



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Ian Murray Auld v. Canada (Minister of Transport)*, 2019 TATCE 7 (Review)

TATC File No.: C-4308-33

Sector: Aviation

BETWEEN:

Ian Murray Auld, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard in: Winnipeg, Manitoba, on November 6–7, 2018

Before: Arnold Olson, Member

Rendered: February 26, 2019

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has not proven, on a balance of probabilities, that the applicant, Ian Murray Auld, contravened section 602.01 of the *Canadian Aviation Regulations*. The monetary penalty of \$1,000 is cancelled.

I. BACKGROUND

[1] On a clear summer evening, August 22, 2016, Transport Canada Inspectors Jennifer Fortier and Robert Fortier were on a family outing and crossing the Assiniboine River on Highway 44 in the rural area of Lockport, Manitoba. From the highway bridge, Ms. Fortier saw in the distance a Robinson R44 helicopter parked in a large gravel parking lot adjacent to Skinner's Restaurant, located on River Road. The couple, accompanied by their daughter, went to investigate. Arriving at the parking lot, they found the helicopter unattended. As Jennifer Fortier was at the time a new Transport Canada Inspector, they contacted the office and received instructions to stay back, watch and wait. After 10–15 minutes, they observed two people approach and enter the aircraft. Both inspectors photographed and videotaped the subsequent engine start, warm-up and take-off.

[2] Inspector Jennifer Fortier prepared and submitted a Detection Notice (Exhibit M-1) for a possible violation of subsection 602.13(1) of the *Canadian Aviation Regulations (CARs)*, which prohibits landing or taking off within a built-up area unless operating from an airport or heliport. Enforcement Investigator William Scholefield received the Notice and prepared an Aviation Enforcement Case Report (Exhibit M-5), changing the allegation to a different contravention—section 602.01 of the *CARs*. On March 10, 2017, the respondent issued a Notice of Assessment of Monetary Penalty in the amount of \$1,000. The Notice states in part:

On or about 22 August 2016, at or near Lockport, Manitoba, you, Ian Murray AULD, did operate a helicopter, to wit, a Robinson R44II, bearing Canadian registration marks C-GRHM, in such a reckless manner as to be likely to endanger the life or property of any person.

Contrary to Canadian Aviation Regulations 602.01.

[3] On that same date, March 10, 2017, Mr. Auld made a request for review to the Transportation Appeal Tribunal of Canada (Tribunal) and further asked that a request for a full disclosure package be forwarded to Transport Canada. Mr. Auld did not receive disclosure from Transport Canada until March 26, 2018, over one year later.

[4] In an Agreed Statement of Facts dated November 6, 2018, both parties agreed that helicopter C-GRHM is registered to 3133796 Manitoba Ltd., that Ian Murray Auld holds a Canadian Private Pilot Helicopter licence and that Mr. Auld was the pilot-in-command of the helicopter on August 22, 2016, for the landing and take-off in question.

II. PRELIMINARY MATTER

A. Qualification of expert witnesses

[5] Both parties presented candidates for qualification as expert witnesses. The applicant put forth the name of John Swallow. I placed on the record that I have previously qualified Mr. Swallow as an expert in another matter, *Friesen v. Canada (Minister of Transport)*, 2015 TATCE 9 (*Friesen*), yet did not agree with all of his conclusions. After reviewing Mr. Swallow's technical credentials, I qualified him as an expert witness for the applicant with the condition that I would assign appropriate weight to his evidence.

[6] Subsequent to the hearing, in the interest of fairness and with the agreement of the parties, I also qualified Daniel Stelman as an expert witness for the Minister.

III. ANALYSIS

[7] The provision at issue in this case is section 602.01 of the *CARs*, which reads as follows:

602.01 No person shall operate an aircraft in such a reckless or negligent manner as to endanger or be likely to endanger the life or property of any person.

[8] Pursuant to subsection 7.91(4) of the *Aeronautics Act*, upon review of a notice of assessment of monetary penalty, the Minister has the burden of proving that a person has contravened a designated provision. The standard of proof imposed on the Minister is the civil standard specified in the *Transportation Appeal Tribunal of Canada Act*, subsection 15(5): “proof on the balance of probabilities”.

A. Definition

[9] While section 602.01 of the *CARs* addresses the reckless or negligent operation of an aircraft, the Notice issued to Mr. Auld refers exclusively to recklessness. Based on the Aviation Enforcement Case Report and the testimony of its author, Investigator Scholefield, this choice was deliberate. Accordingly, I have conducted my review with a view to evaluating only whether Mr. Auld operated the aircraft in a reckless manner.

[10] To define recklessness, the Tribunal appeal panel in *Francis Dominic Decicco v. Minister of Transport*, [1999] CAT File No. C-1316-02 (Appeal), quoted *Black’s Law Dictionary*, Fifth Edition:

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 foreseeing 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.

[11] There are three phases of flight that appear to fall within the charge of “operating a helicopter” on August 22, 2016—the approach and landing of the helicopter, the period of time during which the helicopter was parked and unattended, and the subsequent engine start and take-off. Accordingly, each of these phases of flight is examined and, in each, two questions are asked:

1. Did the applicant, Mr. Auld, operate the helicopter in a reckless manner?
2. Did the operation of the helicopter endanger the life or property of any person, or was it likely to do so?

B. Was Mr. Auld’s approach and landing of the helicopter reckless? Did it endanger the life or property of any person, or was it likely to do so?

[12] I note at the outset that the alleged violation did not arise from a complaint from the public, nor did the Minister present an eyewitness or any factual evidence whatsoever as to the nature of the helicopter’s approach and landing. The matter only arose from the observation by the two inspectors of the helicopter when it was already parked and stationary in the gravel parking lot adjacent to Skinner’s Restaurant.

[13] As Investigator Scholefield prepared his Case Report, he asked for an opinion from Daniel Stelman, who also provided expert witness testimony at the review hearing. In Mr. Stelman’s opinion (Exhibit M-6), the decision to land was not well thought out if not wilful disregard:

Given no measures had been taken to protect persons on the ground near the restaurant, i.e. safety personnel and or barriers in place prior to landing made this an unsuitable ‘uncontrolled’ landing and take-off site for a helicopter under these circumstances.

In my opinion the helicopter presented an unnecessary threat to people on the ground near the restaurant; risks were not “managed” to acceptable levels; it was unsafe to land there.

[14] On the other hand, Mr. Auld presented evidence to the review hearing of his planning, preparation, approach and landing of the helicopter. He described walking the site of intended landing to determine its suitability. On the day of the flight, a Monday, he contacted Skinner’s Restaurant and obtained permission to land his helicopter there. He specifically asked if he could land his helicopter in the adjacent grass field, but the manager suggested that the gravel parking lot might be a better option, since it was used only on Sundays for a farmer’s market. As he approached the area in the helicopter, he overflew at altitude to determine possible safety threats before descending. Approximately 20–30 seconds before landing, his passenger, Adam Auld, took a photograph of the intended landing site. That photograph (Exhibit A-1B) shows the large gravel parking area to be entirely free of persons or vehicles. Mr. Auld descended over the grass field and then slowly hover-taxied over to the gravel parking area, watching to see whether gravel might be displaced. Seeing none, he proceeded to land. The landing was uneventful; he set the rotor brake, locked the helicopter and they went inside for a hot dog and some ice cream.

[15] To find that Mr. Auld violated section 602.01 of the *CARs*, the Minister must establish in this case that he operated his aircraft in such a reckless manner as to create a likelihood of danger to persons or property. As I consider Mr. Stelman’s expert witness testimony, I note that he has qualified his written submission to Investigator Scholefield with the statement, “However, from the still photos and videos it’s hard for me to develop a clear/accurate understanding of the level of threat/hazardous situation created”. In relation to the approach and landing of the helicopter, I must consider that his comments on risk management—that is, the degree to which the helicopter posed a risk to persons or property as it approached and landed and “presented an unnecessary threat to people on the ground near the restaurant...”—be interpreted in light of clear photographic evidence that the gravel parking lot was entirely empty at that time. While I accept the Minister’s assertion that section 602.01 of the *CARs* does not require actual endangerment of life or property in order for a contravention to occur, it must be established that endangerment is “likely”. Apart from Google Maps information, the Minister introduced no direct evidence in relation to the approach and landing other than Mr. Stelman’s opinions that had been inferred

from photographs and video of a helicopter already stationary on the ground. Yet the applicant's aerial photographic evidence clearly shows that no persons were present in the gravel parking lot at the time of approach and landing. The burden is on the Minister to establish likelihood. I find that the Minister has not established that Mr. Auld's actions of approaching and landing the helicopter were likely to create a danger to persons when in fact no persons were present at that time. Similarly, the location of the parked helicopter leads me to find that a risk to property created by the approach and landing has not been established.

C. Was Mr. Auld reckless to leave the helicopter unattended in the parking lot? Did its presence endanger the life or property of any person, or was it likely to do so?

[16] The only evidence provided by the Minister as to risks created by the presence of the stationary, unpowered helicopter in the parking lot are the two exhibits provided by inspectors Jennifer and Rob Fortier (Exhibits M-3 and M-4). These photographs were taken during the 10–15 minutes that they observed the helicopter unattended. They show, at most, the presence of a bystander taking a photograph of the helicopter and two other individuals conversing with the pilot. It is insignificant that there are no warning cones or barriers placed around the helicopter, as these are not required by regulation. The evidence indicates that Mr. Auld and his passenger were likely in the immediate vicinity. When asked if the helicopter posed a danger by simply sitting in the parking lot, Inspector Jennifer Fortier replied that it did not. It cannot be said that the stationary presence of the helicopter in the parking lot presented a likelihood of danger to persons or property.

D. Was the engine start and take-off from the gravel parking lot conducted in a reckless manner? Did these actions endanger the life or property of any person, or were they likely to do so?

[17] In the Minister's view, Mr. Auld's actions of engine start and take-off created many *possibilities* for endangerment of persons or property. A vehicle could have turned in from River Road—the small road in front of the parking lot—and struck the helicopter. A cube van could have driven into the helicopter and struck the rotor blades. Because the area was not secured, a vehicle, an adult, children or animals could have approached the helicopter and been struck by the tail rotor. Loose gravel could have been displaced and caused injury or damage, or plastic garbage cans could have been blown over by the rotor downwash. As the helicopter lifted off, a vehicle could have appeared on the road and been overflown at a close distance. During take-off or at a low altitude, the helicopter could have suffered a major mechanical malfunction and created a hazard to those on the ground. As Investigator Scholefield stated, "...if... for some reason it rolls, then these rotor blades... are going to become like shrapnel in a bomb". These spectres of tragic scenarios were raised by the Minister as some of the possibilities that could have happened. In summary, creating these possibilities constituted recklessness on the part of Mr. Auld. The Minister argued that these *possible* dangers created a likelihood of danger to persons or property and thus a contravention of section 602.01 of the *CARs* had occurred.

[18] It is Mr. Auld's position that the "possibility" of danger does not equate to a "likelihood" of danger as required by the *CARs*. He submitted that to properly evaluate whether a likelihood of danger existed, one should look to the Minister's own evidence. I carefully and repeatedly viewed the Minister's photographic and video evidence (Exhibits M-3 and M-4). It supports Mr.

Auld's sworn statement that he spoke with the several bystanders for a time then told them to step back to a safe distance while he started the engine and departed. Chris Mitchell, an impartial bystander who appears in the photographs, was asked if he felt in danger at any time. He replied, "No, no". He said that when the helicopter took off he was shocked by how uneventful it was, "...as he took off there was really nothing to be concerned about...there was absolutely no wind that hit us at all...". He testified that nothing was blown over or damaged. While I accept the Minister's view that a person without an aviation background is not to be relied upon to make a determination of whether danger from an aircraft likely exists, Mr. Mitchell's statements serve to corroborate what the Minister's video shows: that Mr. Auld conducted an entirely uneventful engine start and take-off not likely to endanger the life or property of any person.

[19] The Minister referred to other cases in which the Tribunal was asked to adjudicate whether a violation of section 602.01 of the *CARs* had occurred. In *Bellefleur v. Canada (Minister of Transport)*, 2016 TATCE 13 (Review) (*Bellefleur*), the situation is described wherein a pilot carrying passengers for hire deliberately shut off his engine on final approach, ostensibly to demonstrate the safety of the aircraft. The review member found that the deliberate inflight engine shutdown had compromised the safety of the flight. The Minister's representative had argued,

When responding to an allegation of a breach of this provision [section 602.01], pilots often raise the argument that if nothing happened then no breach has taken place. This argument, however, is flawed. In this case [*Bellefleur*], although the outcome was favourable, the act of shutting down the engine while in flight was inherently likely to endanger life or property.

[20] However, in the case at hand, unlike *Bellefleur*, it cannot be said that a helicopter take-off is inherently likely to endanger life or property. Mr. Swallow, an expert witness, referred to an article published by the Flight Safety Foundation (Exhibit A-5), "Measuring Safety in Single- and Twin-engine Helicopters", in which the risk of an on-the-ground person being injured by the operation of a helicopter is given as once in 25,000 years, assuming a cycle of one flight per day.

[21] The Minister's representative also referred to a matter heard by the Tribunal (*Friesen*) wherein a helicopter pilot is seen on video to slide his helicopter through a staged ice hockey game on a remote frozen lake in British Columbia. However, in that instance, the pilot was found by the review member to be negligent, rather than reckless. In the case at hand, negligence is not included in the charge.

[22] In summary, Mr. Auld's actions are all captured in photographs and on videotape created by inspectors Jennifer and Rob Fortier. This evidence shows Mr. Auld speaking with a few bystanders who then retreat to what appears to be a safe distance. As Inspector Jennifer Fortier indicated, she was with her daughter and felt she was in a safe spot. The video evidence does not show anyone closer to the helicopter than they were when it took off. The helicopter sits by itself on a large, vacant gravel parking lot; the engine starts and warms up briefly. The helicopter is then observed to lift off and conduct an entirely unremarkable into-wind take-off. The helicopter does not assume an aggressive nose-down attitude; it just leaps into the air and flies away. No gravel is dispersed, no dust created. The take-off is conducted without any apparent greater likelihood of danger than any other helicopter take-off.

[23] In this specific case, on a balance of probabilities, I find that the Minister did not meet its burden of establishing that Mr. Auld's actions were reckless as defined above in these reasons. Nor can it be said that possibilities of tragic scenarios add up to evidence of a likelihood of danger to persons or property. The Minister's evidence does not come close to supporting either assertion. Therefore, I find that the Minister has not established that a contravention of section 602.01 of the *CARs* occurred.

[24] However, I too question the wisdom of Mr. Auld's decision to land on the gravel parking lot rather than the adjoining fenced grass field. Although his photographic evidence shows that no persons or vehicles were present while he landed, he did limit his options for take-off. By landing in the gravel lot, he placed himself in a position wherein he could not be certain that the area would be similarly clear in the future when he took off. Further, the fenced field would have provided greater distance and protection to bystanders when he engaged the rotor blades and lifted off. I am confident that had Mr. Auld landed on the grass field, Inspector Jennifer Fortier would not have so much as raised a regulatory eyebrow.

[25] Before concluding, a word must be said about the Aviation Enforcement Case Report, Exhibit M-5, prepared by Investigator Scholefield. In practice, an Enforcement Case Report serves as the nexus document that brings together relevant facts to see whether sufficient grounds exist to support a charge. As such, it is essential that the report be accurate, objective and dispassionate—qualities that Mr. Scholefield's Case Report clearly lacks. For example, it states, "There was also no evidence that AULD conducted a prior safety inspection of the site for suitability for landing". However, the fact is the Minister had no evidence at all, one way or the other, about any preparations Mr. Auld may or may not have made. Further, his report states, "There was no need for AULD to attend Skinner's in a helicopter, with his passenger, to have a meal. They could have driven there as everyone else does". In fact, there is no regulatory requirement that a recreational flight be necessary. As Mr. Auld's representative pointed out, recreational flying is a freedom that Canadians can enjoy under the *Aeronautics Act*. That Investigator Scholefield added "...as everyone else does" is unworthy of comment. Accordingly, I assign little weight to this document.

[26] Finally, it is unacceptable that the applicant, Mr. Auld, should wait for over one year to receive a disclosure package from the Minister. Although not argued at the review hearing, failure to provide timely disclosure constitutes a fundamental breach of natural justice. Subsection 7.91(3) of the *Aeronautics Act* requires that the Tribunal afford a person who filed a request for review with "an opportunity consistent with procedural fairness and natural justice to present evidence and make representations". *Norman Albert Baudisch v. Minister of Transport*, [1993] CAT File No. W-0182-02 (Appeal Decision of October 5, 1993) (*Baudisch*), states:

Implicit in the wording of the statute is the right to disclosure. Without timely disclosure of all evidence relevant to the administrative enforcement action taken by the Minister of Transport, a document holder's right to a fair hearing is compromised. Transport must play an important role in the truth finding function of the system.

The right to disclosure, apart from the wording of the statute, is reinforced by section 7 of the Canadian Charter of Rights and Freedoms. Section 7 of the Charter provides:

"Everyone has the right to life, liberty and security of the person and the right NOT to be deprived thereof except in accordance with the principles of fundamental justice."

Baudisch further states:

Disclosure should occur, if requested, immediately after the imposition of a monetary penalty or a suspension. Early disclosure will enable a document holder to determine whether a review by the Tribunal is necessary and may result in fewer reviews by the Tribunal.

[27] A significant delay for the Minister to provide an applicant with disclosure invites arguments based on the rules of procedural fairness and natural justice and the principles of section 7 of the *Charter*.

IV. DETERMINATION

The Minister of Transport has not proven, on a balance of probabilities, that the applicant, Ian Murray Auld, contravened section 602.01 of the *Canadian Aviation Regulations*. The monetary penalty of \$1,000 is cancelled.

February 26, 2019

(Original signed)

Arnold Olson

Member

Appearances

For the Minister: Catherine Newnham

For the Applicant: Joe Barnsley