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

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Applicant

- 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

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Review Determination
Pierre J. Beauchamp

Decision: September 19, 2000

TRANSLATION

The contraventions alleged by the Minister of Transport are confirmed. The penalties assessed for counts 1 and 2 are reduced to $500 each, and for counts 3 and 4, they are reduced to $1,000 each, for a total of $3,000. The total amount of the penalty of $3,000, payable to the Receiver General for Canada, must be received by the Civil Aviation Tribunal within 15 days following service of this determination.

A review hearing on the above matter was held Tuesday, February 29, 2000 at 10:00 hours at the Federal Court of Canada in Toronto, Ontario and continued Tuesday, April 18, 2000 at 10:00 hours at the Federal Court building in Montréal, Quebec.

BACKGROUND

The Respondent, Delco Aviation Limited [hereinafter 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 19, 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 the Respondent a Notice of Assessment of Monetary Penalty that reads in part as follows:

> Pursuant to subsection 602.13(1) of the *Canadian Aviation Regulations*, 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.
>
> First offence
>
> On or about May 16, 1999, according to an eyewitness, an aircraft registered C-FSSA, owned by your company, landed on the Welland River, east of Lyons Creek, in the city of Niagara Falls and then took off.
>
> Second offence
>
> On or about May 20, 1999, according to an eyewitness, an aircraft registered C-GMJH, owned by your company, landed on the Welland River, east of Lyons Creek, in the city of Niagara Falls and then took off.
>
> [...]
>
> Pursuant to subsection 601.04(2) of the *Canadian Aviation Regulations*, 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*.
>
> Third offence
>
> On or about May 16, 1999, according to an eyewitness, an aircraft registered C-FSSA, owned by your company, was operated without authorization in Class F Special Use Restricted airspace CYR518 at Niagara Falls, Ontario. In fact, it took off from the Welland River, east of Lyons Creek.
>
> Fourth offence
>
> On or about May 20, 1999, according to an eyewitness, an aircraft registered C-GMJH, owned by your company, was operated without authorization in Class F Special Use Restricted airspace CYR518 at Niagara Falls, Ontario. In fact, it took off from the Welland River, east of Lyons Creek.

The Notice of Assessment of Monetary Penalty set a penalty of $5,000 for each of the first two counts and a penalty of $2,500 for each of the remaining two counts for a total assessed penalty of $15,000.

Since none of the penalties was paid within the prescribed time limit, a review hearing was held before the Tribunal on the dates and at the locations mentioned.

EVIDENCE

The Minister first presented Mr. Alex Oleksiuk, a Niagara Falls resident who lives on Front Street in Chippawa.

His house faces the Welland River, and he has lived there since 1983.

He testified using topographic charts (Exhibits M-3 and M-4) that showed buildings and houses on both sides of the river, as admitted by the Respondent.

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.

Mr. Oleksiuk's letter of complaint was forwarded to the office of the Minister of Transport and Inspector Ross Beck was assigned to the investigation.

He testified that he checked that the two seaplanes identified as C-FSSA for the May 16th incident, and C-GMJH for the May 20th incident, were in fact owned by Delco, as admitted by the Respondent.

The Respondent's representative also admitted, as shown in the log book entries (Exhibit M-9) for the said aircraft, that Mr. Heppell conducted flights on these aircraft in the Niagara Falls area, on the Welland River, on May 16 and 20, 1999.

Mr. Beck explained that CYR518 is a zone of flight exclusion that "protects" the Niagara falls and thereby regulates overflights.

Companies such as Niagara Airtours, Niagara Helicopters and Rainbow Helicopters, which are American companies, operate in the area regularly following a published procedure.[1]

This exclusion zone over the falls is described in the *Designated Airspace Handbook* (Exhibit M-9(1)). As far as Canadian airspace is concerned, it focuses on a geographic point[2] and includes all airspace from the ground to an altitude of 3,500 feet, located within a radius of two miles, centred on this point.

The prohibition indicates that 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.

This restricted zone is more fully described with a graphic representation in the *Canada Flight Supplement*, on the VFR flight procedures page for the Niagara falls (Exhibits M-2 and M-2(A)).

Mr. Beck testified that he went to the area. This section of the Welland River is also known as Chippawa Creek and the region is known as Chippawa.

The photos produced,[3] a video[4] made the following winter from a helicopter and his testimony all show that there are houses on the north and south banks of the Welland River.

The zone in which the aircraft circulated and started its take-off on the river is partially bordered by these homes. The river is approximately 300 feet wide.

According to his verifications with people in the department,[5] Delco had not received special permission to operate in restricted zone CYR518 or in a built-up area, nor was permission given pursuant to its operator certificate.

These facts were confirmed by the testimony of Mr. Michael Stephenson, Regional Manager of Commercial and Business Aviation for the department in Ontario, who has the power to authorize flights in restricted zone CYR518 mentioned in the VFR flight supplement and in the *Designated Airspace Handbook*.

Furthermore, Delco's president, Mr. Jean Heppell, sent him a letter[6] dated June 25, 1998 agreeing not to operate in restricted zone CYR518.

The document, *Aviation Enforcement Case Report*, which was used to prepare the department's case, was presented as Exhibit M-18 by Mr. Joseph Szwalek, under the objection of the Respondent's representative as to its admissibility.

Mr. Szwalek is manager of aviation enforcement for the Department of Transport for Ontario.

He explained the considerations his officials used to determine the sanctions established for each of these offences.

They referred to the *Aviation Enforcement Procedures Manual* which is used as a guide, and he explained that the primary objective of such penalties is to encourage offenders to comply with the regulations. He indicated that the mitigating circumstances of each case are considered, if applicable, as are considerations about flight safety since the department is primarily concerned with compliance with the Act.

He reminded us that there is a high level of air traffic in the area of the Niagara falls, that there had already been a collision between aircraft that were flying over the falls, and finally that the region is well-populated and has many tourists and aircraft.

He indicated that the principles and guidelines in the *Aviation Enforcement Procedures Manual* regarding the amounts of penalties to be assessed for a first, second or subsequent offence were not followed, but that in each case, the maximum penalty was assessed since, in this case, Delco had made the commitment, in the past, not to operate in this region, after discussions between the officials at the department and the representative of the said company. He also explained that when evaluating the penalties, and the mitigating circumstances, the past record of the offender is examined and that, in this case, there had already been payment of a penalty for operating an aircraft in restricted zone CYR518. For this reason, the department decided to assess the maximum penalties. Under cross-examination, in response to questions by the representative for Delco, Mr. Jenner, Mr. Szwalek explained that this penalty was not for the offence regarding built-up areas, but for the offence of unauthorized operation of an aircraft in restricted zone CYR518.

Both Mr. Szwalek and Mr. Stephenson testified that notices of assessment had been sent to the Respondent in the past for several offences regarding unauthorized use of an aircraft in designated airspace and for unauthorized flights in built-up areas, under circumstances similar to those in this case.

Following discussions between the Respondent's representative, Mr. Jenner, and the department's officials, it was agreed that the said notices of assessment would be withdrawn in consideration of the Respondent's commitment in writing (M-17) not to operate in designated zone CYR518. The notice of assessment was rewritten stipulating a penalty of $500 for the unauthorized flight in zone CYR518, and the penalty of $500 was paid by the Respondent.

Testifying for the defence, Mr. Heppell, Delco's president, confirmed the main points of this version of the agreement provided by Mr. Stephenson.

He explained that he has been operating from various locations of the Welland River for nearly 20 years and that he operated from a wharf just east of the marina and the junction of Lyons Creek and the Welland River for nearly 10 years. He can park two or three aircraft there.

He explained that he operates from his Commodore base at Laval, a base approved on his operator certificate, located in a built-up area between the cities of Montréal and Laval. There are also many other bases of operations in the Montréal area that are similar to his, such as Boisvert Aviation Limitée, located more to the east on Rivière des Prairies, and the Venise marina, also located in Laval on Mille-Îles River.

Regarding the rest, there are many waterways in the Montréal region where the department allows operation, such as the St. Lawrence River, Rivière des Prairies or Mille-Îles River, where one can simply fly over to see seaplanes based everywhere.

He was therefore surprised when, just over a year before the events now alleged, he was questioned by the Department of Transport regarding offences in the same location, and as in this case, received notices of assessment for having landed and taken off in a built-up area and flown in restricted airspace designated as CYR518.

These notices of assessment were settled following discussions with the department, considering the commitment in writing (M-10) to no longer operate within CYR518, and since there was a question whether or not this was a built-up area.

Under the circumstances, he had agreed to pay a penalty for a reduced offence for flying in restricted zone CYR518 since it was possible that one of his pilots had taken off within the said restricted zone.

As for the rest, it was agreed that he would subsequently operate west of Stanley Bridge and had accordingly obtained a lease so he could park his seaplanes in this section of the river. The next year, he could not renew his lease and had to restart his operation from his former home base, just east of Lyons Creek. He did however demand of his pilots that they not take off from the water until after leaving the said restricted zone.

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.

In cross-examination he corroborated witness Oleksiuk's statements in that it was definitely his aircraft, C-FSSA (as the Respondent had already admitted) on the photos, turning near the pillars of the old bridge to face the west. The aircraft therefore appears to be starting the take-off procedure in the photos (M-5), with the flaps in take-off position and the motor at full throttle. There is indeed a house in the background of the photo.

THE LAW

The *Canadian Aviation Regulations* (CARs) provide as follows:

> Overflight of Built-up Areas or Open-air Assemblies of Persons during Take-offs, Approaches and Landings
>
> 602.12 Except if conducting a take-off, approach or landing at an airport or military aerodrome, no person shall conduct a take-off, approach or landing in an aircraft during which the aircraft will overfly a built-up area or an open-air assembly of persons, unless the aircraft is operated at an altitude from which, in the event of an engine failure or any other emergency necessitating an immediate landing, it would be possible to land the aircraft without creating a hazard to persons or property on the surface.
>
> Take-offs, Approaches and Landings within Built-up Areas of Cities and Towns
>
> 602.13 (1) Except if otherwise permitted under this section [...] no person shall conduct a take-off, approach or landing in an aircraft within a built-up area of a city or town, unless that take-off, approach or landing is conducted at an airport or a military aerodrome.
>
> [...]
>
> Minimum Altitudes and Distances
>
> 602.14 (1) For the purposes of this section and section 602.15, an aircraft shall be deemed to be operated over a built-up area or over an open-air assembly of persons where that built-up area or open-air assembly of persons is within a horizontal distance of
>
> [...]
>
> (*b*) 2,000 feet from an aircraft other than a helicopter or a balloon.
>
> 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*.
>
> Built-up Area and Aerial Work Zone
>
> 702.22 (1) For the purposes of subsection 602.13(1), a person may conduct a take-off, approach or landing in an aircraft within a built-up area of a city or town at a place other than an airport or a military aerodrome, if the person

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

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

Finally, the *Aeronautics Act* defines the following terms at section 3 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;

"airport" means an aerodrome in respect of which a Canadian aviation document is in force;

Section 101.01 of the CARs defines the following:

"take-off" means

(*a*) in respect of an aircraft other than an airship, the act of leaving a supporting surface, and includes the take-off run and the acts immediately preceding and following the leaving of that surface, and

ARGUMENTS

The department's representative first spoke about the description of Class F Special Use Restricted airspace CYR518 in the extracts from the *Designated Airspace Handbook* (Exhibit M-1) that were given to the Respondent by disclosure of evidence in January 2000. It appears that the geographic coordinates of the central point of the regulated airspace in question are not the same in the French version, *Manuel des espaces aériens désignés*, as those in the English version of the same *Designated Airspace Handbook*.

In fact, the aviation chart[7] on which the said restricted zone is shown is based on the English version of the handbook that places the said Class F Special Use Restricted airspace CYR518 at 43°05'00"N 79°04'25"W.

Mr. Béland argued that there is a typographical error in the French version of the said handbook and that the English version (M-9) must be consulted.

The department's representative then submitted that the Minister has satisfied his burden of proof for the alleged offences.

He argued that it was proven on a balance of probabilities that on May 16 and 20, 1999, two aircraft registered to Delco took off from a built-up area and as such were in contravention of subsection 602.13(1) of the CARs.

In fact, in his opinion, both the testimony of witness Oleksiuk and the photos of the take-off on May 16th clearly establish this fact.

This region of the Welland River is actually a built-up area, and the evidence (testimony of Mr. Oleksiuk, photos M-5 and M-11, topographic charts M-3 and M-4, and video M-15) does not leave any doubt and conforms to the definition of built-up area as established by jurisprudence.

Finally, the Respondent had not obtained special authorization to operate as shown in the testimony of Mr. Ross Beck and in the internal correspondence of the Department of Transport introduced,[8] and the Respondent's air operator certificate did not provide this authorization either.[9]

The proof regarding the flight of the aircraft in a built-up area is the take-off of the aircraft. According to Mr. Béland, Mr. Heppell, the Respondent's pilot and president, admitted that in the photos of May 16th it appears that the motor is at full throttle.

The fact that there was an illegal take-off in a built-up area is therefore proven.

Concerning counts 3 and 4 regarding the unauthorized operation in Class F Special Use Restricted airspace CYR518, by taking off on May 16 and 20, 1999, Mr. Béland again submitted that the Minister has satisfied the burden of proof.

Repeating the evidence for the first two counts regarding the take-offs of the said aircraft in this precise location of the Welland River, he submitted that since this section of the river is clearly within Class F Special Use Restricted airspace CYR518, illegal operation in the said airspace is proven since the Respondent did not have authorization to do so in this case either.

Since the aircraft started their take-off runs within the said restricted zone (CYR518), subsection 601.04(2) of the CARs was contravened without a valid excuse.

The Respondent did not exercise all due diligence to avoid committing the offence. In fact, it would have been easy for the pilot to take off further west, away from both the built-up area and CYR518.

RESPONDENT'S CONTENTION

Mr. Jenner, the Respondent's representative, submitted that the objective of the relevant regulations regarding use of Class F Special Use Restricted airspace CYR518 in counts 3 and 4 is not to prevent the circulation of aircraft on the Welland River, but to protect the tourist area of the Niagara falls and to control access.

He submitted that if we refer to the VFR flight supplement that defines the said restricted zone, only part of the Welland River is within CYR518. The evidence shows, both according to the testimony of Mr. Oleksiuk and that of Mr. Heppell, that the aircraft only took flight close to the

marina and remained on the ground (on the water) until it was just outside the special use restricted airspace.

Furthermore, the relevant page (B481) of the *Canada Flight Supplement* (M-2) refers to "flights" in the said airspace CYR518.

This prohibition is therefore not about circulating within the said airspace, but about flying in it.

Regarding the different versions of the coordinates of the said airspace in the English and French versions of the *Designated Airspace Handbook*, he admitted there is an error in the French version and added that this is not the handbook the pilot normally refers to for determining the area. It is the information in the *Canada Flight Supplement* that is used as a guide.

He also submitted that the *Designated Airspace Handbook* mentions an exclusion zone of a two-mile radius from the geographic location mentioned, and, according to him, one must refer to an equivalent distance in statute miles in this case, rather than nautical miles, as used by Mr. Beck, the inspector.

He submitted that normally, in common terms, statute miles are used while the legend at the bottom of the page refers to nautical miles. One must avoid splitting hairs to prevent misunderstandings. In fact, he said that the *Designated Airspace Handbook* only mentions miles—it does not mention nautical miles. Therefore, no misunderstanding is possible.

Furthermore, Mr. Heppell did everything that can be asked of a reasonable pilot. He waited until he was clear of the restricted zone to take to the air. After all, this is what he requires of pilots who work for him, and both he and Mr. Oleksiuk agree on the identification of the point of take-off, west of the wires that cross the river, close to the marina and therefore outside Class F Special Use Restricted airspace CYR518.

Regarding the allegations of flights in a built-up area, Mr. Heppell established that he landed west of the marina, and there is therefore no question about this.

As for the take-offs, it must be determined if the section of the river in which his take-off was conducted is a built-up area such that he would be in contravention of subsection 602.13(1) of the CARs.

The Respondent's representative argued that it has not been established that Chippawa is a built-up area within a city and that there is no documentary or other evidence of this. According to him, Chippawa is a village as argued by the department's representative.

This brings up another problem, according to him, since the English version of the regulations mentions a "built-up area of a city or town" and "town" was translated as "village" in the French version.

In his opinion, the former *Air Regulations* (534), the source of the current regulations, mentioned a built-up area of a city, town or other settlement, making the cited jurisprudence, which is based on these regulations, questionable because the new regulations are more specific and clearer.

According to him, the new regulations are designed to restrict operations in large built-up areas, in other words, only those that are similar to a city. The regulations in subsections 602.12 to 602.16 must be seen in a wider sense. In his opinion, the legislator wanted to ensure the same level of safety anywhere as an overflight at 1,000 feet over large built-up areas of cities such as Toronto for example.

For him, by definition, a river is not a built-up area and use of the river is permitted by law, as long as it can be done safely. This is the interpretation that must be used for the new regulations.

SEVERITY OF SANCTIONS

Regarding the issue of sanction severity, the Minister's representative submitted that their objective is to protect the public. This is the primary criterion.

He brought up the criteria developed in the *Wyer*[10] judgment, including the laying of information and deterrence effect and proposed that the most severe penalties were assessed in consideration of the 20 previous offences committed by the Respondent that had been settled and reduced on payment of a penalty for a single offence of illegal use of an aircraft in Class F Special Use Restricted airspace CYR518, and his agreement in writing not to operate there.

Such penalties are now assessed based on this context. In his opinion, the context of safety and danger associated with unauthorized operations in the prohibited area, near the Niagara falls, supports this decision.

For his part, the Respondent does not see it as an issue of danger or safety of citizens, but one of noise.

The Respondent complied with his agreement not to operate in CYR518 and the dangers of the described operation along the Welland River are exaggerated.

An offence was not planned and there is no similar offence in the Respondent's record. The Minister is therefore not justified in using the maximum penalty for each offence.

DISCUSSION

In the first two counts, the Minister had to prove:

- that two aircraft (C-FSSA and C-GMJH) owned by the Respondent;
- had landed and taken off in a built-up area;
- on the Welland River, east of Lyons Creek, in the city of Niagara Falls;
- on May 16 and 20, 1999.

Note that the Respondent's alleged actions in counts 1 and 2 were not conducted at an airport or a military aerodrome.

There is also no evidence in the record about the landing of the said aircraft within a built-up area of the city of Niagara Falls.

In their testimony regarding the section of the river described by Mr. Oleksiuk, both Mr. Oleksiuk and Mr. Heppell mentioned only take-offs. Mr. Heppell confirmed having landed to the west of the area in question on those days.

It was established, however, through the testimony of the two witnesses, that take-offs had clearly taken place on the dates set out in the notice of assessment (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.

As mentioned earlier, the Minister had to establish, on a balance of probabilities, that the section of the river on which the take-offs were observed is within a built-up area of a city or town.

Neither the *Aeronautics Act* nor the CARs define the term "*built-up area*";[11] nor are the terms "*cities*" or "*towns*" defined.

As evidence of city or town, the Minister submitted the testimony of Mr. Oleksiuk, who stated he lives in the city of Niagara Falls, more specifically on Front Street in Chippawa.

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, as per the familiar expression "a picture is worth a thousand words", 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.

On the definition of "built-up area" or "zone bâtie" the Tribunal was referred to the case of *R.* v. *Stoesz*[12] that examined the regulations about flying over or within built-up areas in effect at the time. The terms used then were "agglomérations urbaines, villageoises ou autres" in French, and "built-up area of any city, town or other settlement" in English, and stated:

> In spite of all this, if this area over which he flew is not a built up area, then, of course, that is fatal to the Crown's case. The Regulations nor the Act unfortunately does not define built up area... The use of the plural suggests that the specific section or parts of any such city, town or settlement have to be looked at to see whether there are parts that are built up or not built up...

> Oxford Shorter Dictionary defines 'build' as to erect, construct, to erect a building or buildings. Webster's New Twentieth Century Edition defines 'build' as to construct or erect as a home, ship or wall; to unite into a structure... Synthesizing this information, built up suggests to me structures that are, especially those that are not abandoned, erected or built by man and includes such structures as private dwelling residences, schools, elevators, service stations and so forth.

There is no doubt in my mind that the part of the Welland River situated near the pillars of the old bridge and Weightman Bridge is situated within a built-up area, and the Respondent's representative, Mr. Jenner, admitted that in the case of Chippawa, it was a village.

Does this give us evidence that the aircraft described in the notices of assessment in fact took off from a built-up area of a city or town as described in the CARs and therefore, is this satisfactory evidence of the alleged offence?

In his argument, the Respondent's representative admitted that Chippawa is a village; however, he did not admit that the village of Chippawa answered the designation of village in the sense of subsection 602.13(1).

In fact, he submitted that to give full meaning to the regulations, sections 602.12 to 602.16 must be considered in their entirety, as well as their English version, to properly understand the scope of the term "town" used in 602.13(1).

He argued 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":

> 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.[13]

Since the said village of Chippawa does not correspond with this version of a region that is larger than a village, in his opinion, subsection 602.13(1) cannot apply.

Use of the term *village* in the French version of the said section does not accurately translate the true intent of the legislator that is to ensure a certain level of safety equal to overflying a city at a minimum altitude of 1,000 feet, for example (subsection 602.14(2)).

According to the Respondent's representative, the pilot is required to comply with section 602.12 of the CARs if he is not within a built-up area of a town, and as long as he conducted his take-off safely in such a manner that "in the event of an engine failure or any other emergency necessitating an immediate landing, it would be possible to land the aircraft without creating a hazard to persons or property on the surface" as the Respondent did, he cannot be charged with the contravention of 602.13 as alleged.

Respectfully, I could not agree with this position of the Respondent's representative.

It is true that sections 602.12 to 602.16 cover the main points of section 534 of the old *Air Regulations*, and that the new version has many differences.

Under the circumstances regarding counts 1 and 2 (the take-offs in contravention of 602.13(1)), we can begin by saying that it is clear these flights were not of the type covered by section 603.66 that covers miscellaneous special flight operations authorized on the operator's certificate.

The Respondent had not obtained an authorization from the department nor was he authorized under the terms of his operator certificate issued pursuant to part VII of the CARs which would exempt him from the application of subsection 602.13(1), pursuant to subsection 702.22(1).[14]

It is also clear from the evidence, and no such exemption was mentioned by the Respondent, that in the case of these flights, the aircraft were not operated for the purpose of a police operation or for the purpose of saving human life (602.13(2)).

For the purposes of this case, subsection 602.13(1) stipulates:

> [...] no person shall conduct a take-off... in an aircraft within a built-up area of a city or town, unless that take-off... is conducted at an airport or a military aerodrome.

The position of the Respondent is essentially that this is not a built-up area of a city or town, and that section 602.12[15] therefore applies, and since it has not been proven that these take-offs were not conducted in a safe manner, the Respondent did not contravene the regulations.

Under the circumstances, is Chippawa a city or town according to subsection 602.13(1) considering that the English version of the same subsection mentions *city* or *town*? By definition, *town* would mean a region that is larger than a village. If we refer to the standard translation of the term *town*, it is *ville* in French, defined as "Milieu géographique et social formé par une réunion importante de constructions et dont les habitants travaillent, pour la plupart, à l'intérieur de l'agglomération[16].

The term *city* has been translated to *ville* and *town* has been translated to *village.*

However, the term *town* is defined in the dictionary as:

> 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.[17]

This definition of the term *town* would make the French version of the regulations that uses the term *village* as equivalent of *town* more restrictive, because if a village is smaller than a *town*, the French regulations would restrict approaches and landings over a much wider area than the English version, since there are more *villages* than *towns* in the country.

In fact, the term *village* also exists in English and the French definition is almost identical.

"village[18]" A collection of houses in a rural district, smaller than a town but larger than a hamlet, and usually arranged according to a regular plan.

"village[19]" Agglomération rurale; groupe d'habitations assez important pour avoir une vie propre (à la différence des hameaux)... Opposé à *ville*.

"ville[20]" Milieu géographique et social formé par une réunion importante de constructions et dont les habitants travaillent, pour la plupart, à l'intérieur de l'agglomération.

We can contend that the legislator certainly did not want to create a difference in the application of the regulations in French and English.

Section 2 of the *Official Languages Act* decrees that the purpose of the said Act is to:

> (*a*) ensure respect for English and French as the official languages of Canada and ensure *equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect with their use ... in the administration of justice ...*[21] (emphasis added)

And in section 13:

> Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and *both language versions are equally authoritative* (emphasis added).

In my opinion, it is therefore clear, considering the definitions provided above, that the French version of subsection 602.13(1) of the CARs, that covers prohibitions in conducting take-offs, approaches or landings *à l'intérieur d'une zone bâtie d'une ville ou d'un village* differs from the English version which describes this prohibition in terms of *built-up area of a city or town*.

In fact, the English term *town*, taken in its current sense in Canada, does not mean village, even when used with the term *city*, particularly if the French version *ville* is used with *village*.

Furthermore, the term or word *cité* as the French version of the English word *city*, exists and translates, or I should say expresses, the same idea. In other words:

"*city*[22]" 1. A place inhabited by a large, permanent, organized community. 2. In the United States and Canada, a municipality of the first class, governed by a mayor and aldermen and created by charter.

"*cité*[23]" Ville importante considérée spécialement sous son aspect de personne morale = ville.

For example, in Québec, the *Loi des Cités et Villes* has existed since 1903 in English as the *Cities & Towns Act* and applies to municipalities larger than rural municipalities which were covered by the *Code municipal* (municipal code). The term *city* therefore means a large city and the term *town* also means *city*, but in the context of being joined to the term large *city*, it means a smaller *city.*

According to these definitions, a city, even a small city, is not a village and the term *village* used in the text of the regulations cannot be translated as or express the same meaning of law as the English text that uses *town* which, as mentioned earlier, is larger than a village.

As argued by the Respondent's representative, the French text of the regulations would then be more restrictive than the English text, since it would prohibit, among others, take-offs in a larger number of regions in the country for those who consult the Act in French, than those who consult it in English.

This is certainly not what the legislator intended.

The rules of construction require in such a context, that the law be constructed in a way that gives it meaning. In fact the *Interpretation Act*[24] stipulates:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[25]

In this context, the alleged offender must benefit from the least restrictive definition of the law.

If Chippawa is only a *village* and not a *town*, the Respondent would not have contravened subsection 602.13(1) by his take-off, because the take-off would not have been *within a built-up area of a city or town*.

As argued, the pilot's application of the regulations can certainly not be tied to the legal definition given to a region or municipality, that is whether a region is a "city or town" according to applicable provincial law.

It must be possible for the pilot to recognize whether his destination or departure point is a *city or town* or large or small city during preparation and conduct of the flight.

The CARs require pilots to familiarize themselves with everything related to safe operation (and I would add, legal) of the flight to be undertaken. For example, this includes weather and navigation aids for departure and destination points, as well as the entire planned flight.

This information must therefore include his right to take off and land at the departure and destination points. In fact, even when operating at certain certified airports, for example those in large centres such as Toronto or Vancouver, the pilot must familiarize himself with the specific relevant regulations and procedures for operating at these airports that may, as we know, include many restrictions.

The same type of obligation also exists in this context.

The pilot therefore had to ask and check if he could land and take off from the site where he intended to operate.

On one hand, it has been proven that the Chippawa region is part of the "City of Niagara Falls" and, on the other hand, and the visual evidence speaks for itself here, Chippawa is a built-up area of a certain size.

There could be no doubt in the mind of the Respondent's pilot that he was operating within a built-up area of a "town", or of a "petite ville" in French, during the alleged flights, and he must have known he could not take off from that area. Furthermore, he testified to the fact that he had landed further west of the area from which he took off. This meant he had recognized that this was a zone prohibited by regulation. Did he act in this way because of the prohibited CYR518 airspace or because of the prohibition regarding built-up areas of a *city* or *town*? Regarding his landing, this has not been proven.

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 therefore proved on a balance of probabilities the allegations found in counts 1 and 2.

COUNTS 3 AND 4

Regarding the alleged contraventions, of having operated in Class F Special Use Restricted airspace CYR518 at Niagara Falls, Ontario on May 16 and 20, 1999 without authorization by conducting the take-offs mentioned above, 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.

CYR518

The scope of the said Class F Special Use Restricted airspace CYR518 has been proven in one part by the filing of the *Designated Airspace Handbook* (M-1) that describes and identifies the airspace in question as:

> The area of uncontrolled airspace is described as a circle with a radius of 2 miles centred on 43°05'00"N 79°04'25"W, excluding that portion outside a Canadian airspace.
>
> Designated Altitude – Surface up but not including 3500'
>
> [...]

> Operating Procedures – 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.

This is also proven by the filing of the *Canada Flight Supplement* (Exhibit D-3) and the description of said CYR518 and the applicable procedures.[26]

This is also proven by Aviation chart Toronto VTA (D-2) and the entry made by witness Beck on the chart of the Chippawa region (M-3) that appears on the video (M-15).

Regarding the position of CYR518, two disputed points should be clarified immediately.

There is no doubt that the description of CYR518 in the French version of the *Designated Airspace Handbook* does not match with any of the other descriptions of the airspace mentioned above. It is obvious that the aviation charts and entries on the topographic charts of Chippawa (M-3) match the geographic description in longitude and latitude provided in the English version of the said manual.

In fact, the west longitude is given as 74° in the French version, instead of 79° as in the English version.

The Respondent's representative accepted and argued that this was not the manual used by the Respondent's pilot to familiarize himself with the said restricted zone.

It was therefore not necessary to attach any importance to this discrepancy between the French and English versions, and, for the purposes of this case, we can substitute 79° with 74° in the text mentioned above.

Since the debate over the presumed illegal operation of the Respondent's aircraft is based on a question of literally a couple of hundred feet, the Respondent's argument that the two-mile radius should be in statute miles instead of nautical miles must also be dismissed immediately since this would mean 5,280 feet instead of two nautical miles, which would be 6,000 feet, since the said *Manuel des espaces aériens désignés* mentions *milles* without a specific designation.

We must however refer to section 2 of the manual to properly understand the terms used: "Glossary of aeronautical terms and designation of various airspaces".

The first paragraph states: "The terminology used in this section must wherever possible comply with that published in the ... *A.I.P. Canada*...".

Section Gen 1-7 of the above-mentioned A.I.P., in section 1.5, states that distances used in navigation are measured in nautical miles.

The end of the said exclusion zone would therefore be just west of the wires that cross the Welland River.

In the case of the May 16th take-off (count 3), Mr. Oleksiuk's testimony, confirmed by photo 4 produced as M-5, positions the flight just west of the said wires and therefore very close to the boundary of the restricted airspace, possibly even outside the airspace.

Mr. Heppell positions his take-off of May 20th (count 4) close to the marina, at the mouth of Lyons Creek and therefore outside the said restricted airspace.

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 restriction stipulated in the said handbook is that "no aircraft may be *piloted* in the restricted zone, unless authorized..." and this exclusion zone includes a designated altitude from the surface at below 3,500 feet.

Mr. Jenner eloquently argued that the purpose of this exclusion is to prevent accidents over the falls by excluding low-altitude flights and that its purpose cannot be, as here, to exclude or prohibit a take-off in the adjacent area.

Respectfully, I do not agree with this interpretation of the regulations.

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.

While I understand very well that the regulation was strictly applied, the terms used and described herein do not logically permit any other interpretation.

Under the circumstances, I am satisfied that the Minister proved on a balance of probabilities that the Respondent contravened subsection 601.04(2) of the CARs as set out in counts 3 and 4 of the Notice of Assessment.

PENALTIES

The Minister applied the maximum penalty provided for in the regulations for each count, arguing that the offence has been repeated, and that a written agreement about not operating in this region was broken.

According to the department's representatives, the Respondent had in the past contravened the said provisions more than 20 times and that it fully justified the severity of the penalties. What about this?

The Respondent's objection to the submission into evidence of the file[27] used by the department's officials for preparing this case was immediately dismissed. This document is relevant and admissible because it describes and explains the progress of the investigation by inspectors regarding the incidents under study. It does not prove its contents, but simply explains the logic used by the Minister. The Tribunal reserves the right to give it applicable weight when evaluating all of the evidence.

There is evidence that there had been a notice of assessment of monetary penalty in the past, dated June 1998. There were in fact allegations of 13 counts, during the summer of 1997, of having contravened the built-up area regulations, mentioned above, and 7 counts, in the same period, regarding the CYR518 restricted zone.

There is also evidence that after dealings and negotiations between the Minister's representatives and the Respondent, the said 20 counts had been withdrawn, and the Respondent had paid a penalty of $500 for one offence of operating in special use restricted airspace CYR518 without authorization, and had agreed not to "fly or land there". There is therefore no repetition regarding any offences for taking off in a built-up area, since the said notices of penalty were withdrawn.

Regarding the offences under subsection 601.04(2) (the illegal use of CYR518 airspace), the Respondent has in fact pleaded guilty to such an offence in the past.

On the other hand, the severity of the penalties assessed must be considered in regard to the objective of the law as mentioned in the *Wyer*[28] decision and the seriousness of the acts indicated.

We must remember that only two take-offs were involved in which the Respondent's pilot could have contravened two regulations each time. Regarding the take-offs, while noisy, there is evidence that they were not conducted in a manner that would endanger the lives or safety of riverside residents.

In fact, it is clear that if they had been conducted a few thousand feet further west, in the same manner, there would not have been an offence.

The *Wyer* decision mentioned above stated:

> The Dubin Commission ... indicated that the objective of the enforcement branch should be to obtain compliance with the Aviation Safety Standards lawfully promulgated and that Transport Canada should develop a coherent enforcement

> policy to be published in an Enforcement Manual provided to all enforcement specialists and should seek to achieve uniformity in all the Regions. ... The enforcement policy should recognize aviation safety as the paramount consideration in determining when and what enforcement action should be taken with due regard to public convenience and economic consequences. The policy should require that vigorous enforcement action will be taken with respect to all deliberate breaches of the Aviation Safety Standards which derogate from safety. The issue of what is and what is not a deliberate breach should inevitably give rise to different treatment. The regulatory system must inevitably strike a balance between the interests of the individual and those of the aviation community as a whole.[29]

Under the circumstances, are these deliberate breaches as mentioned in the *Wyer* decision? I do not think so.

There is evidence that the Respondent's pilot thought he was outside the CYR518 zone during the said take-offs as well as outside a built-up area as described in the Act.

There is no reason to doubt his good faith. This good faith obviously does not excuse the offences and is not a defence, but must be considered when it comes to considering the severity of sanctions.

The effects of informing, dissuading and re-educating, which are the basis for all sanctions allowed in our penal system, as per the *Wyer* decision mentioned above, are for the most part met here by applying a reduced penalty. For counts 1 and 2, there are in fact no aggravating factors mentioned such as planned violation or premeditation to circumvent the law. I must add that the Tribunal is not governed by the recommended sanctions in the *Aviation Enforcement Procedures Manual* used by the inspectors (M-19). In fact, these are not minimum penalties assessed by the Act, but proposed in an internal department enforcement document.

Given the circumstances of the offence, I therefore reduce the penalty assessed against the Respondent for each of the first 2 counts to $500, for a total of $1,000.

Regarding counts 3 and 4, considering that the Respondent had in the past already paid a penalty of $500 for a similar offence, I reduce the penalty to $1,000 for each count, for a total of $2,000 in this case, because this is clearly a repetition.

I have made this determination in consideration of the principles mentioned above, and because of the fact that pilot Heppell believed his manoeuvre, taking flight outside the said restricted zone, was completely legal.

The contraventions alleged by the Minister of Transport are confirmed, and the penalties assessed for counts 1 and 2 are reduced to $500 each, and for counts 3 and 4, they are reduced to $1,000 each, for a total of $3,000.

Pierre J. Beauchamp
Member
Civil Aviation Tribunal

See Exhibit M-10: Niagara Falls Flight Procedure Chart.

43°05'00"N 79°04'25"W.

See the 13 photos produced under Exhibit M-11.

Exhibit M-15.

See Exhibit M-12, an e-mail message from Mr. Schobesberger (Regional Manager, General Aviation, Ontario Region) who has the power to authorize flights in built-up areas, and Exhibit M-13, an e-mail message from Mr. Ste-Marie (Québec Region) dated October 8, 1999.

See Exhibit M-17.

Exhibit D-2, Toronto VTA, VFR Terminal Area Chart.

M-12, M-13.

See Exhibit M-14.

Minister of Transport v. *Kurt William M. Wyer*, CAT File No. O-0075-33, appeal determination.

See: *Minister of Transport* v. *Jeffrey Erhard Albin Schroeder*, determination by the Vice-Chairperson of the Tribunal, June 16, 1998, C-1584-33 (CAT), p. 6.

Manitoba Provincial Court, T. Lismer J., February 4, 1983.

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

702.22 (1) For the purposes of subsection 602.13(1), a person may conduct a take-off, approach or landing in an aircraft within a built-up area of a city or town at a place other than an airport or a military aerodrome, if the person

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

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

602.12 ... no person shall conduct a take-off... in an aircraft during which the aircraft will overfly a built-up area or an ... assembly of persons, unless the aircraft is operated at an altitude from

which, in the event of an engine failure or any other emergency necessitating an immediate landing, it would be possible to land the aircraft without creating a hazard to persons or property on the surface.

Le Robert Méthodique, Dictionnaire méthodique du français actuel.

Op.cit. 13.

Op.cit. 13.

Op.cit. 16.

Op.cit. 16.

Official Languages Act, Chapter O-3.01 (R.S. (1985), c. 31 (4th Supp.)).

Op. cit. 13.

LE PETIT ROBERT, dictionnaire de la langue française, June 1996 edition.

Interpretation Act, Chapter I-21.

Id sec. 28.

See pages B480 and B481.

Aviation Enforcement Case Report mentioned on page 5.

Wyer note 10.

Id. p. 3, 4. (Pages 8, 9 of the translation)