CAT File No. P-0032-02
MoT File No. EMIS 7233

CIVIL AVIATION TRIBUNAL

BETWEEN:

Gerald R. Abramson, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:
Aeronautics Act, R.S.C. 1985, c. A-2, s. 5.9
Air Regulations, C.R.C. 1978, c. 2, s. 534(2)(a)

Low flying, Built-up area

Appeal decision
James W. Snow, L.R. Ohlhauser, Robert J. Rushford, Q.C.

Decision: February 16, 1989

Heard: Vancouver, British Columbia, January 31, 1989

To confirm the decision of the hearing officer and dismiss the appeal.

The Appellant's private pilot licence was suspended by the Minister pursuant to a Notice of Suspension dated October 26, 1987. The Notice of Suspension reads as follows:

Notice of Suspension:

Pursuant to section 5.9 of the *Aeronautics Act*, the Minister of Transport has decided to suspend your Canadian aviation document indicated above on the grounds that you have contravened the following provision(s): *Air Regulations* 534(2)(a) in that on July 18, 1987, at approximately 15:45 hours, you, as pilot-in-command of C-FLRG, a Navion, led a formation of three aircraft over a built-up area of Surrey, B.C., at an altitude of less than 1,000 feet above ground.

At the opening of this appeal, the Respondent made a motion to have the appeal dismissed on the ground that he had discovered that he had not in fact been flying on July 18th, the date of the alleged contravention. The Respondent produced his journey log, which does not contain any

entries for July 18th but does contain an entry for July 19th. Had this motion been made at the initial hearing before the Respondent presented evidence, the hearing officer would have had to deal with the matter by allowing the application or dismissing it, or had the Minister applied for an amendment, the hearing officer could have dealt with that application. If the application for an amendment was allowed, the Applicant (Abramson) should have been allowed an adjournment, if requested, to meet the amended allegation.

At this stage of the proceedings, the Respondent has admitted that he did make the flight alleged and whether it was made on July 18 or July 19 does not in our view prejudice the Respondent's ability to deal with this appeal. Only one flight was made, and it is that flight which was dealt with by the hearing officer and it is that flight to which the evidence relates.

We therefore propose to deal with this appeal on the basis of the evidence set out in the transcript.

The facts are that an inspector with Transport Canada, Aviation Enforcement Branch, was working in his yard on the date in question when he noticed a three-plane victory formation crossing directly overhead proceeding into the Langley area of British Columbia. The inspector could see the registration on the lead plane and made a note of it at the time, C-FLRG. The Respondent was the pilot of the aircraft in question. The evidence of the inspector and the Respondent differs in relation to the altitude of the aircraft, the inspector's estimation being 500 feet, and the Respondent's in excess of that. In any event, the aircraft was in fact less than 1,000 feet over a built-up area. The evidence of the Respondent is that he had called Langley Tower requesting permission for the formation to do a low pass over runway 19 with a break to the right and clearance for C-FLRG to land—that is in fact what happened. Following the low pass, the other two aircraft proceeded elsewhere and C-FLRG landed. There is nothing in the evidence to contradict the Respondent's evidence and we accept his testimony in this regard.

Section 534(2) of the *Air Regulations* reads as follows:

> 534(2) Except as provided in subsections (4), (5) and (6), or except in accordance with an authorization issued by the Minister, unless he is taking off, landing or attempting to land, no person shall fly an aircraft
>
> (a) over the built-up area of any city, town or other settlement or over any open air assembly of persons except at an altitude that will permit, in the event of an emergency, the landing of the aircraft without creating a hazard to persons or property on the surface of the earth, and such altitude shall not in any case be less than 1,000 feet above the highest obstacle within a radius of 2,000 feet from the aircraft;

The only real issue to be decided is whether the Respondent, at the time he passed over the inspector's home, was landing within the meaning of section 534(2). Following clearance from Langley Tower, the Appellant began his descent.

We therefore conclude that at the point at which the aircraft passed over the inspector's house, C-FLRG was in the process of landing, within the meaning of the section, and that the low pass and subsequent landing was all part and parcel of one continuous process.

We therefore confirm the decision of the hearing officer and dismiss the appeal. We would comment that one of the grounds of appeal was that the hearing officer's decision was based in part upon the irrelevant consideration that no evidence of previous complaints involving the Respondent was introduced. We can find nothing in the evidence to support that conclusion.

Another ground of appeal was that the hearing officer failed to afford the Minister an opportunity to make submissions as to the appropriate sanction. Our decision to confirm the hearing officer's decision makes this ground academic. It may, however, be of assistance to comment on this issue. It is in our view quite proper for a hearing officer to allow both parties to speak to the matter of the appropriate penalty to be imposed prior to the hearing officer finding that a contravention has in fact occurred. The hearing officer should not, however, allow evidence to be introduced or alluded to in relation to previous convictions or infractions prior to making a finding that a contravention has in fact occurred.

If evidence of previous convictions is to be introduced, it must only be done after the hearing officer has concluded that a contravention has occurred and both the Minister and the document holder must have an opportunity to address the question of penalty and the previous convictions at that time.

If evidence of previous convictions were introduced prior to the hearing officer arriving at his determination, the effect could be that the hearing may be influenced by that fact in arriving at his decision, which would not be naturally just or procedurally fair to the document holder.