).

[10] At no point in either of the two recordings does the inspector identify himself as an inspector investigating a possible contravention, nor does he advise the recipient of the calls that the conversations are being recorded, or inform him of the purpose of the calls.

[11] In addition to raising the issue of a *Charter* value infringement, this situation is incompatible with the statutory objectives of the *Aeronautics Act* in regard to the powers of inspectors. Section 8.7 of the *Aeronautics Act*, does not contain a provision that could be construed to allow inspectors call someone at their dwelling and record them without their knowledge and then use the recording as evidence. In fact, subsection 8.7(4) states that an inspector may not enter a dwelling-house without the consent of the occupant or without a warrant. In this case, there was no judicial authorization allowing the inspector (an agent of the state) to record a conversation and use it as evidence in a public legal proceeding, and there was no evidence that the receiver of the call was ever made aware before the hearing that the information provided was going to be used by the state in a public legal proceeding.

[12] The person heard on the recordings could have been called as a witness and given testimony under oath. If that had been the case, the recordings could perhaps have been used to question or contradict that testimony. However, as the applicant pointed out at the hearing in stating his objection to the admission of this evidence, the Minister chose not to call this person to testify. The Tribunal considers that the statements in these recordings, which are from a person who was not legally called to give evidence before the Tribunal, cannot be admissible as evidence of the truth of the facts contained in them. Where evidence was obtained without the knowledge or consent of the person it involves and identifies, using it would affect that person's privacy and admitting it into the evidentiary record would be to the detriment of fairness in the administration of justice.

[13] Based on the several principles that this evidence violates, it will be given no further consideration.

IV. EVIDENCE

A. Minister of Transport

(1) Michael McDermott

[14] Mr. McDermott currently holds the position of Civil Aviation Director, Aircraft Services at Transport Canada. Prior to this, he worked in the Civil Aviation Enforcement branch of Transport Canada in Moncton, New Brunswick. He testified that he had been assigned to investigate complaints made to Transport Canada by the general public about the possibility of an air operator operating an aircraft in an unsafe manner and possibly operating for reward or hire without the appropriate approvals.

[15] Mr. McDermott explained that after investigating the complaints, two monetary penalties of \$1,000 each were assessed against Mr. Bellefleur, the applicant (Exhibit M-1). The Notice alleged that the applicant, the holder of a private pilot licence, had acted as a pilot for hire or reward without meeting any of the required conditions specified in *CARs* subsections 401.28(2), (3), (4) and (5) and, on a different date, that he had operated an aircraft in a negligent manner that likely endangered a person's life or property, contrary to section 602.01 of the *CARs*.

[16] The witness specified that the first contravention had taken place on August 13, 2014 and the second on November 11, 2013. He went on to confirm that Mr. Bellefleur was a holder of a

Canadian private pilot licence and the registered owner of a Cessna C-172 bearing registration mark C-FHLQ (Exhibits M-2 and M-3).

(a) Charge 1, CARs 401.28(1)

[17] Mr. McDermott testified that under subsection 401.28(1) of the *CARs*, a private pilot licence holder could not act as the pilot-in-command of an aeroplane for hire or reward unless the conditions that were set out in subsections (2), (3), (4), or (5) are met. He went on to clarify that the holder of a private pilot licence may only receive reimbursement for costs incurred during a flight and only if these costs relate to direct operating costs such as fuel, oil and any applicable airport fees.

[18] The witness testified that none of the exceptions listed in subsections (3) to (5) would be applicable in regard to the applicant, as the flight was not conducted on behalf of the license holder's employer or a charitable, not-for-profit or public security organization, nor was the license holder a farmer.

[19] Mr. McDermott directed the Tribunal's attention to an entry in aircraft C-FHLQ's logbook dated August 13, 2014, which indicated a flight conducted by Mr. Bellefleur with three passengers identified as "A.P. + 2" (Exhibit M-4). The Minister's witness also produced an excerpt from the Facebook page of an individual who posted pictures of a plane ride taken on August 13 and of himself with his two children next to a plane similar to the applicant's, and thanking Mr. Bellefleur for the ride (Exhibit M-10). This individual's name would be consistent with the initials "A.P." entered in the logbook. Additionally, the witness testified having spoken to this individual, who allegedly stated having paid \$120 for the ride.

[20] Mr. McDermott also explained that during the period from April 2014 to July 2014, weekly publicity ads were being placed by Mr. Bellefleur in the local paper advertising local aeroplane tours and rides (Exhibit M-7). The ad specifically mentioned aerial tours, aerial photography of property, towns or villages. It also included a picture of Mr. Bellefleur and of aircraft C-FHLQ.

[21] Mr. McDermott stated that in addition to these ads, the official festival program of the 2014 *Congrès mondial acadien* ("World Acadian Congress") listed a "parallel event" consisting of airplane tours over Edmunston, New Brunswick, providing the applicant's email address as the contact information (Exhibit M-8).

(b) Charge 2, CARs 602.1

[22] Mr. McDermott testified that under *CARs* section 602.01, it is prohibited to operate an aircraft in a reckless or negligent manner. In support of the Minister's allegation that the applicant contravened this provision, a video downloaded from the applicant's Facebook page was produced (Exhibit M-11).

[23] In the video, which was taken onboard a Cessna aircraft, the applicant can be heard saying that he will be demonstrating a simulated engine failure on his single-engine Cessna 172.

The pilot then proceeds to shut down his engine roughly halfway through the video and glide to the runway for a non-eventful landing.

[24] Based on an entry from the logbook of aircraft C-FHLQ (Exhibit M-4), a flight was conducted on November 11, 2013 with Mr. Bellefleur listed as pilot-in-command. The witness confirmed that the voice heard and aircraft shown on the video belonged to Mr. Bellefleur. It was filmed onboard his aircraft and in the circuit pattern overhead the Edmunston airport. It clearly shows the applicant shutting down the aircraft engine and then proceeding to glide to a landing on runway 34.

[25] Mr. McDermott testified that the Edmunston airport is an uncontrolled airfield in which no active air traffic control services are available. As such, it was mentioned that all incoming and departing aircrafts do so of their own accord with the required radio traffic information broadcasts to other aircraft. He also described the immediate surroundings of the airport and landing runway as comprising hangars, homes and a highway on either side.

[26] Mr. McDermott testified to the various circumstances that could have arisen once the engine on the aircraft had been shut down. Changing wind conditions, obstacles on the runway or any other situation in which the applicant would need to apply engine power in order to either go around or ensure landing would prove to be very problematic, assuming the engine would restart at all. He went on to explain that several teaching techniques exist and are recommended by Transport Canada that simulate zero-engine-thrust conditions and thus allow students and licensed pilots to safely practice “simulated” engine failures without actually having to shut down the engine. He went on to say that he would never recommend shutting down the engine during a flight to anyone.

[27] As to the sanctions imposed on Mr. Bellefleur, the witness explained that the amounts assessed against the applicant were the minimum first-level penalties applicable where there are no aggravating circumstances and no prior history of contraventions.

(2) *Cross-examination of Mr. McDermott*

[28] In cross-examination, the applicant drew the witness's attention to the fact that the complaints against him were said to have been made by members the public. Mr. McDermott explained that the complaints were not taken by him but forwarded to his attention by his acting manager at the time. He stated that he was unaware of who had lodged the complaints. When asked if the complaint was in fact lodged by a competitor in the region, Mr. McDermott responded that he was not the person receiving the complaints but the one conducting the investigation.

[29] The applicant also asked the witness if any of the ads that were entered into evidence included a price or cost. He replied that they did not.

(3) *Re-examination of Mr. McDermott*

[30] Mr. McDermott explained that complaints made by the general public are often anonymous, with no need for the complainants to actually identify themselves. They are received in various ways including by phone or email, or through Canadian Aviation Daily Occurrence

Reporting System (CADORS) reports. Once received, complaints are forwarded to Transport Canada's Enforcement Branch for further investigation.

B. Applicant

(1) *Joseph Dan Elie Bellefleur*

[31] Mr. Bellefleur testified that at no time did he receive any remuneration for any of the flights he had conducted with passengers. If remuneration was given, it was to help offset his operating costs such as fuel and oil. He went on to explain that when he was contacted for an airplane tour, callers were told the rides were free.

[32] Such a flight did take place on August 13, 2014 with the individual with initials "A.P.", who had called to request an airplane tour with his/her children. The applicant explained that at the end of the flight, A.P. had offered him \$120. He had refused at first, explaining that he could not receive any remuneration for the flight. A.P. had insisted and the money was eventually accepted. Mr. Bellefleur again re-iterated that the airplane tours he advertised were free and that if he had wanted to charge for them he would have included the applicable fees in the ads.

[33] The witness was told that complaints were lodged by members of the general public, although no names were ever mentioned by Transport Canada. Mr. Bellefleur stated that he believed that the complaints had in fact been made by a single company in the region that views his ads as direct competition to its service.

[34] With regard to the second contravention, Mr. Bellefleur explained that he had properly assessed the situation prior to shutting down his engine. He made reference to the video to explain that he had a perfect view of the runway during this engine failure practice. He explained that the airport grounds are secured by fencing, thus eliminating any potential obstacle or people inadvertently entering the runway surface area (Exhibit R-1). He added that if this had occurred, he would have been able to restart his engine in a few seconds and proceed to a go-around.

[35] In referencing the video, he highlighted that he did restart the engine approximately three seconds after having landed the airplane. The applicant stated that demonstrating and practicing an engine failure with an actual engine shutdown was important both to himself and to his passengers. He needed to know that if such a situation were to occur one day, he would be able to handle it without panic and safely land the aircraft. Imposing a monetary penalty for having conducted a safety exercise is unwarranted in his view, especially since the airport is properly fenced in and the maneuver posed no danger to anyone or anything.

(2) *Cross-examination of Mr. Bellefleur*

[36] Mr. Bellefleur confirmed that the pictures of the airport (Exhibit R-1) were taken approximately two weeks after the November 13, 2013 flight. The applicant estimated the height of the fence encompassing the airport property to be approximately six feet. When asked if he was sure of this height in reference to a tractor in one of the pictures, Mr. Bellefleur replied that his estimate was correct.

[37] Regarding the various roads, homes and hangars on the airport grounds and in its vicinity, Mr. Bellefleur admitted that some are visible but not close to the airport, and he did acknowledge that there are some hangars and offices in and around the immediate airport area.

[38] Mr. Bellefleur was asked to describe the sequence and checklist required to start the airplane engine on the ground. The applicant explained this in detail, including the run-up sequence. He was also asked to explain how the engine shutdown procedure was done in the video that was screened. Mr. Bellefleur stated that he had applied his carburetor heat and then pulled the mixture knob to the cut-off position.

[39] The applicant was asked if the picture appearing in the ads (Exhibit M-7) was in fact a picture of him and his aircraft, C-FHLQ. He replied it was. He went on to explain that the ads were published free of charge by the local paper. He again re-iterated that if he happened to be at the airport and the circumstances permitted him to do so, he would provide free airplane rides to those interested.

[40] Asked then to explain why he advertises airplane tours quite extensively in the local paper and online, Mr. Bellefleur explained that he simply enjoys having company when he flies and that it also allows him to build flight time towards his professional license. He also admitted to having previously had his licence suspended for thirty days by Transport Canada due to errors in logbook entries.

[41] When asked by the Minister's representative directly if he had accepted any reward for the tours he had conducted, the applicant stated that if he had, it was because the passengers had been persistent in offering one. At no time did he charge any passengers but when they insisted on paying he felt he had no other choice but to accept.

[42] Following his cross-examination, the applicant stated again that all the airplane tours were provided free of charge. He often flew alone and having company made for a more enjoyable flight experience. He went on to explain that he understands that he cannot charge passengers and that he is certain that any public complaint made to Transport Canada was made by a local aviation competitor seeking to discredit him.

V. ARGUMENTS

A. Minister of Transport

(1) Charge 1, CARs 401.28(1)

[43] The Minister alleges that the applicant did fly on August 13, 2014 on aircraft C-FHLQ as pilot-in-command along with three passengers. This is well documented in the logbook entered as evidence. Furthermore, the applicant placed ads almost weekly from April 2014 to July 2014 in which he clearly advertised airplane tours.

[44] Although no pricing is mentioned in the ads, one can see that other ads in the same paper also omit to mention pricing and this does not necessarily indicate that the services are free. The applicant in fact admitted under oath to having accepted remuneration for flights. Since the

applicant's argument is that the airplane tours are free, then the Minister questions the need to place so many ads in the local paper and on Facebook for this service.

[45] In order for Mr. Bellefleur to be legally remunerated for these tours, they must meet the requirements of *CARs* section 401.28. It is the Minister's submission that they do not. The flight conducted on August 13, 2014 did not meet any of the conditions set forth in subsections (2), (3), (4), or (5). The only way a private pilot such as Mr. Bellefleur could fly for reward would be in one of the situations set forth in section 401.28.

[46] With regard to subsection 401.28(2), the Minister's representative argued that a private pilot can receive reimbursement as a private pilot for costs incurred for a flight, but only if passengers are carried incidentally to the purpose of the flight. This was not the case on any flights referred to by the Minister. The sole purpose of these flights, as per the ads placed in the paper and on Facebook, was to provide airplane tours to passengers.

[47] With regard to the subsequent provisions, the Minister's representative submitted that subsection 401.28(3), which relates to an employer/employee relationship, subsection 401.28(4), which relates to work carried out for a charitable, not-for-profit or public security organization, and subsection 401.28(5), which requires the holder of the private pilot licence to be a farmer conducting aerial work relating to agricultural purposes, are all irrelevant in this case. Therefore none of the regulatory exceptions apply to the applicant.

[48] The Minister's representative argued that the applicant had also advertised "Airplane Tours over Edmunston" in the official program of the *Congrès mondial acadien*, providing his email address as contact information (Exhibit M-8). Further to this, he pointed to an exchange from a Facebook chat in which someone wished the applicant "lots [of] customers" during the event (Exhibit M-9).

(2) Charge 2, *CARs* 602.1

[49] Regarding the second alleged contravention, the Minister's representative highlighted that section 602.01 of the *CARs* prohibits the operation of an aircraft in a manner that is "likely to endanger" any person's life or property. When responding to an allegation of a breach of this provision, pilots often raise the argument that if nothing happened then no breach has taken place. This argument, however, is flawed. In this case, although the outcome was favorable, the act of shutting down the engine while in flight was inherently likely to endanger life or property. The video clearly shows homes, roads and buildings near or on airport property. The chance of wildlife entering the airport grounds also existed.

[50] The Minister's representative submitted that although the applicant claimed to be alone and that the area was clear of any possible obstructions, the fact remains that conditions such as a change in winds or the applicant being unable to restart the aircraft's engine could have led him to crash into a home or a highway, thus endangering property and life. It was argued that the applicant could have practiced the engine failure without having to shut down the actual engine. The Minister's witness was adamant that the shutting down of an operable engine on a single-engine aircraft should never be done for the sole reason of practicing engine failure. Other

options exist in which the throttle can be reduced to idle in order to achieve the effect of an engine failure.

[51] Finally, the Minister's representative argued that the issue of the credibility of the applicant's testimony must be taken into account. Whereas the Minister's witness was precise and non-contradictory the same cannot be said for the applicant. When asked if he had been charged with any prior infractions by Transport Canada, his immediate response was that he had not. This, however, turned out to be false since he was previously charged with an infraction under section 7.3 of the *Aeronautics Act*, which relates to the intent to mislead. The applicant had been found to have forged a document and the applicable 30-day suspension had been imposed.

[52] When asked if he had ever accepted reward for the tours provided, the applicant's initial response was that he had not, yet later during the hearing he claimed to have accepted a reward, though only as a result of the passenger insisting that he take the money.

[53] As to the sanctions imposed, the Minister's representative argues that since no aggravating or mitigating circumstances exist, the amounts imposed—the minimum for first-time offences—were justified in both cases.

B. Applicant

[54] The applicant submits that he has always followed aviation regulations. As to remuneration received for the airplane tours, it was always unsolicited and he had only accepted it when passengers had insisted he take it. He argues that the charges alleged against him are fabricated and untrue.

[55] Furthermore, the applicant notes that the planned engine shutdown at the airport did not endanger anyone. It was conducted so as to improve his piloting skills in the event that he experiences a real engine failure during a flight.

C. Minister in Reply

[56] The Minister's representative argued that the applicant had stated that the Minister's witness had lied under oath but no specific examples were provided. The Minister's representative submitted that no evidence was submitted by Mr. Bellefleur with regard to clients actually insisting that he accept payment for the airplane tours.

VI. ANALYSIS

(1) Elements of the Offences

[57] The standard of proof that the Minister is required to meet is the one specified in subsection 15(5) of the *TATC Act*, that being “proof on the balance of probabilities”. As such, the elements to be proven to this standard by the Minister are the following:

Charge 1, CARs 401.28(1)

Did the applicant, on August 13, 2014, act as pilot-in-command of his C-172 aircraft with registration C-FHLQ for hire or reward when the conditions set out in subsection 401.28(2), (3), (4) or (5) were not met?

Charge 2, CARs 602.1

Did the applicant, on November 11, 2013, operate an aircraft in a reckless or negligent manner that likely endangered the life or property of any person?

(2) Agreed-on Facts

[58] Throughout the hearing, matters arose that were agreed on by the applicant and the Minister. Specifically, both parties agreed that:

1. the applicant, Mr. Bellefleur, is the registered owner and operator of the Cessna 172 aircraft bearing registration C-FHLQ (Exhibit M-3);
2. the applicant is the holder of a single-engine landplane private pilot licence (Exhibit M-2);
3. the flights at issue did take place on the date, time and location that were detailed in Schedule A of the Notice dated October 31, 2014; and
4. the applicant was operating aircraft C-FHLQ when both alleged contraventions took place.

(3) Charge 1, CARs 401.28(1)

[59] The evidence shows that on August 13, 2014, the applicant, the holder of a private pilot licence, received a monetary reward from a passenger after having acted as the pilot-in-command of aircraft C-FHLQ. It is important to note however that section 401.28 of the *CARs* does set out several sets of conditions, in subsections (2), (3), (4), and (5), that allow a private pilot to be hired or rewarded. As the Minister's representative argued, subsections (3) to (5) cannot apply at all to the applicant's situation so I will focus specifically on subsection (2). This states:

401.28 (2) The holder of a private pilot license may receive reimbursement for costs incurred in respect of a flight if the holder

- (a) is the owner or operator of the aircraft;
- (b) conducts the flight for purposes other than hire or reward;
- (c) carries passengers only incidentally to the purposes of the flight; and
- (d) receives a reimbursement that
 - (i) is provided only by the passengers referred to in paragraph (c), and
 - (ii) is for the purpose of sharing the costs of fuel, oil and fees charged against the aircraft in respect of the flight, as applicable.

[60] With regard to paragraph (a), the evidence confirms that Mr. Bellefleur is both the owner and operator of aircraft C-FHLQ (Exhibit M-3). This first condition, therefore, is met. Those set out in paragraphs (b), (c) and (d), however, are another matter.

[61] Considering paragraph (b), testimony from the applicant at times was contradictory and confusing as to the purpose of the flights in which remuneration had taken place. Mr. Bellefleur did advertise his services extensively, including on social media (Exhibit M-9), in the official program of the *Congrès mondial acadien* (Exhibit M-8) and, on at least eight occasions, by placing an ad in a local community paper (Exhibit M-7). In relation to paragraph (c), this evidence also indicates that the presence of passengers was not incidental to the purpose of the flights but rather constituted the main reason for the flights.

[62] Turning finally to paragraph (d), while the applicant may not necessarily have discussed remuneration or referred to it in social media posts, and despite the fact that no pricing is mentioned in the ads, plane rides were solicited and offered. Exhibit M-9 shows various responses to the applicant's advertising on Facebook, such as "Hope you get lots customers during the event..." (*sic*) on page 1, "jaimerais le savoir combien" ("I'd like to know how much") on page 4 and "Combien pour 2 adultes et un enfant de 4ans" ("How much for two adults and a four-year-old child?") on page 5.

[63] With no information in the ads referring to pricing, or any written guidance by the applicant in stating that any payment associated with the flight would be for shared operational expenses (fuel, oil, etc.), one would be expecting in most probability a fee or remuneration to be associated with the ride.

[64] Furthermore, the applicant, having chosen to testify and give evidence, did not provide the Tribunal with any evidence from his passenger or for that matter any statement from himself indicating that a discussion had taken place to the effect that any remuneration or reimbursement for the flight would be for the purpose of sharing the costs of fuel, oil and fees charged against the aircraft. Instead, Mr. Bellefleur testified that he did accept remuneration on August 13, 2014, but only from a passenger who had insisted that he accept payment. Based on my overall assessment of the applicant's credibility, I give little to no weight to his statement.

[65] Oral evidence offered by the applicant is not compelling enough for me to dismiss or counterbalance the Minister's evidence. On the balance of probabilities, the conditions set forth in paragraphs (b), (c) and (d) of *CARs* subsection 401.28(2) have not been met. Given the fact that the applicant admitted under oath to having accepted money for the August 13, 2014 flight, coupled with the amount of print and online publicity placed by Mr. Bellefleur for airplane tours, it would be most reasonable and probable to expect that a fee for the service was involved. I do not believe that having no fee or pricing mentioned on the ads constitutes any indication that the tours are free.

[66] Having carefully considered all of the evidence pertaining to the alleged contravention under *CARs* subsections 401.28(1) and (2), I find that the testimony of the Minister's witness was generally more credible than that of the applicant and that the Minister has satisfied his burden of proof on the balance of probabilities with regard to this contravention.

(4) Charge 2, *CARs* 602.01

[67] Mr. Bellefleur testified that he did carry out a deliberate in-flight engine shutdown on November 11, 2013 as he flew his C-172 aircraft with registration C-FHLQ. This engine

shutdown was videotaped and posted on Facebook, and the Minister presented the footage as Exhibit M-11. Mr. Bellefleur testified having carried out the engine shutdown as a safety training exercise with the purpose of ensuring that if this situation were to occur unexpectedly, his skills as a pilot would allow him to end the flight safely and adequately.

[68] Section 602.01 of the *CARs* prohibits the operation of an aircraft “in such a reckless or negligent manner as to endanger or be likely to endanger the life or property of any person”. The Minister’s position is that the applicant, in intentionally shutting down an engine while in flight, contravened this regulation. Two distinct issues need to be decided:

1. In deliberately shutting down the engine in flight, did the applicant operate the aircraft in a reckless or negligent manner?
2. Did this maneuver endanger the life or property of any person, or was it likely to do so?

[69] The Tribunal’s appeal panel in *Francis Dominic Decicco v. Minister of Transport*, [1998] CAT File No. C-1316-02 (Appeal), referred to *Black’s Law Dictionary*, Fifth Edition, to define recklessness and negligence as follows:

[Recklessness]

Rashness; heedlessness; wanton conduct. The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended.

[Negligence]

The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

[70] It is clear from the testimony heard by Mr. Bellefleur and the video produced in evidence (Exhibit M-11) that the actual shutting down of the engine was not carried out in a rash or heedless way. The engine shutdown was conducted during the base to final circuit leg. The entire video is just under four minutes long. Approximately one minute and 15 seconds elapse between the time when the applicant shuts down the engine as the aircraft appears to be aligning with the runway for landing, in essence turning from base to final, and the landing. This would indicate to me a planned engine shutdown, leaving enough time and altitude to provide the gliding distance required to reach the landing surface of the runway.

[71] Mr. Bellefleur can be heard on the video calling the engine shutdown a simulated engine failure. I would disagree. It was an intentional shutdown of the engine with the purpose of demonstrating his ability to land without power. Even though the maneuver concluded with a safe landing, in my opinion, it nevertheless constituted negligent behaviour on the part of a pilot and needlessly compromised the safety of the applicant himself as well as that of property and people. To practice an engine failure is perfectly acceptable, but actually shutting down one’s only engine in order to do so is unreasonable.

[72] In the one minute and 15 seconds during which Mr. Bellefleur flew with no engine running, he purposely limited his options in spite of multiple factors that could have led to a different conclusion than the one he had planned for. Without an engine, he would have been unable to properly conduct any evasive or late go-around in a timely matter. Changing winds or gust conditions, unexpected traffic in the pattern, obstacles on the runway such as people, vehicles or wildlife are but some examples of situations where the applicant would have had little to no options to avoid an unfortunate accident.

[73] Instructional practice for engine failure, as recommended by Transport Canada and detailed in testimony by the Minister's witness, is that engine failures are simulated in other ways than actually shutting down an engine on a single- or multi-engine aircraft. Engine idle, with or without minimal flap, will provide the pilot with the engine failure descent rate that is required in order to properly and safely practice a simulated engine failure. I find that Mr. Bellefleur was negligent in that he relinquished control of his flight as he descended to land by severely reducing by his options should one of the situations listed above occur. A reasonable and prudent pilot would not have done this.

[74] Did Mr. Bellefleur, in shutting down his engine, likely endanger life and property? Based on the photographic and video evidence produced, various properties were located on either side of the final approach path. As well, the airport environment itself, in spite of a fence surrounding the field, did have areas in which people or wildlife could have access to the airport property, and more importantly to the runway. It would seem from the photographs that the fence did not necessarily encompass the airport property completely and openings are visible (Exhibit R-1, photographs D and G).

[75] I am inclined to agree with the Minister that performing an actual non-simulated engine shutdown while in flight for training purposes carried an unnecessary risk to the safety of the pilot and of other persons, as well as to property. The engine failure exercise could have been practiced and demonstrated without having to actually shut down a perfectly operating engine. In taking the risk of being unable to restart the engine promptly, if at all, when he could have required evasive or go-around power on short final, I find that the applicant compromised the safety of his flight.

[76] The applicant claimed to have taken the necessary steps to ensure safety prior to demonstrating the engine failure, which is akin to invoking the due diligence defence provided in section 8.5 of the *Aeronautics Act*. Although he shut down the engine at an altitude he may have deemed safe and that may have provided him enough gliding altitude, the fact remains that once he had shut down his only operating engine, he had reduced, if not practically eliminated, any possible go-around scenario if required as he descended to land. Consequently, in my opinion, he failed to use such care as a reasonably prudent and careful person would have used in similar circumstances and he therefore failed to exercise all due diligence to prevent a contravention of section 602.01 of *CARs*.

VII. DETERMINATION

[77] The Minister of Transport has proven, on the balance of probabilities, that the applicant, Joseph Dan Elie Bellefleur, contravened subsection 401.28(1) and section 602.01 of the *Canadian Aviation Regulations*. Consequently, the monetary penalty of \$1,000 for each contravention is maintained.

May 17, 2016

(Original signed)

Franco Pietracupa

Member