CAT File No. O-2418-71
MoT File No. AAR6605-6

CIVIL AVIATION TRIBUNAL

BETWEEN:

Andrew Boyd, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:
Aeronautics Act, R.S., c. 33 (1st Supp), s. 7.1
Canadian Aviation Regulations, SOR/96-433, s. 602.27

Weather conditions, VFR flight requirement, Special flight operations certificate, Negligent or reckless operation of an aircraft, Ground visibility, Flying under meteorological minimum conditions, Flight visibility, Failure to comply with conditions of issuance, Double jeopardy, Aerobatic flying, Admissibility of evidence

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Appeal decision
Allister W. Ogilvie, Samuel J. Birenbaum, Suzanne Racine

Decision: April 10, 2003

We allow the document holder's appeal and refer the matter back to the Minister for reconsideration.

An appeal hearing on the above matter was held Wednesday, February 12, 2003 at 10:00 hours, at the Standard Life Building, in Ottawa, Ontario.

BACKGROUND

The 2001 CanAm Aerobatic Championship, sponsored by Aerobatics Canada Chapter 3, was held at the Hanover-Saugeen aerodrome over the weekend of August 24 to 26, 2001. The competition was held under the auspices of a special flight operations certificate (SFOC) issued to the sponsor. Unfortunately on Sunday the 26th the weather had deteriorated to a degree that precluded competition flying. By 9:30 a.m., the competition had been cancelled by the contest director.

At about noon that day a Mr. Andrew Boyd, one of the pilots who was to have competed, decided that the weather was adequate for flight. He took off and performed some low-level aerobatics over the airport in a Pitts S-2B. Mr. Boyd at that time possessed a personal SFOC. It authorized him to perform low-level aerobatics in accordance with the conditions stated in the certificate.

Although Mr. Boyd had satisfied himself as to the weather, some of the other pilots who were still present thought the weather to be unsatisfactory for aerobatics. Some of the pilots who viewed the aerobatics thought that he had, at the very least, displayed poor judgement whereas others thought his actions may have been reckless. The contest director, a Mr. Chris Pulley, was concerned enough to draw the occurrence to the attention of Transport Canada. An investigation ensued.

Subsequent to that investigation Transport Canada took two separate actions against Mr. Boyd. In the first, CAT File No. O-2468-02, (the 02 file) pursuant to section 6.9 of the *Aeronautics Act* the Minister of Transport alleged that he had contravened two regulations:

1) section 602.01 of the *Canadian Aviation Regulations* (CARs) in that he had operated his aircraft in a reckless or negligent manner by taking off and performing aerobatics when the weather conditions were such that the performance of aerobatics endangered or likely endangered life and the property of persons;

2) paragraph 602.27(*c*) of the CARs in that he operated a Pitts Special and conducted aerobatic manoeuvres when flight visibility was less than three miles.

Second, in CAT File No. O-2418-71 (the 71 file) pursuant to paragraph 7.1(1)(*b*) of the *Aeronautics Act*, the Minister decided to cancel Mr. Boyd's SFOC as it was alleged that he ceased to comply with the conditions subject to which it was issued in that he had operated a Pitts, conducting aerobatic manoeuvres when flight visibility was less than three miles contrary to condition to (1)(b) of his SFOC.

These matters were heard together before a single Tribunal Member, Mr. Philip Jardim, on October 3 and 4, 2002 in Ottawa. The Member found that Mr. Boyd did contravene the conditions of his SFOC in the 71 file. He also found that Mr. Boyd contravened both section 602.01 and paragraph 602.27(*c*) of the CARs in the 02 file.

However, he found that the cancellation of the SFOC and the suspension of the airline transport pilot licence (ATPL) were both penalties imposed on him for a single act, i.e., that of having conducted a low-level aerobatic flight contrary to the conditions of his SFOC. That was contrary to the rule against "double jeopardy" which precludes a person from being subject to more than one punishment for the same offence. Therefore, he quashed the finding of contraventions regarding Mr. Boyd's ATPL.

From that finding both the Minister and Mr. Boyd appealed.

THE APPEAL

Minister's Appeal Grounds

1. The Member erred in law in interpreting the law of double jeopardy;

2. The Member erred in law in applying the law of double jeopardy to the facts of the case; and

3. Such further and other grounds in fact and in law that the transcript of the proceedings may disclose.

Mr. Boyd's Appeal Grounds

CAT File No. O-2418-71

The Appellant makes request for appeal from the Review Determination CAT File No. O-2418-71 October 24, 2002 in its entirety.

CAT File No. O-2468-02

The Appellant makes request for appeal from that part of the Review Determination in CAT File No. O-2468-02 dated October 24, 2002 which found that the Appellant contravened both section 602.01 and paragraph 602.27(*c*) of the *Canadian Aviation Regulations*. The Appellant does not appeal from that part of the Review Determination which served to quash the ATPL suspension in light of the double jeopardy rule.

The grounds for appeal are as follows:

1. The Member erred in law in determining that the Appellant contravened the conditions of his special flight operations certificate in that the Member erroneously found, based on the evidence, that the flight visibility was less than three miles during the conduct of the flight in question.
2. The Member erred in law in determining that the Appellant contravened section 602.27(*c*) of the *Canadian Aviation Regulations* in that the Member erroneously found, based on the evidence, that the flight visibility was less than three miles during the conduct of the flight in question.
3. The Member erred in law in determining that the Appellant contravened section 602.01 of the *Canadian Aviation Regulations* in that the Member ignored the basis upon which the charge brought against the Appellant. In this regard, the Member erroneously interpreted the law in finding that the actions of the Appellant were negligent and reckless.
4. The Member made numerous errors in fact arising from the evidence which prejudiced his deliberations regarding the matters before him in the review hearing.
5. Such other grounds as the Appellant may deem appropriate.

At the appeal the following grounds were added pursuant to the filed ground 5.

1. The Member made numerous errors in rulings during the conduct of the hearing, which served to frustrate natural justice and procedural fairness. The most serious of these errors was in the basic conduct of the hearing itself. The Member simply did not allow the Appellant to put on the case that we had prepared.
2. The second ruling has to do with the denial of my testimony as that of an expert witness. He also stated that he thought it a conflict of interest in that I was representing the Appellant.
3. The Member denied the attempt to have Mr. Norman Hull as an expert on eyewitness testimony.
4. The Member seemed to be confused as to what constituted relevance relative to the case before him. Since the Minister never charged the Appellant with flying in cloud, the Member erred in not deeming evidence of flight into cloud irrelevant.

Mr. Broadfoot gave other illustrations of what he considered to be the Member's errors regarding relevant evidence.

MINISTER'S APPEAL

Held

We allow the Minister's appeal on the grounds that the Member erred in the interpretation and application of double jeopardy. The suspensions of Mr. Boyd's ATPL pursuant to section 602.01 and paragraph 602.27(*c*) of the CARs are reinstated. However, for reasons addressed in Mr. Boyd's appeal grounds, the charge pursuant to paragraph 602.27(*c*) will be dismissed.

DISCUSSION

The Member's basic premise that no person shall be subject to more than one punishment for the same offence is correct. However, a more substantial analysis needs to be undertaken before it can be established that the principle applies.

The rule against "double jeopardy" is also known by such terms as "the rule against multiple convictions" or the "Kienapple principle". Although the principle had its origins in criminal law, it has been found to be applicable in an administrative law context.[1] As it is a creature of common law rather than statute it has been described in a variety of ways but one of the most recognized analyses is found in the Supreme Court case of *R*. v. *Prince*.[2] One act of an accused must ground two or more charges. For double jeopardy to apply there must be a relationship of sufficient proximity first as between the facts, and secondly as between the offences which form the basis of those charges. The court found that; Facts—the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? Offences— the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded.

In the determination the Member found the single act of the accused was that of having conducted a low-level aerobatic flight in less than three miles visibility. That was contrary to both the conditions of his SFOC and paragraph 602.27(*c*) of the CARs. Therefore, the revocation of the SFOC and the suspension of the ATPL were both penalties imposed upon Mr. Boyd for a single act.

The Member relied upon the *Sanchez*[3] case as precedent in coming to his conclusion. Mr. Sanchez had rented an aircraft for a cross-country flight. While approaching the destination the aircraft lost power and landed on a high school athletic field. Investigation revealed that the power loss was the result of fuel exhaustion.

Mr. Sanchez's pilot licence was suspended pursuant to section 5.9 (now 6.9) of the Act on the grounds that he contravened subsection 520(1) of the *Air Regulations*, as he, the pilot-in-command had operated the aircraft in a negligent manner. He was also assessed a monetary penalty pursuant to section 6.7 (now 7.7) of the Act on the grounds that he contravened paragraph 544(*a*) of the *Air Regulations* as he had operated the aircraft without sufficient fuel to fly to the intended place of landing and thereafter for 45 minutes. A single act, the running out of fuel grounded both charges.

There were no additional or distinguishing elements going to the guilt of the accused, because the operation of the aircraft without sufficient fuel reserve also constituted the negligent act.

The Appeal Panel found double jeopardy applied. The penalties imposed for both contraventions could not stand, and therefore they stayed the lesser offence (544(*a*)).

We find that *Sanchez* was correctly decided and is of value as guidance in the application of double jeopardy matters, but it must be distinguished in this case. In the case at hand Mr. Boyd did not suffer two penalties for one act.

We agree with Mr. Béland's submission that the cancellation of a Canadian aviation document under paragraph 7.1(1)(*b*) of the Act is imposed in respect of safety. Cancellations under section 6.9 are punitive in nature, as are monetary penalties imposed under section 7.6. The objects of the provisions of sections 6.9 and 7.6 differ from that of 7.1.

The object of the suspension of the ATPL under section 6.9 was to punish Mr. Boyd for his actions, and to deter him or others from taking the same course of conduct.

The wording of both sections 6.9 and 7.6 contemplates a suspension or monetary penalty respectively, on the grounds that the Minister believes that a *contravention* has taken place. That was found to be the case in *Sanchez*. He had suffered two penalties: a suspension of his licence under section 6.9; a monetary penalty imposed under section 7.6.

The object of the suspension in this case under section 7.1 was to ensure public safety. The SFOC was issued subject to certain conditions. It was found that he was no longer in compliance with the conditions of issue and therefore could not hold the certificate. Only those holders that are in compliance with the conditions may exercise the privileges under it as a matter of safety.

No mention of contravention is found in section 7.1. Each of the paragraphs contemplates some form of competence or qualification. In the case of a pilot who has suffered an illness that prevents him or her from being able to hold a licence, the suspension or cancellation of the licence is not punishing her or him for having become ill but to ensure that only medically fit pilots may fly. In short, it is a safety matter.

This approach has been recognized in Civil Aviation Tribunal jurisprudence. In the *Dykstra*[4] case the panel concluded at page 9 of its determination:

> The facts giving rise to the two actions in the case of Mr. Dykstra may be the same, but it is only for the purposes of section 7.6 or 6.9 of the Act that they are treated as an offence. Under paragraph 7.1(1)(*b*) of the Act, the contravention is not treated as an offence but as evidence of a safety problem.
>
> It should be recalled that in licensing cases of all kinds it is usually inherent in the system of control that applications for permits may be made at any time, and permits or licences may be renewed if the applicant meets the required conditions. In this case, Mr. Dykstra's AME licence was suspended for fourteen days under section 6.9 of the Act for contraventions and then under paragraph 7.1(1)(*b*) of the Act for safety reasons until the conditions for reinstatement were met. In the *Aeronautics Act*, Parliament obviously intended that the Minister would have to suspend documents for different purposes.

That approach was also followed in the more recent *Tremblay* case.[5]

Although two actions were taken against Mr. Boyd we find that the cancellation of Mr. Boyd's SFOC under section 7.1 of the Act and the suspension of his ATPL under section 6.9 do not constitute double jeopardy. He was punished once under section 6.9. His SFOC was cancelled under section 7.1 as he no longer met the conditions of issue, a safety matter.

DOCUMENT HOLDER'S APPEAL

Appeal Grounds 1 and 2—Flight Visibility

ISSUE

The outstanding issue in both files is whether or not Mr. Boyd conducted aerobatic manoeuvres when flight visibility was less than three miles. That element is common to charge 2 relating to the alleged violation of paragraph 602.27(*c*) of the CARs and to the allegation regarding condition (1)(b) of Mr. Boyd's SFOC. Therefore, our reasoning and finding pertain to both allegations.

Held

We allow the appeal and dismiss the charges. We find that the Member erred in the application of law in his finding of flight visibility. Additionally, we find that Mr. Boyd was incorrectly charged pursuant to paragraph 602.27(*c*) of the CARs.

DISCUSSION

The Member found that three miles flight visibility did not exist. He relied upon the eyewitness testimony of some observers and also found that Mr. Boyd's aircraft had entered cloud during some flight manoeuvres, stating that the visibility in cloud approximates to zero.

The Minister, at appeal, also relied upon that double facet: ground based observations and that the aircraft had entered into cloud and hence did not have the required visibility. That opinion was expressed in the case report of the investigator. Upon questioning by the panel, Mr. Béland appeared to abandon that latter facet, but we will also address why we feel it to be inapplicable. We have addressed the visibility issue in those two parts: 1) eyewitness testimony, 2) flight into cloud.

Eyewitness Testimony

The Member's finding ignores the pertinent definitions provided in the regulations. Additionally although flight visibility is the key element in the two allegations, he did not undertake an analysis of it.

We have relied extensively on the Appellant's submission as we find it to be a clear, cogent and a correct analysis of the regulatory structure. Mr. Broadfoot displayed an understanding of the legislation to which we could all aspire.

In his analysis Mr. Broadfoot has come to the conclusion that the charges under paragraph 602.27(*c*) were incorrect. We concur with his analysis but also find it necessary to address the visibility issue.

We agree with the Appellant that the legislation must be understood in its total context. To that end we have undertaken an analysis to clarify our reasons for allowing the appeal.

The definitions for various terms are found in the CARs and are part of the regulations. As such they are part of the "law" and therefore cannot be ignored.

Subsection 101.01(1) of the CARs:

> "aerobatic manoeuvre" means a manoeuvre where a change in the attitude of an aircraft results in a bank angle greater than 60 degrees, an abnormal attitude or an abnormal acceleration not incidental to normal flying;
>
> "flight visibility" means the visibility forward from the cockpit of an aircraft in flight;

"ground visibility", in respect of an aerodrome, means the visibility at that aerodrome as contained in a weather observation reported by

(*a*) an air traffic control unit,

(*b*) a flight service station,

(*c*) a community aerodrome radio station,

(*d*) an AWOS used by the Department of Transport, the Department of National Defence or the Atmospheric Environment Service for the purpose of making aviation weather observations, or

(*e*) a radio station that is ground-based and operated by an air operator;

"VMC" or "visual meteorological conditions" means meteorological conditions equal to or greater than the minima specified in Division VI of Subpart 2 of Part VI, expressed in terms of visibility and distance from cloud.

As the actual minima for VMC are not provided in the definition, we must refer to those parts specified. It can also be seen that VMC is expressed in terms of visibility and distance from cloud as separate elements.

Part VI—General Operating and Flight Rules

Subpart 2—Operating and Flight Rules

Division VI—Visual Flight Rules

602. 114 Minimum Visual Meteorological Conditions for VFR Flight in Controlled Airspace

602. 115 Minimum Visual Meteorological Conditions for VFR Flight in Uncontrolled Airspace

602. 116 VFR Over-the-Top

602. 117 Special VFR Flight

As Mr. Boyd was conducting a VFR flight in uncontrolled airspace, section 602.115 provides the VMC for that operation. However, a read of the other sections also helps to establish the scheme and illustrates the need for specific definitions.

A perusal of the sections delineated under VMC shows that "flight visibility" and "ground visibility" are separate and distinct concepts. When flying into a control zone, sections 602.114 and 602.117 provide both flight and ground visibility. When in a control zone, control is provided by ground-based personnel, for example, tower controllers. Hence the regulation also addresses ground visibility.

Although both ground visibility and flight visibility are stipulated as three miles in section 602.114, it is recognized that the two are not the same. In the *A.I.P. Canada*, RAC 4.0 Airport Operations, at section 4.1 it states in part:

> [...] CAR 602.114 requires a minimum of three miles ground visibility for VFR flight within a control zone. This visibility is, of course, taken by a person on the ground and does not preclude the possibility that the visibility aloft may be less. [...]

We use that comparison only to show that flight and ground visibility are not synonymous.

That they are not synonymous is also recognized in jurisprudence. In the *Pourtau*[6] case a thorough analysis of subparagraph 602.115(*c*)(i) was undertaken by the Member. He stated in part at page 5:

> Simply by virtue of the fact that on take-off, visibility declines as the aircraft moves along the ground, and even more so in flight once the aircraft has left the supporting surface, *the observations of witnesses motionless on the ground and those of the pilot-in-command will invariably differ. And this, in my view, is the crux of the whole case: the visibility reported by witnesses on the ground cannot be the same as that of the pilot...* [our emphasis]

That is the crux of the case here as well. The Member erroneously relies upon ground-based witnesses to provide "flight visibility". He simply ignores the definition provided by law, seemingly preferring to rely on the "experience" of pilots.

We do not doubt the truthfulness of the witnesses' testimony. They simply cannot provide "flight visibility". As can be seen by the definition they cannot provide "ground visibility" either. They can provide only their opinion or recollection of how far they thought they could see that day.

The Member rejected Mr. Broadfoot's assertion that the sole judge and arbiter of flight visibility was the pilot-in-command, stating that he believed that to be clearly wrong, but he did not say *why* it was wrong. Some reasoning or analysis would have been helpful.

In the *Pourtau* case mentioned above, having done a thorough analysis of section 602.115 and the definitions, the Member provides his reasoning, noted above, before coming to the conclusion at page 5 that: "As a result of the foregoing, I find that the visibility referred to in the regulations within uncontrolled airspace is that which the pilot is able to observe in flight..."

Another Tribunal case[7] addressed flight visibility, but pursuant to section 602.117 special VFR flight. In the *Devlin* case the allegation arose regarding the flight of a float equipped DeHavilland Twin Otter (DHC-6) between Vancouver Harbour and Victoria Harbour. A Transport Canada inspector was a passenger seated about half way back in the cabin next to a window.

The aircraft was flown VFR, at low altitude of 100 feet over the water in poor visibility. As the inspector thought that the flight had less than the required flight visibility he reported it.

In this testimony the pilot Devlin pointed out that in his experience the ceiling and visibility over the Juan de Fuca Strait are considerably better than over the peninsula, (that is) the land around which they usually fly. A passenger sitting on the right-hand side of the aircraft would have a view of the peninsula during southbound flight. It would be weather not associated with the flight path. The pilot and co-pilot in the DHC-6 had a 180-degree unobstructed view from the cockpit. After assessing the evidence the Member concluded: "The definition of flight visibility in the CARs is plain. It means the visibility forward from the cockpit. Mr. Devlin was the only witness who could observe the visibility forward from the cockpit."

Both these cases declare the pilot to be the one who could observe the visibility forward from the cockpit in flight and they both provide reasons for the conclusions. As the reasoning is understandable and the conclusions are consistent with the definition we concur with their findings.

Mr. Béland argued that such an interpretation could not stand. He reasoned that if the pilot were the only person who could establish flight visibility, then Transport Canada could never get a conviction for a violation of flight visibility regulations. That could not have been the intended result in his view.

We acknowledge that the Minister may have difficulty obtaining a conviction under flight visibility regulations, given the definition of flight visibility. However, we must note that the Minister is also the author of the definition and the regulations and the Minister is able to change them if the circumstances warrant.

Further we feel that when regulations are drafted, the primary concern is aviation safety, not ease of enforcement by the Minister's staff.

The sole witness able to provide evidence of flight visibility was Mr. Boyd as he was the only person able to do so within the meaning of flight visibility stipulated in the regulations. He not only stated that he had the required visibility, he described why he knew what it was, i.e., in reference to the Walkertown water towers. Although the Member made findings of credibility regarding the Minister's witnesses, he made no finding regarding Mr. Boyd's. Given that there is no adverse finding regarding Mr. Boyd's credibility, his evidence on flight visibility is the sole evidence on the record.

Flight into Cloud During Aerobatic Manoeuvres

The definition of flight visibility from section 101.01 of the CARs has been previously stated. An aerobatic manoeuvre is also defined in the CARs as:

> "aerobatic manoeuvre" means a manoeuvre where a change in the attitude of an aircraft results in a bank angle greater than 60 degrees, an abnormal attitude or an abnormal acceleration not incidental to normal flying;

Most aircraft are being operated from point A to B that is progressing "forward" in normal attitudes, not those attitudes described in aerobatic manoeuvres. We think that flight visibility pertains to those normal flight attitudes looking forward from the cockpit of an aircraft in flight.

However, the Minister has tried to apply "flight visibility" to "aerobatic manoeuvres". That is readily evident by the statement in the case report (Exhibit D-2) under Supervisor's Comments where it is stated: "Therefore if we are to proceed with this charge, we must prove that, *at the top of his vertical manoeuvers, ..., he was flying without the required 3 miles of flight visibility.*" [our emphasis]

The Member concluded that the Appellant performed aerobatics when flight visibility was less than three miles based on the fact that Mr. Boyd flew into clouds during certain vertical manoeuvres.

Visibility forward from the cockpit of an aircraft in flight denotes visibility along the longitudinal axis of the aircraft. In horizontal flight that would be the view as the aircraft progresses along its route whether flying from point A to point B, flying around a circuit, or partaking of other "normal flying".

However, during aerobatic flying the aircraft is put into abnormal attitudes. For instance in some of Mr. Boyd's manoeuvres such as a hammerhead stall the aircraft is pulled back until it is in a vertical climb.

For the Minister's view of flight visibility to prevail, the distance that one could see along the longitudinal axis would have to be three miles, during all aerobatic manoeuvres.

Yet a perusal of Exhibit M-5, the SFOC for the competition, shows at condition 8 that an acceptable ceiling is that of 500 feet above the upper limits of the competition box. The visibility along the longitudinal axis, when ascending in a vertical aerobatic manoeuvre, would be the distance between the aircraft and that ceiling. Were the Minister's interpretation to be taken as correct that ceiling would have to be somewhere in excess of three miles, not the 500 feet stipulated.

The absurdity of such an interpretation is readily apparent from its application.

When the energy of the aircraft ascending in a vertical climb has dissipated, the aircraft stalls and begins a vertical dive toward the ground. The distance that one could see along the longitudinal axis in that attitude would be that distance between the aircraft and the ground. If that distance were required to be three miles, all such manoeuvres would necessarily have to be performed at an altitude in excess of the three miles. That would have less than a salutary effect on air shows and aerobatic competitions.

Further, part of the definition of flight visibility is that it be "forward from the cockpit" and we believe that when the aircraft is going straight up or straight down, it lacks that defined component.

Mr. Dodge, an experienced pilot upon whose testimony the Minister has relied, stated that in the United States, when specifying flight visibility it was on the horizontal plane. A review of the *Federal Aviation Regulations* (FARs) shows that to be so. In Chapter I, Part 1, Definitions:

> *Flight visibility* means the average forward horizontal distance, from the cockpit of an aircraft in flight, at which prominent unlighted objects may be seen and identified by day and prominent lighted objects may be seen and identified by night. [our emphasis]

Of course, the US definition in the FARs is not governing; we use it only as a comparison. Although "horizontal" is absent in the CARs, we think that it accords a degree of common sense to interpret it in that manner. To equate flight visibility into the vertical plane, whether ascending or descending, renders it nonsensical as can be seen in its application.

Charges under the wrong section

We feel this case reveals a very basic misunderstanding of the legislative scheme on behalf of the Member and the Minister's representatives.

For flight under visual flight rules (Division VI) certain minimum visual meteorological conditions (VMC) must be present. These minima are expressed in the definition in terms of two concepts: visibility and distance from cloud. They are independent, separate and distinct elements.

The minimum visibility and distances from cloud are found in those sections specified in Division VI of Subpart 2 of Part VI. Those sections are 602.114, 602.115, 602.116 and 602.117. A perusal of those sections reveals that the two concepts are treated separately and distinctly in each of these sections. The required visibility and distance from cloud vary in accordance with the type of operation for example whether operation is in controlled or uncontrolled airspace, or VFR over-the-top.

While that approach seemed beyond the appreciation of the Member and the Minister, it is however clear to us on a review of the legislation and it has been recognized in the jurisprudence.

In the *Devlin* case mentioned earlier the Member undertook two separate analyses of the concepts as follows:

1. Did the Respondent maintain during the flight the required one-mile flight visibility?

2. Did the Respondent operate the aircraft clear of cloud and with visual reference to the surface at all times?

The CARs that would deal specifically with a VFR flight in uncontrolled airspace, operating at less than 1,000 feet AGL during the day would be paragraph 602.115(*c*). It stipulates: (i) [...] flight visibility not less than two miles [...] (iii) [...] the aircraft is operated clear of cloud [...].

Those are the minimum VMC required for VFR flight in the circumstance.

The Member stated that it was inapplicable, as it did not refer to aerobatic flight. The section does not refer to any specific type of operation, as it is a section of general applicability. The minimum visibility and distance from cloud apply to all aircraft being operated VFR in that circumstance, i.e., in uncontrolled airspace, below 1,000 feet AGL, during the day.

We then move from the section of general applicability to the more specific, that is the performing aerobatics, section 602.27. The more specific sections are usually more restrictive. The Minister's allegation was for the contravention of paragraph (*c*).

Section 602.27 forbids conducting aerobatic manoeuvres in certain circumstances.

(a) over a built-up area;

(b) in controlled airspace, except in accordance with a special flight operations certificate;

(c) when flight visibility is less than three miles; or

(d) below 2,000 feet AGL, except in accordance with a special flight operations certificate issued pursuant to section 603.02 or 603.67.

As can be seen the flight visibility requirement increased from two miles in the general section to three miles for aerobatics. What section 602.27 does not stipulate is the distance from cloud. However, we are dealing with a VFR flight and therefore must abide by the rules that prescribe the visual meteorological conditions applicable to the circumstance. As per our previous analysis, a VFR flight in uncontrolled airspace less than 1,000 feet AGL during the day, paragraph 602.115(*c*) provides the criteria. At subparagraph (iii) it stipulates clear of cloud.

Read in conjunction, we have the visibility requirement in paragraph 602.27(*c*) of three miles and the requirement of paragraph 602.115(*c*) to remain clear of cloud.

Thus, in this circumstance the Minister should have utilized section 602.115 for an allegation of unauthorized flight into cloud. We believe the misinterpretation stems from confusing operation of an aircraft into cloud with a restriction on flight visibility. We concede visibility in cloud is not three miles, but visibility and remaining clear of cloud are two separate entities.

A further error in the allegation is revealed by that analysis. Charge 2 of the 02 file was brought under paragraph 602.27(*c*). The flight was conducted under paragraph 602.27(*d*).

Paragraph 602.27(*d*) addresses aerobatic manoeuvres below 2,000 feet AGL, which is the situation here. The conduct of such an operation must be in accord with an SFOC pursuant to section 603.02 or 603.67. Mr. Boyd had an SFOC pursuant to section 603.67.

Therefore, the flight conditions are found in the SFOC not paragraph (*c*). The flight condition stipulated at 1(d) of the SFOC is that flight visibility be not less than three miles. Although both

(c) and (d) stipulate not less than three miles, it is incumbent on the Minister to charge under the proper paragraph.

That (d) is the relevant paragraph and is also clear from the Minister's own evidence at Exhibit M-6, Mr. Boyd's SFOC where it states:

> Pursuant to section 603.67 of the *Canadian Aviation Regulations*, this letter constitutes your Special Flight Operations Certificate to operate an aircraft while conducting aerobatic manoeuvres below 2,000 feet AGL in accordance with paragraph 602.27(*d*) of the *Canadian Aviation Regulations*. [our emphasis]

Had the Minister proved flight visibility to be less than three miles, the charge would still have failed as he charged under the wrong subsection.

Appeal Ground 3—Reckless and Negligent

The Member made a finding that Mr. Boyd was both reckless and negligent. Mr. Boyd appealed that finding.

Held

We do not think that the conduct of Mr. Boyd constituted recklessness; we do find that it amounted to negligence and hence a contravention of section 602.01 of the CARs.

DISCUSSION

Mr. Broadfoot submits that the Member erroneously interpreted the law in coming to his conclusion. We have set out his argument in some detail.

He asserts that the Minister qualified the charge by stating that the Appellant had been reckless or negligent "by taking off and performing aerobatics when the aerobatic competition was cancelled and the weather conditions were such that the performance of aerobatics endangered or likely endangered life and property of persons." We agree that the charge is qualified and that it is incumbent upon the Minister to prove those elements of the offence which he alleges. It is most helpful to break the offence into its constituent elements. The Appellant has done so in his appeal.

He submits that there are four separate elements consisting of two separate conditions that may be set out as follows:

1. Taking off when the aerobatic competition was cancelled;
2. Taking off when the weather conditions were such that the performance of aerobatics endangered or likely endangered life and property of persons;
3. Performing aerobatics when the aerobatic competition was cancelled; and

4. Performing aerobatics when the weather conditions were such that the performance of aerobatics endangered or likely endangered life and property of persons.

It was argued that as aviation activity carries some risk the Minister defines and quantifies that risk when establishing the regulations. The minimum level of safety is then embodied in the regulations. Therefore, if one acts within the regulations the Minister cannot then maintain that such actions are reckless and negligent.

Mr. Broadfoot says that there was no question that in three of the elements listed in charge 1 there was no violation of the CARs. We concur regarding the first three elements. The Appellant's reasoning follows:

1. There is no regulatory provision in the regulations which requires a take-off to be performed within the authority of an SFOC.
2. The take-off manoeuvre is not governed by weather conditions applicable to aerobatic flight. As the definitions show, "take-off" and "aerobatic manoeuvre" are defined differently, hence a take-off is not an aerobatic manoeuvre and is not subject to the same weather conditions. The Appellant was therefore compliant with the regulations relative to the performance of a take-off.
3. There is no regulatory provision embodied in the regulations which requires aerobatic manoeuvres to be performed within the authority of an SFOC issued for a special event (the competition) if one is operating under the authority of his own SFOC. So the Minister's criterion for safety has been met.

We agree with the foregoing submissions and also query the relevance of any mention of a competition that was cancelled several hours prior to the flight that is the subject of the allegation. Although the cancellation of the competition forms part of the allegation, we do not see it as part of the offence.

It is with the Appellant's conclusion regarding the fourth ground that we take issue. To ensure that we do not misconstrue the argument, we provide the pertinent paragraph in whole. His submission is as follows:

> The fourth issue, performing aerobatics when the weather conditions were such that the performance of aerobatics endangered or likely endangered life and property of persons, must, also, be considered against the applicable regulatory provisions. The only weather condition that needs to be satisfied in this case is the condition (1)(b) of the Appellant's SFOC which required that aerobatic manoeuvres are prohibited when flight visibility is less than three miles. I refer back to our previous arguments regarding the flight visibility issue relative to the cancellation of the SFOC and Charge 2 of the Notice of Suspension as being equally applicable here. We submit that the Appellant did have the requisite three miles flight visibility throughout the flight in question and, again, met the Minister's criterion for safety in this regard.

We accept on the evidence that Mr. Boyd did have the three miles flight visibility. We do not accept that he therefore met the Minister's criterion for safety in this regard.

The Appellant states that the three miles flight visibility prescribed under the SFOC is the only weather condition that needs to be satisfied. We note for visual meteorological conditions to exist the aircraft must also be clear of cloud (602.115(*c*)). However, he has earlier characterized that as a conduct of flight restriction rather than a weather restriction. We can accept that premise as well. But we must note that the allegation stipulates "weather conditions" rather "than visual meteorological conditions". We take it that "weather conditions" was meant in the common parlance or a dictionary definition because the Minister did not stipulate "visual meteorological conditions". *Gage Canadian Dictionary* defines "weather" as "the condition of the atmosphere at a particular time and place with respect to temperature, moisture, cloudiness, or windiness." Wind can be a significant weather factor. For instance Mr. Ashwood-Smith did not fly that day because of weather; the winds exceeded his personal cross wind limitation.

We then go back to the Appellant's original thesis that if one is acting within the regulations the Minister cannot maintain that an act was reckless or negligent. We find that Mr. Boyd did act outside the regulations.

The Minister has referred us to case law[8] which provides that findings of fact should not be disturbed on appeal unless there is an absence of evidence to support the conclusion or that the findings are patently unreasonable and cannot be supported by testimony. We have noted elsewhere in the decision where we have found the Member's facts not to be supported by evidence.

Contrary testimony was given on key issues such as flight into cloud. Although we may have come to a different conclusion on the same facts, we are guided by the jurisprudence and where the member's conclusions are supported by the testimony he accepted we will not disturb his findings.

The Member found that the witnesses (the Minister's) were unanimous in having observed Mr. Boyd's aircraft enter cloud. Entering cloud while in VFR flight is contrary to regulations, as the condition of flight stipulation of section 602.115 requires that an aircraft be operated clear of cloud.

Those witnesses also stated that Mr. Boyd on several occasions exited cloud right above them. The Member found that the witnesses saw Mr. Boyd digress from the flight line descending vertically over the assembled contestants by the terminal building. He stated that Mr. Boyd had been blown off course by the wind, and because of the low cloud and poor visibility he had not been able to correct it. In short, the weather conditions had contributed to his predicament.

It is common ground that Mr. Boyd was operating the flight under his personal SFOC. Condition (1)(a) of that certificate prohibits aerobatic manoeuvres over a built-up area or an open-air assembly of persons.

We find that the gathering of competitors outside the terminal building watching Mr. Boyd's aerobatics qualifies as an open-air assembly of persons. His descent over the assembled persons was prohibited. As the SFOC was issued pursuant to paragraph 602.27(*d*), Mr. Boyd was in violation of that regulation.

Subparagraph 602.14(2)(*a*)(i) of the CARs also prohibits operation of an aircraft over a built-up area or an open-air assembly of persons unless it is operated at a safe altitude and in any case not less than 1,000 feet above the highest obstacle within a horizontal distance of 2,000 feet of the aeroplane.

The Appellant has argued that if the pilot acted within the regulations then the Minister could not maintain that the act was reckless or negligent. Here the evidence accepted shows Mr. Boyd to have acted outside the regulations.

ISSUE

Did Mr. Boyd operate an aircraft in a reckless or negligent manner by performing aerobatics when the weather conditions were such that the performance of aerobatics endangered or was likely to endanger life and property of persons?

The Appellant has argued that the witnesses' testimony must be considered in the context that they viewed the occurrence with a mind set geared toward competition or air show criteria rather than the criteria of Mr. Boyd's SFOC. There is some evidence to support that. For example one witness spoke about Mr. Boyd having crossed "the deadline", a term used in conjunction with the competition's aerobatic box. But we reject the argument, as the testimony of the Minister's witnesses read together shows their expressions of concern were not directed in terms of an aerobatic competition but rather at Mr. Boyd's flight, and in great measure the concern arose because of its proximity to them.

The Member found Mr. Boyd to have been negligent because he acted unreasonably and against the advice of his peers. There is no evidence that Mr. Boyd acted against the advice of his peers. He was castigated by some of them only after the flight. So we reject that finding. Did he act unreasonably?

The *Decicco* case[9] at Appeal provides guidance on the subject. The Appeal Panel stated that in any consideration of what constitutes negligent or reckless conduct, we must review the conduct in light of what a reasonable and prudent pilot would do in the circumstances.

We believe that a reasonable and prudent pilot adheres to the regulations pertinent to his flight. Here the record shows that Mr. Boyd was in violation of section 602.115 of the CARs and condition 1(a) of his SFOC, although he was not charged with either.

What else would be indicative of a reasonable pilot's conduct in the circumstances? We can compare Mr. Boyd's conduct to that of the other pilots. Other than Mr. Ashwood-Smith, the witnesses, most of whom were also aerobatic pilots, stated in no uncertain terms that they thought it was unadvisable or even dangerous to have conducted that flight.

In considering that criterion we find Mr. Boyd's conduct fell below that expected of a reasonably prudent pilot in that he failed to exercise the degree of skill and care required of him.

The Member also found Mr. Boyd had been reckless. He declared that recklessness was perceiving a risk and deliberately deciding to run it. But he also stated Mr. Boyd may not have perceived his actions to be fraught with risk. We do not understand how he could state that Mr. Boyd may not have perceived his action to be fraught with risk and yet find that he perceived the risk. We reject his finding as contradictory.

The Panel in *Decicco* also addressed recklessness relying on a definition in *Black's Law Dictionary* at page 1142 where it states in part:

> Rashness; heedlessness; wanton conduct. The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended.

We do not find evidence in the record of any state of mind accompanying his actions which would constitute conduct egregious enough to be considered reckless.

Some of the witnesses also expressed their fear for their own safety and Mr. Boyd's so as to bring his conduct within the second facet of the offence "endangered or likely endangered life and property of persons."

We are satisfied that his conduct was negligent and did present an unnecessary risk to those on the ground that he overflew.

As neither party spoke to the propriety of the length of the suspension at the appeal hearing, we will not interfere with it.

Appeal Ground 4

The Member made numerous errors in fact arising from the evidence which prejudiced his deliberations regarding the matters before him in the review hearing.

Held

We deny this ground of Appeal. The finding that Mr. Boyd acted against the advice of his peers is clearly wrong and prejudicial, but we have previously dealt with it under ground 3. The Member did err in some of his other findings of fact; those errors did not lead to an adverse finding against the document holder.

DISCUSSION

Mr. Broadfoot asserted that the Member made several findings of fact which were untrue or inaccurate. They may be summarized as follows:

- Mr. Boyd acted against the advice of his peers.
- Mr. Boyd acted against the advice of the contest director and others.
- The Member found that visibility was less than 2.5 miles.
- The Member found that all the witnesses were experienced pilots.
- The Member found that none of them flew that day because of the weather.

The findings of the Member noted in the first two statements above are inaccurate. The record shows that Mr. Pulley and Mr. Dodge approached Mr. Boyd only after the flight was completed. Therefore, it cannot be said that he acted against their advice. One witness, Mr. Speer, suggested that others had advised Mr. Boyd against his activity, but Mr. Speer was not present nor did he identify who supposedly approached Mr. Boyd prior to the flight.

The Member's remarks regarding visibility must be read with care. The statement given at page 2 of the Review Determination, background, says that the weather at the time was corroborated by *several* of the witnesses. That weather included visibility of 2.5 miles. At other times he stated that the eyewitnesses were unanimous (page 5, evidence), but that statement refers to losing sight of Mr. Boyd's aircraft from time to time. At page 6 reference is made to the *consistency* of the Minister's eyewitnesses, but the context is not clear.

It is correct to say that *several* witnesses corroborated the visibility at about 2.5 miles. However, several others contradicted that finding stating that the visibility was up to 3 miles. We do not know why he rejected that testimony as no mention is made of it.

The Appellant disputes the Member's findings that the eyewitnesses were "all experienced pilots" (page 5). The criticism is correct as a review of witness testimony shows that Mr. David Whitton was attending the competition with his partner who was an aerobatics pilot. Mr. Whitton stated that he flew radio-controlled model aeroplanes and had the beginnings of a private pilot licence.

Another witness, Mr. Darin Graham, is the President and CEO of a communications and information technology company. He related that his flying experience consisted of about 280 hours, single engine aircraft, with an IFR rating. About half the 280 hours was as pilot-in-command; he had no aerobatic experience. Although "experienced pilots" may be a relative term, Mr. Graham would be better described as relatively inexperienced as compared to those witnesses who have several thousands of hours of flight time.

Mr. Broadfoot also took umbrage with the Member's finding that they were all eyewitnesses. It is clear from Mr. Pulley's testimony and his statement to Transport Canada that he was not a witness to the aerobatic flying as he had returned to the confines of the terminal building. He did at one point briefly return to the front of the airport terminal building and noticed Mr. Boyd flying by. But in his statement he had said: "... I could not watch Mr. Boyd's flying display." As

far as seeing Mr. Boyd's manoeuvres or alleged flight into cloud, Mr. Pulley said in his statement that these acts had been brought to his attention.

He also challenged whether it was accurate to state that none of them flew that day due to weather. We are left to surmise that the Member was referring to the participants in the aerobatic competition when he stated that "none of them flew that day because of the weather".

We think that because some of the witnesses were not flying in any case. For example it is more likely that Mr. Whitton did not fly because he was not a pilot, rather than because of the impediment of weather.

Mr. Dodge was at the competition as a coach not a competitor. It is not clear from his testimony whether he had planned to return home as a pilot or passenger in an aircraft. In any case he rode back in an automobile.

Mr. Gusakow did not perform aerobatics, but he did fly that day. He took off with three other aircraft, in an attempt to return to the United States. They returned due to weather concerns, but departed again later that day.

If the Member's remarks were addressed to all the witnesses, then his remarks were clearly inaccurate. However, we feel from the context that they were meant to apply to the competition contestants. As such, they are accurate.

From the foregoing review we find that several findings of fact made by the Member in his determination are either incomplete or inaccurate. When making findings of fact the Member should consider all of the evidence, not ignore some of it, or fail to evaluate some of it, as to do so does not put it into its proper perspective.

We find that to be the case here. For instance, the Member altogether ignores the evidence of Mr. Boyd and Mr. Ashwood-Smith regarding flight visibility. If a Member rejects elements of the evidence, he must explain why. Here we must infer that he has rejected it as the testimony of Mr. Boyd and Ashwood-Smith is not even mentioned. It is important to state why you do not accept certain evidence. Here particularly so, as it is the evidence of the accused document holder that is ignored or rejected. Although the Member makes findings of credibility regarding witnesses he believes, he makes no mention of the credibility of those whose testimony he does not consider.

In *Pitts* v. *Director of Family Benefits Branch*[10] it was stated:

> The task of determining credibility may be a difficult one but it must be faced. If the board sees fit to reject a claim on the ground of credibility, it owes a duty to the claimant to state clearly its grounds for disbelief. The board cannot simply say, as the member did here, 'I feel that I have not received credible evidence to rescind the decision of the Respondent.' Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided.

It is simple to state that you find someone to be "credible" or "highly credible" but it is preferable to also include your reasons for that finding. Just why was it that you found them credible? It is a more delicate and difficult challenge to reject a person's testimony and state clearly your reasons for doing so. In this case the Member did not accept that challenge but simply ignored the issue, not making any findings of credibility regarding the testimony that he has not accepted. That leaves the appearance of arbitrariness.

Regarding this ground of appeal we find that the Member did err in some of his findings of fact as noted in our discussion. However, whether all the witnesses were "experienced pilots" or which of them flew that day is not significant as those errors did not lead to an adverse finding against the document holder.

That cannot be said of the findings that Mr. Boyd acted against the advice of the contest director or others or against the advice of his peers. The finding is wrong, unsupported by the record. There is no evidence in the record that Mr. Boyd received advice from anyone prior to his flight. The record is clear that the contest director, Mr. Pulley, and a Mr. Dodge castigated Mr. Boyd only after the flight.

However, that finding and its connotation permeate the determination. It is found in the "background" material, in the second paragraph of the determination, before any assessment of the evidence is undertaken. More importantly it seems to be the basis upon which the Member makes his finding of negligent and reckless conduct. The Member stated that: "Negligence is the performance of an act which a reasonable person would not do. This is certainly the case with Mr. Boyd, who acted unreasonably and *against the advice of his peers*." [our emphasis]

If acting against the advice of his peers was the sole criterion for the finding that the act was unreasonable and hence negligent and reckless conduct, it should fail. However, in this instance it does not fail for the reasons stated at ground 3.

Appeal Ground 5

Such other grounds as the Appellant may deem appropriate. Under that filed ground the Appellant added the following grounds at the appeal hearing.

The Member made numerous errors in rulings during the conduct of the hearing, which served to frustrate natural justice and procedural fairness.

The Conduct of the Hearing

1) The Member did not allow the Appellant to put on the case that they desired.

2) The Member denied Mr. Broadfoot the status of expert witness regarding the interpretation of legislation.

3) The Member found Mr. Broadfoot to be in a conflict of interest as both expert and case presenter.

4) The Member denied Mr. Norman Hull the status of expert witness regarding eyewitness testimony.

5) The Member was confused as to what constituted relevance:

a) Evidence regarding flight into cloud, as he was not charged with flying in cloud;

b) Exhibit M-3, the Boyd Flying Pictures illustrating the attitude of the Appellant, is irrelevant;

c) Exhibit M-4, application for the competition SFOC, is irrelevant as the competition was terminated prior to the flight in question.

Held

Grounds 1 and 5 rulings as to relevance—we would allow the appeal but need not do so pursuant to this ground as the charges relating to flight visibility have been overturned on the basis of error of law. Grounds 2, 3, 4 expert witness testimony—we deny the appeal on the grounds that the admission or denial of a witness as expert is within the discretion of the Member.

DISCUSSION

As this ground of Appeal brings into question whether the hearing was conducted with regard to fairness and natural justice, we feel the issues raised need to be addressed.

We will deal with the issues of expert testimony (grounds 2, 3, 4) together as each concerns the denial of expert witness status.

The decision as to whether a witness may be qualified as an expert is at the discretion of the hearing Member, based on his assessment of whether he needs the assistance of expert testimony and, if so, on his finding as to the expert's qualifications. If the Member is satisfied that the witness is sufficiently skilled in the particular field, the expert's opinion testimony is admissible. As it is in the Member's discretion to accept or deny the expert's status, we cannot find that he made an error in his findings regarding whose testimony to accept as expert.

Whether a Member needs the assistance of an expert is a subjective finding based on the Member's own expertise and experience. Here, as his reasons for denying Mr. Broadfoot's status were in relation to Broadfoot's qualifications, we must assume that he had already accepted that he could use expert assistance regarding statutory interpretation. His findings bear that out.

The refusal to grant expert status on the basis of qualification is an objective exercise that should be based on the proffered expert's credentials. It is here that we must beg to differ with the Member. We feel that the record supported Mr. Broadfoot's expertise.

The Member rejected Mr. Broadfoot's expert status on three grounds. First, he stated that Mr. Broadfoot's experience was "primarily military and some civil regulatory work". Second, he stated that Mr. Broadfoot had left the scene before the new CARs had come into force. Third, he had a conflict of interest in that he was also representing Mr. Boyd.

The Member misstates and trivializes Mr. Broadfoot's role in drafting and promulgating the very regulations in issue by saying that his experience spanned a "long period of primarily military and later some civil regulatory work". The record shows his experience to be almost equally divided between the two in terms of years of service. As to "some regulatory work" Mr. Broadfoot testified that he was the Chief, Air Navigation Policy and Standards, during the period when the regulatory revisions which were to become the CARs were being drafted. As such he was responsible for, among other things, those elements of Part VI generally known as "The Rules of the Air." It will be remembered from the earlier analysis that the VMC criteria are found in Part VI as are the regulations in issue sections 602.27 and 602.115.

The reference to "a long period of primarily military and later some civil regulatory work" could more aptly describe Mr. Flewelling's status as he told the Tribunal that he had been an inspector for Transport Canada for three years but before that had been in the military for 20 years.

Mr. Broadfoot retired in 1996 just before the new regulations, the CARs, came into force. The Member found that fact to be disqualifying as well stating during the hearing that there had been many subtle changes arising out of the changes in the CARs, and he was reluctant to accord Mr. Broadfoot the title of expert witness to the CARs as they currently exist. That was despite Mr. Broadfoot's assertions that the regulations he was referring to were promulgated prior to his retirement and had not changed since. A review of the amendment record of those sections confirms that fact.

The third ground for refusal to qualify him as an expert was that Mr. Broadfoot was in a conflict of interest as he was also representing Mr. Boyd.

Parties, adverse in interest, often both call expert witnesses to further the parties' position. Although expert opinion should be objective, based on the evidence, the expert usually bolsters the case of the party for whom he or she is the expert. That is not in itself a conflict of interest.

It is unusual that a case presenter for a party also is qualified as an expert witness but we do not see it as a conflict of interest that would disqualify him from testifying. In many cases a representative of the party is also an expert witness. Here the Minister's expert witness is also an employee of the Minister but the Member does not see that as disqualifying. Having heard the testimony of such a witness, a member may be inclined to give it less weight than he might one who is at arm's length.

We find that Mr. Broadfoot's qualifications were exemplary. He was well qualified to be an expert on the statutory issues.

Mr. Norman Hull was proffered, on behalf of Mr. Boyd, as an expert on aerobatics and eyewitness testimony.

The Member accepted that Mr. Hull was qualified to give testimony as expert in aerobatic flight but denied that status regarding eyewitness testimony. He gave no reasons for the denial in the determination. We on the appeal panel are able to infer from the transcript that the Member did not feel Mr. Hull was sufficiently qualified to serve as an expert on eyewitness testimony. But those reading only the determination do not have our advantage. Failing to give reasons for the denial gives the impression of arbitrariness.

Grounds 1 and 5 are interrelated as Mr. Broadfoot has argued that they could not put their case in as they desired because of the rulings on relevance whenever they tried to suggest that Mr. Boyd had been wrongly charged. Therefore, those grounds will be addressed together.

We concur with the Appellant's argument that the Member made errors in his findings regarding relevance. A review of the transcript does reveal that when the Appellant challenged certain exhibits in evidence (testimony relating to flight into cloud (M-3, M-4)) on the grounds of relevance, the Member ruled against him saying that he found it to be relevant, but never explained why other than saying that the Tribunal was not bound by the legal rules of evidence. He did not attempt to establish what he meant by relevant.

Subsection 37(1) of the *Aeronautics Act* does stipulate that the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter before it. But that does not mean that no rules apply. The evidence still must be relevant. The concept is aptly put in Sara Blake's text[11] where she states:

> Unless expressly prescribed, the rules of evidence applied in court proceedings do not apply to proceedings before an administrative tribunal. This is, in part, because tribunal members, being lay people, are not schooled in the rules of evidence and are expected to apply common sense to their consideration of evidence. It also reflects the public interest mandate of many tribunals.
>
> *The basic criterion for the admissibility of evidence is relevance.* Relevant evidence is admissible; irrelevant evidence is inadmissible. To determine relevance, one looks to the notice of hearing and other documents that describe the purpose and subject matter of the proceeding. Any evidence relevant to those matters is admissible. [our emphasis]

When looking to the Notice, we see the allegations against the document holder. A fact sought to be put in evidence must tend to prove or disprove those allegations to be relevant and hence admissible.

Sara Blake goes on to say where there is doubt as to relevance at the outset, it may be advisable to admit it and make a ruling on its relevance later. However, that is not the case here as the Member makes declarations as to relevance when challenged by Mr. Broadfoot.

In theses files the time, date, place of occurrence, identity of the accused and the performance of aerobatics by him are not in issue. In reviewing the Notices in both files, we see that in the paragraph 602.27(*c*) allegation and the suspension of the SFOC the common outstanding issue is

whether the flight visibility was less than three miles. Facts which would go to prove or disprove the flight visibility issue are relevant and thus admissible. Facts sought to be entered in evidence that do not go to prove or disprove that issue are irrelevant and are not admissible.

In looking at the Notice in the file regarding the allegation of reckless or negligent operation, the outstanding issues are:

- operation of the aircraft in a reckless or negligent manner
- by taking off and performing aerobatics
- when the aerobatic competition was cancelled
- when weather conditions were such
- that the performance of aerobatics endangered or likely endangered life and property of persons.

Facts which would go to prove or disprove those elements would be relevant and admissible. Facts which would not do so would be irrelevant and inadmissible.

Flight into cloud

Mr. Broadfoot questioned the relevance of the Minister adducing evidence relating to flight into cloud as Mr. Boyd had not been charged with flight into cloud. As can be seen from the Notices, flight into cloud does not form any part of the allegations regarding section 602.27 and the SFOC. Our earlier analysis has established that the Member misdirected himself on this issue by confusing flight visibility with flight into cloud. Unfortunately the Member seems to have relied upon his personal experience rather than relying on the testimony, law and argument on the issue as, during the testimony of the first witness (after Mr. Foy was qualified as an expert) when challenged on the relevance of flight into cloud, he stated in part: "That is highly relevant because flight visibility in cloud cannot be three miles, in my experience. I also have 15,000 hours as a pilot."(transcript p. 60)

Exhibit M-3

This exhibit was offered during a line of questioning about Mr. Boyd's attitude. It gives a Boyd family history and notes their current activities. It also contains a single line directed to Department of Transport enforcement inspectors getting their thrill when mailing registered letters. It may be that the line was highlighted to punctuate Mr. Boyd's attitude to Transport Canada. From our analysis of the allegations above we cannot see that his attitude could be brought to bear on the flight visibility issue. It may be that his attitude could be pertinent to the allegation of reckless and negligent conduct. But the Member did not make it clear on what basis he was admitting it as he only said: "All I would say is that the Tribunal is not bound by the legal rules of evidence. I have accepted this exhibit from the Minister and will give it such weight in my decision as it deserves."(transcript p. 84)

Exhibit M-4

That exhibit is the application for an SFOC for the 2001 CanAm Aerobatic Championship. It was entered during the testimony of the contest director, Mr. Pulley. Mr. Broadfoot questioned its relevance, asking how it related to the charge. The Member stated that he thought it highly relevant although he did not state why. Mr. Broadfoot pointed out that the alleged offence took place outside the special aviation event. It occurred only after the event had been cancelled. In answer to that the Member stated: "I deem this relevant, and we will have no further discussion on it."(transcript p. 108)

The allegation regarding reckless and negligent conduct states in part, "...by taking off and performing aerobatics when the aerobatic competition was cancelled...". That is the only wording in the allegations that brings the competition into issue and it speaks to the competition having been cancelled. This exhibit is not even the authorization to hold the competition but is the application to hold it made several months earlier. We cannot fathom how it pertains to either flight visibility or reckless/negligent conduct, and the Member did not say how he thought that it did.

The record is clear that the contest was cancelled before Mr. Boyd flew. It is clear that he flew under the auspices of his personal SFOC, not the one that was issued pursuant to the application that is Exhibit M-4. We would find that it was irrelevant and thus inadmissible.

Of further concern to us is that a legitimate objection to the exhibit's relevance was raised but was brusquely dismissed without even an attempt by the Member to explain why. That also gives an impression of arbitrariness.

DETERMINATION

CAT File No. O-2418-71

- We allow the document holder's appeal and refer the matter back to the Minister for reconsideration.

CAT File No. O-2468-02

- We dismiss the charge pursuant to paragraph 602.27(*c*) of the CARs. We find the Member erred in the application of law in the matter of flight visibility.
- We find that Mr. Boyd operated his aircraft in a negligent manner contrary to section 602.01 of the CARs. The ninety-day suspension imposed by the Minister is reinstated.

Reasons for Appeal Determination by:

Allister Ogilvie, Vice-Chairperson

Concurred:

Dr. Samuel Birenbaum, Member
Suzanne Racine, Member

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[1] *Stewart Lake Airways Ltd.*, CAT File No. C-0334-10.

[2] *R.* v. *Prince* [1986] 2 S.C.R. 480.

[3] *Edmundo R. Sanchez* v. *Minister of Transport*, CAT File No. O-0105-33, Appeal Determination.

[4] *Jelle Dykstra* v. *Minister of Transport* (Appeal) W-0213-04.

[5] *Minister of Transport* v. *Alain Tremblay*, O-2293-33.

[6] *Minister of Transport* v. *Denis Pourtau*, Q-1634-33.

[7] *Minister of Transport* v. *James Devlin*, P-1614-33.

[8] *Trent Wade Moore* v. *Minister of Transport* (Appeal) C-0138-33.

Minister of Transport v. *Thomas Ritchie Phillips* (Appeal) C-0014-33.

[9] *Francis Dominic Decicco* v. *Minister of Transport*, C-1316-02, Appeal Determination.

[10] *Pitts* v. *Director of Family Benefits Branch of the Ministry of Community & Social Services*, 51 O.R. (2d) 302.

[11] Sara Blake, *Administrative Law in Canada*, 2nd ed. (Toronto and Vancouver: Butterworths, 1997) at 50.