

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Edward David Lubitz, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:

Canadian Aviation Regulations, SOR/96-433, subsection 602.96(4)

Appeal decision

Suzanne Racine, J. Richard W. Hall, Franco Pietracupa

Decision: September 28, 2010

Citation: *Lubitz v. Canada (Minister of Transport)*, 2010 TATCE 24 (appeal)

[Official English Translation]

Heard at Toronto, Ontario, on May 20, 2010

Held: The Appeal is dismissed, and the monetary penalty assessed by the Minister of Transport is upheld. The amount of \$1 500 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within thirty-five (35) days of service of this Decision.

1. BACKGROUND

[1] On September 25, 2008, Transport Canada assessed a monetary penalty of \$1 500 against the Appellant, Edward David Lubitz, for contravening subsection 602.96(4) of the *Canadian Aviation Regulations* ("CARs"), pursuant to section 7.7 of the *Aeronautics Act* ("Act").

[2] The Appellant, as pilot-in-command of a Cuby Coupe ultralight aircraft bearing registration mark C-IBCZ, was alleged to have, on or about June 14, 2008, at approximately 14:00 UTC (10:00 a.m., local time), at or near New Hamburg, Ontario, operated the aircraft at an altitude of

less than 2 000 feet above aerodrome elevation (AAE, John Kunz airstrip located at N 43 25 15 and W 80 43 54) when it was not for a purpose of landing or taking off.

[3] The Review Member, Richard F. Willems, determined that the Appellant had contravened subsection 602.96(4) of the *CARs* and confirmed the monetary penalty of \$1 500 assessed by the Minister of Transport.

[4] On January 11, 2010, Mr. Lubitz appealed the Review Determination rendered by the Transportation Appeal Tribunal of Canada ("Tribunal").

II. GROUNDS FOR APPEAL

[5] The Appellant's grounds are set out in his letter to the Tribunal dated January 8, 2010, and in the brief he presented at the hearing.

1. The Minister's witnesses are not credible. They contradict each other on major points, including:

- identification of the Appellant and his aircraft;
- time at which the Appellant's aircraft was seen; and
- position of the Appellant's aircraft, as well as the number of aircraft seen the morning of June 14, 2008, and their positions.

2. The testimonies regarding the Appellant's character and events unrelated to the alleged contravention are not relevant and should be rejected.

III. ARGUMENTS

A. Appellant

[6] The Appellant submits that on the morning of June 14, 2008, the Minister's witnesses did not identify his aircraft, nor did they identify him as the pilot-in-command of the aircraft flying at low altitude that morning.

[7] Gary Wolf claims to have seen a beige J-4 Cuby Coupe aircraft. He assumed it was the Appellant's aircraft, but he was unable to take note of the aircraft's registration mark or its pilot-in-command, as he had been looking at the roof of the aircraft. Also, Mr. Wolf did not notice the dark fibreglass window covering the aircraft's cockpit, despite the fact that it is an unusual characteristic of the aircraft he claims to have seen that morning.

[8] Clare Snyder said that he had seen a "glint" when the aircraft flew over at low altitude. He identified the aircraft as a J-3 Cuby Coupe with red stripes. However, he had been unable to note the aircraft's registration mark or see its pilot-in-command.

[9] Donald Sinclair said that he had seen the letters C-IBCZ on the tail of the aircraft, but he was unable to confirm that the Appellant had been the pilot-in-command of the aircraft in question.

[10] Taken separately, in the opinion of the Appellant, the testimonies of Messrs. Wolf, Snyder and Sinclair are insufficient to establish that the Appellant flew over the Kunz airstrip at low altitude in his J-4 Cuby Coupe aircraft without landing.

[11] The Appellant also submits that the Minister's witnesses gave contradictory evidence as to the time at which they saw his aircraft. Therefore, the witnesses' contradictions regarding this important element of the contravention undermine their credibility. The Appellant argues that the Review Member erred in relying on these testimonies rather than the consistent testimonies of the Appellant's witnesses.

[12] Messrs. Wolf and Sinclair said that they had seen the Appellant at about 10:00 a.m., while Mr. Snyder said that the low-altitude flight had occurred at about 10:30 a.m. The Appellant submits that it was not possible for the Minister's witnesses to have seen his aircraft at around 10:00 a.m., as he was at home at that time, checking the weather forecast. The Appellant states that he left the Lubitz aerodrome shortly after 10:00 a.m. on June 14, 2008, to meet up with David Kubassek's aircraft in loose formation and head for Brussels, Ontario. The Appellant remained in this loose formation for the entire journey to Brussels. He was half a mile from Mr. Kubassek's aircraft, slightly behind it and to the right. Don Goddard, a passenger flying with Mr. Kubassek, confirmed this fact by stating that he could see the Appellant's aircraft when he looked to his right, and slightly behind. The Lubitz aerodrome is 10 miles from the Kunz aerodrome. Since Mr. Kubassek's aircraft was closely matched in performance, flying at about 65 miles per hour, the Appellant stated that he arrived in the vicinity of the Kunz aerodrome at about 10:15 or 10:20 a.m. There he saw a Beaver aircraft parked near the Kunz barn.

[13] The Appellant also submits that the Minister's witnesses do not agree about the relative positions of the aircraft they claim to have seen on the morning of June 14, 2008. Mr. Wolf stated that his aircraft was south of Erb's Road and that it was approaching the Kunz aerodrome along Nafziger Road. That was when he first saw a blue aircraft, outside of the Kunz aerodrome traffic circuit, flying in a northerly direction, east of Nafziger Road. Later in his testimony, during chief examination, Mr. Wolf contradicted himself by stating that he had seen a blue aircraft to the west while he was flying midfield over the Kunz airstrip.

[14] Mr. Snyder said that he was at the approach end of the Kunz airstrip on the morning of June 14, 2008, and that he had seen a blue aircraft, which he identified as a Champ aircraft, flying in a northwesterly direction about halfway at the east between the Kunz airstrip and Nafziger Road, at an altitude lower than that estimated by Mr. Wolf. This witness also stated that the Champ was about a mile away.

[15] Mr. Sinclair did not notice the blue aircraft, despite the fact that he was next to Mr. Snyder.

[16] Re-entering the Kunz aerodrome circuit on the downwind leg, Mr. Wolf noticed, at an altitude much lower than his own, a J-4 Cuby Coupe aircraft on short final that appeared to be landing on the Kunz airstrip.

[17] Mr. Kubassek and his passenger, Mr. Goddard, stated that they had flown in loose formation with the Appellant all the way to Brussels on the morning of June 14, 2008. The Appellant's

aircraft was slightly behind and to the right of Mr. Kubassek's aircraft, at a distance of half a mile.

[18] According to the Appellant, the Minister's witnesses probably did not see what they believed they saw, and the Review Member should not have relied on their testimony.

[19] The Appellant also submits that the Minister's documentary and testimonial evidence contains unfounded and irrelevant accusations that prejudicially affect his reputation, and that he was not given the opportunity to rebut them. These allegations should never have been admitted into evidence, as they are unfairly injurious to the Appellant.

B. Minister of Transport

[20] The Respondent submits that it has proven, on the balance of probabilities, each element of the alleged contravention.

[21] Mr. Sinclair took note of the registration mark of the aircraft flying below the regulatory 2 000 feet without landing on the airstrip of the Kunz aerodrome. The aircraft in question belongs to the Appellant. The testimonies of Messrs. Wolf and Snyder complete and corroborate that of Mr. Sinclair.

[22] The Appellant himself admitted that, on June 14, 2008, he had flown over the Kunz aerodrome at an altitude of 700 feet above ground level (AGL). -

[23] Concerning the contradictions regarding the positions of the other aircraft the morning of June 14, 2008, the Minister submits that these are irrelevant and cannot be taken into consideration.

[24] From the Respondent's perspective, the Review Member is in the best position to evaluate the evidence before him when it is contradictory. In this case, the Review Member's findings of fact are reasonable and must be upheld.

IV. ANALYSIS

A. Ground 1 for appeal

The Minister's witnesses are not credible. They contradict each other on major points, including:

- 1. identification of the Appellant and his aircraft;*
- 2. time at which the Appellant's aircraft was seen; and*
- 3. position of the Appellant's aircraft, as well as the number of aircraft seen the morning of June 14, 2008, and their positions.*

(1) Identification of the Appellant and his aircraft

[25] The Appellant submits that the Minister has not established, on the balance of probabilities, that on June 14, 2008, he flew over the Kunz aerodrome at an altitude lower than 2 000 feet AGL without intending to land, thereby contravening subsection 602.96(4) of the *CARs*. Mr. Wolf said that he had seen a beige J-4 Cuby Coupe aircraft flying at an altitude much lower than his own when he was joining the downwind leg of the Kunz aerodrome circuit. The aircraft seemed to be on short final for a landing on the Kunz airstrip. Although he suspected that it was the Appellant's aircraft, Mr. Wolf could not positively identify the aircraft he had seen that morning or its pilot-in-command.

[26] The morning of June 14, 2008, Mr. Snyder was near the approach end of the Kunz aerodrome airstrip. He stated that he had seen a J-3 Cuby Coupe with red stripes, while Mr. Wolf testified that he had seen a beige J-4 Cuby Coupe. According to Mr. Snyder, the aircraft was flying too fast to land. When the aircraft passed over, Mr. Snyder saw a glint off of a visor or sunglasses. He had not been able to identify the pilot-in-command. From the comments of the others present, Mr. Snyder assumed that it was the Appellant. -

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[27] The Appellant submits that Mr. Snyder must have convinced himself, given that comment, that he had seen his aircraft on the morning of June 14, 2008. That afternoon, on the Kunz farm, Mr. Snyder saw the Appellant, who was wearing wraparound sunglasses, exit the aircraft bearing registration mark C-IBCZ. The glasses could have caused the glint that he had seen during the low-altitude flyover. Nevertheless, Mr. Snyder could not positively identify the Appellant as the pilot-in-command of the aircraft.

[28] Mr. Sinclair, who was near the approach end of the Kunz airstrip next to Mr. Snyder, noted that the aircraft bore the registration mark C-IBCZ. Mr. Sinclair did not notice the colour of the aircraft, nor could he identify the Appellant as the pilot-in-command of the aircraft bearing registration mark C-IBCZ, as he did not know him. According to the Appellant, it is possible that Mr. Sinclair was confused about the letters he saw, given that they are only six inches high.

[29] According to the Appellant, the Minister's evidence is so riddled with assumptions and contradictions that the Review Member should not have relied on the testimony in question in support of his determination.

[30] However, the Minister submits that Mr. Sinclair did indeed note on the morning of June 14, 2008, that the aircraft bore the registration mark C-IBCZ. A search performed by Inspector Oonagh Elliott in the database of the Canadian Civil Aircraft Register confirmed that the aircraft bearing the registration mark C-IBCZ was registered in the Appellant's name. Although Mr. Wolf could not positively identify the Appellant, his testimony was supported by that of Mr. Sinclair, who noted the registration mark of the aircraft that had flown at low altitude over the Kunz airstrip on the morning of June 14, 2008. Mr. Snyder, who was next to Mr. Sinclair, also saw the same aircraft fly at low altitude over the Kunz airstrip without landing.

[31] The Appellant alleges that on the morning of June 14, 2008, he flew in loose formation with Mr. Kubassek toward the Brussels aerodrome, north of the Kunz aerodrome. The Appellant

stated that he maintained a 45-degree angle behind Mr. Kubassek's aircraft the whole time, at a distance of half a mile, and that the two aircraft were closely matched in performance. Mr. Goddard, a passenger in Mr. Kubassek's aircraft, testified that he saw the Appellant's aircraft every time he turned around to check for it. Mr. Goddard did not, however, keep the Appellant's aircraft in view at all times.

[32] In the face of contradictory evidence, the Review Member must attempt to determine the most likely version of events in light of all the circumstances described. After reviewing all the evidence, the Review Member determined that the evidence was in favour of the Minister. From the Appeal Panel's perspective, the fact that Mr. Sinclair noted the registration mark of aircraft C-IB CZ was the determinative element in the analysis of the evidence carried out by the Review Member on the balance of probabilities, despite the consistent testimonies of the Appellant's witnesses.

[33] Mr. Snyder indicated that he was with Mr. Sinclair when he saw an aircraft on the morning of June 14, 2008, fly low over the Kunz airstrip without landing. His testimony corroborates Mr. Sinclair's with respect to a low flyover by an aircraft. Even though Mr. Wolf was unable to identify the aircraft as being the Appellant's, his testimony on the colour and type tends to corroborate and complete the testimonies of Messrs. Sinclair and Snyder. Inspector Elliott established that aircraft C-IB CZ was registered under the Appellant's name.

[34] The Review Member was also influenced by the fact that Mr. Goddard, the passenger in Mr. Kubassek's aircraft, did not keep the Appellant's aircraft, which was flying in loose formation with Mr. Kubassek's aircraft, in constant view. The Review Member also accepted the evidence of Messrs. Kubassek and Goddard that it was possible that the Appellant had left the formation that morning, flown over the Kunz airstrip and returned to the formation.

[35] The Appeal Panel is of the view that Mr. Sinclair's testimony regarding the aircraft's registration mark, which was completed and corroborated by the testimony of Messrs. Wolf and Snyder and the admission by the Appellant's witnesses that the Appellant could have left the formation and returned, was enough to convince the Review Member that, on the balance of probabilities, the Minister's version was more plausible and more representative of the events that actually occurred on the morning of June 14, 2008. The unequivocal testimony of Mr. Sinclair, a disinterested party who knew neither the Appellant nor his aircraft, was determinative.

[36] In *The Law of Evidence in Civil Cases* (Toronto: Butterworth, 1974, at pp. 530-31), authors Sopinka and Lederman have the following to say about contradictory evidence regarding an essential element of an offence:

Absent extenuating circumstances, the testimony of disinterested witnesses should prevail over that of persons who are or may be interested in the result. The court, however, is not to disbelieve or attribute error to the evidence of a witness solely because he is interested but must, instead, examine such evidence with reference to the facts of the case and other relevant factors. One judge has put it this way:

". . . when the evidence of an important fact is contradictory . . . the Court must weigh the motives of the witnesses, their relationship with the parties, their attitude and demeanour in the box, the way in which they gave evidence, the probability of the facts sworn to, and come to a conclusion regarding the version which should be taken as the true one. . . ."

[37] According to the Appeal Panel, the Review Member is in the best position to evaluate the evidence before him. In this case, the Review Member made reasonable findings of fact, which must be confirmed.

[38] Consequently, the Appeal Panel rejects the item "Identification of the Appellant and his aircraft" under ground 1 for appeal.

(2) Time at which the Appellant's aircraft was seen

[39] The Appellant submits that the Minister did not establish the time at which the contravention occurred. Schedule A of the Notice of Assessment of Monetary Penalty ("Notice") states that the contravention took place on June 14, 2008, in New Hamburg, at approximately 14:00 UTC, or 10:00 a.m. (local time).

[40] The Appellant submits that the Minister's three witnesses said that they had seen a low-flying aircraft at different times. Mr. Sinclair saw an aircraft bearing registration mark C-IBCZ fly at low altitude over the Kunz airstrip, without landing, *shortly before* 10:00 a.m., while Mr. Snyder claims to have seen the same thing at about 10:30 a.m. Mr. Wolf testified that he had seen a beige J-4 Cuby Coupe aircraft in short final at about 10:00 a.m. on June 14, 2008, while he was joining the downwind leg of the Kunz aerodrome circuit.

[41] The Appellant claims that nobody could have seen him at or near the Kunz aerodrome at around 10:00 a.m. on June 14, 2008, as he was at home at the time, checking the weather forecast. The Appellant submits that he left shortly after 10:00 a.m. to join Mr. Kubassek's aircraft in loose formation. The Appellant stated that he was not in the vicinity of the Kunz aerodrome until 10:15 a.m., when he saw Mr. Wolf's Beaver aircraft parked by the Kunz barn, not far from the runway.

[42] The Appellant's testimony is corroborated by Mr. Kubassek's. The latter states that he left his home at about 9:45 a.m. on June 14, 2008, and flew over the Lubitz aerodrome. Mr. Kubassek stated that he flew above the aerodrome for at least 15 minutes, waiting for the Appellant to join him in loose formation to fly toward Brussels. Given that the Appellant's aircraft and Mr. Kubassek's are closely matched in performance, 65 miles per hour at most, and that the Kunz aerodrome is located 10 miles north of the Appellant's, it would have taken Messrs. Lubitz and Kubassek at least 10 minutes to reach the Kunz aerodrome. The Appellant's aircraft could therefore not have been seen near that aerodrome before at least 10:10 a.m.

[43] According to the Appellant, the testimonies of Messrs. Wolf, Snyder and Sinclair diverge too much on this important element of the contravention to be credible. The Review Member

should have, according to the Appellant, preferred the consistent testimony of his own witnesses with respect to the time of the alleged contravention in light of the circumstances described.

[44] The Appellant did not admit to having been in the vicinity of the Kunz airstrip at around 10:00 a.m. on June 14, 2008, contrary to the Review Member's assertion at paragraph [30] of his determination. The Review Member nevertheless concluded that it was highly probable that the Appellant's aircraft had been seen at about 10:00 a.m. He preferred to accept the version put forth by the Minister's witnesses rather than that of the Appellant, who denied having committed the offence, claiming that he was at home checking the weather forecast at 10:00 a.m. and that he had left shortly thereafter to join Mr. Kubassek's aircraft in loose formation.

[45] The Review Member based his determination on the fact that Mr. Sinclair saw, at approximately 10:00 a.m. on June 14, 2008, an aircraft bearing registration mark C-IBCZ fly at low altitude over the Kunz aircraft without landing. Although Mr. Snyder, who was beside Mr. Sinclair at the approach end of the Kunz airstrip, said that he had seen the aircraft fly low over the airstrip at around 10:30 a.m. without landing, the fact remains that both witnesses simultaneously saw the same aircraft fly low over the Kunz airstrip that morning. A 30-minute difference between the two testimonies is not a determinative factor undermining Mr. Sinclair's credibility.

[46] Mr. Sinclair noted the aircraft's registration mark at about 10:00 a.m. on June 14, 2008. The fact that Messrs. Sinclair and Snyder saw the aircraft at the same time convinced the Review Member that the aircraft bearing registration mark C-IBCZ was indeed spotted at about 10:00 a.m. on June 14, 2008. The testimonies of Messrs. Snyder and Sinclair also confirmed that of Mr. Wolf, who said that he had seen, shortly before 10:00 a.m. that day while completing the downwind leg of the Kunz aerodrome circuit, a beige J-4 Cuby Coupe aircraft on short final to the Kunz airstrip.

[47] The Appeal Panel is of the view that this finding of fact is based on the evidence presented at the Review Hearing and that it is reasonable. The Review Member was best placed to evaluate the evidence before him and make the necessary findings of fact.

[48] Accordingly, the Appeal Panel rejects the item "Time at which the Appellant's aircraft was seen" under ground 1 for appeal.

(3) Position of the Appellant's aircraft, as well as the number of aircraft seen the morning of June 14, 2008, and their positions

[49] The Appellant has also based his arguments on the fact that the Minister's witnesses contradicted each other on the positions of the aircraft they saw the morning of June 14, 2008.

[50] Mr. Wolf saw two aircraft while he was approaching the Kunz aerodrome. While he was south of Erb's Road, travelling east above Nafziger Road, he first saw, at 800 feet AGL, a blue aircraft travelling in a northerly direction, at approximately the same altitude as his. A few minutes later, after joining the downwind leg of the Kunz aerodrome circuit, he saw a beige J-4 Cuby Coupe aircraft on short final to the Kunz airstrip, at an altitude much lower than his.

Mr. Wolf did not notice any aircraft in loose formation to the right of the blue aircraft that he had seen when he was south of Erb's Road. He said that he had seen the blue aircraft and the beige Cuby Coupe aircraft at very different altitudes and locations.

[51] Mr. Kubassek testified that he had flown at the head of a loose formation with the Appellant at an altitude of 700 feet AGL for the entire flight to Brussels. The Appellant's aircraft, which was slightly behind and to the right of his own, arrived in Brussels shortly after he did. When he arrived in the vicinity of the Kunz aerodrome, the Appellant noted that there was a Beaver aircraft parked near the Kunz barn.

[52] Mr. Snyder, who was near the approach end of the Kunz airstrip, said that he first heard Mr. Wolf's Beaver and then saw it in the downwind leg of the circuit. At about the same time, he saw a blue Champ aircraft at an approximate altitude of 1 000 feet AGL, heading in a northerly direction halfway between the Kunz airstrip and Nafziger Road. Shortly after that, he saw a third aircraft about a mile from the blue aircraft. It was coming from the south and flying at low altitude over the Kunz airstrip, too fast to land. Beside him, Mr. Sinclair was able to identify the aircraft's registration mark as being C-IBCZ.

[53] Mr. Snyder's testimony corroborates Mr. Wolf's on the fact that the blue aircraft and the beige Cuby Coupe were seen at very different altitudes and locations. According to Mr. Snyder, the blue aircraft was flying alone in a northerly direction, east of the Kunz airstrip, at an altitude much higher than that of the beige aircraft he had seen when he had been with Mr. Sinclair. The morning of June 14, 2008, the blue aircraft flew low over the Kunz airstrip without landing on it. The Appellant attempted to discredit Mr. Snyder's testimony by pointing out that he had miscalculated the distances between the aircraft. The fact that Mr. Snyder thought that the blue aircraft was one mile rather than half a mile from the location where he had first seen the Appellant flying low over the Kunz airstrip does not impugn the Minister's evidence.

[54] Moreover, the Appeal Panel is of the view that the fact that Mr. Sinclair did not see the blue aircraft is not really material to the alleged contravention. The Review Member did not accept this detail put forth for the purpose of discrediting the witness with respect to his recollection of the events. The fact that Mr. Sinclair noted the aircraft's registration mark when it passed in front of him while flying over the Kunz airstrip was more important to the Review Member than the fact that he did not notice the blue aircraft flying outside the aerodrome circuit.

[55] Therefore, the Appeal Panel finds that the Review Member's findings of fact were reasonable and supported by the evidence.

[56] Therefore, the Appeal Panel rejects the item "Position of the Appellant's aircraft, as well as the number of aircraft seen the morning of June 14, 2008, and their positions" under ground 1 for appeal.

B. Ground 2 for appeal

Testimonies relating to the Appellant's character and to events not related to the alleged contravention are not relevant and should be rejected

(1) The Appellant's reputation

[57] The Appellant alleges that the Minister's evidence contains several disparaging remarks about his conduct relating to events that have nothing to do with the contravention described in the Notice. The Minister's evidence is therefore an unfair attack on the Appellant's reputation as an aviator. The allegations constitute hearsay and should not be admitted into evidence.

According to the Appellant, the Review Member should not have referred in his determination to the warning from the insurance agent from the Recreational Aircraft Association Canada. The insurance agent had told Mr. Wolf that, if non-standard procedures were used by aircraft arriving and departing from a fly-in, the event could be deemed an air show and no insurance coverage would be provided (paragraph [7] of the Review Determination).

[58] The Review Member may admit any evidence that he considers relevant when hearing the parties. Relevant evidence is evidence that tends to prove or disprove the existence of a disputed fact. The Review Member must then determine the evidential weight to be attached to it.

[59] To prove the contravention, the Minister had to establish the following elements on the balance of probabilities:

- approximate date and time of the contravention;
- place of the contravention;
- identity of the pilot-in-command;
- identity of the aircraft; and
- place, time and date the pilot-in-command operated the aircraft at an altitude of less than 2 000 feet AAE when it was not for the purpose of landing.

[60] The Appellant's character and reputation with respect to similar facts before or after the alleged contravention are not among the elements that the Minister must prove to establish, on the balance of probabilities, that there has been a contravention of the *CARs*. Such evidence is neither relevant nor admissible with respect to the contravention of which the Minister accuses the Appellant.

[61] In our view, the Review Member addressed the insurance coverage issue to provide context for why Mr. Wolf reported the low-altitude flyover that took place on June 14, 2008. The Review Member did not consider this issue in his analysis of the facts (Part IV of the Determination) to render his Determination on whether the Appellant had or had not flown over the Kunz aerodrome at an altitude of less than 2 000 feet AAE for a purpose other than landing. He also did not consider the impressions or assumptions of Messrs. Wolf and Snyder regarding the Appellant's reputation as an aviator, the state of their relationship with the Appellant or facts that occurred before or after the contravention under appeal and that were alleged in paragraphs [5], [7], [9] and [10] of the Review Determination, which relies on and is rightly limited to the testimonies heard and the documentary evidence specifically related to the elements of the contravention, ignoring any irrelevant elements.

[62] In light of this, the Appeal Panel rejects ground 2 of the appeal.

C. Two items raised by the Appellant

(1) Afternoon of June 14, 2008

[63] The Appellant attempted to undermine the credibility of the Minister's witnesses regarding the events that occurred on the afternoon of June 14, 2008, specifically with respect to Mr. Kubassek's missed approach. The only relevant elements of the evidence submitted that the Review Member could integrate into his analysis were the photographs (Exhibit M-12) of the aircraft bearing registration mark C-IBCZ, taken by Mr. Sinclair on the afternoon of June 14, 2008, and showing that it was indeed the aircraft that he had seen flying at low altitude over the Kunz airstrip on the morning of June 14, 2008, without landing. Mr. Snyder stated that, on the afternoon of June 14, 2008, the man he saw exiting the aircraft bearing registration mark C-IBCZ was wearing sunglasses that may have caused the glint. According to him, it was the same person who had flown at low altitude over the Kunz airstrip without landing.

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[64] The Review Member did not give any weight to the glint observed by Mr. Snyder during the low-altitude flight over the Kunz airstrip when analyzing the facts to render his determination.

[65] The photographs (Exhibit M-12) clearly show that Mr. Wolf saw a beige aircraft bearing the red stripes observed by Mr. Snyder.

[66] The Review Member was correct to limit his analysis to the events of the morning of June 14, 2008, as the events of the afternoon were unrelated to the contravention described in the Notice.

[67] Given this, the Appeal Panel rejects the item "Afternoon of June 14, 2008" raised by the Appellant.

(2) Appellant's altitude in vicinity

[68] During the Review Hearing, the Appellant admitted that, on the morning of June 14, 2008, he operated his Cuby Coupe bearing registration mark C-IBCZ in the vicinity of the Kunz airstrip at an altitude of 700 feet AGL. However, he denied having flown over the Kunz airstrip, which he could not see to his left, as his vision was impaired by a 41-degree blind spot. The Appellant did, however, tell Inspector Elliott that he noticed the Kunz airstrip while flying over it (Exhibit M-24) at an altitude of 700 feet AGL, much lower than the altitude permitted by subsection 602.96(4) of the *CARs*.

[69] The Review Member did not consider this point, preferring the version of the Minister's witnesses, particularly that of Mr. Sinclair, who saw the aircraft bearing registration mark C-IBCZ fly along the runway centre line on June 14, 2008, at an altitude of about 200 feet, without landing. This constituted a contravention under subsection 602.96(4) of the *CARs*. The Review Member also accepted that Mr. Wolf had had to extend his downwind circuit to allow the aircraft he had seen lined up along the centre line of the Kunz runway on short final to land

and park. Notwithstanding the Review Member's determination, the Appellant was prohibited from operating his aircraft at an altitude of less than 2 000 feet AAE for a purpose other than landing.

[70] Subsection 3(1) of the *Act* defines the term "aerodrome" as follows:

"aerodrome" means any area of land, water (including the frozen surface thereof) or other supporting surface used, designed, prepared, equipped or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft and includes any buildings, installations and equipment situated thereon or associated therewith.

Consequently, the Review Member correctly found that the aircraft bearing registration mark C-IBCZ had flown over an aerodrome, the Kunz airstrip, at an altitude of less than 2 000 feet without landing, contrary to the requirements of subsection 602.96(4) of the *CARs*.

V. SANCTION

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[71] Transport Canada prescribes a fine of \$750 to \$3 750 for a first contravention of subsection 602.96(4) of the *CARs*. The Minister assessed a fine of \$1 500 because of certain aggravating factors.

[72] First, the Appellant, a highly experienced pilot and member of an ultralight pilots association, should have known that flying at low altitude over the Kunz airstrip for a purpose other than landing was prohibited. Second, by giving Mr. Wolf the impression that he was going to land on the Kunz runway, the Appellant forced Mr. Wolf to extend his circuit. In the case of an emergency, Mr. Wolf could have had difficulty gliding his aircraft to the runway. The purpose of subsection 602.96(4) of the *CARs* is to ensure that pilots operating in the vicinity of an aerodrome follow established procedures to avoid any risk of accident or collision. The Appeal Panel is of the view that a fine of \$1 500 is dissuasive and appropriate, despite being the Appellant's first contravention.

VI. DECISION

[73] Accordingly, the Appeal is dismissed, and the monetary penalty of \$1 500 assessed by the Minister of Transport is upheld.

September 28, 2010

Reasons for Appeal Decision: Suzanne Racine, Member

Concurred by: J. Richard W. Hall, Chairperson

Franco Pietracupa, Member