

**CIVIL AVIATION TRIBUNAL**

BETWEEN:

**Minister of Transport**, Appellant

- and -

**Francis A. McGovern**, Respondent

**LEGISLATION:**

*Aeronautics Act*, R.S.C. 1985, c. A-2, s. 7.4

*Air Regulations*, C.R.C. 1978, c. 2, s. 534(2)(a)

**Low Flying, Built-up Area, Balloon**

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**Appeal decision**

**James W. Snow, Robert J. MacPherson, Robert J. Rushford, Q.C.**

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**Decision: June 4, 1987**

**Heard:** Edmonton, Alberta, June 4, 1987

*That the appeal be denied.*

Appeal Hearing on the above application heard by the Civil Aviation Tribunal, at the Department of Regional Industrial Expansion, Cornerpoint Building, 10179-105th Street, 5th Floor Boardroom, Edmonton, Alberta.

The Minister of Transport appeals the determination of Ed Jensen made on March 18, 1987, in which the single member of the Civil Aviation Tribunal found, pursuant to section 7 of the *Aeronautics Act*, that the Respondents, Francis A. McGovern and Joanne M. Cameron, did not contravene section 534(2)(a) of the regulations under the *Aeronautics Act*.

Section 7.1(1) of the Act provides a right of appeal of such determination. The Minister has appealed the determination. The appeal was heard at 09:00 hours at Edmonton, Alberta, before a three-member tribunal upon the record of the proceedings. Mr. Graham appeared for the Applicant and Mr. Colvin for the Respondents.

The Appeal Tribunal is empowered under section 7.1(4) of the Act to dismiss the appeal, or, allow it and in so doing substitute its decision for the determination appealed against.

The facts are as follows: Both Respondents accompanied by three others launched their balloons from a site known as Government House Park near Edmonton, commencing at approximately 21:00 hours local time on July 20, 1986. Prior to launching, a weather check was made both at Edmonton Municipal Airport and the Edmonton International Airport. In addition, three pieballs were let up. A pieball is a balloon, and the term pieball stands for "Pilot Inflated Balloon Aloft". The purpose of a pieball is to determine wind speed and wind direction aloft. At ground level, the winds were described as "gusty". The pieballs indicated that the higher they went, the more the winds switched and were blowing toward the southeast and lower down the winds were blowing in a more northeasterly direction. The area to the southeast of Edmonton is known as the Cooking Lakes area. It is a sensitive area for balloonists, containing a positive control zone, a game farm, some hostile land owners, water, swamp and marsh and, while it is possible to land a balloon in the area, it is generally considered to be hostile terrain unsuitable for landing balloons. A landing in the area could result in danger to both passengers and the balloon itself.

The area to the northeast of Edmonton has more open areas, less trees, water and swamp and a less hostile terrain more conducive to conducting a safe landing in a balloon. Balloons differ from other types of aircraft in that the landing is made downwind. An approach for a landing is different than a fixed-wing aircraft in that the approach is set up much farther back. Surface winds are critical and may differ considerably from winds aloft. It is often necessary to shoot an approach and if the spot chosen for landing is unsuitable, several more approaches may be necessary until a suitable spot is found. The process is one of evaluation and re-evaluation.

The evidence of the witnesses called on behalf of the Minister was that the balloons piloted by the two accused were well under the height prescribed in section 534(2)(a) of the regulations. The heights given by these witnesses were from observations from the ground. It was not possible to determine with any degree of accuracy the angle of the balloon from the point of observation, the size of the balloons or their distance from the observation point, all of which are relevant factors in determining height above the ground. It is therefore understandable that words such as "perhaps", "estimate" and "eyeballing" were used in relation to the evidence of height above ground.

The evidence of the Respondents is that after launch, they climbed to 1,000 feet above ground level and remained at that level until they were clear of the built-up area and were on the eastern edge of Sherwood Park. At this height, the winds aloft were estimated to be at 20 knots from the northwest. To remain at 1,000 feet would result in drifting over the Cooking Lakes area to the southeast of Edmonton, with a landing dangerous to both the occupants and the balloon. A decision was made at this point to look for a suitable landing area to the northeast and to do so, and obtain favourable winds, reduced altitude was necessary. At this point, a decision to land had been made. Several approaches were made before a suitable site was found approximately 1 3/4 miles northeast of the small community of Ardrossan, Alberta. From the eastern outskirts of Sherwood Park, the balloons were in the process of "attempting to land".

Evidence was also called by the Respondents from qualified witnesses showing the extreme difficulty of judging the height of an object above the ground with any degree of accuracy.

The wording of section 534(2)(a) under which both of the Respondents have been charged is as follows:

534.(2) Except as provided in subsections (4), (5) and (6), or except in accordance with an authorization issued by the Minister, unless he is taking off, landing or attempting to land, no person shall fly an aircraft

(a) over the built-up area of any city, town or other settlement or over any open air assembly of persons except at an altitude that will permit, in the event of an emergency, the landing of the aircraft without creating a hazard to persons or property on the surface of the earth, and such altitude shall not in any case be less than 1,000 feet above the highest obstacle within a radius of 2,000 feet from the aircraft;

The burden of proof in this case is on the Minister. It is not necessary that the Minister prove the case "beyond a reasonable doubt", which is the degree of proof required in criminal cases, but the Minister must establish a case on a "balance of probabilities". The degree of proof required was established by this Tribunal in *Minister of Transport v. Thomas Ritchie Phillips* CAT File no. C-014-33. The Tribunal in that case followed the reasoning of the Supreme Court of Canada in *London Life Insurance Co. et al v. Moore* (1928) S.C.R. 117 at page 119:

That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt. In criminal cases this rule is often expressed by saying that the crime imputed must be proved to the exclusion of reasonable doubt. There is authority for the proposition that the same presumption of innocence from crime should be applied with equal strictness in civil as well as in criminal cases (Taylor, Evidence, 11th ed., vol. 1, par. 112, and cases referred to). Whether or not, however, the cogency of the presumption is as great in civil matters as in criminal law (a point not necessarily involved here), I would like to adopt the statement of the rule by Middleton J.A., in the court below, which appears entirely sound:

While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed. See Alderson, B., in *Rex v. Hodge* (1).

The Tribunal was not unanimous on whether the Minister had established on "a balance of probabilities" that the Respondents had been flying their balloons at less than the height prescribed in section 534(2)(a) of the regulations over a built-up area. One member of the Tribunal found as a fact that the Minister had established an infraction but the majority decision is that in the case of both Respondents, the Minister has not established on a "balance of

probabilities" that an infraction of section 534(2)(a) occurred. The majority of the Tribunal have concluded that the Minister's evidence is an estimate of height from an observation point on the ground and is subject to all of the inaccuracies inherent in this type of observation, including the angle of the balloons from the observation point, the size of the balloons and their distance from the observer.

On this basis, the majority decision is that the case has not been proven on a "balance of probabilities" and the appeal should be dismissed. It is not therefore necessary that the Tribunal deal with the other grounds of defence; however, two of the issues raised require the interpretation of sections 534 and 818 of the regulations. The Tribunal has decided to deal with these issues in any event. Had the Minister proven the case on a "balance of probabilities", the Tribunal were unanimous in their view that two of the other grounds of defence that were raised were valid defences to the charges. The first of such defences is that, at all times, the balloons were under 1,000 feet above ground level over a built-up area, and that they were in the process of taking off or attempting to land, both of which are exceptions in section 534(2) of the regulations.

The wording used in section 534 of the regulations is "landing or attempting to land". The ordinary dictionary definition of "attempt" in the *Concise English Dictionary* is:

- (a) to try, endeavour;
- (b) to make trial of;
- (c) an endeavour, effort, undertaking;
- (d) an effort as contrasted with attainment.

Roland Burrows *Words and Phrases Judicially Defined* Volume 1 at page 278 defines "attempt" in relation to the commission of an offence as follows:

An act done or omitted with intent to commit that offence forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause.

From the point at which a decision to choose a landing site is made and a descent begins, the balloon is "attempting to land" within the meaning of the exception contained in section 534(2). The entire process of evaluation and re-evaluation of suitable landing sites is all part of the process of "attempting to land"; the Tribunal would have dismissed the appeal if it were founded on this basis.

A third defence is that the provisions of sections 818(1) and (2) provide a valid defence to the charges. Sections 818(1) and (2) read as follows:

818. (1) In complying with these Regulations due regard shall be had to all dangers of navigation and of possible collision, and to any special circumstances rendering non-compliance therewith necessary to avoid immediate danger.

(2) In any prosecution for a contravention of these Regulations or any direction of the Minister thereunder, it is a good defence if the person charged therewith establishes that the contravention took place due to stress of weather or other unavoidable cause as contemplated by this section.

In the present case, had the Respondents remained at 1,000 feet above ground level after reaching the outskirts of Sherwood Park, the winds at that altitude would have taken them to the Cooking Lake area southeast of Edmonton with the resulting immediate danger to crew, passengers and equipment caused by a landing in hostile terrain unsuitable for balloons. Both pilots exercised due diligence and good airmanship in electing not to land in Cooking Lake area.

Counsel for the Minister kindly referred the Tribunal to a 1985 Ontario Provincial Court decision *Her Majesty the Queen v. Bruce Blanchard*, a decision of His Honour Judge L.T.G. Collins of the Provincial Court County of Peterborough. In that case, the accused, flying his hot air balloon to promote the opening of a shopping centre, ran into weather problems, which caused the balloon to fly low over a built-up area with a resulting forced landing. Section 818(2) "Stress of Weather" was successfully raised as a defence. It is interesting to note that the weather problem in this case arose from a lack of sufficient wind to propel the balloon, and His Honour held that:

The peculiar wind once he got up there might not constitute stress of weather for an aircraft that is powered by a propeller or powered by a jet engine; in those situations stress of weather usually contemplates heavy winds and turbulence rather than absence of wind, but in the view of this Court for this kind of aircraft (balloons) stress of weather would include light variable winds that were difficult to predict from time to time.

If a "lack of wind" constitutes a valid stress of weather defence, then winds which at 1,000 feet would have taken the balloons to the Cooking Lake area would constitute a valid "stress of weather" defence in this case. The Tribunal would therefore have dismissed the appeal on the basis of sections 818(1) and (2).

Section 7.4 of the *Aeronautics Act* was also raised. This section reads as follows:

7.4 No person shall be found to have contravened a provision of this Part or of any regulation or order made under this Part if the person exercised all due diligence to prevent the contravention.

In view of the Tribunal's findings, the Tribunal makes no finding on whether or not this section may be successfully raised as a defence in the present cases.

For the reasons given, the appeals are dismissed in both cases.

While it is not necessary for the purpose of disposing of the present appeals, the Tribunal is of the view that section 534 of the regulations is more applicable to fixed wing aircraft and helicopters. Because of the characteristics of hot air balloons, the most skillful hot air balloon pilot may find it difficult to strictly comply with this regulation. The Minister in consultation with the Free Balloonist Society might make suitable amendments to this regulation, which would be more appropriate for hot air balloons and public safety.

We would comment with gratitude upon the well-prepared and articulate arguments of both counsel and thank them for their assistance.