CAT File No. O-1918-41
MoT File No. PAP 5504-C-002924-033700

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Appellant

- and -

Delco Aviation Limited, Respondent

LEGISLATION:
Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.7
Canadian Aviation Regulations, SOR/96-433, s. 601.04(2), 602.13(1)

Restricted zone, Reduction of monetary penalty, Flight in Class F airspace, Double jeopardy, Built-up area

---

Appeal decision
Faye H. Smith, Michel G. Boulianne, Michel Larose

Decision: September 19, 2001

TRANSLATION

We allow the appeal in respect of counts 3 and 4 regarding contraventions of subsection 601.04(2) and cancel the sanction. We deny the appeal in respect of counts 1 and 2 regarding contraventions of subsection 602.13(1) and confirm the penalties of $500 each for a total of $1,000.. This amount is to be made payable to the Receiver General for Canada and received by the Civil Aviation Tribunal within fifteen days following service of this determination.

An appeal hearing respecting the above-noted matter was held Tuesday, January 16, 2001 at 10:00 a.m. at the Québec Municipal Commission in the City of Québec, Quebec.

BACKGROUND

The Appellant Delco Aviation Limited (herein referred to as Delco), is a Canadian air operator operating, among others, tourist flights from its main base, situated on La Rivière des Prairies, at Laval.

It was alleged that the company had on May 16 and 20, 1999 landed on the Welland River to the east of Lyons Creek in the town of Niagara Falls, and then had taken off, and on the same dates, had operated an aircraft in Class F Special Use Restricted airspace without having obtained the required prior authorization.

To this end, the Department of Transport sent Delco a Notice of Assessment of Monetary Penalty for contravention of the two regulations cited therein. The Notice of Assessment of Monetary Penalty set a penalty of $5,000 for each of the first two counts, being alleged breaches of subsection 602.13(1) of the *Canadian Aviation Regulations* (CARs) and a penalty of $2,500 for each of the remaining two counts which were alleged breaches of subsection 601.04(2) of the CARs for a total assessed penalty of $15,000.

Subsections 601.04(2) and 601.13(1) of the CARs state as follows:

> 601.04 [...]
>
> (2) No person shall operate an aircraft in Class F Special Use Restricted airspace unless authorized to do so by the person specified for that purpose in the *Designated Airspace Handbook*.
>
> 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.

Mr. Pierre Beauchamp, Member of the Civil Aviation Tribunal, rendered his determination on September 19, 2000 following the review hearing held on February 29 and April 18, 2000. The decision of the Minister was confirmed and the assessed penalties for counts 1 and 2 were reduced to the sum of $500 each, and the penalties for counts 3 and 4 reduced to $1,000 each, for a total of $3,000.

GROUNDS FOR APPEAL

Mr. Jenner on Delco's behalf appealed the determination of the Tribunal Member for the following reasons:

1. The Member erred in law in applying jurisprudence relevant to an overflight of a built-up area to a case concerning the take-off of an aircraft in a built-up area.
2. Further, he imputed to the pilot a task of familiarization which could not be applied to all pilots.
3. The member confused operations in airspace with operations on the ground.
4. The member erred in fact in attributing to Chippawa the name of "town" (larger than a simple village) when it is clearly a village in the bilingual sense of the word.

THE APPELLANT'S ARGUMENTS

Upon alluding to the concept of exposure to multiple convictions, Mr. Jenner, on Delco's behalf posed the following question: "Was it possible to take off and to land on this date at this location without having breached CYR518?" He referred to page 3 of the determination following the review concerning the flight inside the CYR zone in Niagara Falls regarding the evidence of Mr. Alex Oleksiuk.

> Regarding the events of May 16, 1999, he testified to having observed a seaplane circulating on the Welland River in the direction of the pillars of an old bridge, which were located near Weightman Bridge, situated near his home.
>
> The aircraft turned in the proximity of the said pillars, the motor increased its power, and the seaplane commenced its take-off run, climbing after having passed the electrical wires that cross the river, near the entrance of a brook called Lyons Creek, where the local marina is located.
>
> He had taken some photos (Exhibit M-5) at the time of the take-offs which seem to corroborate his statement.
>
> On May 20, 1999, he again observed a seaplane which proceeded in the same way and he informed the Minister of Transport by letter (Exhibit M-6) dated May 20, 1999.
>
> Mr. Oleksiuk described two points of flight of the seaplanes which are different. Regarding the take-off on the 16th of May, the seaplane of which he took photos, flew near the intersection of Lyons Creek and the Welland River. According to the event of the 20th of May, the seaplane, this time, took its flight a little more to the east, in the proximity of the wharf.
>
> Finally, he testified that he had seen Delco's aircraft operate in this region in the past and stated that there was also a private seaplane which was stationed up at Lyons Creek. This seaplane has been operating from the Welland River for over 20 years, but lands and takes off to the west of the mouth of Lyons Creek, on the Welland River.

This testimony of Mr. Oleksiuk is corroborated by that of the pilot at page 7 of the determination:

> Regarding the events of May 16, 1999, he landed on the western part of the Welland River, but regarding the take-off, he commenced his take-off (as the witness Oleksiuk indicated on map M-3) to the west of the pillars of the old bridge, but kept the aircraft on the water until after he had exited the CYR518 zone. He did not take flight until he had passed this location, which he wrote on the said map M-3 and which corresponds, according to him, to the western extremity of Chippawa, near the entrance of Lyons Creek.

Mr. Jenner referred to page 19 where the Tribunal Member stated that regarding the alleged contraventions, the Minister had the burden of proving that the take-off position was actually inside said airspace CYR518 and that such take-offs are prohibited.

It is the position of Mr. Jenner that the CYR518 prohibition is to not fly and there is no specific mention of take-off. At page 3 of the determination, the witness Mr. Beck explains that CYR518 is a zone of flight exclusion and he makes no reference to take off or landing. Mr. Jenner asserts that the word "take-off" was added in the infraction. He does not agree with the use of the word take-off in the last paragraph of page 20. It is not prohibited to take off in the zone. It is prohibited to fly. Thus there is no infraction. Finally, he refers us to the last sentence on page 6: Testifying for the defence, Mr. Heppell stated that he demands of his pilots that they not take off from the water until after leaving the said restricted zone.

The Tribunal Member concluded that it is clear that during take-off, as soon as the motor is powered up with the object of taking off, this operation initiates the take-off. In the circumstances, the aircraft running on the water with the flaps in take-off position, and the motor powered up ready for take-off, is an integral part of take-off and thus from this point the aircraft is in flight even if it has not actually taken flight until a few hundred feet further, outside the said regulated zone.

Mr. Jenner submits that the strict interpretation is not reasonable. He urges that he had not left the ground, he did not fly in the zone and it was not a contravention.

Concerning the built-up area, he referred the appeal panel to page 17 where the Tribunal Member has summarized the arguments. He states that it is explained very well that according to the definitions, a town, even a small town, is not a village and the term village used in the text of the regulation cannot translate or explain the same spirit of the law as the English text which speaks of a town which, as he had said, is larger than a village.

He argued that the French text would be more restrictive than the English text, and it would prohibit, among other things, take-offs in a greater number of areas in the country, for those who consult the law in French as opposed to in English.

THE RESPONDENT'S ARGUMENTS - THE MINISTER

The Minister's representative maintains that the Tribunal Member did not err in law in applying jurisprudence regarding an overflight of a built-up area to the Appellant's take-off in a built-up area. He submits that neither the *Aeronautics Act* nor the CARs define the term "built-up area". In such case, the Tribunal can refer to the jurisprudence and come to a conclusion based on the evidence. In the case at hand, the Member referred to the decision *R. v. Stoesz*[1] for a definition of "built-up area". It is submitted that this definition applies to a take-off in a built-up area or flight over a built-up area. The Minister states that the facts fully justify the Member's conclusion that the part of the Welland River where the two aircraft took off is situated within a built-up area.

Regarding the third ground of appeal, the Minister stated that subsection 601.04(2) of the CARs is clear in prohibiting the operation of an aircraft in Class F airspace without authorization. In this case, zone CYR518 includes the surface up to 3,500 feet.

The restriction in the *Designated Airspace Handbook* reads as follows:

> No person shall **operate** an aircraft within the area described unless the flight has been authorized by the User/Controlling Agency, except for medical and police flights. [emphasis added]

In this case, the Member concluded that the aircraft had made the take-offs. These take-offs were inside CYR518. The Member wrote at page 20 of his determination:

> The problem is that it is not contested that on the 16th and 20th of May, the Respondent's pilot commenced his take-off run near the pillars of the old bridge and therefore within the said restricted airspace.
>
> It is clear in my view that during take-off, when the motor is powered up with the object of taking off, this operation initiates the take-off. In the circumstances, the aircraft running on the water with the flaps in take-off position, and the motor powered up ready for take-off, is an integral part of take-off and thus from this point the aircraft is in flight even if it has not actually taken flight until a few hundred feet further, outside the said regulated zone.
>
> It is not the departure of the aircraft from the supporting surface (in this case the water) which constitutes the take-off, but also the whole aircraft operation immediately preceding the flight or as the *Aeronautics Act* stipulates: "the act of leaving a supporting surface, and includes the take-off run and the acts immediately preceding ... the leaving of that surface."

The Tribunal Member wrote in his determination at page 21:

> The prohibition clearly indicates that no aircraft can be *piloted*, and making an aircraft take off is surely piloting it, even if the flight itself is made outside the restricted zone.

Mr. Béland for the Minister submits that it is evident that one **operates or pilots** an aircraft when one makes a take-off, and he maintains that the conclusion of the Member is not unreasonable.

Regarding the Appellant's last ground of appeal, that the Tribunal Member erred in attributing to Chippawa the stature of "town", the Member wrote at page 18 of his determination:

> In view of the evidence, Chippawa is a region that is larger than a simple *village*, plus the fact that it forms part of the municipality of Niagara Falls ("The City of Niagara Falls"). It therefore comes within the terms of the prohibition in

subsection 602.13(2), and does so, even with the interpretation of the words *town* or *village* which is the most favourable to the Respondent.

The Minister argued that the evidence presented at the review fully justifies the conclusion of the Member that the region of Chippawa is larger than a simple village, plus the fact that it forms part of the municipality of Niagara Falls:

- Determination, p. 18
- Testimony of Al Oleksiuk, p. 24
- Testimony of Ross Beck, p. 80, 82
- Testimony of Michael Stevenson, p. 110
- Exhibit M-3 - Map B-3
- Exhibit M-4 - Map B-11
- Exhibit D-2 - VTA Toronto
- Exhibit M-15 - Video
- Testimony of Jean Heppell, April 18, 2000, p. 23.

The Minister's representative, Mr. Béland, refers the Tribunal to his earlier argument that conclusions of fact or findings of credibility ought not be reversed unless they are unreasonable.

DISCUSSION

Respecting the two allegations found in counts 1 and 2 the principal point of the debate is whether the aircraft cited landed and took off within a built-up area.

On the definition of "built-up area" or "zone bâtie" the Tribunal was referred to the case of *R.* v. *Stoesz,* supra, as cited at page 13 of the review determination. The appeal panel agrees with the finding in that case that it is not enough to say an area is within the boundaries of a city, but we must look at the areas to see if they are built-up or not. Equally, as was stated in the earlier case of *R. v. Crocker*,[2] built-up areas are not confined to areas within incorporated areas, but rather we must deal with the factual situation on the ground in determining whether the area is built-up. The regulations are designed for pilots and thus built-up areas should be recognizable from the air.

Accordingly, we must look to the facts of each individual case to determine whether the area in question is a built-up area. In the case before us, it was established, through the testimony of the two witnesses, that take-offs had clearly taken place on the dates set out in the Notice of Assessment of Monetary penalty (May 16, and 20, 1999) at some point on the Welland River, near the pillars of the old bridge, according to the testimony of Mr. Oleksiuk, or near the marina, according to the testimony of M. Heppell, and this is the main issue in dispute.

Also, the maps indicating the town of Niagara Falls (M-3 and M-4) were produced in support of the affirmations of the said Oleksiuk and displayed the infrastructures of the said region of Chippawa and the houses and streets which border the Welland River at the mouth of the Niagara River, in a westerly direction towards the mouth of the brook called Lyons Creek.

Further, the photos (M-11) taken by Inspector Beck from the banks of the said river and the aerial video taken on board a helicopter overflying the region concerned, provide good evidence of a built-up area along that part of the Welland River.

The Tribunal Member stated that there was no doubt in his mind that the part of the Welland River situated near the pillars of the old bridge and the Weightman Bridge is situated within a built-up area, and that Delco's representative admitted that in the case of Chippawa, it was a village.

Notwithstanding that he admitted this fact, Delco's representative did not admit that the village of Chippawa answered the designation of village in the sense of subsection 602.13(1). He pleaded that the English version which uses the terms "within a built-up area of a city or town"supposes an urban agglomeration as defined by "town"[3]:

> Any considerable collection of dwellings and other buildings larger than a village and comprising a geographical and political community unit, but not incorporated as a city.[4]

At page 18, the Tribunal Member concluded that in view of the evidence, Chippawa is a region that is larger than a simple *village*, plus the fact that it forms part of the municipality of Niagara Falls ("The City of Niagara Falls"). It therefore comes within the terms of the prohibition in subsection 602.13(2), and does so, even with the interpretation of the words *town* or *village* which is the most favourable to the Respondent (herein the Appellant). He found that the Minister had therefore proved on a balance of probabilities the allegations found in counts 1 and 2.

We find that the determination of the Tribunal Member was reasonable in the light of the evidence presented at the review as summarized at the conclusion of the Minister's case herein.

With respect to the two allegations contained in counts 3 and 4 concerning the airspace CYR518, the prohibition clearly indicates that no aircraft can be *piloted*, and making a take-off in an aircraft is surely piloting, even if the flight is made outside the said exclusion zone.

Furthermore, the reviewing member stated that while he understood very well that the regulation was strictly applied, the terms used and described herein do not logically permit any other interpretation. The Member accordingly concluded that the Minister had proved on a balance of probabilities that the Respondent (herein the Appellant) had contravened subsection 601.04(2) as set out in counts 3 and 4 of the Notice of Assessment of Monetary Penalty. The appeal panel accepts the analysis of the member at review and concurs with his conclusions.

DOUBLE JEOPARDY

The issue of double jeopardy and the rule against multiple convictions have arisen in a number of Tribunal cases, the earliest being *Marcus Brace and the Minister of Transport*.[5] These infractions involve allegations of flying with equipment that was not properly secured; undertaking a VFR flight made not in accordance with weather minima as prescribed by the

Minister and finally operating the aircraft in a negligent or reckless manner. All matters were heard by Mr. Barry Dryvynsyde at one hearing. The Member confirmed the Minister's decision to suspend the licence in each case and required that the suspensions run concurrently one to the other. The approach taken by Mr. Dryvynsyde is interesting in that he recognizes that each of the three allegations arise out of the same set of circumstances and hence the eminent fairness of treating them in the penalty, as concurrent infractions. No doubt the issue was not raised with him and accordingly it was not necessary for him to determine the "rule against multiple convictions"[6].

In the case of *Sanchez*, Mr. Sanchez was faced with the allegations of negligent flying and failing to have sufficient fuel as required by the applicable regulations. The distinction here is that one charge is a "designated provision" and the other one is the suspension of a Canadian aviation document pursuant to section 5.9 (now 6.9) of the *Aeronautics Act*. Given that the Tribunal has jurisdiction in respect of both procedures, it is not an issue of consequence. The appeal panel discussed at length the concept of double barrel charges and the rule against multiple convictions as well as the long line of cases leading to *Kienapple. v. The Queen.*[7] In *Kienapple*, the majority of the court found in its decision rendered on February 12, 1974, that the rule against multiple convictions exists within our Canadian jurisprudence and has a long common law history. In holding that the penalties for both allegations could not stand, the appeal panel in *Sanchez* cited the words of the Chief Justice in *Prince*:[8]

> We have no hesitation in concluding that the requirement of a sufficient factual nexus is satisfied in the present appeal. A single act of the accused grounds both charges.

This appeal panel is faced with the consideration of the issue of double jeopardy as it relates to the four counts cited. That is whether Delco can be found to have contravened the two counts relating to using an aircraft in Class F airspace without prior authorization and, in respect of the same act, be found to have contravened the two counts relating to flight within a built-up area. It is the same act of flight on May 16th and the same act of flight on May 20th which grounds both sets of charges. To establish double jeopardy, there must be a legal nexus between the two offences charged. A sufficient nexus between counts 1 and 3 and of counts 2 and 4 will be satisfied if there is no additional or distinguishing element that goes to the culpability contained in the offences which are sought to be precluded.

We consider that there is a legal link in these multiple charges, all of which are found in the designated provisions. It is our view that upon considering the prior authorizations which were required, we conclude that had a prior authorization been obtained from the Minister regarding flight in Class F airspace, then it is not likely that the Minister would have pursued an allegation regarding flight in a built-up area, and vice versa. Essentially, where the required factual similarities found in the same act of the accused is the ground for each of the charges, short of a clearly expressed intention of Parliament to the contrary, the rule against multiple convictions will prevent a conviction on both offences arising out of the same fact situation. It is our view that the offences in counts 1 and 3 are alternative charges as are those found in counts 2 and 4. Hence, where offences overlap as they do in this case, unless there are additional or distinguishing elements, a conviction on both offences should not stand.[9]

We concur with the conclusion of the Tribunal Member at review that all of the allegations were proved by the Minister; however, we are of the view that the offences do overlap and we believe that Delco has been placed in a position of double jeopardy. In the *Sanchez* case the appeal panel found that negligence was the subsuming charge in that it embraces the elements which give rise to the findings in respect of the paragraph 544(*a*) charge, and the panel decided, as did the court in the *Prince* case at page 55, to render a stay of the proceedings on the lesser offence and leave the penalty in respect of the greater offence.

We find on the facts before us that the flight within a built-up area is the subsuming charge and embraces elements giving rise to the charge of flight within Class F airspace. In the table of sanctions available to the Minister, the first two counts have potential for assessments of larger monetary penalties than do the offences found in counts 3 and 4.

DETERMINATION

Accordingly, we think it appropriate that the appeal in respect of counts 3 and 4 regarding contraventions of subsection 601.04(2) of the CARs be allowed in the result, for the reasons set out above, the sanction be cancelled and that the appeal in respect of counts 1 and 2 regarding contraventions of subsection 602.13(1) of the CARs be denied and we confirm the penalties of $500 each for a total of $1,000.

The foregoing decision does result in an anomaly in that while we have confirmed contravention of the larger offences and set aside the lesser offences, in fact the penalty is less than if we had confirmed the lesser offence. This is a matter beyond our control. The Tribunal Member at review reduced the penalties for counts 1 and 2 from $5,000 to $500 each. The Tribunal Member also reduced the assessed penalties for counts 3 and 4 from $2,500 to $1,000 each.

If this appeal panel had power to do so, we might be inclined to reinstate a higher penalty for the first two counts to reflect the monetary penalty usually assessed for a corporate offender having a record of a prior breach of flight rules . This consideration is moot for the purposes of this appeal since we have no power to increase the sanction for counts 1 and 2. On a reading of subsection 8.1(4) of the *Aeronautics Act* this panel can only alter the penalty in relation to matters where the appeal is allowed and not as in this case where we have dismissed the appeal regarding counts 1 and 2. The only way we could have altered these sanctions would have been in response to an appeal by the Minister of the Tribunal Member's reduction of sanction.

Reasons for Appeal Determination:

Faye Smith, Chairperson

Concurred:

Dr. Michel Larose, Member
Michel Boulianne, Member

[1] Manitoba Provincial Court, T. Lismer, J., February 4, 1983.

[2] (1979) N.S. County Court, O'Hearn, J.C.C.

[3] Determination, page 14.

[4] *New Illustrated Webster's Dictionary of the English Language*, Pamco Publishing Company, Inc.

[5] July 10, 1987, CAT File No. P-0009-02.

[6] *Edmundo R. Sanchez and the Minister of Transport*, December 14, 1989, CAT File No. O-0104-02.

[7] The Supreme Court of Canada - 15 C.C.C. 2d pg. 524.

[8] *Regina* v. *Prince*, S.C.C. November 6, 1986, 30 C.C.C. (3d) page 35.

[9] *Ibid*.