TATC File No. W-3592-02
MoT File No. SAP 5504-67470 P/B

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Lawrence Glenn Mashowski, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:
Canadian Aviation Regulations, SOR/96-433, ss 602.19(10), para. 602.96(3)(b

---

Appeal decision
Richard F. Willems, Elizabeth MacNab, Patrick T. Dowd

Decision: September 26, 2012

Citation: *Mashowski v. Canada (Minister of Transport)*, 2012 TATCE 28 (Appeal)

Heard in Calgary, Alberta, on April 3 and 4, 2012

Count 1 – subsection 602.19(10) of the *Canadian Aviation Regulations* - the Minister's Appeal is allowed. There is no reason to interfere with the thirty (30) day suspension imposed by the Minister.

Count 2 – paragraph 602.96(3)(*b*) of the *Canadian Aviation Regulations* - the Appeal Panel upholds the Review Member's Determination as to the allegation. However, the Appeal Panel reinstates the suspension of 45 days imposed by the Minister. Accordingly, we allow the appeal of the Minister as to sanction.

The thirty (30) day suspension for Count 1 and the forty-five (45) day suspension for Count 2 are both maintained for a total suspension of seventy-five (75) days. This suspension will commence on the 35th day following service of this Decision.

I. BACKGROUND

[1] On May 28, 2009, the Minister of Transport ("Minister") issued a Notice of Suspension to Lawrence Glenn Mashowski pursuant to section 6.9 of the *Aeronautics Act*, R.S.C. 1985,

c. A-2, suspending his pilot licence for a total of 75 days. Schedule A of the Notice of Suspension sets out the basis for the suspension as follows:

> **#1 – CARs 602.19(10)**
>
> On or about the 27th of September 2008, at approximately 15:58 hours local time, at or near the High River Airport, in the Province of Alberta, you did conduct a take-off in an aircraft, to wit a Cassutt, bearing Canadian registration C-FNZP, when there was an apparent risk of collision with an aircraft, more specifically, a Diamond bearing Canadian registration C-GHYJ, in the landing path, thereby contravening subsection 602.19(10) of the *Canadian Aviation Regulations*.
>
> **SUSPENSION – 30 DAYS**
>
> **#2 – CARs 602.96(3)(*b*)**
>
> On or about the 27th day of September 2008, at approximately 15:58 hours local time, you being the pilot-in-command of an aircraft, to wit Cassutt bearing Canadian registration C-FNZP, operating at an aerodrome, namely the High River Airport, in the Province of Alberta, did fail to avoid the pattern of traffic formed by other aircraft in operation, thereby contravening subsection 602.96(3)(*b*) of the *Canadian Aviation Regulations*.
>
> **SUSPENSION – 45 DAYS**
>
> **TOTAL SUSPENSION – 75 DAYS**

[2] The basis for these charges was an incident at High River Airport in Alberta. An aircraft occupied by a student and his instructor (Alexander Bahlsen) was flying left-hand circuits and performing touch-and-goes on Runway 06 at the airport. That aircraft reported by radio that it was downwind for a touch-and-go. Mr. Mashowski then radioed his intention to take off from Runway 24 (the opposite end of Runway 06) and, after entering and taxiing to the end of that runway, took off. Both aircraft took evasive action; Mr. Mashowski turning sharply left at an altitude of 100 feet, and the other aircraft turning early on the final leg of the circuit and eventually executing a missed approach.

[3] On June 16, 2009, Mr. Mashowski requested a review of the Minister's decision by the Transportation Appeal Tribunal of Canada ("Tribunal") and the Review Hearing was held in Calgary, Alberta, on April 22 and May 10-12, 2010.

II. REVIEW DETERMINATION

[4] In his Review Determination dated April 5, 2011, the Review Member, J. Richard W. Hall, Chairperson, held in relation to Count 1 of the Notice of Suspension that the Minister had not proven a contravention of subsection 602.19(10) of the *Canadian Aviation Regulations*, SOR/96-433 ("*CARs*"), so the 30-day suspension was cancelled. In relation to Count 2, he found that the Minister had proven that Mr. Mashowski had contravened paragraph 602.96(3)(*b*) of the *CARs*, but reduced the period of the suspension from 45 days to 10 days.

III. GROUNDS FOR APPEAL

[5] Both parties filed Notices of Appeal in this matter. On May 5, 2011, the Minister filed a Notice of Appeal of the Review Member's Determination that there was no contravention of subsection 602.19(10) of the *CARs* on the following grounds:

1. The Member erred in law in his interpretation of "*apparent risk of collision*" as mentioned in subsection 602.19(10) of the *Canadian Aviation Regulations*.
2. The Member's findings of fact regarding the alleged violation of subsection 602.19(10) of the *Canadian Aviation Regulations* were unreasonable and not based on all evidence put on the record.
3. The Member erred in fact and in law by reducing the suspension period regarding the violation of subsection 602.96(3)(*b*) of the *Canadian Aviation Regulations*.
4. Such further and other grounds in fact and in law that the transcript of the proceedings may disclose.

[6] Mr. Mashowski's Notice of Appeal was filed on May 6, 2011. While his request was formulated more or less as a narrative commenting upon various paragraphs of the Review Determination, the Appeal Panel finds that his request amounts to an appeal of the Review Member's Determination that there was a contravention of paragraph 602.96(3)(*b*) of the *CARs* on the grounds that:

1. The procedure used by the Minister in issuing the Notice of Suspension was improper;
2. The Review Member erred in determining the facts; and
3. The Review Member erred in interpreting the law.

IV. INTERLOCUTORY MOTION AT APPEAL

[7] On January 9, 2012, Mr. Mashowski filed an application for disclosure of:

1. The legal opinion of the Department of Justice legal counsel mentioned in Inspector Kim Brown's notes; and
2. The Case Report by Inspector Brown regarding Mr. Mashowski's written complaint against Mr. Bahlsen.

[8] The request for the disclosure of the legal opinion was denied on the grounds that such opinions come within one of the three recognized grounds of privileged information that cannot be compelled to be disclosed in evidence.

[9] The request for the Case Report was also denied (to the extent that the material therein is not protected from disclosure under the *Privacy Act, R.S.C., 1985, c. P-21*) on the basis that it is material that could have been sought before the Review Hearing was completed and thus was available at that time. The Appeal Panel's powers to hear (and thus order the disclosure of) evidence is limited to new evidence that was not available at the time of the Review Hearing.

V. APPEAL HEARING – ARGUMENTS

[10] With the consent of the parties, the Appeal Panel decided that the appeal by each party should be argued separately. For ease of style, Mr. Mashowski is referred to as the Appellant for his appeal of the Review Member's Determination regarding Count 2, and the Minister is referred to as the Appellant for his appeal of the Determination for Count 1.

A. Mr. Mashowski's Appeal of Count 2 – Paragraph 602.96(3)(*b*) of the *CARs*

(1) Appellant's Argument (Mr. Mashowski)

[11] Mr. Mashowski first argued that this matter relates to a pilot's "freedom to fly" in accordance with the *CARs*. He said that he would be quoting from the *Aeronautical Information Manual*, TP 14371 ("*AIM*"), and the *Flight Training Manual* ("*FTM*"), both published by Transport Canada. In response to the Minister's objection that only parts of these documents were submitted in evidence, Mr. Mashowski said that he had been informed by his counsel that they would be material for argument rather than evidence. The Appeal Panel held that they could be referred to in argument as if they were texts, but the weight to be given to their extracts was a matter for its consideration.

[12] He referred to the explanation of "shall" and "should" in the *AIM*: "shall" meaning required by regulation; and "should" meaning recommended but not legislated. On that basis, he argued that "should" encompasses "procedures" and argued that he could not be found to be in contravention of a procedure, and that he could not be charged with an offence under a regulation that does not apply to that procedure. Since High River Airport is an Aerodrome Traffic Frequency ("ATF") uncontrolled aerodrome, matters related to radio communications are procedures that are not required by regulation. On this basis, matters relating to radio communication are not relevant to a charge under paragraph 602.96(3)(*b*) of the *CARs*.

[13] He discussed the meaning of the words used in the phrase "conform to or avoid the pattern of traffic" and argued that the word "pattern", as well as "circuit", both imply that aircraft are being flown. He also argued that "pattern" excludes departing aircraft because there are departure procedures for aircraft specifically aimed at avoiding the pattern of traffic. The procedure is to climb up straight to 1000 feet and to not turn into traffic that is potentially in the pattern, which could possibly cause a conflict. The use of the phrase "conform to or avoid the pattern of traffic" gives a pilot the latitude to operate in a safe manner.

[14] He argued that an aircraft taxiing or manoeuvring on a runway is not in flight and cannot therefore be in contravention of paragraph 602.96(3)(*b*) of the *CARs* since there is not a "pattern" on the ground that must be followed. He further discussed the meaning of "active runway" (or "runway in use") and argued that, by definition, it applies to any runway currently being used for take-offs or landings. There is no regulation preventing the use of multiple runways at uncontrolled aerodromes. He referred to the interpretation of the provision in the *FTM* stating that it is intended to prevent an aircraft from cutting off another aircraft in the pattern.

[15] He justified his decision to use Runway 24 by referring to the statement in the *AIM* that landing and taking off should be done heading into the wind, but that a pilot has the final responsibility for safety and may use another runway if safety requires it. He disagreed with the

argument made by the Minister at the Review Hearing that it is acceptable to take off with a tailwind "where practical" and argued that it would be dangerous to do so. He referred to paragraph 602.96(3)(*e*) of the *CARs*, which provides that a pilot shall take off and land into the wind where practicable, and argued that a pilot taking off with a tailwind for reasons of convenience is contravening that provision. To take off with a tailwind merely because another pilot is in the circuit and has not looked at the windsock would be negligence.

[16] He referred to the statement in the Aviation Enforcement Case Report ("EMS 67470") (Exhibit M-18), which reads as follows: "His decision to take off using the opposite runway to the established traffic pattern is not a violation of the regulations…" He repeated his allegation that J. R. Pollock (the Acting Regional Manager for Aviation Enforcement at that time) told Inspector Brown to "get [him] for something" while noting that Inspector Brown did not deny stating this to Mr. Mashowski, but only said he could not remember doing so.

[17] He referred to page 88 of the *FTM* where the requirement for taking off into the wind is discussed. The *FTM* lists a number of reasons in support, including that taking off into the wind "establishes circuit pattern direction for all aircraft in the case of an uncontrolled airport" (as read). On this basis, Mr. Mashowski maintained that by taking off from Runway 24, he established the circuit. He suggested that the main reason taking off into the wind might not be practical is the nature of a runway's terrain or its slope.

[18] He challenged the Review Member's conclusion in paragraph [93] of the Review Determination that "it is incorrect to conclude that pilots can alter the established active runway by ignoring other aircraft in the circuit and making unilateral decisions" and alleged that the conclusion was based on the Minister's position that he was required to request the permission of the pilot flying the existing circuit (Mr. Bahlsen) before changing it. However, Mr. Mashowski stated that the procedure set out in the *AIM* for changing active runways is to announce the intention to change, as well as change the runway based on wind conditions. He stated that he was the only witness to give evidence with regard to the wind conditions at the time of his take-off.

[19] He discussed the radio calls and stated that, while there is no regulatory obligation to make these calls, he made the correct calls and repeated that he was not required to request permission from the other pilot, Mr. Bahlsen.

[20] He stressed that an aircraft that is seen cannot be hit and that he could be seen by the other aircraft. He again pointed out that there is no regulation preventing him from entering the manoeuvring area.

[21] He referred to subsection 602.19(10) of the *CARs* and argued that this provision gave him the right of way. His argument was based on his analysis of the asymmetrical application of "landing path" and "take-off path" in that provision. He argued that the take-off path ends when the wheels of the aircraft leave the surface and the aircraft climbs out of ground effect. The take-off path is effectively the runway and does not extend beyond it since a pilot must be able to leave the surface before the runway ends. When he entered the runway, he was in the landing path of the other pilot's aircraft but that aircraft was not in Mr. Mashowski's take-off path since the other aircraft was still five to seven miles away from the threshold of Runway 06. The effect

of this lack of symmetry is to create a right of way regulation that gives the right of way to the aircraft on the ground.

[22] The Appeal Panel notes that Mr. Mashowski also argued extensively concerning the actions of Mr. Bahlsen, alleging errors and faults on his part and suggesting actions he could have or should have taken. While the Appeal Panel appreciates that this pilot's actions form part of the factual circumstances surrounding this matter, the purpose of this appeal is to determine whether Mr. Mashowski contravened paragraph 602.96(3)(*b*) of the *CARs*, not whether another pilot also did so. Consequently, we have not considered these arguments.

(2) Respondent's Argument (Minister)

[23] The Minister's Representative argued that the subject of appeal with regard to paragraph 602.96(3)(*b*) of the *CARs* is a question of mixed fact and law and that the standard of review for such matters is "reasonableness" according to the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. She referred to the same decision as determining that the concept of reasonableness encompasses a situation where there could be a number of possible reasonable conclusions. In *Genn v. Canada (Minister of Transport)*, 2012 TATCE 7 (Appeal), TATC File No. P-3739-02, the Appeal Panel relied on *Dunsmuir* in finding that reasonableness is the appropriate standard of review for an Appeal Panel in reviewing factual conclusions and holding that "so long as a decision is within a range of reasonable outcomes based on the evidence before the decision-maker, a reviewing body should not interfere".

[24] She argued that the Review Member's Determination that there was a contravention of paragraph 602.96(3)(*b*) of the *CARs* met this standard by falling within a range of reasonable outcomes and that it was supported by the evidence of both parties at the Review Hearing. There were no unreasonable findings of fact, nor any legal errors that needed to be corrected.

[25] The Review Member's finding in paragraph [91] of his Determination that Runway 06 was the active runway is reasonable based on the evidence that aircraft were using that circuit, which had already been established by Christopher Yeryk. The Review Member's statement in paragraph [93] that one pilot cannot unilaterally change a circuit is based on statements made by the Civil Aviation Tribunal Member in *Canada (Minister of Transport) v. Kalist*, 1995 CAT File No. C-0397-33 (Review).

[26] With regard to paragraph 602.96(3)(*e*) of the *CARs*, which provides that a pilot must take off into the wind where practicable, she argued that in a situation where the wind has changed, it is not practicable to take off while another aircraft is in the circuit intending to land. The option is to wait until the circuit has cleared. If anyone can change the traffic pattern at any time when there is already traffic in the circuit, paragraph 602.96(3)(*b*) of the *CARs* would be meaningless.

[27] The Minister's Representative challenged Mr. Mashowski's statement that there is a right to fly by noting that acting as a pilot is not a right but a privilege. She answered his arguments concerning his right of way by pointing out that subsection 602.19(7) of the *CARs* ("[w]here an aircraft is in flight or manoeuvring on the surface, the pilot-in-command of the aircraft shall give way to an aircraft that is landing or about to land") provides that the pilot landing has the right of

way. She said that if the wind had changed, Mr. Mashowski could have waited until the other aircraft had cleared the circuit before entering Runway 24. There was no compelling reason, such as an emergency, for him to enter the runway immediately other than his statement that he "had an aircraft to fly" (as found in paragraph [43] of the Review Determination). Finally, she disagreed with his statement that the expression "where practicable", used in paragraph 602.96(3)(*e*) of the *CARs*, was meant to apply only in situations relating to the terrain or slope of the runway.

(3) Appellant's Reply (Mr. Mashowski)

[28] In response, Mr. Mashowski pointed out that the Minister did not submit any evidence concerning wind conditions at the time of the incident. He suggested that the Review Member made a factual error in paragraph [96] of his Review Determination when he stated that it seemed that Mr. Mashowski had a general preference for Runway 24. In fact, his testimony on page 404 of the transcript of the Review Hearing was that it was not the better runway.

[29] He challenged the Minister's interpretation of "where practicable" in paragraph 602.96(3)(*e*) of the *CARs* as having been advanced without any expert evidence as to its meaning; as well no witness testified that it was "practical" to take off with a tailwind. There is no procedure that says a pilot should wait for an aircraft to finish doing circuits at an uncontrolled aerodrome where that aircraft is operating with a tailwind. To do so would allow the pilot flying circuits to effectively close the aerodrome to all traffic.

[30] He referred to section 4.5.2 of the *AIM*, "Traffic Circuit Procedures – Uncontrolled Aerodromes" (Exhibit M-5), and pointed out that it establishes a procedure, not a regulation. The procedure is that if there is a change in active runway, the pilot should communicate the change with the ground station. He suggested that where there is no ground station, as at High River Airport, the appropriate communication is to broadcast the change, which he did.

[31] He suggested that the purpose of the Tribunal is to review allegations of contraventions by the Minister. In this case, there was a statement by the Minister's officials that entering the runway was not a contravention, yet the Review Member found that he had no right to enter the runway. He suggested that this was a legal error and a new interpretation of a regulation without any expert evidence.

[32] He argued that his right to fly stems from the privileges attached to his licence. The right of way for an aircraft that is landing, established by subsection 602.19(7) of the *CARs*, is not relevant since the other aircraft involved was not close to the runway. Finally, he argued that his comment that he "had an aircraft to fly" is common pilot parlance when operating an aircraft under power.

B. Minister's Appeal of Count 1 – Subsection 602.19(10) of the *CARs*

(1) Appellant's Argument (Minister)

[33] The Minister's Representative argued that the Review Member's Determination that there was no contravention of subsection 602.19(10) of the *CARs* was an error in law in that he did not interpret the subsection correctly; therefore, the appropriate standard of review is correctness.

She cited the most recent Tribunal Appeal Decision on the standard of review, *Genn*. This Decision cited *Dunsmuir* for the proposition that once a standard of review analysis has been made, it need not be repeated if the question has previously been determined. In Tribunal matters, the appropriate standard was established by the Federal Court in *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17, [2008] F.C.J. No. 17; the Appeal Panel in *Genn* summarized this standard as follows: "when reviewing questions of fact and credibility, the Appeal Panel owes considerable deference to the Tribunal Member. However, when issues of law are concerned, no deference is due to the Review Member and the Appeal Panel may make its own findings".

[34] She argued that the words in the subsection "conduct or attempt to conduct a take-off" make it clear that a pilot must assess the risk prior to take-off but that the Review Member evaluated the risk in light of the situation after take-off; it cannot be said that there was no risk of collision because that collision was avoided. She referred to paragraph [85] of the Review Member's Determination where he stated that all the pilots "possessed situational awareness of the other aircraft and had taken the necessary precautions to ensure no possibility of a collision". She argued that there was no "situational awareness" as found by the Review Member, because such awareness required not only knowledge of where the other aircraft was, but also knowledge of the intentions of the other pilot.

[35] While the Minister's Representative acknowledged that there is no requirement for radio communication at High River Airport, she took the position that adequate communication of each pilot's intention was a necessary component of "situational awareness". Mr. Mashowski had communicated his intention to backtrack on Runway 24 and asked the other pilot to extend his downwind leg; he then received an unreadable reply and so was not aware of the other pilot's intentions. In such a situation, where complete communication is lacking, the appropriate method to avoid risk is to wait until the other aircraft has landed. This would have involved a delay of only a few minutes and, contrary to Mr. Mashowski's argument, would not have prevented the take-off for an extended period of time.

[36] She referred to section 4.5.2 of the *AIM* (Exhibit M-5), which defines "active runway" as "a runway that other aircraft are using or are intending to use for the purpose of landing or taking off". The same paragraph states that where a pilot wishes to change the active runway, "it is expected that the appropriate communication between pilots and the ground station will take place to ensure there is no conflict with other traffic". She argued that where, as at High River Airport, there is no ground station, the appropriate practice would be for the pilots to communicate with each other.

[37] The Minister's Representative referred to the Oxford online dictionary definition of "apparent" as "clearly visible or understood; obvious; seeming real or true, but not necessarily so" (as read). On the basis of this definition she submitted that the risk of collision was "apparent" to Mr. Mashowski since he knew that another aircraft was attempting to land directly in front of him and had planned to turn after taking off in order to move out of its way.

[38] She argued that the fact that both pilots had to take evasive action, as described in paragraph [94] of the Review Member's Determination, supports the position that there was an apparent risk of collision. She referred to *Bergeron v. Canada (Minister of Transport)*,

1997 CAT File No. C-1349-33 (Review), where it was found that the need to take evasive action was an indication of a collision hazard. In *Stover v. Canada (Minister of Transport)*, 1997 CAT File No. C-1460-33 (Review), it was again held that the need to take evasive action to avoid a collision with another aircraft indicated that there was a hazard.

[39] She argued that it was an error in law for the Review Member, in paragraph [86] of his Determination, to take into account the distance between aircraft in determining whether there was a risk of collision. Instead, the Determination should be based on the circumstances and Mr. Mashowski's actions prior to take-off. Mr. Mashowski did not properly evaluate the risk but was clearly aware of an apparent risk since he asked the other pilot to extend his downwind leg and he expedited his taxiing in case the other pilot decided to land on Runway 06.

[40] The Minister's Representative argued that the Review Member erred in law in concluding in paragraph [88] of his Determination that the other pilot was partially responsible. The person charged was Mr. Mashowski and any reference to another's wrongdoing should not be a factor in deciding whether Mr. Mashowski contravened subsection 602.19(10) of the *CARs*. The subsection does not refer to the creation of a risk, and actions that create the risk are irrelevant; only Mr. Mashowski's actions should be considered. He knew that the other pilot's aircraft was in the circuit while he was doing the run-up on the apron, but had made the decision to backtrack on Runway 24 before entering that runway. He should have realised when he entered the runway that he did not have time to take off without creating a risk of collision. He therefore put himself in a position where he had to take off illegally since it was dangerous to remain on the ground. The Minister's Representative argued that the Appeal Panel should decide whether there was an apparent risk of collision based on the situation when Mr. Mashowski entered the runway.

(2) Respondent's Argument (Mr. Mashowski)

[41] At the beginning of his argument, Mr. Mashowski wished to refer to the original letter of complaint against him on the basis that it had been included in the Disclosure Package provided to him by the Minister. The Minister's Representative objected to the introduction of this material on the basis that it was new evidence that had been available at the time of the Review Hearing; the Appeal Panel ruled in favour of the Minister on the basis that section 14 of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29 ("*TATC Act*") only allows the introduction of new evidence in matters at an Appeal Hearing if that evidence was not available at the time of the Review Hearing.

[42] He referred to a Transport Canada document on the internet stating that Minister's delegates are liable for negligence and alleged that he was being bombarded by negligent misstatements of fact, such as there being a requirement to request permission from another pilot to change runways or take off with a tailwind.

[43] He referred to his letter to Inspector Brown (Exhibit M-12) and said that according to the *AIM*, pilots should use standard phraseology in making transmissions. Consequently, the Appeal Panel should disregard arguments concerning the need to coordinate with other pilots. The comments by the Minister's Representative on radio communications imply that pilots have a control function at ATF aerodromes. There is no regulatory requirement or procedure regarding such communication.

[44] Mr. Mashowski pointed out that, in setting out the words of subsection 602.19(10) of the *CARs*, the Minister's Representative omitted the words "in the take-off or landing path". He was charged with taking off when there was "a risk of collision with an aircraft in the landing path". He argued that, in the context of the entire provision, the charge does not make sense. The exact description of the risks in the subsection is "apparent risk of collision with any aircraft, person, vessel, vehicle or structure in the take-off or landing path". It is nonsensical to say that a person, vessel, vehicle or structure could be in the landing path of an aircraft that is taking off. The charge against him was an effective rewording of the subsection that makes no sense.

[45] He referred to his earlier argument concerning the nature of the take-off path and repeated that the path ended with the runway. Consequently, the Regulation means that a pilot cannot take off if there is a risk of collision with something that is on the runway.

[46] He also repeated his earlier argument that he had the right of way and so had precedence. The Regulation applied to the other pilot to prevent him from attempting to land. It could not apply to Mr. Mashowski since there was no obstruction on the take-off surface.

[47] He argued that he did not cause the other pilot to overshoot the runway. It was a voluntary decision on that pilot's part to accommodate the inexperienced student pilot who was at the controls.

[48] He suggested that, while doing continuous circuits in the pattern, it is easy for a pilot to accommodate other aircraft and to facilitate their leaving the airport by simply adjusting speed or the size of the circuit.

(3) Appellant's Reply (Minister)

[49] The Minister's Representative referred to page 92 of the Review Hearing transcript where Mr. Bahlsen stated that when one aircraft is departing and climbing and the other is approaching and descending on the same trajectory, there is a risk of collision if neither pilot makes an adjustment. She argued that it was clear that the other pilot's overshoot was related to Mr. Mashowski's actions. At the time of the take-off, Mr. Mashowski was not aware of the other pilot's intentions.

C. Sanction (Minister's Appeal)

(1) Appellant's Argument (Minister)

[50] The Minister's Representative submitted that the periods of suspension assessed by the Minister for both contraventions were reasonable and, furthermore, that the Review Member erred in fact and in law in reducing the suspension for the contravention of Count 2 (paragraph 602.96(3)(*b*) of the *CARs*) from 45 days to 10 days.

[51] She argued that the Review Member's finding at paragraph [102] of his Determination is unreasonable; that, in light of Mr. Bahlsen's contribution to the situation, it was unfair to place the blame entirely on Mr. Mashowski. It was an error to take the other pilot's actions into consideration and to reduce the period of suspension by putting the blame on another person.

(2) Respondent's Argument (Mr. Mashowski)

[52] Mr. Mashowski referred to the statement in EMS 67470, signed by Mr. Pollock (Exhibit M-18), that separate offences arising from subsequent charges (EMS 67510, Exhibit M-24) for which his licence was suspended, were not specifically second offences. Mr. Pollock nevertheless assessed suspensions in the recommended range for second offences. Mr. Mashowski acknowledges that there was another incident three days later, but argued that it was under a different provision of the *CARs* and at a different airport.

[53] He argued that the overshoot by the other aircraft should not be considered an aggravating factor as implied by the synopsis given on page 3 of the EMS Report (Exhibit M-18), since it was never established that the purpose of the overshoot was to avoid his aircraft. With regard to the aggravating factors listed on page 9 of that Exhibit, he replied to the statement that he took off because the wind was favourable by stating that pilots are supposed to take off into the wind. The second factor of "limited and in concise [sic] communications" between the two aircraft is irrelevant since there was no requirement to communicate. If it was a factor at all, it was relevant to Mr. Bahlson's actions since he did not ask about wind conditions.

[54] He repeated that the procedure used in issuing the Notice of Suspension was faulty. There were no comments on the EMS Report by either the Supervisor or Regional Manager. He compared this report to that of the later incident (Exhibit M-24), which he stated was properly adjudicated.

(3) Appellant's Reply (Minister)

[55] The Minister's Representative argued that it was considered a second offence precisely because of the incident of September 30, 2008. While it may have occurred later in time, it was adjudicated by Transport Canada before this matter and had to be taken into account in determining the sanction. The nature of the later offence, "illegal aerobatic", is similar since it relates to reckless and negligent movement of aircraft. In his Determination, the Review Member indicated that it was reckless and negligent for Mr. Mashowski to take off as he did.

(4) Respondent's Further Reply (Mr. Mashowski)

[56] Mr. Mashowski repeated his argument that an infraction of a different regulation that took place later in time could not be considered a second offence. He suggested that the remark that he had been reckless and negligent was libelous.

(5) Appellant's Further Reply (Minister)

[57] She pointed out that the Transport Canada decision on this enforcement matter was made by the Acting Regional Manager of Enforcement, Mr. Pollock. It is normal practice to have a person acting in a position while the actual incumbent is away.

VI. ANALYSIS/DISCUSSION

A. Standard of Review

[58] The standard of review to be exercised by an Appeal Panel of the Tribunal was established by the Federal Court in *Billings* where it was held that while findings of fact or credibility made by the Review Member should be given considerable deference, the Appeal Panel is entitled to its own view of the law. This standard of review was recently accepted by the Appeal Panel in *Genn*. In *Dunsmuir*, the Supreme Court of Canada reviewed the standard for review of administrative decisions by the courts and came to the conclusion that there were only two standards: reasonableness and correctness. Questions of law should be reviewed as to whether the conclusion reached was correct, whereas questions of fact, or mixed fact and law, should be reviewed on the basis of whether the determination made was reasonable. The Supreme Court held that reasonableness is a deferential standard based to some extent, at least, on the expertise and experience of the administrative decision-maker in a complex administrative scheme. "Reasonableness" in judicial review includes the process of articulating the reasons and justifications for the conclusion, as well as determining whether the decision fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[59] While the decision in *Dunsmuir* concerned the judicial review of administrative determinations, it reinforced the standard set out in *Billings*; however, it is noted that *Billings* referred to the three standards that were generally accepted before they were reduced to two in *Dunsmuir*. Consequently in reviewing these matters, the Appeal Panel, while giving due deference to the Review Member's findings, bases its decision on whether his findings of fact fell within the range of possible and acceptable outcomes and, where he has determined questions of law, on whether his Determination is correct.

B. Mr. Mashowski's Appeal of Count 2 – Paragraph 602.96(3)(*b*) of the *CARs*

[60] In his Request for Appeal, Mr. Mashowski suggested that the person who reviewed the EMS Report (Exhibit M-18) as Superintendent was also the Acting Regional Manager who issued the Notice of Suspension, and had therefore acted improperly because he had acted in both capacities and against the advice of Inspector Brown; and furthermore, because he is not a pilot. The Minister's Representative pointed out that it is normal practice for one person to act on behalf of his superior when the latter is absent; additionally, Inspector Brown did not testify that he had recommended against a suspension. While the EMS Report of Inspector Brown does suggest that at one point in time Mr. Mashowski had not breached a regulation, he went on to say that there was evidence that he had contravened two regulations and pointed out a number of aggravating factors. The Appeal Panel finds that the procedure followed in assessing the suspension was carried out in a proper manner.

[61] The Minister's Representative characterized Mr. Mashowski's appeal as a question of mixed fact and law and suggested that on that basis, the standard of review is whether the Review Member's Determination fell within the range of reasonable conclusions that could be made on the evidence. While Mr. Mashowski did not state whether his objections were based on fact or law in this matter, in his Notice of Appeal, he specifically challenged a number of findings, of both fact and mixed fact and law, made by the Review Member. In oral argument, he

put forward a number of alternative interpretations of paragraph 602.96(3)(*b*) of the *CARs*. The Appeal Panel considers that he is appealing on both: matters of fact, to which we will apply a standard of reasonableness; and matters of law, for which the standard is correctness.

[62] In his oral argument supported by his written submissions, Mr. Mashowski argued that the wording of paragraph 602.96(3)(*b*) of the *CARs*, "conform to or avoid the pattern of traffic formed by other aircraft in operation", implies that it refers only to aircraft that are being flown and excludes both departing aircraft, since there are specific procedures for departing aircraft aimed at avoiding the pattern, and those manoeuvring on the runway. The Appeal Panel finds that this interpretation is incorrect. The introductory words of subsection 602.96(3) of the *CARs* place the obligation on a "pilot-in-command operating at or in the vicinity of an aerodrome" and "operating" clearly includes both taking off and manoeuvring on the runway. Therefore, an aircraft that is departing from the aerodrome must either conform to or avoid the pattern of traffic.

[63] Mr. Mashowski also argued that by taking off on Runway 24, he was establishing the pattern of traffic. This argument is in direct contradiction to paragraph 602.96(3)(*b*) of the *CARs* which refers to "the pattern of traffic formed by other aircraft in operation". It is clear from these words that if another aircraft is already operating in a pattern, then that is the pattern that must be conformed to or avoided.

[64] To a certain extent, Mr. Mashowski based his argument on his "freedom to fly" which, in turn, is based on the privileges attached to his licence. This argument, however, does not take into account his obligation to operate in accordance with the *CARs*.

[65] In his written request for appeal, Mr. Mashowski challenged a number of findings of the Review Member. Many of these challenges related to the Review Member's account of the material and arguments presented by the parties, and did not necessarily reflect the Member's opinion on the matter set out. There were, however, also challenges to findings on which he based his Determination. These challenges are to findings either of fact, or mixed fact and law, and are to be tested on the standard of reasonableness.

[66] Mr. Mashowski disagreed with the Review Member's statement in paragraph [90] that he had testified that the wind slightly favoured Runway 24 and that he preferred that runway for several listed reasons. He referred to passages in the Review Hearing transcript in support of his contention that he had no preference. While he did give the testimony referred to, he also testified on page 430 of that transcript that Runway 24 was the preferable runway at the time "even with no wind preference" and some reasons for preferring it were listed in his letter to Inspector Brown (Exhibit M-12). The relevant finding made by the Review Member is, however, that, on the basis of the findings objected to, Mr. Mashowski's preference for Runway 24 is understandable. Whether that finding is based on the Review Member's understanding of the evidence or on Mr. Mashowski's contention that it was a necessary choice because of the wind direction, it is a finding that is reasonable in the circumstances.

[67] He further disagreed with the Review Member's statement that where a pilot decides not to take off on the active runway, he has a duty to avoid the established traffic pattern. He contends that this statement is contradicted by the *AIM*. He may have been referring to

statements in the *AIM* that pilots should take off into the wind, and that pilots have the final responsibility for determining which runway is operationally acceptable. The Appeal Panel could find no statement in the *AIM*, however, indicating that a pilot can ignore the regulatory requirement to avoid the pattern of traffic formed by other aircraft in operation. This regulatory requirement is restated in the Review Member's finding at paragraph [90].

[68] Mr. Mashowski disagreed with the Review Member's statement in paragraph [91] that the active runway is determined by aircraft already in a circuit and that this is the interpretation generally accepted by pilots. The Minister's Representative argued that the Review Member's finding was reasonable based on the evidence of Mr. Yeryk and Mr. Bahlsen, both of whom testified that they were in the circuit for Runway 06. She also referred to section 4.5.2 of the *AIM* which states that the "active runway is a runway that other aircraft are using or are intending to use for the purpose of landing or taking off". The section does acknowledge that it may be necessary to use another runway, but states that in such situations there should be appropriate communication with the ground station to ensure there is no conflict with other traffic.

[69] Mr. Mashowski argued that paragraph 602.96(3)(*e*) of the *CARs* is authority for the proposition that the runway in use is determined by the wind direction. This paragraph provides that, where practicable, pilots shall land and take off into the wind. While this provision establishes a requirement that pilots must follow, it does not override other requirements that pilots must also follow. A change in the wind direction does not of itself change the active runway being used by pilots in the existing circuit, rather it creates a situation where a pilot wishing to take off must consider how to best meet both that regulatory provision and paragraph 602.96(3)(*b*).

[70] The Appeal Panel finds that the Review Member's finding that Runway 06 was the active runway is reasonable. There was evidence that it had been used by Mr. Yeryk and Mr. Bahlsen, and that the latter was continuing in the circuit that would lead to a further landing on that runway, thus falling within the description of "active runway" in the *AIM*.

[71] Mr. Mashowski argued that the Review Member was incorrect in his conclusion in paragraph [94] that Mr. Mashowski had a duty to "comply with or avoid the established traffic pattern" since he changed the word "conform" to "comply". The Appeal Panel finds that this is a distinction without a difference since the means of complying with the established pattern is by conforming to it.

[72] He also disputes the finding that he had to "scramble" to clear the runway and alleges that he acted in a prudent and expedient manner. The Minister defended the statement by pointing out that Mr. Mashowski testified that he expedited his taxiing and the Review Member found in paragraph [98] that both pilots had to make adjustments to avoid each other. The Appeal Panel finds that a conclusion that Mr. Mashowski had to act in a hurry or "scramble" is reasonable.

[73] Mr. Mashowski also challenged the Review Member's finding at paragraph [94] that "[a]s a result of the conflict, Mr. Bahlsen and his student altered their usual circuit pattern by turning final early" as contradicting his earlier statement in paragraph [88] that "once [Mr. Mashowski] was on the runway, the possibility of a collision was almost entirely in the hands of

Mr. Bahlsen". Without commenting on the cause of the conflict, it is clear that there was such a conflict and a consequent disruption of the traffic pattern.

[74] There is no dispute that Mr. Bahlsen turned final early and eventually overshot the runway. Similarly, there is no dispute that Mr. Mashowski turned left when his altitude was 100 feet. This is contrary to the procedure outlined in 4.5.2(*c*) of the *AIM* which suggests that "aircraft departing the circuit or airport should climb straight ahead on the runway heading until reaching the circuit traffic altitude before commencing a turn in any direction to an en route heading". The Review Member's finding that there was a conflict that caused Mr. Bahlsen and his student to turn final early is a reasonable conclusion.

[75] Mr. Mashowski alleged that in paragraph [96] of his Determination, the Review Member misinterpreted paragraph 602.96(3)(*e*) that requires that a pilot "where practicable, land and take off into the wind," to mean "where practicable, land and take off with a tailwind". The Appeal Panel does not accept this analysis of the paragraph. The Review Member simply stated that, in his view, "it was neither practicable nor necessary". He concluded that it was not necessary because, as he stated in paragraph [97], "the factors contributing to his decision to select Runway 24 were not overly compelling from an airmanship perspective". This is a long way from saying that the Regulation requires a pilot to take off with a tailwind. The Appeal Panel accepts that the wind favoured Runway 24 at the time Mr. Mashowski decided to use it but also finds that it was not practicable to take off at that instant because there was not enough time to do so in a manner that would have allowed him to avoid a risk of collision or to avoid the existing pattern of traffic.

[76] Mr. Mashowski challenged the Review Member's statement in paragraph [98] that there is a clear disagreement in the evidence as to Mr. Bahlsen's position in the circuit at the time Mr. Mashowski entered Runway 24. The Appeal Panel sees no reason to disagree with the Review Member's finding on this point. In any event, the relevant finding by the Review Member is that "Mr. Bahlsen was not sufficiently far off for Mr. Mashowski to conduct a comfortable and safe take-off".

[77] The Appeal Panel finds that it was not practicable within the meaning of paragraph 602.96(3)(*e*) of the *CARs* for Mr. Mashowski to depart from Runway 24 at a time when doing so risked breaching other regulations.

[78] In paragraph [95] of his Determination, the Review Member found that "[a]lthough Mr. Mashowski did ‘avoid' the other aircraft, he did not avoid the traffic pattern within the meaning of paragraph 602.96(3)(b) of the CARs. He clearly interfered with traffic in the pattern as evidenced by the alterations each pilot had to make to his usual take-off/landing path [emphasis in original]". The Appeal Panel agrees with this conclusion and finds that Mr. Mashowski failed to conform to the pattern of traffic as required by paragraph 602.96(3)(*b*) of the *CARs*.

[79] Therefore, the Appeal Panel finds that Mr. Mashowski contravened paragraph 602.96(3)(*b*) of the *CARs*.

C. Minister's Appeal of Count 1 – Subsection 602.19(10) of the *CARs*

[80] The Minister's Representative submitted that the Review Member erred in law in interpreting subsection 602.19(10) of the *CARs*, therefore, the standard of review on this point is correctness. The errors in interpretation are his findings that the pilots involved (other than the student pilot) agreed that there was no risk of collision, that they both had "situational awareness", and that they took the necessary precautions to ensure that there was no collision.

[81] The Minister's Representative argued that the words of the provision "conduct or attempt to conduct a take-off" clearly indicate that the risk of collision should be determined when or before an attempt to take off is made.

[82] Mr. Mashowski argued that the Minister's Representative based her arguments on a partial reading of the provision and did not consider the effect of the words: "apparent risk of collision with any aircraft, person, vessel, vehicle or structure in the take-off or landing path". He was charged with taking off when there was a risk of collision with an aircraft in the landing path and argued that it cannot be said that an aircraft that is taking off has a "landing path".

[83] The Appeal Panel takes the position that the use of the word "apparent" imports an objective test in determining if the provision applies, and that the risk should be determined on the basis of whether a reasonable and knowledgeable person observing the situation would consider a collision possible. While the risk might arise at any point during the take-off process, it must be evaluated at the earliest possible point. In this matter, that point was after Mr. Bahlsen made the radio call saying "downwind, touch and go" (Review Hearing transcript, page 495) and Mr. Mashowski concluded that the appropriate runway for take-off was Runway 24. These events took place before Mr. Mashowski entered the runway and it was then that he should have calculated the risk of collision. The Appeal Panel notes that the expert witness, Harold Rainforth, testified that Mr. Mashowski acted properly, but his conclusion was reached on the basis of assumptions that were given to him. These assumptions must, however, not have been in accord with the facts since the Review Member found that take-off was expedited and that both pilots needed to take evasive action.

[84] Mr. Mashowski's interpretation of subsection 602.19(10) is incorrect. It is not, as he suggested, two provisions condensed into one: one relating to obstructions in the take-off path of an aircraft taking off; and the other, to obstructions in the landing path of an aircraft that is landing. Rather it is a provision that is worded very broadly in order to capture as many situations as possible where there would be an apparent risk of collision, and one of these possible risks is for an aircraft to take off when there is another aircraft in its landing path.

[85] The Appeal Panel finds that there was an apparent risk of collision between Mr. Mashowski's aircraft and an aircraft that was in its landing path. While the pilots testified that there was no risk of collision, each departed from normal procedures to avoid that risk. Even if the overshoot by Mr. Bahlsen's aircraft was to help his student recover, as alleged by Mr. Mashowski, Mr. Bahlsen's turning final early had no other purpose than to avoid Mr. Mashowski's aircraft. These actions seem to be a clear indication that each pilot was aware that there was a possibility of collision if no evasive actions were taken.

[86] Mr. Mashowski also argued that based on the meanings he gave to "landing path" and "take-off path", he had the right of way. He argued that because the definitions of both "take-off" and "land" do not relate to the acts immediately preceding or following the wheels of an aircraft leaving or touching the ground, the path must be contiguous with the runway. Since he was on the take-off path before Mr. Bahlsen was on the landing path, he argued that he consequently had the right of way. This argument reflects a misunderstanding of the meaning of these words. Neither the take-off path nor the landing path can be limited to the path taken by an aircraft on the ground, but also relates to the route followed in the procedures associated with taking off and landing. In the case of a take-off, the normal procedure is that set out in the AIM at 4.5.2, climbing straight ahead to 1000 feet above airport elevation ("AAE"). The evidence of Mr. Mashowski's expert, Mr. Rainforth, was that the landing procedure begins when an aircraft turns base and begins its descent (Review Hearing transcript, p.606). The landing path is established when the descending aircraft turns onto the final leg of the circuit, and the route or "path" the pilot must follow in order to land becomes clear.

[87] The Minister's Representative challenged the Review Member's finding that there was no apparent risk of collision because both pilots had "situational awareness". Each pilot testified that he had the other aircraft in sight and at the Appeal Hearing Mr. Mashowski said "you cannot hit an aircraft that you can see" (Appeal Hearing transcript, page 61). The Minister's Representative argued that situational awareness includes more than the ability to see the other aircraft; it must also include an awareness of the intentions of the other pilot. On this premise, it is necessary that there be adequate communication between the pilots through radio where possible. Mr. Mashowski argued that since radio communications are not mandatory at High River Airport, arguments concerning radio communication should not be taken into account. He went on to refer to section 4.5.6 of the *AIM*, also referred to in his letter to Inspector Brown (Exhibit M-12), for the proposition that radio transmissions should be in standard formats and suggested that any transmissions outside this format would be improper.

[88] The Appeal Panel notes that subsection 602.19(10) of the *CARs* prohibits taking off where there is an "apparent" risk of collision. The perception of risk is based on the relationship of the aircraft to the obstacle: in this case another aircraft in its landing path. The situational awareness of the pilots involved does not mean that there is no apparent risk, but rather that each should be aware of that risk and be prepared to take steps to avoid it.

[89] The Minister's Representative also submitted that it was an error in law to take the distance between the aircraft into account in determining if there was an apparent risk as the Review Member did in paragraph [86] of his Determination where he stated that "[a]t the point in time where both aircraft were on the same trajectory, they were still separated by sufficient distance to preclude the possibility of a collision". By taking account of the vertical and horizontal distances between the aircraft, the Review Member was considering their relative positions before Mr. Mashowski made his evasive turn to the left. At that point, there was indeed an apparent risk of collision even if the possibility of a collision was avoided.

[90] Finally, the Minister's Representative submitted it was an error in law for the Review Member to take into account the actions of the other pilots as he did in paragraphs [87] and [88] of his Determination. In paragraph [88], the Review Member stated that he could not find that Mr. Mashowski was entirely responsible for creating the risk of a collision and that once

Mr. Mashowski had entered the runway, which the Review Member did not condone, the possibility of a collision was almost entirely in the hands of Mr. Bahlsen. She submits that an analysis of the subsection does not refer to the creation of risk; it simply prohibits a pilot from taking off whenever there is an apparent risk of collision. She argued that the factors that created the risk are irrelevant in determining whether Mr. Mashowski contravened the subsection.

[91] The Appeal Panel cannot accept this position in its entirety. In determining whether a contravention took place, the Review Member must analyze the activities of all involved. If he determines that the fault partially lies with another party, that may be a mitigating factor, but, it cannot completely excuse the person charged with the contravention. Mr. Mashowski, in his Notice of Appeal, points out an inherent contradiction in the Review Member's Determination, where, in paragraph [87], he finds that once Mr. Mashowski entered the runway, the risk of collision was equally in the hands of both pilots involved but goes on to find, in paragraph [88], that once Mr. Mashowski was on the runway, the risk was almost entirely in the hands of Mr. Bahlsen. This conclusion ignores the precipitating event of the occurrence: Mr. Mashowski's decision to backtrack on Runway 24 so that he could take off on that runway when he was aware both visually and from Mr. Bahlsen's radio call that he was downwind for touch and go on Runway 06. While Mr. Bahlsen's failure to accommodate Mr. Mashowski may be a mitigating factor, equally Mr. Mashowski's failure to accommodate Mr. Bahlsen is an aggravating factor. The Appeal Panel finds that, from an objective point of view, there was a risk of collision until each pilot had taken evasive action. Consequently, the Minister has proven on a balance of probabilities that Mr. Mashowski contravened subsection 602.19(10) of the *CARs.*

D. Sanction

[92] In the Notice of Suspension, the period of suspension imposed in respect of the contravention of Count 2 (paragraph 602.96(3)(*b*) of the *CARs*) was 45 days, and in respect of the contravention of Count 1 (subsection 602.19(10) of the *CARs*) was 30 days. In recommending the periods of suspension, both Inspector Brown and his Supervisor and Acting Manager, Mr. Pollock, took into account an incident involving Mr. Mashowski that took place three days later in contravention of a different provision and for which he served the resulting suspension.

[93] The Review Member reduced the period of suspension for the contravention of paragraph 602.96(3)(*b*) of the *CARs* from 45 days to 10 days. He pointed out that, while this was a first offence, the suspension imposed was longer than the suggested minimum for a third offence. He felt that it was unfair to assign the entire blame for the situation on Mr. Mashowski and that the aggravating factors mentioned in the EMS Report (Exhibit M-18) were not reflected in the evidence.

[94] The Appeal Panel finds that it is not an error in law for the Review Member to take the actions of another into account in assessing the term of the suspension. Subsection 6.9(8) of the *Aeronautics Act* provides that a Tribunal Member conducting a review "may determine the matter by confirming the Minister's decision or substituting his or her own determination". This provision gives a Tribunal Member a very large discretion that includes deciding what to take into account in determining a sanction. The Review Member explained the reasons for reducing the period of suspension and his findings in the matter were reasonable.

[95] The Appeal Panel, however, is not bound by the Review Member's findings with regard to sanctions. While giving great deference to his findings of fact, the application of those findings to the determination of the appropriate sanction is a matter for the Appeal Panel's discretion. In the same way that subsection 6.9(8) of the *Aeronautics Act* provides that a Tribunal Member may substitute his or her own decision, paragraph 7.2(3)(*b*) of that Act authorizes the Appeal Panel to "dismiss the appeal, or allow the appeal and substitute its own decision".

[96] The Minister's Representative argued that both periods of suspension were reasonable and that it was an error in law to reduce the penalty because the Review Member felt it was unfair not to take Mr. Bahlsen's conduct into account. Mr. Mashowski argued that the suspensions could not be considered second offences because the other matter referred to was both later in time and under a different provision of the *CARs*. The Minister's Representative responded that, while the second incident took place three days after the ones that are the subject of this Appeal, the matter was adjudicated by the Minister before the Minister decided to issue the Notice of Suspension in this matter.

[97] The Appeal Panel considers that the same factors should be considered in determining the period of suspension for each contravention set out in the Notice of Suspension. In this regard, the Appeal Panel notes that the suggested periods referred to in the EMS Report (Exhibit M-18) are established in guidelines which, although they provide a means of establishing a relatively uniform pattern of decisions regarding penalties, are not mandatory and can be deviated from in circumstances the Tribunal deems appropriate. One factor emphasized by the Review Member was the unfairness of placing the blame entirely on Mr. Mashowski. The Appeal Panel finds that while the actions of others in contributing to the contravention may be taken into account as a mitigating factor, they cannot be used as a means of assessing blame. A person who contravenes a regulatory provision is responsible for that action and should not be able to shift the blame to others.

[98] The Review Member found that he could not accept the aggravating factors set out in the EMS Report. He held that it was not an aggravating factor that Mr. Mashowski was aware of the circuit since there would have been no offence had he taken off without interfering with the traffic in that circuit. The Appeal Panel cannot agree with this assessment of the situation. Before entering the runway, it was Mr. Mashowski's responsibility to assess the situation as it existed at the time. In other words, he knew that the circuit was established and that the pilot in the circuit intended to land in a touch-and-go. He had decided that the wind conditions necessitated a take-off on Runway 24. At that point, he should have been able to determine whether he would have been able to take off using normal procedures, without either creating a risk of collision or interfering with the circuit. If he could not have done so, he should not have entered the runway without determining whether Mr. Bahlsen would extend his downwind leg or until Mr. Bahlsen had cleared the runway.

[99] The Review Member also gave little weight to the statement in the EMS Report that there were accusations that Mr. Mashowski often operated in conflict with established traffic patterns and found there was little evidence to support this statement. The Appeal Panel agrees with this finding but notes that the Review Member ignored the comment that there was support for statements about his attitude in the incident of September 30, 2008. Furthermore, the Review Member did not comment on the listed aggravating factors of limited radio communications

between Mr. Mashowski and Mr. Bahlsen, and the fact that Mr. Mashowski held a commercial pilot licence. These factors really relate to airmanship.

[100] Airmanship begins where regulations end. It is the consistent use of good judgment and discipline in all flight situations. The exercise of airmanship is one of the most important qualities a pilot must have to ensure his safety, and more importantly, the safety of others. A pilot must always err on the side of caution.

[101] Mr. Mashowski failed to exercise sound airmanship in two different situations.

Even though the use of radio is not mandatory at High River Airport, it is a tool which should be used to promote safety. In this case, waiting clear of the runway until he had communicated with the aircraft on downwind would have been what a responsible pilot would have done. Taking off on the opposite runway without establishing confirmed contact with the other aircraft was not a good decision given the fact that the aircraft on downwind would have been approaching Runway 06 directly on his departure path, risking a point of contact. Mr. Mashowski's own expert witness testified that good airmanship suggests that communication should be kept going (Review Hearing transcript, page 625).

[102] He was aware of aircraft using Runway 06. He had no idea of the exact time the aircraft on downwind would be on short final, because he did not know the actual speed of that aircraft, or the point at which that aircraft would be turning onto base or final.

[103] He states that the wind favored Runway 24, and for safety reasons he was going to use it. In the interest of safety he should have made sure that the other aircraft were aware of the wind, and that it was the reason he needed to use Runway 24.

[104] To backtrack an active runway, take the time to do an engine runup, and then to take off head-to-head with another aircraft, shows a complete lack of consideration for other airport users.

[105] These considerations of airmanship constitute an aggravating factor and should be taken into account in assessing the period of suspension. The event of September 30, 2008 should be considered as a demonstration of further disregard of the principles of good airmanship and constitutes an aggravating factor on that basis.

[106] Throughout the proceedings, Mr. Mashowski attempted to lay the blame on Mr. Bahlsen and asserted that the Review Member's Determination was an interference with his "right to fly". Any such right is limited by the conditions of his licence, the requirements of the *CARs*, and the principles of good airmanship. Nevertheless, Mr. Mashowski is convinced of the correctness of his attitude and actions. This attitude is a further demonstration of his lack of respect for the rules of the air and airmanship.

[107] While Mr. Bahlsen's actions undoubtedly contributed to the situation and questions could arise with respect to his airmanship, we have all been taught from earliest childhood that two wrongs do not make a right and another's misbehaviour does not excuse our own wrongdoing. In

this matter, the Appeal Panel finds that Mr. Bahlsen's actions are a mitigating factor, but any mitigating effect is balanced by the aggravating factor of Mr. Mashowski's lack of airmanship.

[108] The principles to be applied in determining a penalty for breach of a regulatory provision were set out in *Canada (Minister of Transport) v. Wyer*, 1998 CAT File No. O-0075-33, and include denunciation, deterrence and rehabilitation. [Although this matter dealt with monetary penalties, the principles apply equally to a suspension under section 6.9 of the *Aeronautics Act.*]

[109] The Appeal Panel considers that Mr. Mashowski's actions demonstrate that more rather than less time to reflect on his attitude would be appropriate if he is to be deterred and rehabilitated. Equally, "denunciation", or as explained in *Wyer*, the "retrospective public repudiation of the wrongful conduct", demands that the seriousness of the conduct complained of should be a consideration in establishing the length of the suspension.

[110] While the Appeal Panel recognizes that the periods of suspension imposed by the Minister are longer than those recommended in the guidelines, the guidelines do not impose mandatory limits and may be deviated from when appropriate. When the factors mentioned above are taken into account, a significant extension of the recommended period of suspension is warranted to meet the purposes set out in *Wyer*. The Appeal Panel, therefore, confirms the original suspensions assessed by the Minister in the Notice of Suspension.

VII. DECISION

[111] **Count 1** – subsection 602.19(10) of the *Canadian Aviation Regulations* - the Minister's Appeal is allowed. There is no reason to interfere with the thirty (30) day suspension imposed by the Minister.

[112] **Count 2** – paragraph 602.96(3)(*b*) of the *Canadian Aviation Regulations* - the Appeal Panel upholds the Review Member's Determination as to the allegation. However, the Appeal Panel reinstates the suspension of 45 days imposed by the Minister. Accordingly, we allow the appeal of the Minister as to sanction.

September 26, 2012

(Original signed)

Reasons for the Appeal Decision: Elizabeth MacNab, Member

Concurred by: Richard F. Willems, Member

P. Terry Dowd, Member